

A  
T R E A T I S E  
O F T H E  
P L E A S  
O F T H E  
C R O W N :  
O R A

S Y S T E M of the Principal Matters relating  
to that S U B J E C T, digested under their  
proper Heads.

---

I n T W O B O O K S.

---

By *WILLIAM HAWKINS*,  
Serjeant at Law.

---

B O O K I.

---

*The Second Edition corrected, with the Addition of  
some References.*

---

L O N D O N :

---

Printed by the Assigns of E. SAYER, Esq; for J. WALTHOE  
in the *Middle-Temple-Cloysters*. MDCCLXXIV.

---

---

T H E

P R E F A C E

**N**OTHING is more common than to hear those, who have taken only a superficial View of the Crown-Law, charge it with numberless Hardships and undistinguishing Rigour; whereas those, who have more fully examin'd it, agree, that it wants nothing to make it admir'd, for Clemency and Equity, as well as Justice, but to be understood: It is so agreeable to Reason, that even those who suffer by it, cannot charge it with Injustice; so adapted to the Common Good, as to suffer no Folly to go unpunished, which that requires to be restrained; and yet so tender of the Infirmities of Humane Nature, as never to refuse an Indulgence, where the Safety of the Publick will bear it; it gives the Prince no Power, but of doing Good; and restrains the People from no Liberty, but of doing Evil.

It would be needless therefore to say any Thing of the Usefulness of this Treatise, could I be so happy as any Way to come up to the Design of it, which was, to vindicate the Justice and Reasonableness of the Laws concerning criminal Matters, and to reduce them into as clear a Method, and explain them in as familiar a Manner, as the Nature of the Thing will bear.

Had any of those great Men, who formerly have written on this Subject, gone through the whole Law relating to it, all farther Attempts of this Kind had been unnecessary. The Treatise, published under the Name of Sir Matthew Hale, is indeed very useful, and written in a clear Method, and with great Learning and Judgment; but is certainly very imperfect in the Whole, and

a seems

## The P R E F A C E.

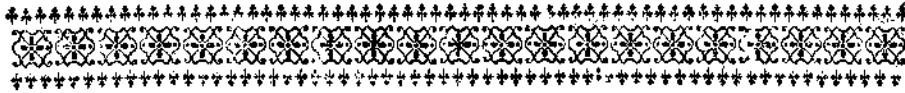
*seems to be only a Model or Plan of a Work of this Kind, which is said to have been intended by him.*

*Sir Edward Coke's third Institute is also a Treatise of great Learning, and not unworthy of the Hand that produc'd it; but yet it seems by no Means a compleat Work, many considerable Heads being either wholly omitted in it, or barely touched upon.*

*The Treatise of Sir Will. Staundforde seems to be writ with great Judgment, but he takes in a very small Compass, scarce mentioning any Offences under Felonies.*

*As for the Treatises of Lambard, Crompton, Pulton, and Dalton, they having an Eye chiefly to the Direction of Justices of Peace; and, treating of the Crown-Law no farther than as it concerns them, are far from being compleat Systems of it.*

*Upon the whole, I apprehend that none of the Authors before mentioned were so perfect, but that, by reducing all the Laws relating to this Subject, under one general Scheme, they might generally be understood with much less Difficulty than they have hitherto been. This 'twas induc'd me to write on this Subject, and I hope to finish the Whole in two Books, proposing in this First to shew the Nature of criminal Offences; and in the Second, the Manner of bringing Offenders to Punishment.*



To the Right Honourable,  
*THOMAS* Lord *PARKER*,  
Baron of *MACCLESFIELD*,  
Lord Chief Justice of *ENGLAND*.

MY LORD,



THE following Treatise containing that Part of the Law, which is peculiarly under the Administration of the Chief Justice of *England*, I presum'd, in regard to the Subject of it, to think of presenting it to your Lordship, which your Goodness having been pleas'd to permit, it is with the less Uneasiness that I venture to make it Publick; for I could not hope to introduce it into the World with greater Advantage than under your Protection.

This was the real Ground of my Ambition, to dedicate it to your Lordship, and not to give my self an Opportunity of publishing how much I honour those wonderful Talents, that have rais'd You to so high a Station: A private Character indeed may be set forth to Advantage, and many Virtues in it be made known by an Address of this Nature, which might otherwise have lain for ever concealed: But your Lordship's is Publick and Conspicuous, and can appear no where with so much Lustre as when you sit in Judgment, where that vast Genius you are blest'd with, shines forth to all the World, adorn'd with all the Improvements that Humane Art can furnish, and supported with the greatest Courage and Integrity.

And nothing less, My Lord, could give You that Command of all the Variety of Business which comes before You, and that Facility with which You dispatch it: The most intricate Points of Law, that have for Ages lain in Confusion and Obscurity, when they fall under your Lordship's Consideration, receive such Light, are stated and explain'd with such exact Method, and such Propriety and Beauty of Expression, that the most Polite Compositions appear not  
more

*The Dedication.*

more Elegant, nor the most Demonstrative more Convincing: This, My Lord, is the agreeable Part of the Exercise of your Authority, being no Violence to that general Humanity which You delight to shew to all Mankind: But the Duties of your Office require You sometimes to put on another Character, and to shew the awful Face of Justice, to curb the Rage of an unruly People, and to fright them into their Duty by the Terrours of the Law; and 'tis with Pleasure all good Men see your Lordship pursue the prevailing Vices of the Age with such Zeal and Indignation, that Crimes no longer appear less odious for being fashionable, nor are the more secure from Punishment for being popular.

These, My Lord, are Blessings which the whole Nation shares in, and have an Influence upon all Parts of the civil Administration: But we, who have the Honour to attend your Lordship at the Bar, are in a more particular Manner to acknowledge our Obligations, for that Candour and Condescension with which You treat us: The Encouragement You give to our weak Endeavours, no less engages our Affections, than your comprehensive Knowledge and clear and accurate Judgment command our Reverence and Esteem.

Such Goodness charms all that approach and feel it; and it was with universal Joy we saw your Lordship's Firmness to the present Establishment, and great Services to your Country, distinguished lately by an Accession of Honour from his Majesty, whose Wisdom in conferring his Favours has eminently appeared, by the many signal Benefits the Nation has received from those who have the Honour to serve Him. I am with the greatest Respect,

MY LORD,

*Your Lordship's*

*Most obliged,*

*And most Humble Servant,*

William Hawkins.

---

A N

# A N A L Y S I S

O F T H E

## First B O O K

O F T H E

### Pleas of the C R O W N.

---

**A**LL Persons whatsoever are liable to be punish'd as Criminal Offenders, unless they can excuse themselves, either,

1. In respect of their Want of Reason: Or,
2. In respect of their Subjection to the Power of others. ch. 1.

Offences, considered in relation to the Persons against whom they are committed, are either,

1. Such as are more immediately against God: Or,
2. Such as are more immediately against Man.

Offences more immediately against God are either by Common Law or by Statute.

Those at Common Law are either capital or not capital.

The capital are of three Kinds.

1. Heresy, ch. 2.
2. Witchcraft, ch. 3.
3. Sodomy, ch. 4.

Those not capital are either by Common Law or Statute.

Those by Common Law are of five kinds.

1. Blasphemies against God, ch. 5. sect. 1.
2. Scoffing at the Scriptures, ch. 5. sect. 2.
3. Impostures in Religion, ch. 5. sect. 3.

4. Open Lewdness grossly scandalous, ch. 5. sect. 4.

5. Seditious Words against the established Religion, ch. 5. sect. 6.

Those by Statute are two-fold.

1. Such as are against Religion in general.
2. Such as are against the established Church.

Those against Religion in general are of four kinds.

1. Profanations of the Lord's Day, ch. 6. sect. 1, 2, 3.
2. Profane Swearing and Cursing, ch. 6. sect. 4.
3. Drunkenness, ch. 6. sect. 5.
4. Reviling the Lord's Supper, ch. 6. sect. 6.

Those against the established Church are three-fold.

1. Such as concern all Persons in general.
2. Such as more immediately relate to those of the Popish Religion.
3. Such as more immediately regard Protestant Dissenters, ch. 16.

Those, which concern all Persons in general, are either,

1. Against the Common Prayer; ch. 7. Or,
2. In accepting or holding an Office without due Conformity to the Church, ch. 8. Or,

3. In

# A N A L Y S I S.

3. In Teaching School without conforming to the Church, ch. 9. Or,
4. In not coming to Church, ch. 10, 11.

Those relating more immediately to Persons of the Popish Religion, are of four kinds,

1. Popish Recusancy, ch. 12.
2. The Offence of saying or hearing of Mass, or other Popish Service, ch. 13.
3. The Offence of not making a Declaration against Popery, ch. 14.
4. The Offence of promoting or encouraging the Popish Religion; either,
  1. In giving or receiving Popish Education, ch. 15. sect. 1, 2, 3. Or,
  2. In professing the Popish Religion, ch. 15. from sect. 4. to sect. 15. Or,
  3. In buying or selling Popish Books, ch. 15. sect. 15.

Offences more immediately against Man are either more immediately against the King, or more immediately against the Subject.

Those more immediately against the King are either capital or not capital.

- The capital are either,
1. High Treason: Or,
  2. Felonies.
- High Treason is either,
1. Such as is within 25 E. 3. and other Statutes grounded upon it, and explaining it: Or,
  2. Such as depends upon subsequent Statutes.

Of Treason within 25 Ed. 3. there are four Species.

1. That which immediately concerns the King, his Wife or Children, ch. 17. sect. 3, 4, &c.
2. That which concerns his Office in the Administration of Justice, ch. 17. sect. 46.
3. That which concerns his Seal, ch. 17. sect. 48.
4. That which concerns his Coin, ch. 17. sect. 54.

Of High Treason depending on subsequent Statutes, there are three Species.

1. Offences in upholding or favouring the Power of the Pope.
2. Offences against the Protestant Succession, ch. 17. sect. 85.
3. Offences in listing Men without the King's Licence, ch. 17. sect. 86.

Of Offences in upholding or favour-

ing the Power of the Pope, there are five Species.

1. Extolling the Pope's Power, ch. 17. sect. 72.
2. Putting in Ure Popish Bulls, ch. 17. sect. 75.
3. Perverting others, or being perverted to Popery, ch. 17. sect. 76.
4. Receiving Popish Orders or Education in Popish Seminaries, and not submitting, &c. ch. 17. sect. 79.
5. Refusing a second Tender of the Oaths, ch. 17. sect. 84.

Felonies more immediately against the King are of five kinds.

1. Offences relating to the Coin or Bullion.
2. Offences against the King's Council, ch. 18. sect. 8.
3. The Offence of passing beyond Sea, to serve a Foreign Prince, ch. 18. sect. 10.
4. The Offence of imbezilling the King's Armour, ch. 18. sect. 12.
5. The Offence of relieving a Popish Priest, ch. 18. sect. 14.

Of Felony relating to the Coin or Bullion, there are three Species.

1. The Offence of debasing it, ch. 18. sect. 1.
2. The Offence of unlawfully diminishing it, ch. 18. sect. 2.
3. The Offence of endeavouring by extraordinary Means to encrease it, ch. 18. sect. 7.

Of Offences more immediately against the King, not capital, there are two kinds.

1. *Præmunire*.
2. Misprision.

Offences coming under the Notion of *Præmunire*, are either,

1. Against the Prerogative of the Crown: Or,
2. Against the Authority of the King and Parliament, ch. 19. sect. 44.

Of Offences of this kind against the Prerogative of the Crown, there are nine Species.

1. Making use of Papal Bulls, ch. 19. sect. 12.
2. Derogating from the King's Common Law-Courts, ch. 19. sect. 14.
3. Appealing to *Rome* from any of the King's Courts, ch. 19. sect. 20.
2. Exercising the Jurisdiction of a Suffragan, without the Appointment of the Bishop of the Diocese, ch. 19. sect. 21.      5 Re-

## A N A L Y S I S.

5. Refusing to elect or consecrate the Person nominated by the King to a Bishoprick, ch. 19. sect. 22.
6. Maintaining the Pope's Power, ch. 19. sect. 23.
7. Bringing in *Agnus Dei*, ch. 19. sect. 24.
8. Contributing to the Maintenance of a Popish Seminary, ch. 19. sect. 26.
9. Refusing the Oaths, ch. 19. sect. 27.

Misprisions more immediately against the King are either Negative or Positive.

The Negative is commonly called Misprision of Treason, ch. 20.

Positive Misprisions of this kind either amount to Misprision of Treason, or do not.

Of such Misprisions, amounting to Misprisions of Treason, there is only one Species; forging foreign Coin not currant here, ch. 20. sect. 7.

Of such Misprisions not amounting to Misprision of Treason, there are four kinds.

1. Contempts against the King's Palace or Courts of Justice, ch. 21.
2. Contempts against his Prerogative, ch. 22.
3. Contempts against his Person or Government, ch. 23.
4. Contempts against his Title, ch. 24.

Of Contempts against the King's Prerogative, there are three Species.

1. Refusing to assist him for the Good of the Publick, ch. 22. sect. 2.
2. Preferring the Interests of a Foreign Prince to that of our own, ch. 22. sect. 3.
3. Disobeying the King's lawful Commands or Prohibition, ch. 22. sect. 4.

Of Contempts against the King's Person or Government, there are six kinds.

1. Charging the Government with Oppression or weak Administration, ch. 23. sect. 2.
2. Doing an Act which impliedly encourages Rebellion, ch. 23. sect. 4.
3. Endeavouring to frighten the King into a Change of his Measures, ch. 23. sect. 4.
4. Spreading false Rumours concerning the King's Intentions, ch. 23. sect. 5.

5. Charging him with a Breach of his Coronation-Oath, ch. 23. sect. 6.

6. Speaking contemptuously of him, ch. 23. sect. 7.

Of Contempts against the King's Title, there are two kinds.

1. Denying his Title, ch. 24. sect. 1.
2. Refusing to take the Oaths required by Law for the Support of his Government.

Of Offences in refusing to take such Oaths, there are two kinds.

1. The Offence of refusing the Oath required by Common Law, ch. 24. sect. 3.
2. The Offence of refusing the Oaths required by Statute.

Of Offences in refusing the Oaths required by Statute, there are two kinds.

1. The Offence of refusing the Oaths of Allegiance and Supremacy, ch. 24. sect. 5.
2. The Offence of refusing the Oath of Abjuration, ch. 24. sect. 6.

Offences more immediately against the Subject are either capital or not capital.

The capital are either by the Common Law or by Statute.

Those by the Common Law are committed either,

1. Against the Life of a Man; or,
2. Against his Goods; or,
3. Against his Habitation; or,
4. Against publick Justice.

Those against the Life of a Man are either,

1. Casual, not being occasion'd by the Default or Procurement of any Man, ch. 26. Or,
2. Such as come under the Notion of Homicide, being occasioned by a Man, ch. 26. sect. 2.

Of Homicides there are two kinds.

1. Such as is committed against a Man's own Life, ch. 27.
2. Such as is committed against the Life of another.

Of Homicide against the Life of another, there are two kinds.

1. Such as amounts not to Felony.
2. Such as amounts to Felony.

Of such Homicide not amounting to Felony there are two kinds.

1. Justifiable.
2. Excusable.

Justifiable Homicide is either of a publick or a private Nature.

That of a publick Nature is of two kinds.

- b
1. Such



# A N A L Y S I S.

1. Such as happens in the due Execution, ch. 28. sect. 4. and
  2. Such as happens in the due Advancement, of publick Justice.
- Of the latter there are two kinds.
1. Such as happens in Criminal ch. 28. sect. 11. And
  2. Such as happens in Civil Causes, ch. 28. sect. 17.
- Of justifiable Homicide of a private Nature, there are two kinds.
1. Such as happens in killing a Wrong-Doer, ch. 28. sect. 21.
  2. Such as happens in killing an innocent Person, ch. 28. sect. 26.
- Of excusable Homicide there are two kinds.
1. Homicide *per infortunium*, ch. 29. sect. 1.
  2. Homicide *Se defendendo*, ch. 29. sect. 13.
- Homicide against the Life of another, amounting to Felony, is either with or without Malice.
- That which is without Malice is called Manlaughter or Chancemedley, ch. 30.
- Of such Homicide with Malice there are two kinds.
1. Murder, ch. 31.
  2. Petit Treason, ch. 32.
- Of Murder there are two kinds.
1. Such as is done with express Malice.
  2. Such as is done with implied Malice.
- Of Murder done with express Malice, there are three kinds.
1. Such as happens in Duelling, ch. 31. sect. 21.
  2. Such as happens in killing another without any Provocation; or but upon a slight one, ch. 31. sect. 32.
  3. Such as happens in killing one whom the Person killing intended to hurt in a less Degree, ch. 31. sect. 38.
- Murder done with implied Malice, generally happens in the following Instances.
1. Where the principal Intention is to commit another Felony, ch. 31. sect. 41.
  2. Where the principal Design is to commit a bare Breach of the Peace, nor intended against the Person of him who happens to be slain, ch. 31. sect. 46.

3. Where the chief Motive is to assist a third Person, ch. 31. sect. 49.
  4. Where the direct Design is to escape from an Arrest, ch. 31. sect. 55.
  5. Where the principal Purpose is to usurp an illegal Authority, ch. 31. sect. 59.
  6. Where no Mischief is intended at all, ch. 31. sect. 61.
- Of Petit Treason there are three kinds, ch. 32.
1. Where a Servant kills his Master.
  2. Where a Wife kills her Husband.
  3. Where an Ecclesiastical Person kills his Prelate.
- Of capital Offences at Common Law against the Goods of another, there are two kinds.
1. Simple Larceny.
  2. Mix'd Larceny.
- Of simple Larceny there are also two kinds.
1. Grand Larceny, ch. 32. sect. 1.
  2. Petit Larceny, ch. 32. sect. 31.
- Mix'd Larceny is either from the Person of a Man, or from his House, ch. 36.
- Of mix'd Larceny from the Person there are two kinds.
1. Robbery, ch. 34.
  2. Larceny from the Person, ch. 35.
- Also there is another Offence of this Nature call'd Piracy, ch. 37.
- Capital Offences at Common Law against the Habitation of a Man are of two kinds.
1. Burglary, ch. 38.
  2. Arson, ch. 39.
- Offences more immediately against the Subject, made capital by Statute, are such as are committed.
1. Against Women, (and of these there are two kinds.
    1. Rape.
    2. Forcible Marriage.)
  2. Against the Rights of Marriage, ch. 43.
  3. Against the Members of a Man's Body, ch. 44.
  4. Against Records, ch. 45.
  5. Against Cattle, ch. 46.
  6. By Purveyors, ch. 47.
  7. By Soldiers and Mariners, ch. 48.
  8. By Hunters, ch. 49.

## ANALYSIS.

9. By Forgers of false Deeds, ch. 50.
10. By Gaolers, ch. 51.
11. By Transporters of Sheep or Wool, ch. 52.
12. By Servants, ch. 53.
13. By *Egyptians*, ch. 54.
14. By Cutters of Pow-dike, ch. 55.
15. By Trespassers on the Borders, and Rioters, ch. 56.
16. By Bankrupts, ch. 57.
17. By Counterfeiters of Bank-Notes, Exchequer-Bills, Stamps, South-Sea Bonds, Lottery-Orders, &c. ch. 58.

Offences more immediately against the Subject not capital, are of two kinds.

1. Misprison of Felony, ch. 59.
2. Other inferiour Offences.

Such inferiour Offences are of two kinds.

1. Such as amount to an actual Disturbance of the Peace.
2. Such as do not amount to such a Disturbance.

For the Prevention of the former of these Kinds of Offences, the Law has provided two Remedies.

1. By Surety for keeping the Peace, ch. 60.
2. By Surety for the good Behaviour, ch. 61.

Of the abovementioned Offences amounting to the actual Disturbance of the Peace, there are two kinds.

1. Such as may be committed by one or two Persons.
2. Such as require a greater Number.

Of those which may be committed by one or two Persons there are four kinds.

1. Assaults, ch. 62. sect. 1.
2. Batteries, 62. sect. 2.
3. Affrays, ch. 63.
4. Forcible Entries and Detainers, ch. 64.

Of those, which require a greater Number of Persons, there are three kinds.

1. Riots, ch. 65. sect. 1.
2. Routs, ch. 65. sect. 8.
3. Unlawful Assemblies, ch. 65. sect. 9.

Of such inferiour Offences not amounting to an actual Disturbance of the Peace, there are two kinds.

1. Such as are committed by Officers.
2. Such as are committed by common Persons without any relation to an Office.

Of Offences of this Nature committed by Officers, there are three Species.

1. Neglect or Breach of Duty, ch. 66.
2. Bribery, ch. 67.
3. Extortion, ch. 68.

Of Offences of this Nature, committed by private Persons, without any relation to any Office, there are two kinds.

1. Such as are infamous and grossly scandalous, proceeding from Principles of down-right Dishonesty, Malice or Faction.
2. Such as are of an inferiour Nature, and neither infamous nor grossly scandalous.

Of Offences of the first sort, there are six Species.

1. Perjury, ch. 69.
2. Forgery, ch. 70.
3. Cheats, ch. 71.
4. Conspiracy, ch. 72.
5. Libels, ch. 73.
6. Keeping of a Bawdy-house, ch. 74.

Of Offences of the latter sort there are two kinds.

1. Such as more immediately affect the Publick.
2. Such as more immediately affect the Interests of particular Persons.

Of those which more immediately affect the Publick, there are four kinds.

1. Common Nuisances, ch. 75.
2. Monopolies, ch. 79.
3. Forestaling, Ingrossing, and Regrating, ch. 80.
4. Barratry, ch. 81.

The most remarkable kinds of common Nuisances are,

1. Such as relate to Highways.
2. Such as relate to Publick Houses, ch. 78.

Those which relate to Highways come under a two-fold Consideration.

1. As they relate to Highways in general, ch. 76.
2. As they relate to Bridges in particular, ch. 77.

Of

## ANALYSIS.

Of the Offences above-mentioned more immediately affecting the Interests of particular Persons, there are three kinds,

1. *Ufury*, ch. 82.
  2. Maintenance.
  3. Buying or selling a pretended Title, ch. 86.
- Maintenance is two-fold.

1. *Ruralis*, ch. 63, sect. 2.

2. *Curialis*, ch. 83, sect. 3.

Of Maintenance *Curialis* there are three Species.

1. General Maintenance, ch. 83, sect. 4.

2. Champerry, ch. 84.

3. Embracery, ch. 85.

---

AN  
ACCOUNT  
OF THE  
AUTHORS  
Referred to in this  
BOOK.

---

- |  |   |
|--|---|
| <p><b>A</b> Leyn<br/>And. 1, 2.<br/>Aff. 1, 2, 3, 4, &amp;c.</p> <p>Barrow<br/>Benloe<br/>Brac. Bracton<br/>Bridg.<br/>Bro.<br/>Bul. 1, 2, 3.</p> <p>Caw. Cawley<br/>Co. Litt.<br/>Cro. E.<br/>Cro. Ja.<br/>Cro. Ca.<br/>Crom.</p> <p>Dalif<br/>Dal.<br/>Danv. Abr. 1, 2.<br/>Dav. Davis<br/>Ly. Dyer</p> <p>F N. B.<br/>Fitz.</p> <p>Gibf. Gibson</p> | <p><b>A.</b><br/><b>A</b> Leyn's Reports.<br/><i>Anderson's Reports, first and second Part.</i><br/>} <i>The Book of Assizes in the Reign of King Edward the third, for the</i><br/>} <i>first, second, third, fourth Years, &amp;c.</i></p> <p><b>B.</b><br/><i>Barrow's Supremacy.</i><br/><i>Benloe's Reports.</i><br/><i>Bracton, De legibus &amp; consuetudinibus Angliæ.</i><br/><i>Bridgman's Reports.</i><br/><i>Brook's Abridgment.</i><br/><i>Bulstrode's Reports, the first, second and third Part.</i></p> <p><b>C.</b><br/><i>Cawley's Laws against Recusants.</i><br/><i>Sir Edward Coke's Reports, the first and second Part, &amp;c.</i><br/><i>Sir Edward Coke's Commentary upon Littleton.</i><br/><i>Croke's Reports for the Reign of Queen Elizabeth.</i><br/><i>Croke's Reports for the Reign of King James the first.</i><br/><i>Croke's Reports for the Reign of King Charles the first.</i><br/>} <i>Crompton's Office of a Justice of Peace, printed in the Year</i><br/>} <i>1606.</i></p> <p><b>D.</b><br/><i>Dalison's Reports.</i><br/><i>Dalton's Country Justice, printed in the Year 1655.</i><br/><i>D'Anvers's Abridgment, first and second Part.</i><br/><i>Davis's Reports.</i><br/><i>Dyer's Reports.</i></p> <p><b>F.</b><br/><i>Fitzherbert's Natura Brevium.</i><br/><i>Fitzherbert's Abridgment.</i></p> <p><b>G.</b><br/><i>Gibson's Cædex Juris Ecclesiastici Anglicani.</i></p> |
|--|---|

# An Account, &c.

H. P. C.	H.	<i>Hale's Pleas of the Crown.</i>
Hard.		<i>Hardress's Reports.</i>
Hectl.		<i>Hesley's Reports.</i>
Hob.		<i>Hobart's Reports.</i>
Hutt.		<i>Hutton's Reports.</i>
1 Jon. Sir Wm. Jon.	J.	<i>Sir William Jones's Reports.</i>
2 Jon.		<i>Sir Thomas Jones's Reports.</i>
1 Inf.		<i>Coke upon Littleton.</i>
2 Inf.		<i>The second Part of Coke's Institutes.</i>
3 Inf.		<i>The third Part of Coke's Institutes.</i>
4 Inf.		<i>The fourth Part of Coke's Institutes.</i>
Keb. 1, 2, 3.	K.	<i>Keble's Reports, the first, second, and third Part.</i>
Kell.		<i>Kellerwey's Reports.</i>
Kelynge		<i>Kelynge's Reports.</i>
Kitch.		<i>Kitchin, of Courts-Leet and Courts-Baron.</i>
Lam. Lamb.	L.	<i>Lambard's Office of Justices of Peace, printed in the Year 1614.</i>
Lane		<i>Lane's Reports.</i>
Latch.		<i>Latch's Reports.</i>
Leon. 1, 2, 3.		<i>Leonard's Reports, the first, second, and third Part.</i>
Lev. 1, 2.		<i>Lewinz's Reports, the first and second Part.</i>
Litt.		<i>Littleton's Reports.</i>
Mar.	M.	<i>March's Reports.</i>
Mod. 1, 2, 3, &c.		<i>Modern Reports, the first, second, and third Part, &amp;c.</i>
Mo.		<i>Moore's Reports.</i>
Noy	N.	<i>Noy's Reports.</i>
Ow. Owen.	O.	<i>Owen's Reports.</i>
Pal. Palm.	P.	<i>Palmer's Reports.</i>
Parsons		<i>Parsons against Sir Edward Coke's fifth Institute.</i>
Pl. Com.		<i>Plowden's Commentaries.</i>
Po. Poph.		<i>Popham's Reports.</i>
Pult.		<i>Pulton, De Pace Regis &amp; Regni.</i>
Ray. Raym.	R.	<i>Raymond's Reports.</i>
Reg.		<i>Register.</i>
R. A. Rol. Ab. 1, 2.		<i>Rolle's Abridgment, the first and second Part.</i>
R. R. Rol. Re. 1, 2.		<i>Rolle's Reports, the first and second Part.</i>
Rushw. Coll.		<i>Rushworth's Collections.</i>
Saun. 1, 2.	S.	<i>Saunders's Reports, the first and second Part.</i>
Sav.		<i>Savil's Reports.</i>
Selden's Janus Anglorum		<i>Jani Anglorum facies altera by Mr. Selden, translated into English by Redman Westcot, and printed in the Year 1682.</i>
Selden's Epinomis		<i>England's Epinomis by Mr. Selden, printed in the Year 1683.</i>
Sid. Syd. 1, 2.		<i>Siderfin's Reports, the first and second.</i>
Vaugh.	V.	<i>Vaughan's Reports.</i>
Vent. 1, 2.		<i>Ventris's Reports, the first and second Part.</i>
Watf. Watson	W.	<i>Watson's Compleat Incumbent, Folio Edition.</i>
Win. Winch		<i>Winch's Reports.</i>
Wood's Inf.		<i>Wood's new Institute of the Imperial or Civil Law.</i>
Year Books.	Y.	
Yel.		<i>Yelverton's Reports.</i>

---

A  
**TREATISE**  
 OF THE  
**PLEAS**  
 OF THE  
**CROWN.**

---

**BOOK I.**

---

C H A P. I.

*Of the Persons who may be guilty of criminal  
 Offences.*

**T**HE Guilt of offending against any Law whatsoever, necessarily supposing a wilful Disobedience, can never justly be imputed to those, who are either incapable of understanding it, or of conforming themselves to it: Therefore, before I come to the several Kinds of Offences, I shall shew what Degrees of Discretion and Freedom are required in the Commission of them; for the better Understanding whereof, I shall consider what Offenders are excusable,

1. In respect of their Want of Reason;
2. In respect of their Subjection to the Power of others.

1 H.P.C. 10.  
 41. 65.  
 Publ. 122. b  
 Dalt. ca. 95.  
 Bro. Coron.  
 6, 61, 136,  
 170, 217  
 3 H. 7. 1. b  
 4 Co. 124. b.  
 2 Rol. R. p.  
 324.  
 7 Lunatick  
 pardoned  
 Regist. 329.  
 Fitz. Cor. 351  
 3 Infl. 46.  
 H. P. C. 10.  
 43.  
 Co. Litt. 247.  
 4 H. P. C. 10.  
 3 Infl. 4. 6.  
 1 And. 107,  
 109  
 26 Aff. Pl. 27.  
 Sav. 50. 57.  
 26 Aff. Pl.  
 27.  
 Bro. Coron.  
 101.  
 1 And. 107.  
 Sav. 50.  
 8 H. P. C. 226.  
 Sav. 56.  
 1 R. A. 547.  
 Pl. 4.  
 Ho. 134.  
 35 H. 6. 11. b.  
 Co. Litt. 247. b.  
 Bro. Coron. 6.  
 Dalt. ca. 95.  
 1 Co. Litt. 247.  
 1 H. P. C. 43.  
 44.  
 Keyl. 53.  
 Dalt. ca. 95.  
 1 H. P. C. 43.  
 12 Aff. Pl. 30.  
 3 H. 7. 1. b.  
 12. b.  
 Bro. Coron.  
 74, 133.  
 3 H. 7. 1. b.  
 12. b.  
 S. P. C. 16. E.  
 H. P. C. 35.  
 35 H. 6. 11. b.  
 Bro. Coron.  
 6, 61.  
 11 Keyl. 31.  
 S. P. C. 26. c.  
 142. c.  
 27 Aff. 40.  
 H. P. C. 65.  
 3 Infl. 108.  
 H. P. C. 65.  
 4 H. P. C. 65.  
 Dalt. ca. 104.  
 27 Aff. Pl. 40.  
 Fitz. Coro.  
 199. B. 2. Ch.  
 29 S. 34.  
 Queen and  
 Williams,  
 Mich. 10 An.  
 127.

*Sett.* 1. As to the first Point it is to be observ'd, <sup>a</sup> That those who are under a natural Disability of distinguishing between Good and Evil, as Infants under the Age of Discretion, Idiots and Lunaticks, are not punishable by any criminal Prosecution whatsoever.

*Sett.* 2. Indeed it was <sup>b</sup> anciently holden, in Respect of that high \*Regard which the Law has for the Safety of the King's Person, That a Madman might be punish'd as a Traitor, for killing or offering to kill the King; but this is <sup>c</sup> contradicted by the later Opinions.

*Sett.* 3. And it seems agreed at this <sup>d</sup> Day, That if one, who has committed a capital Offence, become *Non Compos* before Conviction, he shall not be arraigned; and if after Conviction, that he shall not be executed.

*Sett.* 4. But by 12 *Anna*, 23. which seems to be agreeable to the <sup>e</sup> ancient Common Law, a dangerous Madman may be kept in Prison till he recover his Senses; and by the Common Law, if it be doubtful whether a Criminal, who at his Trial is in <sup>f</sup> appearance a Lunatick, be such in Truth or not, it shall be tried by an Inquest of Office, to be returned by the Sheriff of the County wherejn the Court sits; and if it be found by them that the Party only feigns himself mad, <sup>g</sup> and he still refuse to answer, he shall be dealt with as one who stands mute.

*Sett.* 5. And if one who wants Discretion commit a <sup>h</sup> Trespass against the Person or Possession of another, he shall be compelled in a civil Action to give Satisfaction for the Damage.

*Sett.* 6. And he, who is guilty of any Crime whatever, through his <sup>i</sup> voluntary Drunkenness, shall be punished for it as much as if he had been sober.

*Sett.* 7. Also he, who incites a Madman to do a Murder or other Crime, is a <sup>k</sup> principal Offender, and as much punishable as if he had done it himself.

*Sett.* 8. And if it appear by the Circumstances, that an Infant under the Age of Discretion could <sup>l</sup> distinguish between Good and Evil, as if one of the Age of nine or ten Years kill another, and hide the Body, or make Excuses, or hide himself, he may be convicted and condemned, and forfeit, *&c.* as much as if he were of full Age. But in such a Case the Judges will in Prudence respite the Execution in order to get a Pardon: And it is said, That if an Infant apparently wanting Discretion be indicted and found guilty of Felony, the Justices themselves may dismiss him without a Pardon, *&c.*

As to the second Point, *viz.* How far those are to be excused who are under the Power of others:

*Sett.* 9. 1. A Feme Covert is so much favour'd in respect of that Power and Authority which her Husband has over her, that she shall not suffer any Punishment for committing a bare <sup>m</sup> Theft in Company with, or by Coercion of her Husband.

*Sett.* 10. Neither shall she be deemed accessory <sup>n</sup> to a Felony for receiving her Husband who has been guilty of it, as her Husband shall be for receiving her.

*Sett.* 11. But if she commit a Theft of her own voluntary <sup>o</sup> Act, or by the bare Command of her Husband; or be guilty of Treason, Murder, or Robbery, in Company with, or by Coercion of, her Husband, she is punishable as much as if she were Sole.

*Sett.* 12. Also a Wife may be indicted together with her Husband, and condemned to the Pillory with him for keeping a Bawdy-house; for this is an Offence as to the Government of the House, in which the

Wife

Wife has a principal Share; and also such an Offence as may generally be presumed to be managed by the Intrigues of her Sex.

*Sec.* 13. And generally <sup>a</sup> a Feme Covert shall answer as much as if she were Sole, for any Offence, not capital, against the Common Law, or Statute; and (if it be of such a Nature that it may be committed by her alone, without the Concurrence of the Husband) she may be punished for it without the Husband, by way of Indictment, which being a Proceeding grounded merely on the Breach of the Law, the Husband shall not be included in it for an Offence to which he is no way privy; and <sup>b</sup> if a Woman bring a malicious Appeal for the Death of her Husband, known by her to be alive, she may be imprisoned for her false Appeal, till she make <sup>c</sup> Fine to the King, and the Husband shall go at large: But if a Wife incur the Forfeiture of a penal Statute, the Husband may be made a Party to an Action or Information for the same, (as he may be generally to any Suit for a Cause of Action given by his Wife,) and shall be liable to answer what shall be recovered thereon.

*Sec.* 14. 2. Neither <sup>d</sup> a Son, nor a Servant, are excused the Commission of any Crime, whether capital or not capital, by the Command or Coercion of the Father or Master.

<sup>a</sup> 9 Co. 71.  
 Con. Mo. 813.  
 1 Sid. 410.  
 2 Keb. 634.  
 Vide Ho. 93.  
 Noy 103.  
 Savil. 25.  
 1 Rol. Rep.  
 93 94, 233.  
 234.  
 Cro. Ja. 483.  
 11 Co. 61. b.  
 62.  
 8 H. 4. 17. Pl.  
 2. Fitz. Coro.  
 73.  
 Bro. Impri-  
 sonm 100.  
<sup>c</sup> See the Cita-  
 tions to Letter 2  
<sup>d</sup> 1 Keb. 34  
 H. P. C. 66.  
 Moor 813.

## C H A P. II.

### Of Heresy.

Offences considered in Relation to the Persons against whom they are committed, are either,

1. Such as are more immediately against God; or,
2. Such as are more immediately against Man.

Offences more immediately against God are either by Common Law, or by Statute.

Those at Common Law are either capital, or not capital. The capital Offences of this Nature are of three Kinds:

1. Heresy.
2. Witchcraft.
3. Sodomy.

Concerning Heresy I shall consider,

1. What it is;
2. By whom it is cognizable;
3. How it is punishable.

*Sec.* 1. As to the first Point it seems, That among Protestants Heresy is taken to be a false Opinion repugnant to some Point of Doctrine clearly revealed in Scripture, and either absolutely essential to the Christian Faith, or at least of most high Importance.

*Sec.* 2. But it is impossible to set down all the particular Errors which may properly be called Heretical, concerning which there are,  
 and



and always have been, so many intricate Disputes; However the 1 H. 1. which erected the High-Commission-Court, having restrain'd the same from adjudging any Points to be Heretical, which have not been determined to be such either by Scripture, or by some one of the four first General Councils, or by some other Council, by exprefs Words of Scripture, or by the Parliament with the Assent of the Convocation, it has been since generally holden, that these Rules will be good Directions to Ecclesiastical Courts in Relation to Heresy.

3 Inst. 40.  
H. P. C. 3.

See Bro. Heresy. 2 Roll. Ab. 226.

*Seç. 3.* As to the second Point, *viz.* By whom Heresy is cognizable, it is certain, That the Convocation may declare what Opinions are Heretical: But it hath been questioned of late, Whether they have Power at this Day to convene and convict the Heretick?

F. N. B. 269.  
12 Co. 56, 57.  
3 Inst. 40.  
H. P. C. 5.  
Gibson 401.  
41e. 12 Co.  
56, 57, 93.  
3 Inst. 40.

*Seç. 4.* However it is agreed, That every Bishop may convict Persons of Heresy, within his own Diocese, and proceed by Church-Censures against those who shall be convicted; but it is said, That no Spiritual Judge, who is not a Bishop, hath this Power; and it has been questioned, Whether a Conviction before the Ordinary were a sufficient Foundation whereon to ground the Writ *de Heretico comburendo*, as it is agreed that a Conviction before the Convocation was?

*Seç. 5.* By 24 H. 8. 9. the Archbishop of either Province may cite any Person before him for Heresy, if the immediate Ordinary either consent thereto, or do not his Duty in punishing the same.

27 H. 8. 14. b.  
5 Co. 58. 1.  
H. P. C. 4.  
Hob. 236.

*Seç. 6.* But it is certain, That a Man cannot be proceeded against at the Common Law in a Temporal Court merely for Heresy; yet if in Maintenance of his Errors he set up Conventicles, and raise Factions, which may tend to the Disturbance of the publick Peace, it seemeth that he may in this Respect be fined and imprisoned upon an Indictment, &c. at the Common Law.

H. P. C. 4.

*Seç. 7.* Also a Temporal Judge may incidentally take Knowledge whether a Tenet be Heretical or not; as where one was committed by Force of 2 H. 4. 5. for saying, That he was not bound by the Law of God to pay Tithes to the Curate: And another for saying, That though he was excommunicate before Men, yet he was not so before God. The Temporal Courts, on an *Habeas Corpus* in the first Case, and an Action of false Imprisonment in the other, adjudged neither of the Points to be Heresy within that Statute; for the King's Courts will examine all Things which are ordain'd by Statute.

3 Inst. 42.  
1 Ro Re. 110.  
2 Bull 300.

5 Co. 58.  
1 And. 191.  
3 Leon. 199.  
3 Lev. 314.

*Seç. 8.* Also in a *Quare impedit*, if the Bishop plead that he refused the Clerk for Heresy, it seems that he must set forth the particular Point, that it may appear to be Heretical to the Court wherein the Action is brought, which having Consfance of the original Cause must by Consequence have a Power as to all incidental Matters necessary for the Determination of it; and, without knowing the very Point alledged against the Clerk, will not be able to give Directions concerning it to the Jury, who (if the Party be dead) are to try the Truth of the Allegation.

5 Co. 58. 2.  
27 H. 8. 14. b.

*Seç. 9.* But if a Man be proceeded against as an Heretick in the Spiritual Court *pro salute anime*, and think himself aggrieved, his proper Remedy seems to be to bring his Appeal to a higher Ecclesiastical Court, and not to move for a Prohibition from a Temporal one, which, as it seems to be agreed, cannot regularly determine or discuss, what shall be called Heresy.

F. N. B. 269.  
3 Inst. 43.  
H. P. C. 5.

*Seç. 10.* As to the third Point, *viz.* How Heresy is punishable; there is no Doubt but that at Common Law one convicted thereof, and refusing to abjure it, or falling into it again after he had abjured it, might

might be burnt by Force of the Writ *de Heretico comburendo*, which was grantable out of Chancery upon a Certificate of such Conviction; but it is said, That he forfeited neither Lands nor Goods, because the Proceedings against him were only *pro salute animæ*. Doffor and Student, lib 2 ca. 29. H. P. C. 5.

*Sett.* 11. But at this Day the said Writ *de Heretico comburendo* is abolished by 29 *Car.* 2. 9. And all the old Statutes, which gave a Power to arrest or imprison Persons for Heresy, or introduced any Forfeiture on that Account, are repealed; yet by the Common Law an obstinate Heretick being excommunicate, is still liable to be imprisoned by Force of the Writ *de Excommunicato capiendo* till he make Satisfaction to the Church. And by 9 & 10 *Wil.* 3. 32. If any Person having been educated in, or having made Profession of, the Christian Religion within this Realm, shall be convicted in any of the Courts of Westminster, or at the Assizes, of denying any one of the Persons in the Holy Trinity to be God, or of maintaining that there are more Gods than one, or of denying the Truth of the Christian Religion, or the Divine Authority of the Holy Scriptures, he shall for the first Offence be adjudged incapable of any Office; and for the second, shall be disabled to sue any Action, or to be a Guardian, Executor, or Administrator, or to take by any Legacy or Deed of Gift, or to bear any Office Civil or Military, or Benefice Ecclesiastical, for ever, and shall also suffer Imprisonment for three Years, without Bail or Mainprize, from the Time of such Conviction. H. P. C. 4, f. 12 Co. 44.

## C H A P. III.

## Of Witchcraft.

*Sett.* 1. **O**F Offenders of this Nature there are said to be three Kinds, 3 Inst. 44. Dalt. ca. 107.

1. Conjurers, who by Force of certain Magick Words endeavour to raise the Devil, and compel him to execute their Commands.

2. Witches, who by Way of friendly Conference are said to bargain with an evil Spirit to do what they desire of him.

3. Sorcerers or Charmers, who by the Use of certain superstitious Forms of Words, or by Means of Images, or other odd Representations of Persons or Things, &c. are said to produce strange Effects above the ordinary Course of Nature.

*Sett.* 2. All these were anciently punish'd in the same Manner as Hereticks, by the Writ *de Heretico comburendo* after a Sentence in the Ecclesiastical Court, and a Relapse. And it is said also, That they might be condemned to the Pillory, &c. upon an Indictment at Common Law. 3 Inst. 144. F. N. B. 269 b. H. P. C. 38. g. Cro. Eliz. 571.

*Sett.* 3. In the Time of King Edward the third, one taken with the Head and Face of a dead Man, and a Book of Sorcery, was brought into the Kings Bench: But there being no Indictment against him, he was sworn that from thenceforth he would not be a Sorcerer, and then delivered from Prison, and the Head was burnt at his Charge: But this Method seems to be obsolete at this Day. 45 Ed. 3. 17. b. B. 10. Cor. 15. 2 Keb. 719.

*Sett.* 4. By 1 *Jac.* 1. cap 12. the only Law now in Force against these Offenders, they are divided into two Degrees; and those in the first Degree, and their Accessaries before, shall suffer as Felons without Clergy; and of these there are the four following Species.

C

1. Such

- H. P. C. 6.  
3 Inst. 45. con. 1. *Such as shall use any Invocation or Conjurati- on of any evil Spirit: and such seem clearly to be within the Law, though no Spirit do actually appear.*
- H. P. C. 6.  
3 Inst. 45. 2. *Such as consult, covenant with, entertain, employ, feed, or reward any evil Spirit to any Intent: And these are agreed to be within the Statute, though nothing farther be done upon such Consultation, &c.*
- H. P. C. 6.  
3 Inst. 45. 3. *Such as take up any dead Person's Body or any Part thereof, to be used in any Manner of Witchcraft: And these are also clearly within the Statute, though they do not actually so use it.*
- H. P. C. 7.  
3 Inst. 45.  
1 Jon. 143. 4. *Such as exercise any Witchcraft, Inchantment, Charm or Sorcery, whereby any Person shall be killed, destroyed, consumed, or lamed in his or her Body, or any Part thereof: But none are within this Branch, who do not actually effect such Mischief.*

*Seçt. 5.* Those in the second Degree shall for the first Offence suffer a Year's Imprisonment, and the Pillory; and for the second, as Felons without Clergy, and these by the manifest Purport of the Words of the Act, which is very obscurely penned, seem to be divided into the two following Species.

1. *Such as take upon them by Witchcraft, Inchantment, Charm or Sorcery, to tell where Treasure is to be found, or where Things lost or stoln may be found, or to do any Thing to the Intent to provoke any Person to unlawful Love, or to hurt or destroy any Person in his or her Body, though the same be not effected.*
- H. P. C. 8.  
3 Inst. 46. 2. *Such as shall use any Witchcraft, &c. whereby any Cattle or Goods of any Person shall be destroyed, wasted or impaired: But those, who take upon them to do this, are not within the Act unless they actually do it.*

## C H A P. IV.

## Of Sodomy.

- 12 Co. 36, 37.  
3 Inst. 58. *Seçt. 1.* ALL unnatural Carnal Copulations, whether with Man or Beast, seem to come under the Notion of Sodomy, which was Felony by the ancient Common Law, and punish'd, according to some Authors, with Burning; according to others, with Burying alive: But at this Day by Force of 25 H. 8. 6. & 5 El. 17. is punished in the same Manner as other Felonies, which are excluded from the Clergy.
- 12 Co. 36, 37.  
3 Inst. 58. *Seçt. 2.* In every Indictment for this Offence, there must be the Words *Rem habuit veneram & carnaliter cognovit*; and consequently some Kind of Penetration, and also of Emission, must be proved; but any the least Degree is sufficient, and Emission is *prima facie* an Evidence of Penetration.

## C H A P. V.

## Of Offences against God not Capital at Common Law.

Offences more immediately against God not Capital, are either by the Common Law or Statute.

Those by the Common Law are,

- 1 Ven. 293.  
3 Keb. 607.  
621. *Seçt. 1.* I. All Blasphemies against God, as denying his Being or Providence, and all contumelious Reproaches of Jesus Christ.

*Seçt. 2.*

Chap. 6. *Of Offences by Statute against Religion, &c.*

*Seçt.* 2. II. All profane Scoffing at the Holy Scripture, or exposing any Part thereof to Contempt or Ridicule.

*Seçt.* 3. III. Impostures in Religion, as falsely pretending to extraordinary Commissions from God, and terrifying or abusing the People with false Denunciations of Judgments, &c.

*See the Case of James Nailor, and of the French Protestants, &c.*  
1 Sid. 168.  
1 Keb. 620.

*Seçt.* 4. IV. All open Lewdness grossly scandalous, such as was that of those Persons, who exposed themselves naked to the People in a Balcony in *Covent-Garden* with most abominable Circumstances

*Seçt.* 5. Offences of this Nature, because they tend to subvert all Religion or Morality, which are the Foundation of Government, are punishable by the Temporal Judges with Fine and Imprisonment, and also such corporal infamous Punishment as to the Court in Discretion shall seem meet, according to the Heinousness of the Crime.

1 Ven. 293  
3 Keb. 607,  
621.

*Seçt.* 6. V. Seditious Words in Derogation of the Established Religion are indictable, as tending to a Breach of the Peace, as these, Your Religion is a new Religion, and Preaching is but Prattling, and Prayer once a Day is more edifying.

2 R. A. 187.  
Pl. 1.  
Cro J2. 421.

C H A P. VI.

*Of Offences by Statute against Religion in general.*

OFFENCES by Statute not Capital more immediately against God, are either,

1. Such as are against Religion in general; or,
2. Such as are against the Established Church.

Those against Religion in general are of several Kinds; as,

*Seçt.* 1. I. All Profanation of the Lord's Day; for by 1 Car. 1. 1. There shall be no Assembly of People, out of their own Parishes, on this Day, for any Sport whatsoever; nor any Bull-baiting or Bear-baiting, Interludes common Plays, or other unlawful Exercises and Pastimes, used by any Persons in their own Parishes, on Pain that every Offender shall forfeit 3 s. and 4 d. to the Use of the Poor, &c.

*Seçt.* 2. By 29 Car. 2. 7. No Persons whatsoever, above fourteen Years old, shall exercise any wordly Labour, Business, or Work of their ordinary Calling on the Lord's Day, (except Works of Necessity and Charity, and the Dressing and Selling of Meat in an Inn and Victualling House, for those who cannot otherwise be provided,) on Pain of forfeiting 5 s. And no Person shall publicly cry, or expose to Sale, any Goods whatsoever on this Day, (except Milk, which may be sold before Nine in the Morning, and after Four in the Afternoon,) on Pain of forfeiting the same.

Par. 3

*Seçt.* 3. Also no Drover, Horse-courser, Waggoner, Butcher or Higler, shall travel, or come to their Inn on this Day, on Pain of twenty Shillings. And no Person shall use, employ, or travel with any Boat or Barge, without the Allowance of some Justice of Peace, &c. on Pain of five Shillings. But by 11 & 12 Gul. 21. Forty Watermen may be appointed by the Company of Watermen to ply

on

on the Thames, &c. And by 9 Ann. 23. Hackney Coach-Men are permitted to work within the Bills of Mortality on Sunday.

Sett. 4. II. All profane Swearing and Cursing; for by 21 Jac. 1. 20. and 6 & 7 Gul. 11. Every Servant, Day-Labourer, Seaman or Soldier, convicted of profane Cursing or Swearing, forfeits one Shilling, and every other Person two Shillings, and shall be registred at Sessions; and by 13 Car. 2. cap. 9. Artic. 2. All Persons in the King's Pay at Sea, for profane Oaths, &c. shall be punished by Fine and Imprisonment, as the Court-Martial shall think fit.

Sett. 5. III. Drunkenness, for which by 1 Jac. 1. 5. all Persons whatsoever forfeit five Shillings to the Poor; and for which Seamen may by 13 Car. 2. 9. be punished by Fine, &c. as the Court-Martial shall think fit.

Sett. 6. IV. Reviling the Sacrament of the Lord's Supper with contemptuous Words, &c. for which (by 1 Ed. 6. 1. which was repealed by 1 Mar. 2. and revived by 1 El. 1.) the Offender shall be imprisoned, fined, and ransomed.

Sett. 7. I shall not mention the Offences against 2 & 3 Ed. 6. 19. and 5 El. 5. relating to Fasts and Fifth days, because it is expressly declared, That those Statutes are enacted merely on a political Account, and it is made penal to affirm that any eating of Fish, or forbearing of Flesh mentioned therein, is necessary to Salvation, or that it is the Service of God.

## C H A P. VII.

### Of Offences against the Common Prayer.

**O**FFENCES against the Established Church are

1. Such as concern all Persons in general;
2. Such as more immediately relate to those of the Popish Religion;
3. Such as more immediately regard Protestant Dissenters.

Those which concern all Persons in general are,

1. Against the Common Prayer.
2. In accepting or holding an Office without due Conformity to the Church.
3. In teaching School without conforming to the Church.
4. In not coming to Church.

Sett. 1. And first of Offences against the Common Prayer, as to which it is to be observed, That by 2 & 3 Ed. 6. 1. and 6 Ed. 6. 1. (which were repealed by 1 Mar. 2. and revived by 1 El. 2.) the Common Prayer Book was first established under severe Penalties, but the same Penalties being repeated and enlarged by 1 El. 2. and 13 & 14 Car. 2. 4. which enacts the use of the same Common Prayer with some Alterations; those Statutes of Ed. 6. seem at this Day to be of little Use.

Sett. 2. By 1 El. 2. Par. 4. If any Parson, Vicar, or other whatsoever Minister, that ought to say the said Common Prayer, &c. shall refuse to use it in such Church, &c. or other Place where he should use to minister the same, or wilfully or

*obstinately standing in the same, use any other Form, or speak any Thing in Derogation of the said Book, or any Thing therein contain'd, he forfeits for the first Offence one Year's Profit of all his spiritual Promotions, and shall suffer six Months Imprisonment; and for the second Offence shall be deprived, &c.*

*See for the Form of the Indictment*  
3 Mod. 78, 79

In the Construction of this Act it has been resolved,

*Sect. 3.* I. That under the Words, *Parson, Vicar, or other whatsoever Minister, that ought or should say the said Common Prayer, &c.* those Clergymen who have no Cure are included, as much as those who have one, and that they are punishable for using any other Form, &c. inasmuch as by their Ordination they are oblig'd to officiate in the Offices of the Church, &c. and it is said that they are sufficiently shewn to be in Holy Orders by the Word *Clericus* in an Indictment.

Dyer 203. Pi. 73. 74.

*Sect. 4.* II. That this Statute being not only in the Affirmative, but also expressly saving the Jurisdiction of Ecclesiastical Courts, does not restrain them from proceeding against these Offenders in their own Methods, as Disturbers of the Unity and Peace of the Church; and consequently that such Persons may be deprived by the said Court according to the Course of the Spiritual Law, for the first Offence.

5 Co. Cas. dry's Case, s. b. 6. a. Poph. 59. 2 Roi Abr. 222, 5.

*Sect. 5.* Also it is farther enacted, by 1 El. 2. Par. 9. *That if any Person shall in Plays, Songs, or other open Words, speak any Thing in Derogation, Depraving or Despising of the said Book, &c. Or by open Fact compel, or otherwise procure or maintain any Minister to say any Common Prayer openly, &c. in other Form: Or shall by any of the said Means let any Minister to say the said Common Prayer, &c. he shall forfeit one hundred Marks for the first Offence, and four hundred for the Second, &c. (which if he pay not within six Weeks after Conviction, he shall suffer six Months Imprisonment for the first Offence, and twelve for the second.) and for the third Offence shall forfeit all his Goods and Chattels, and shall suffer Imprisonment for Life.*

*Sect. 6.* It has been made a Question in the Construction of this Clause, Whether if the Party die within six Weeks, the said Forfeiture be not discharged, since by the Act of God the Election of paying it, or suffering Imprisonment in lieu of it, is taken away?

Dyer 203 74. 231 +

## C H A P. VIII.

### *Of Offences in accepting or holding an Office without due Conformity to the Church.*

**O**ffences in accepting or holding an Office, without due Conformity to the Church, are of two Kinds,

1. In not receiving the Sacrament both before and after the Acceptance of an Office.

2. In going to any other Place for religious Worship, than the Church, during the Continuance in an Office.

*Sect. 1.* As to the first of these Offences, it is enacted by 13 Car. 2. Stat. 2. Cap. 1. Par. 10, 12. *That no Person shall be placed, elected, or chosen, to any Office or Place of Mayor, Alderman, Recorder, Bailiff, Town-Clerk, Common Council-Man, or other Office of Magistracy, Place or Trust, or other Employ-*

ment relating to the Government of any City, Corporation, Borough, Cinque-Port, or other Port-Town, who shall not have received the Sacrament, according to the Rites of the Church of England, within one Year next before such Election; and that every Person so placed or elected shall take the Oaths of Allegiance and Supremacy at the same Time, when the Oath for the due Execution of the said Office, &c. shall be administered; and that the said Oaths shall be administered and tendered by those, who administer the Oath of Office, and in Default of such by two Justices of Peace of the Corporation, &c. (which makes <sup>a</sup> it necessary in a Return to a *Mandamus*, setting forth that the Party did not take the Oaths before the Major, &c. to add that he did not take them before two Justices of Peace, &c.) And it is further enacted, That on Default hereof every such Election, Placing and Choice shall be void. And <sup>b</sup> it hath been adjudged, to be no Excuse, that the Oaths were not tendered.

*Seç. 2.* Also it is enacted by 25 Car. 2. That all Officers civil and military, (Except those of Inheritance, appointing sufficient Deputies) and all, who have any Fee, &c. by Patent from the King, (Except such as shall be granted for valuable Consideration for Life or Years, and not relate to any Office or Place of Trust;) and also all, who have any Place of Trust, or any Employment in the King's Household, shall take the Oaths of Allegiance and Supremacy, and Test, the next Term, (in the King's Bench or Chancery, or Quarter-Sessions;) and receive the Sacrament within three Months, and give in a Certificate thereof proved by two Witnesses to the Court, wherein they take the said Oaths. And in case of Neglect shall be disabled to hold the said Offices, &c. and forfeit five hundred Pounds, except Fems Covert, &c. But <sup>c</sup> it hath been adjudged, that the Persons so disabled lose only their Right to the Profits of their Offices from the Time of such Disability; but that they lose nothing vested in them before. Also it <sup>d</sup> hath been adjudged, to be no Excuse for a Person bound by Law to accept a Corporation Office, that he is disabled to receive the Sacrament by having been excommunicated; and <sup>e</sup> *Quare*, if it be any Excuse, that his Conscience will not suffer him to take it, being a Protestant Dissenter, &c.

*Seç. 3.* Notwithstanding the Words of the first of these Acts are so very strong as to make such Election, &c. void, and those of the second to make such Persons disabled in Law to all Intents and Purposes whatsoever, to have, occupy, or enjoy the said Offices; <sup>f</sup> yet it hath been strongly holden, that the Acts of one under such a Disability being instated in such an Office, and executing the same without any Objection to his Authority, may be valid as to Strangers; for otherwise not only those who no way infringe this Law, but even those whose Benefit is intended to be advanced by it, might be Sufferers for another's Fault to which they are no Way privy; and one Chasm in a Corporation happening thro' the Default of one Head-Officer would perpetually vacate the Acts of all others, whose Authority in respect of their Admission into their Offices, or otherwise, may depend on his.

*Seç. 4.* By 25 Car. 2. Parag. 17. it is expressly provided, That the said Act shall not extend to Constables, or Church-wardens, or such like inferiour civil Officers, or to a Bailiff of a Manor or Lands, or such like private Officers.

But it hath been questioned, Whether it extends to the Censor of the College of Physicians?

*Seç. 5.* As to the second Offence of this Kind, *viz.* that of going to any other Place for religious Worship than the Church, during the Continuance of an Office, it was enacted by 10 Ann. 2. That if any Person having any Office, civil or military, or receiving any Pay, Salary, Fee, or Wages, by reason of any Grant from the Crown, or having any Command or Place of Trust

5 Mod. 431.

<sup>a</sup> 5 Mod. 317.  
318.  
Salk. 428 429.

<sup>b</sup> 5 Mod. 316,  
317, 318.  
<sup>2</sup> Jon 121.  
Salk 428,  
429.

Lutw. 910.

<sup>d</sup> 2 Mod. 299.  
2 Vent 248.

<sup>e</sup> Sal. 167, 168.  
2 Vent. 248.

<sup>f</sup> *Vide* 3 Keb.  
606, 605, 682,  
721  
<sup>2</sup> Jon 81. 137.  
<sup>2</sup> Lev. 184.  
242.  
<sup>2</sup> Mod. 193,  
194.

5 Mod 431,  
432.

*Trust from the Crown, or admitted into any Service or Employment in the King's Household or Family, or bearing any Office of Magistracy, or Place of Trust, or other Employment relating to the Government of any City, Corporation, Borough, or Cinque-Port, and obliged by 13 Car. 2. Stat. 2. Cap. 1. or 25 Car. 2. 21. to receive the Sacrament, according to the Usage of the Church of England, should at any Time after Admission into any such Office, &c. and during the Continuance in the same, knowingly or willingly be present at any Assembly in England, Wales, or Berwick on Tweed, for the Exercise of Religion in other Manner than according to the Church of England, at which Assembly there shall be ten Persons besides those of the Family, &c. or at any such Meeting where such Liturgy is used, and the King, and such, others as shall be lawfully appointed to be prayed for, should not be prayed for in express Words, &c. he should forfeit forty Pounds; and be disabled to hold any Office or Employment whatsoever in England, &c. But this Statute, so far as it relates to this Matter, is repealed by 5 Geo. 4.*

C H A P. IX.

*Of Offences in teaching School without conforming to the Church.*

*Seçt. 1. AS to the Offence of teaching School without conforming to the Church, so far as it concerns all Persons in general, it is enacted by 23 El. 1. Par. 6 & 7. That if any Person or Persons, Body Politick or Corporate, shall keep or maintain any School-master, who shall not repair to Church according to the Form of the said Statute, or be allowed by the Bishop or Ordinary of the Diocese, (who shall not take any Thing for the said Allowance) they shall forfeit for every Month ten Pounds; and such School-master presuming to teach contrary to the said Act, and being thereof convicted, shall be disabled to be a Teacher of Youth, and shall suffer Imprisonment without Bail or Mainprize for one Year.*

*Seçt. 2. And it is farther enacted by 1 Jac. 1. 4. Par. 9. That no Person shall keep any School, or be a School-master, out of the Universities or Colleges of this Realm, except it be in some publick or free Grammar-School; or in some such Nobleman's or Noblewoman's, or Gentleman's or Gentlewoman's House, as are not Recusants, or where the same School-master shall be specially licenced thereunto by the Archbishop, Bishop, or Guardian of the Spiritualities of that Diocese, upon Pain, that as well the School-master, as also the Party that shall retain or maintain any such School-master, contrary to the Meaning of the said Statute, shall forfeit each of them, for every Day so wittingly offending, forty Shillings.*

*Seçt. 3. But it having been doubted whether such Persons, as are within the Benefit of 1 Gul. & Mar. 18. commonly called The Toleration Act, are not exempted from the Penalties of the above mentioned Statutes, it was farther enacted by 12 Ann. 7. That whoever shall keep any publick or private School or Seminary, or teach any Youth as Tutor, or School-master, (unless he instruct them only in Reading, or Writing, Arithmetick, or such mathematical Learning as relates to Navigation, or some mechanical Art, and that in the English Tongue; or unless he shall be a Foreigner of a Foreign reformed Church, and teach the Children of such Foreigners only) without having first subscribed that Part of the Declaration in 13 & 14 Car. 2. which relates to Conformity to the Liturgy of the Church of England, and also having obtained a Licence from the Bishop, &c. and shall be thereof convicted in any of the Courts at Westminster,*



or at the Assizes, or before Justices of Oyer and Terminer, shall be committed to the common Gaol for three Months, &c. But this Statute, so far as it relates to this Matter, is repealed by 5 Geo. 4.

As to Popish School-masters in particular, See Chap. 15. Sect. 3.

## C H A P. X.

### *Of Offences in not coming to Church.*

FOR the better Understanding of the Offences of not coming to Church, so far as the same relate to all Persons in general, except such as are within the Indulgence of 1 Will. & Mar. 18. which is commonly called *The Toleration Act*, I shall consider:

1. How far Persons are punishable for their own Absence from the Church.
2. How far they are punishable for suffering such Absence in others.

And first, In Order to shew how far Persons are punishable for their own Absence, I shall consider the following Particulars:

1. What Forfeitures of Money, Lands or Goods, such Offenders incur.
2. In what Manner they are to be proceeded against for those Forfeitures.
3. What other Inconveniencies they are subject unto.
4. By what Means they may be discharged.

As to the first Point, I shall consider,

1. What Forfeitures of Money; and,
2. What Forfeitures of Lands and Goods such Offenders are liable unto

And first, The Forfeitures of Money, to which they are liable, are threefold;

1. That of twelve Pence for the Absence of one Sunday, or other Holy Day.
2. That of twenty Pounds for the Absence of every Month contained in a Conviction.
3. That of twenty Pounds for the Absence of every Month after a Conviction.

Sect. 1. And first, The Forfeiture of twelve Pence for the Absence of one Sunday, or other Holy Day, depends upon 1 El. 2. by which it is enacted, *That all Persons inhabiting within this Realm, or any other the King's Dominions, shall diligently and faithfully, having no lawful or reasonable Excuse to be absent, endeavour to resort to their Parish Church or Cha-*

pel accustomed, or upon reasonable Let thereof, to some usual Place, where Common Prayer and such Service of God shall be used, in such Time of Let, upon every Sunday, and other Days ordained and used to be kept as Holy Days, and then and there to abide orderly and soberly, during the Time of the Common Prayer, Preaching, or other Service of God there to be used and ministered, upon pain of Punishment by the Censures of the Church, and also upon Pain that every Person so offending shall forfeit for every such Offence twelve Pence.

In the Exposition of this Statute, the following Opinions have been holden.

*Seç.* 2. I. That the Indictment needs not shew that the Party had no reasonable Excuse for his Absence, or that he is an Inhabitant within this Realm, &c. But that the Defendant, if we have any Matter of this Kind in his Favour, ought to shew it.

2 Leon. 5.  
Godbolt 148.  
Sec 29 El. 6.  
Par. 5.

*Seç.* 3. II. That if the Spiritual Court, proceeding upon this Statute, refuse to allow a reasonable Excuse, they may be prohibited; but that if they proceed wholly on their own Canons, they shall not be at all comptrolled by the Common Law, (unless they act in Derogation from it, as by questioning a Matter not triable by them, as the Bounds of a Parish, &c.) for they shall be presumed to be the best Judges of their own Laws.

2 Rol. Rep.  
438, 455.

1 Bull. 159.  
See Gibs. 358.

*Seç.* 4. III. That he, who misbehaves himself in the Church, or misses either Morning or Evening Prayer, or goes away before the whole Service is over, is as much within the Statute as he, who is wholly absent; and that he who is absent from his own Parish Church shall be put to prove where he went to Church.

1 Rol. Rep. 93.  
Godbolt. 148.  
Dal. ca. 45.  
fo. 106.  
1 Syd. 230.

*Seç.* 5. IV. That the Offence in not coming to Church consisting wholly in a Non-feasance, and not supposing any Fact done, but barely the Omission of what ought to be done, needs not be alledged in any certain Place; for properly speaking, it is not committed any where.

1 And. 139.  
Hob. 251.  
See 2 Leon.  
167.

*Seç.* 6. Secondly, The Forfeiture of twenty Pounds for the Absence of a whole Month contained in a Conviction, depends upon 23 El. 1. Par. 5. by which it is enacted, That every Person above the Age of sixteen Years, who shall not repair to some Church, Chapel or usual Place of Common Prayer, but forbear the same, contrary to the Tenor of the said Statute of 1 El. 2. and being thereof lawfully convicted, shall forfeit to the King for every Month, which he or she shall so forbear, twenty Pounds.

President of  
del Here on  
Lutw. 201.  
208.

In the Exposition hereof it hath been resolved,

*Seç.* 7. I. That this Statute, by inflicting twenty Pounds for a Month's Absence, dispenses not with the Forfeiture of twelve Pence, given by 1 El. 2. for the Absence of one Sunday, for both may well stand together, and the twelve Pence is immediately forfeited upon the Absence of each particular Day.

11 Co. 63. b.  
1 Rol. Re 94.

*Seç.* 8. II. That those Words, being thereof lawfully convicted, are no more than the Law would have implied, if they had not been expressed, and therefore operate nothing; from whence it follows, That they neither cause the Party to forfeit any Thing by a Conviction, unless Judgment be given thereon, nor restrain the Forfeiture to such Offences only, as are committed after a previous Conviction, inasmuch as they mean no more than what the Law provides of common Right in every Case, viz. That the Party shall forfeit nothing till he be convicted.

Lutw. 162,  
163.  
11 Co. 57. b.  
59. b.  
1 R. R. 89,  
90, 233, 234.  
Dy. 160. Pl.  
40.  
3 Bull. 87.

11 Co. 58. a. b.  
60. 2.  
1 Rol. Rep.  
29, 90.

Cro. Ja. 529.

Yel. 100.  
Cro. El. 835.  
2 Rol. Abr.  
521. c.  
Cawley 61.

3 Lev. 313.  
Luc. 203.  
1117.  
2 Mod. 240.  
241.  
1 And. 294.  
295.

See 29 El. 6.  
Par. 1, 8.

1 Jones 24.  
25.  
Cawley 171,  
172.

12 Co. 1, 2.  
1 Leon. 98.  
1 Rol. Ke. 7.

Owen 37.  
1 Leon. 97.  
Cawley 107. a

*Señ. 9.* III. That he, who is condemned on Demurrer, or *nihil dicit*, is sufficiently convicted within the Act; for whoever is adjudged, is convicted, though it follow not that every one, who is convicted, is adjudged, &c.

*Señ. 10.* IV. That one, who was sick for Part of the Time contained in an Information upon this Statute, shall not be at all excused by Reason of such Sickness, if it be proved that he was a Recusant both before and after; for it shall be intended that he obstinately forbore during that Time.

*Señ. 11.* V. That the Time of a Month, intended by the Statute, shall be computed not by the Kalendar, but by the Number of Days, allowing 28 Days to each, according to the common Rule of expounding Statutes, which speak generally of a Month.

*Señ. 12.* Thirdly, The Forfeiture of twenty Pounds for the Absence of every Month after a Conviction, depends upon 29, (commonly called \*28) El. 6. Par. 2, 3, 4. and 3 Jac. 1, 4. Par. 8, 3. by which it is enacted, That every Offender being convicted of not coming to Church, contrary to the Purport of the Statutes above mentioned, shall pay twenty Pounds for every Month after such Conviction, until he shall conform himself, and come to Church.

*Señ. 13.* As to the second Branch of this Head, viz. What Forfeiture of Lands and Goods such Offenders are liable to, the same depends also upon 29 El. 6. Par. 4. and 3 Jac. 1. 4. Par. 8, 9. by which it is enacted, That if the Offender shall make Default of Payment of the twenty Pounds, both for every Month contained in the Conviction, and also for every Month subsequent, during which he shall not conform himself to the Church, the King shall take, seize and enjoy all his Goods, and two Parts of his Hereditaments, Leases, and Farms, leaving the third Part only of the same Hereditaments, Leases and Farms, to and for the Maintenance and Relief of the same Offender, his Wife, Children, and Family, notwithstanding any prior Conveyance thereof made by such Offender with Power of Revocation, or to the Use of himself or his Family. Also by the said Statute of 3 Jac. 1. 4. Par. 11. the King may refuse the Penalty of twenty Pounds a Month, though it be tendered according to Law, and thereupon seize two Parts of all the Hereditaments, Leases and Farms, which at the Time of such Seizure shall be, or afterwards shall come to any such Offender, or to any other to his Use or in Trust for him or at his Disposition, or whereby or in Consideration whereof he or his Family shall be relieved, maintained or kept, leaving unto him his chief Mansion House, as Part of his third Part.

In the Construction of these Statutes the following Points have been resolved.

*Señ. 14.* I. That the King by making his Election given him by 3 Jac. 1. to seize the Offender's Hereditaments, &c. waives the Benefit of the twenty Pounds a Month, and the Power of seizing the Offender's Goods.

*Señ. 15.* II. That a Recognizance or Bond taken by such Offenders, either in their own Names or in the Names of others to their Use, are within the Statute of 29 El. for the Words thereof to this Purpose are, That the King shall take, seize, and enjoy all the Goods, &c. which in an Act of Parliament will include the whole personal Estate; and though a Chose in Action cannot properly be said to be taken or seized, yet may it properly enough be said to be enjoyed.

*Señ. 16.* III. That no Copyhold Lands are within 29 El. (and by the same Reason it seemeth that they are not within 3 Jac. 1.) in Respect of the Prejudice, which would accrue to the Lord by the Loss of his Services, &c.

*Sect.* 17. IV. That the Profits of the Lands seized by the King by Force of 29 *El.* for the Non-payment of the twenty Pounds a Month, ought not to be applied to the Satisfaction thereof, but that the Lands ought to remain in the King's Hands by way of Pledge, till the whole Forfeiture be paid some other Way; but this Construction of the Statute seeming over severe it was provided by 3 *Jac.* 1. 4. Par. 3. *That the Profits of the said Lands should go towards the Satisfaction of the twenty Pounds.*

*Cro El.* 845.  
2 *Roll. Re.* 25.  
*Palm.* 41.  
*Sir W. Jon.*  
24.

*Sect.* 18. It hath been questioned, Whether an Estate conveyed by another in Trust for a Recusant, be liable to be seized by Force of the said Statute of 29 *El.* because it expressly avoids such Conveyances only as are made by the Recusant himself to his own Use, &c. And perhaps if it shall plainly appear, That an Estate is settled *bona fide* in Trust for a Recusant by some Friend of his, upon some other View, and not merely with an Intent to evade the Statute, it may be reasonable to exempt such a Conveyance out of the Meaning of it; however it is clear from the express Words of 3 *Jac.* 1. 4. Par. 11. *That the King, upon his waiving the Forfeiture of the twenty Pounds a Month, may seize two Parts of all the Hereditaments, &c. which shall come to any such Offenders, or to others to their Use, or in Trust for them:* Also it is said, That the King may seize an Estate, which is granted to a Recusant in Trust for another; and it is certain that the Statute has made no express Provision for the *Cestui que Trust.*

*Lane* 105,  
106.  
*Cawley* 169.  
*Sec. 1 Co.* 2, 2.

*Lane* 39.

As to the second general Head of this Chapter, *viz.* In what Manner Offenders of this Nature are to be proceeded against for the Forfeitures above mentioned, I shall consider,

1. How they are to be proceeded against for the said Forfeitures of Money, and

2. In what Manner for the said Forfeitures of Lands and Goods.

As to the Prosecution for the said Forfeitures of Money, I shall shew,

1. How they are to be proceeded against for the said Forfeiture of twelve Pence for the Absence of every *Sunday, &c.* and

2. In what Manner for the said Forfeiture of twenty Pounds for the Absence of every Month contained in a Conviction, and

3. In what Manner for the said Forfeiture of twenty Pounds for the Absence of every Month after a Conviction.

*Sect.* 19. And first, As to the Recovery of the said Forfeiture of twelve Pence for the Absence of every *Sunday*, it was enacted by 1 *El.* 2. *That the same should be levied by the Church-wardens of the Parish where such Offence should be done, to the Use of the Poor of the same Parish, of the Goods, Lands, and Tenements of such Offenders, by way of Distress:* But this being defective in not shewing by whom, or in what Manner such Offenders should be convicted, or by whom the Warrant for levying the said Forfeiture should be granted; it was farther enacted by 3 *Jac.* 1. 4. Par. 27. *That it shall be lawful for any one Justice of the Peace of the Limit, Division, or Liberty, wherein the said Party shall dwell, upon the Confession of the Party, or the Oath of one Witness, to call the said Party before him, and if he shall not make a sufficient Excuse and due Proof thereof, to the Satisfaction of the said Justice of Peace, that it shall be lawful for the said Justice of Peace to make a Warrant to the Church-warden of the said Parish, where the said Party shall dwell, to levy twelve Pence for every such Default, by Distress and Sale of the Offender's Goods, rendering the Overplus to the said Offender; and that in Default of such Distress, it shall be lawful for the said Justice of Peace to commit every such Offender to Prison, until the said Forfeiture shall be paid, which shall be employed to*

*the*

*the Use of the Poor of the Parish, wherein the Offender shall be resident or abiding at the Time of the Offence.*

*Señ. 20.* As to the second Point, *viz.* In what Manner the said Offenders are to be proceeded against for the said Forfeiture of twenty Pounds for the Absence of every Month contain'd in a Conviction, I shall consider,

1. In what Manner the same may be recovered at the Suit of the King, and
2. In what Manner at the Suit of an Informer.

And first, as to the Recovery hereof at the King's Suit, I shall consider,

1. In what Manner it may be recovered at the King's Suit by way of Indictment.
2. In what Manner by way of Action or Information.

See 1 Rol.  
Re. 94.  
11 Co. 63.  
Cawley 65,  
67, 82, 83.

*Señ. 21.* And first, as to the Recovery hereof at the Suit of the King by way of Indictment, it was enacted by 23 El. 1. Par. 9. *That the Justices of Oyer, Assize, Gaol Delivery, and Quarter-Sessions of the Peace, might enquire of and determine these Offences, within one Tear and a Day:* But by 29 El. 6. Par. 2 *It was ordained that all such Convictions should be in the King's Bench, or at the Assizes, or general Gaol Delivery, and not elsewhere:* However by 3 Jac. 1. 4. Par. 7. the Jurisdiction of the Sessions is revived.

President  
Lut. 203.  
1101.

*Señ. 22.* Also it is farther enacted by 29 El. 6. Par. 5. and 3 Jac. 1. 4. Par. 7. *That upon an Indictment at the Assizes, Gaol Delivery, or General Sessions of the Peace, Proclamation shall be made that the Offender render himself to the Sheriff before the next Assizes, Gaol Delivery or Sessions; and that if he shall not then appear of Record, upon such Default recorded, the same shall be a Conviction in Law, as if a Trial by Verdict on the Indictment had been recorded.*

Sal. 145.

And by Par. 9. *Every such Conviction shall be certified into the Exchequer, &c.*

1 Vent. 355.  
Raym. 434.

*Señ. 23.* In the Construction hereof it hath been resolved, I. That such a Conviction shall not be look'd on as a Judgment; for the Words are, *It shall be a Conviction in Law, as if a Trial, &c. had been recorded:* And consequently that it cannot be reversed by Writ of Error, which cannot be brought on any Record, which is not a Judgment, and therefore that the Party has no other Remedy against an insufficient Conviction, but to remove it into the Exchequer, and quash it there. Also upon the same Ground it has been holden, That a Forfeiture due to the King, by Force of such a Conviction, shall not be taken to be within the Exception of a general Pardon, which excepts all Forfeitures, &c. converted to a Debt by Judgment.

Vide Sal. 145.  
Pl. 5.  
11 Co. 65. a.  
Vide infra  
Señ. 42.

Palm 40. 41.  
Bridg. 123.  
3 Lev. 333.  
Lut. 1117.

*Señ. 24.* II. That if the Proclamation do not pursue the Statute, as if it appoint that the Body shall be rendered at next Sessions, &c. whereas by the Statute it ought to order a Render to the Sheriff, and that before the next Sessions, the Conviction is insufficient.

Cawley 164.  
Poph. 29.  
Keilw. 180. a.

*Señ. 25.* III. That an actual personal Appearance of the Defendant at the next Sessions, &c. will no way avail him, unless the same be entered of Record.

Hob. 205.

*Señ. 26.* It hath been holden, That a Man cannot be convicted by Force of this Statute upon a Default on a Proclamation, &c. in the King's Bench, because this Court is not mentioned in the Statute; But perhaps this Opinion may justly be questioned, because the Court of King's Bench being the supreme Court of Assize, and Gaol-Delivery, &c. in the County where it sits, it seems that a Statute by giving any Power to the Courts of Assize, or Gaol-Delivery, does impliedly give the same to the Court of King's Bench, unless it have some restrictive Words to the contrary.

H. P. C. 156.  
Cro. Ca. 465.  
2 Lev. 179.  
2 Mod. 128,  
129.

*Señ.*

*Señ. 27.* If the Defendant do appear, there is no doubt but that the Proceedings ought to be according to the common Course of Law upon other Indictments in all Respects, except those, which are within the Restraint of 3 Jac. 1. 4. Par. 16, 17. by which it is enacted, *That no such Indictment, nor any Proclamation, Outlawry, or other Proceeding thereupon, shall at any Time hereafter be avoided, discharged or reversed, by reason of any Default in Form or lack of Form, or other Defect whatsoever, (other than by direct Traverse to the Point of not coming to Church, &c.) but the same Indictment shall stand in Force and be proceeded upon; any such Default of Form, or other Defect whatsoever notwithstanding, unless the Party so indicted shall conform, &c.*

Cro. Ca. 594.

Raym. 434.

*Señ. 28.* However it hath been resolved,

I. That the Party is only restrained from taking Advantage of Defects in the Record it self, and that he may plead any collateral Matter, as a Pardon, or *autrefois convict*, &c.

11 Co. 59. b.

65. a. b.

1 Rol. Re. 95.

Cro Jac 480.

482.

*Señ. 29.* II. That he may even reverse a Judgment after Verdict for any such Defect in the Record it self, as tends to the King's Prejudice, as the Omission of a *Capiatur*, &c. And that he may reverse an Outlawry for any common Defect, upon putting in Bail, and traversing the Indictment as to the Point of not coming to Church, which is very agreeable to the Purport of the whole Clause, the latter Part whereof seems manifestly to qualify the Generality of the former.

Cro. Ca. 504.

505.

Show. 309.

5 Mod. 141.

3 Keb. 591.

*Señ. 30.* Secondly, As to the Recovery of the said Forfeiture by way of Action or Information at the King's Suit, it was enacted by 35 El. 1. Par. 10. *That all and every the said Pains, Duties, Forfeitures and Payments, shall and may be recovered and levied to her Majesty's Use, by Action of Debt, Bill, Plaint, Information, or otherwise, in any of the Courts commonly called the King's Bench, Common Pleas, or Exchequer, in such Sort and in all Respects, as by the ordinary Course of the Common Laws of this Realm, any other Debt due by any such Person in any other Case should or may be recovered or levied, wherein no Effoign, Protection, or Wager of Law, shall be admitted or allowed.*

*Señ. 31.* It is said, That the principal End of making this Clause, was to enable the Queen to proceed against the Husband for the Recufancy of his Wife, which she could not do by Virtue of any of the former Statutes, by which she had no other Way of proceeding but by Indictment, and consequently could not charge the Husband for the Forfeiture of the Wife, because she could not make him a Party to the Suit, as she may by Force of this Statute; However it is said, That on a Conviction of the Wife upon an Indictment, the Lands and Leases, which the Husband has in her Right, may be seized by the Exchequer-Process.

11 Co. 61. b.

62. a.

Vide supra

ca. 1. S. 13.

Cro. Ja. 482.

Bridgm. 122.

seems cont.

*Sect. 32.* As to the second Particular, viz. In what Manner an Informer may proceed for the Forfeitures aforesaid, it is enacted by 23 El. 1. Par. 11. *That all Forfeitures of any Sums of Money limited by that Act, shall be divided into three equal Parts, whereof one Third shall be to the Queen, to her own Use, one other Third to the Queen, for the Relief of the Poor in the Parish where the Offence shall be committed, to be delivered by the Warrant of the principal Officers in the Receipt of the Exchequer, without further Warrant from her Majesty; and the other Third to such Person, as will sue for the same in any Court of Record, by Action of Debt, Bill, Plaint, or Information, in which Suit no Effoign, &c. shall be allowed: And that every Person, which shall forfeit any Sums of Money by Virtue of that Act, and shall not be able, or shall fail to pay the same within three Months after Judgment thereof given, shall be*

2 Leon. 167.

& 29.

Eliz 6. Par. 7.

committed to Prison, there to remain until he have paid the same Sums, or conform himself to go to Church, and there do as is aforesaid.

*Seçt.* 33. It has been objected, that this Clause shall not extend to the said Forfeiture of twenty Pounds a Month for not coming to Church, because the same is by the former Part of this Statute given expressly to the Queen, whereas the Forfeitures for saying or hearing Mass, and keeping an unlicensed School-master, are inflicted by the same Statute indefinitely, and not expressly given to any one; from which it is argued, That this latter Clause of Distribution ought only to be apply'd to the said indefinite Clauses, and not to take from the Queen any Part of that, which was expressly given her before; yet it has been answered and resolved, That it shall equally extend to all; for the Limitation of the

Forfeiture to the Queen is mere Surplus, and no more than the Law would have implied, & *expressio eorum, quæ tacite insunt, nihil operatur.*

*Seçt.* 34. Also it has been resolved, That an Informer may sue, not only for the third Part which belongs to him, but for the whole Penalty in the Behalf of himself and the King, and that the Judgment shall be that they shall recover, &c.

*Seçt.* 35. Also it has been adjudged, That neither the above mentioned Clause of 29 *El.* 6. which orders, That all Convictions upon 23 *El.* shall be certified into the Exchequer, and also that the Offender shall pay to the Queen twenty Pounds for every Month contained in the Indictment, &c. nor the said Clause in the 35 *El.* 1. by which it is enacted, That all the said Pains, &c. shall be recovered to the Queen's Use, to take away the Suit of the Informer, against one not proceeded against by the King, or the third Part of the Penalty given him by 23 *Eliz.* For the plain Purport of both these Acts is to further the Punishment of Recusants, and therefore inasmuch as they are in the Affirmative, and consistent with 23 *El.* they shall not be construed to abrogate any Part of it.

*Seçt.* 36. Moreover it is manifest, that 29 *El.* 6. extends only to the King's Suit by Indictment, for the Word Indictment is mentioned almost in every Clause.

*Seçt.* 37. And it also follows from hence, That the second Paragraph of the said Statute of 29 *El.* which enacts, That Convictions for this Offence shall be only at Assizes, Gaol-Delivery, or the King's Bench, restrains only Convictions upon Indictments, and consequently does not any Way impeach the Jurisdiction of the Common Pleas or Exchequer, as to Informations, &c.

*Seçt.* 38. It seems the better Opinion, (upon comparing all the Books together, which differ much from one another both in stating the Cases, and giving the Reasons of the Judgments relating to this Matter,) that a Conviction at the King's Suit, whether strictly regular or erroneous, may be pleaded to a Suit by an Informer, because while it stands in Force, it makes the Party liable to the Forfeiture of twenty Pounds a Month, and no one ought to be punished twice for the same Offence: But it hath been resolved, that an erroneous, and strongly holden that a regular, Conviction by Proclamation cannot be pleaded to a new Suit by the King, because such a Conviction is of no greater Effect than a Conviction by Verdict, and consequently the King may waive it and begin anew.

*Seçt.* 39. But it seems very doubtful, whether the Conviction of a Feme Covert upon an Indictment can be pleaded to an Information against her and her Husband, because the Husband is not liable to pay the Forfeiture recovered upon an Indictment.

*Seçt.*

11 Co. 58. 2  
See 3 & 6 Par.  
1 Rol. Re. 89.

11 Co. 58. a.

1 And. 139,  
140.  
B. 2. Ch. 26.  
S. 76.

Supra Seçt.  
13.

Supra Seçt.  
30.

11 Co. 61, 62.  
1 Rol. Re.  
92. 93.

Hob. 205.  
Con. 11. Co.  
61 a.

11 Co 59. b.  
65. a.  
See B. 2. Ch.  
26. S. 63.  
Lutw 208.  
1 Rol. Re 93.  
Cro Jac. 481,  
482.  
Noy 117.  
Lane 60.  
Palm. 39, 40,  
41.  
2 Rol Re. 108  
Bridg. 122,  
123.

Cro. Jac. 481,  
482  
Bridg. 120,  
121, 122.  
2 Rol. Re 108  
Vide supra,  
cap. 1. S. 13.

*Seçt.* 40. It seems that the ordinary Method of recovering the said Forfeiture of twenty Pounds for every Month contained in a Conviction, either at the Suit of the King, or of an Informer, may sufficiently appear from what has been already said; but there is an extraordinary Remedy provided by the said Statute of 20 *El.* 6. to enforce the Party to take Care of the Payment of the Forfeiture of the twenty Pounds for every Month contained in an Indictment, whereon he shall be convicted, by making his Lands and Goods liable to be seized by the King for the Non-payment thereof into the Exchequer, upon such of the Terms of *Easter* or *Michaelmas*, as shall be next after his Conviction; but this extends not to a Conviction by Way of Action, or Information, as more fully appears from the two next Sections.

*Seçt.* 41. As to the third Point, *viz.* In what Manner the Forfeiture of twenty Pounds for the Absence of every Month after a Conviction is to be recovered, it seems needless to enquire how far it may be recovered by an Action or Information for it at the King's Suit, inasmuch as the said Statutes of 20 *El.* 6. & 3 *Jac.* 1. have made a most effectual Provision for the Payment of it, by expressly enacting, *That every such Offender being once convicted, shall for every Month after such Conviction, without any other Indictment or Conviction, pay into the Exchequer twice in the Year, viz. in every Easter and Michaelmas Term, as much as shall then remain unpaid, after the Rate of twenty Pounds for every Month after a Conviction, and that for a Default herein the King may seize all the Goods, and two Parts of the Hereditaments of such an Offender, &c.*

*Seçt.* 42. But it seemeth that these Clauses extend not to any Conviction upon an Information, or Action, &c. but only to a Conviction upon an Indictment, for there is no other Suit referred to besides that of Indictment; also it is said that the said Clauses extend to no Convictions by Verdict or otherwise, unless Judgment be given thereon; because, till then, nothing is forfeited. And from the same Ground it seems to follow, That they would not have extended to a Conviction by Default upon Proclamation, if there had been no other Words in the Statute to this Purpose, than those by which it is enacted, *That such a Default recorded shall be as sufficient a Conviction in Law of the said Offence, whereof the Party standeth indicted, as if upon the same Indictment a Trial by Verdict thereupon had proceeded and been recorded,* which Words of themselves can by no Means make such a Conviction amount to a Judgment after Verdict, without which there can be no Forfeiture upon any other Conviction; and therefore it seemeth that the Forfeiture caused by such a Conviction must depend upon the other Clauses of the said Statutes, and the constant Tenor of our Law Books, which seem to suppose that a Person so convicted shall be liable to the said Forfeitures, as much as one, against whom a Judgment is expressly given.

Cawley 102, 103.

Vide supra, Seçt. 8.

Vide infra, S. 56.

See 29 *El.* 6. Par. 6. 3 *Jac.* 1. 4. Par. 7, 8, 9. Cawley 103, 104.

*Seçt.* 43. As to the second general Branch of this Head, *viz.* In what Manner Offenders of this Nature are to be prosecuted for the Forfeiture of Lands or Goods, it appeareth from the 13th, 14th, 15th, 17th, 18th, 40th and 41st Sections of this Chapter, that the King hath his Election either to seize all the Goods and two Parts of the Hereditaments and Leases of the Offender, upon his making Default in the Payment of twenty Pounds, both for every Month contained in an Indictment, whereon he shall be convicted, and also for every Month subsequent, or else to refuse the said Penalty of twenty Pounds a Month, and thereupon to seize two Parts of the Hereditaments and Leases of the Offender.

*Seçt.*



*Seç.* 44. It also appeareth from what has been said in the forty second Section of this Chapter, that the King hath this Advantage of seizing the Lands and Goods of the Offender upon no other Conviction, but such as followeth an Indictment, nor even upon such a Conviction without a Judgment, unless it be caused by a Default upon a Proclamation; therefore I shall add no more to this Head, except these two following Observations:

2 Inst. 573.  
8 Co 169.  
Plowd. 486.

*Seç.* 45. I. That the King cannot seize the Lands, till it appears by the Return of an Inquisition to that purpose to be awarded, of what Lands, &c. the Offender was seized, because the King's Title to Lands ought always to appear of Record.

Bro. Coro. 2,  
14, 25, 45, 47,  
55, 60.  
1 Rol. Re. 7.  
2 Rol. Ab.  
184. Pl. 3.

*Seç.* 46. II. That the King, according to the better Opinion, may seize the Goods, but not grant them over, without such an Inquisition.

*Seç.* 47. As to the third general Head of this Chapter, *viz.* What Disabilities, and other Inconveniences, Offenders of this Kind are liable unto, it is enacted by 3 Jac. 1. 5. Par. 8. *That no Recusant convict shall practise either the Common or Civil Law, or Physick, or use the Trade of an Apothecary, or be Judge or Minister of any Court, or bear any Office in Camp, Troop, or Company of Soldiers, or in any Ship, or Fortrefs, but shall be utterly disabled for the same, and forfeit for every such Offence, one hundred Pounds.*

*Sect.* 48. Also it is farther enacted by the said Statute of 3 Jac. 1. 5. Par. 22. *That such Recusants, as shall be convicted at the Time of the Death of any Testator, or at the Time of the Granting of any Administration, shall be disabled to be Executors or Administrators; and that no such Persons shall be Guardians to any Child, &c.*

*Sect.* 49. And it is enacted by 23 El. 1. *That every Person forbearing the Church twelve Months, shall on Certificate thereof into the King's Bench by the Ordinary, a Justice of Assize and Gaol Delivery, or a Justice of Peace of the County where such Offender shall dwell or be, be bound with two sufficient Sureties in the Sum of two hundred Pounds at the least to the Good Behaviour, and so continue bound until such Offender shall conform himself, &c.*

*Seç.* 50. As to the fourth general Head of this Chapter, *viz.* By what means Offenders of this Nature may be discharged from the said Forfeitures, &c. it is enacted by 23 El. 1. Par. 10. *That every Person guilty of the above mentioned Offences, who shall before he be thereof indicted, or at his Arraignment or Trial before Judgment, submit and conform himself before the Bishop of the Diocese where he shall be resident, or before the Justices where he shall be indicted, arraigned, or tried, (having not before made like submission at any his Trial, being indicted for his first like Offence,) shall upon his Recognition of such Submission in open Assizes, or Sessions of the County where such Person shall be resident, be discharged of all and every the said Offences against the said Statute, &c.*

*Seç.* 51. Also it is enacted by 29 El. 6 Par. 6. *That whensoever any such Offender shall make Submission, and become conformable, according to the Form limited by the above mentioned Statute of 23 El. 1. or shall fortune to die, that then no Forfeiture of twenty Pounds for any Month, or Seizure of the Lands of the same Offender, from and after such Submission and Conformity, or Death, and full Satisfaction of all the Arrearages of twenty Pounds Monthly, before such Seizure due or payable, shall ensue, or be continued against such Offender, so long as the same Person shall continue in coming to Divine Service, according to the Intent of the said Statute.*

*Seç.* 52. But this Statute being thought not to give sufficient Encouragement to such Persons to conform to the Church, because, by the most favourable Construction that could be made, it still obliged them

to pay such Debts as were due to the King by Force of a Judgment, it was enacted by 1 Jac. 1. 4. Par. 2. *That a Recusant conforming himself according to the Meaning of the above mentioned Statutes, &c. shall during such Conformity, be discharged of all Penalties, which he might otherwise sustain by reason of his Recusancy.*

1 Ro Re 94.

*Sect. 53.* And it hath been resolved, that such Conformity may by Force of this Statute be pleaded as well to the Suit of an Informer as to that of the King; and that after Judgment it will be a good Ground for an *Audita Querela* against an Informer; and also may be pleaded against the King before Execution awarded.

Raym. 391, 465.

2 Jon. 187.

1 Mod. 213.

1 Rol Re 95.

2 Bul. 324.

325.

Savil. 130.

*Sect. 54.* However, there seems to be no Remedy for such a Person to get a Restitution of such of the Profits of his Lands, as have been actually taken by the King.

*Sect. 55.* It seemed very doubtful before 1 Jac. 1. 4. how far the Lands of an Heir were chargeable with the Forfeitures incurred by his Ancestor in Respect of his Recusancy; but this seems to be for the most Part cleared by the 3d, 4th and 5th Paragraphs of that Statute, by which it is enacted, *That the Heir, if he be no Recusant, or were such, and conform, shall be freed from all Penalties happening upon him by reason of his Ancestor's Recusancy, unless the two Parts of the Lands were seized by the King in the Ancestor's Life, in which Case they shall continue in the King's Hands till the whole Debt shall be levied. But it is farther enacted, That the King shall not extend the other third Part of the Lands for the said Penalty.*

Lanc. 92, 93,

106.

Cawley 109.

110.

*Sect. 56.* It seems by the manifest Purport of this Statute, that the Heir of a Recusant, being also a Recusant himself, has no Remedy, but by conforming, to free his Fee-Simple Lands from any of the Forfeitures incurred by the Conviction of his Ancestor, whether the Lands were seiz'd in the Ancestor's Life or not: However, it is said, that the Land in Fee-Tail, which he claims from such Ancestor, is no way chargeable after the Death of the Ancestor, with any Forfeitures upon a Conviction by Proclamation, (which has no greater Effect than a Verdict recorded) but only with such, as are due upon a Judgment; which, as it is agreed, charge an Heir in Tail by Force of 33 H. 8. 39. Par. 29. which makes an Heir chargeable with the Debts of his Ancestor by Judgment, Recognizance, Obligation, or other Specialty; but perhaps the Authority of these Opinions may justly be questioned: For tho' a Conviction by Proclamation amount not to a Judgment, yet surely it cannot be inferiour to an Obligation: And therefore perhaps the Books cited in the Margin are misreported in this particular, and the more proper Distinction may be this: That an Heir in Tail is chargeable only with the Forfeitures for those Months, which are contained in the Indictment it self, on which a Judgment is afterwards given, or a Conviction by Proclamation recorded, and not for the Months subsequent to such Conviction, or Proclamation, inasmuch as the first seem to be Debts appearing of Record, the latter not; and the same Distinction seems applicable to such Lands in Tail of an Heir who conforms, as were seized in the Ancestor's Life; but it is clear, that such only of his Lands as were so seized are in any Case liable, whether he claim them in Fee-Simple or Tail.

Moore 513.

1 Rol Re 94.

Cro. El. 846.

Cawley 109,

110, 150, 151,

152.

Vide supra

S. 42.

## C H A P. XI.

*Of the Offence of suffering others to be absent from Church.*

**H**AVING shewn how far all Persons in general are punishable for their own Absence from the Church, I am now to shew how far they may be punished for the Absence of others; as to which it is enacted by 3 Jac. 1. 4. Par. 32, 33, 34. *That whosoever shall retain or keep in his Service, Fee or Livery, or shall willingly maintain, retain, relieve, keep, or harbour, in his House, any Servant, Sojourner, or Stranger, (except a Father or Mother wanting, without Fraud or Covin, other Habitation, or sufficient Maintenance, and also except a Ward, or Person committed to the Custody of another by Authority,) who shall not go to some Church or Chapel, or usual Place o<sup>c</sup> Common Prayer, to hear Divine Service, but shall forbear the same for the Space of one Month, &c. shall for every Month, that he shall keep such Servant, &c. forfeit ten Pounds.*

## C H A P. XII.

*Of Popish Recusancy.*

**A**ND now we are come to Offences against the Established Church, more immediately relating to those of the Popish Religion, for the better understanding whereof I shall consider:

1. The above mentioned Offence of not coming to Church, so far as it particularly concerns those of this Persuasion.
2. The Offence of saying or hearing Mass, or other Popish Service.
3. The Offence of not making a Declaration against Popery.
4. The Offence of promoting or encouraging the Popish Religion.

And first, As to the said Offence of not coming to Church, so far as it particularly concerns those of the Popish Religion, who in respect hereof are commonly called Popish Recusants, I shall consider;

1. How far such Recusants are punishable in their own Persons.
2. How far they make others liable to be punished.

As to the first of these Points, *viz.* How far such Recusants are punishable in their own Persons, it is to be observed, that they are not only liable to all the Forfeitures and Disabilities, and other Inconveniencies mentioned in Chap. 10. but also to many particular Disabilities, Restraints and Forfeitures, and other Inconveniencies, to which no others are liable.

And first, They are put under the following Disabilities,

1. That of bringing an Action.

2. That

2. That of presenting to Church.
3. That of bearing any publick Office, or Charge.
4. That of claiming any Part of a Husband's personal Estate.
5. That of claiming an Estate by Curtesy, or by Way of Dower, after a Marriage against Law.

Secondly, They are put under the following Restraints,

1. From going above five Miles from Home.
2. From coming to Court.
3. From keeping Arms.
4. From coming within ten Miles of London.

Thirdly, They are liable to the following Forfeitures,

1. That of two Parts of a Jointure or Dower.
2. That of twenty Pounds for not receiving the Sacrament yearly after Conformity.
3. That of one hundred Pounds for an unlawful Marriage.
4. That of one hundred Pounds for an Omission of lawful Baptism.
5. That of twenty Pounds for an unlawful Burial.

Lastly, They are subject to the following Inconveniencies,

1. That their Houses may be searched for Reliques, whether they be Men or Women.
2. If they be Women and married, that they may be committed, &c

*Seç.* 1. As to the first of the said Disabilities, viz That of bringing an Action, it is enacted by 2 Jac. 1. 5. Par. 11, 12. That every Popish Recusant convicted shall stand to all Intents and Purposes disabled, as a Person lawfully excommunicated, and as if such Person had been so denounced and excommunicated according to the Laws of this Realm until he or she shall conform, &c. And that every Person, sued by such Person so disabled, may plead the same in disabling of such Plaintiff as if he or she were excommunicated by Sentence in the Ecclesiastical Court: Except the Action of such Recusant to concern some Hereditament or Lease, which is not to be seized into the King's Hands, by Force of some Law concerning Recusancy.

In the Exposition hereof it hath been resolved,

*Seç.* 2. I. That the Plea of such a Conviction, like all other Pleas in Disability, ought to be pleaded before Imparance, and also to conclude with a Demand if the Plaintiff shall be answered.

Noy 89.  
Latch. 176,  
177.  
Hecl. 18.

*Seç.* 3. II. That such Plea ought also to shew before what Justices the Conviction was, that the Court may know where to send for a Certificate thereof, if it be denied; and also that the Record it self, or at least a Certificate thereof ought to be immediately produced, according to the general Rule of the Law as to all dilatory Pleas grounded upon Records.

Noy 89.  
Latch. 176.  
3 Lev. 333,  
334.

*Seç.* 4. III. That if after such a Plea it be certified that the Plaintiff hath conformed, and thereupon the Defendant be ordered to plead in chief, and then the Plaintiff relapse and be convicted again, the Defendant cannot plead the same in Disability a second Time.

Hecl. 176.

*Seç.* 5. IV. That it must appear either from the Conviction it self, or by proper Averments, that the Plaintiff is convicted of Popish Recusancy, because no Recusants, except Popish ones, are within the said Clause; however, that this is sufficiently set forth, by alledging that the Plaintiff being *Popalis Recusans*, was indicted and convicted *Secundum formam Statuti*, &c.

3 Lev. 333,  
334 11, 12.

*Seç.* 6. And some have gone so far as to hold, That all Popish Recusants convicted may be taken up by the Writ \* *De Excommunicato capiendo*, and that they are not to be admitted as competent Witnesses in any Cause;

\* 2 Bul. 155,  
156. The same Point seems admitted, State Trials, Vol. 1, fol. 268 Vol. 3. fol. 325.

Coxley 216.

Cause; but this seems to be a Construction over severe: For, inasmuch as this, like all other Penal Statutes, ought to be construed strictly, and the Words thereof are no more than, That such Persons shall stand disabled, &c. as Persons lawfully excommunicate, &c. and the Purport thereof may be fully satisfied by the Disability to bring any Action, it seems to be too rigorous to carry them farther.

*Señ. 7.* As to the second of the said Disabilities, viz. That of presenting to a Church, the same being at this Day extended by 12 *Ann.* 2. to all Persons making Profession of the Popish Religion, I shall refer the Reader, for the Matters relating to this Head, to Chap. 15, wherein is shewn how penal it is, barely to profess the said Religion; and I shall only take Notice in this Place, that by 1 *Gul. & Mar.* 26. Par. 4. *If the Trustee, Mortgagee, or Grantee of any Avoidance, whereof the Trust shall be for any Popish Recusant convicted, shall present without giving Notice in Writing of the Avoidance to the University, &c. within three Months after the Avoidance, he forfeits five hundred Pounds.*

*Señ. 8.* As to the Third of the said Disabilities, viz. That of bearing any publick Office or Charge, it is enacted by 3 *Jac.* 1. 5. Par. 9. *That no Popish Recusant convicted shall exercise any publick Office, or Charge, in the Commonwealth, but shall be utterly disabled to exercise the same, by himself or his Deputy.*

*Señ. 9.* It is observable, that this Clause is more strongly penned than that, which immediately precedes it, relating to all Recusants in general, as to the following Particulars:

1. That this extends to all publick Offices and Charges in general, whereas the former extends only to those, which are particularly enumerated.

2. That this expressly disables a Popish Recusant to exercise such an Office by himself or his Deputy, but the other says nothing at all of the Exercise of an Office by a Deputy.

*Señ. 10.* As to the Fourth of the said Disabilities, viz. That of claiming any Part of a Husband's personal Estate, it is enacted by 3 *Jac.* 1. 5. Par. 10. *That every Woman being a Popish Recusant convicted, (her Husband not standing convicted of Popish Recusancy) which shall not conform her self and remain conform'd, but shall forbear to repair to some Church or usual place of Common Prayer, and there hear Divine Service and Sermon, if any then he, and receive the Sacrament of the Lord's Supper, according to the Laws of this Realm, by the Space of one whole Year next before the Death of her said Husband, shall not only be disabled to be Executrix or Administratrix of her said Husband, but also to have or demand any Part of her said Husband's Goods or Chattels, by any Law, Custom or Usage whatsoever; and by 3 *Jac.* 1. 5. Par. 13. Every Woman is put under the like Disability, being a Popish Recusant, who shall be married otherwise than according to the Church of England.*

*Señ. 11.* As to the Fifth of the said Disabilities, viz. That of claiming an Estate by the Curtesy, or by way of Dower, &c. it is enacted by 3 *Jac.* 1. 5. Par. 13. *That every Man, who being a Popish Recusant convicted, shall be married otherwise than in some open Church or Chapel, and otherwise than according to the Orders of the Church of England by a Minister lawfully authorized, shall be disabled to have any Estate, as Tenant by the Curtesy; and that every Woman being a Popish Recusant convicted, who shall be married in other Form than as aforesaid, shall be disabled to claim her Dower or Jointure, or Widow's Estate, &c.*

*Señ. 12.* As to the first of the above mentioned Restraints, viz. That from going above five Miles from Home, &c. it is enacted by 35 *El.* 2. and 3 *Jac.* 1. 5. Par. 6, 7. *That every Popish Recusant convicted shall repair to*

his

his Place of Dwelling, &c. and not remove above five Miles from thence, unless he be urged by Process, &c. or have a Licence from the Privy Council, &c. or under the Hands and Seals of four Justices of Peace, with the Assent in Writing of the Lieutenant of the County, or of the Bishop, &c. (Every Licence of which Kind by Justices of Peace must express both the particular Cause and the Time for which it is given, and ought not to be granted without a previous Oath of some reasonable Cause,) under Pain of forfeiting all his Goods and Hereditaments, (whether Freehold or Copyhold,) for his Life, or of abjuring the Realm, if he be not worth twenty Marks a Year, or forty Pounds in Goods, unless he recant before Conviction, and also continue conformable.

See Cawley  
128, 129, &c.  
207, 208.

*Sec. 13.* Note, That the Privy Council may grant such Licence without any Special Cause or Oath, &c. but that the Justices of Peace cannot: And it hath been resolved, That in pleading a Licence of Justices of Peace, you must expressly shew, that it was made under their Hands and Seals, and also set forth the Cause in particular for which it was granted, and the Time for which it was limited, and that the Party was sworn to the Truth of such Cause, &c.

Cro. Jac. 352.  
1 Rol. Re. 108.  
Moore 836.

*Sec. 14.* It is said, That if the same Person be both a Justice of Peace and a Lieutenant, he cannot both join in a Licence as Justice of Peace, and also give his Assent as Lieutenant, but can only act in one Capacity.

Cro. Ja. 352.  
1 Rol. Re. 108.  
Moore 836.

*Sec. 15.* It seems that the Miles shall be computed according to the English Manner, allowing 5280 Foot, or 1760 Yards to each Mile, and that the same shall be reckoned not by strait Lines, as a Bird or Arrow may fly, but according to the nearest and most usual way.

Cawley 130,  
131.  
Cro. El. 212.

*Sect. 16* As to the Second of the above mentioned Restraints, viz. That which relates to the coming to Court, it is enacted by 3 Jac. 1. 5. Par. 2. That no Popish Recusant convict shall come into the Court or House, where the King or his Heir apparent shall be, unless he be commanded so to do by the King, upon Pain of one hundred Pounds, &c. And it is farther enacted by 30 Car. 2. St. 2. Par. 5, 6. That every Popish Recusant convict, who shall come advisedly into, or remain in the Presence of the King or Queen, or shall come into the Court or House, where they or any of them reside, shall be disabled to hold or execute any Office or Place of Trust Civil or Military, or to sue in Law or Equity, or to be an Executor, &c. or capable of any Legacy or Deed of Gift, and shall forfeit for every wilful Offence five hundred Pounds, unless such Person do within the Term next after such his coming or remaining, take the Oaths of Allegiance and Supremacy, and make the Declaration against Transubstantiation and the Invocation of Saints, &c. in the Court of Chancery.

*Sec. 17.* As to the Third of the above mentioned Restraints, viz. That which relates to the keeping of Arms, it is enacted by 3 Jac. 1. 5. Par. 27, 28, 29. That all such Armour, Gun-powder, and Munition of whatsoever Kinds, as any Popish Recusant convict shall have in his own House or elsewhere, or in the Possession of any other at his Disposition, shall be taken from him by Warrant of four Justices of Peace at their General or Quarter-Sessions, (except such necessary Weapons, as shall be allowed him by the said four Justices, for the Defence of his Person or House) and that the said Armour, &c. so taken, shall be kept at the Costs of such Recusant, in such Place as the said four Justices at their said Sessions shall appoint: And that if any such Recusant having such Armour, &c. or if any other Person who shall have any such Armour, &c. to the Use of such Recusant, shall refuse to discover to the said Justices, or any of them, what Armour he hath, or shall let or hinder the Delivery thereof to any of the said Justices, or to any other Person authorized by their Warrant to take the same, that then every Person so offending shall forfeit his said Armour, &c. and

also be imprisoned for three Months without Bail, by Warrant from any Justices of Peace of such County. And it is farther enacted, That notwithstanding the taking away such Armour &c. yet such Recusant shall be charged with the maintaining of the same, and with the providing of a Horse, &c. in such Sort as others of his Majesty's Subjects. Also it is farther enacted by 1 Will. & Mar. 15. That no reputed Papist refusing to make the said Declaration against Popery, mentioned in 30 Car. shall keep Arms; as is set forth more at large, Chap. 14. Sect. 4.

Sect. 18. As to the fourth of the above mentioned Restraints, viz. That which relates to the coming within ten Miles of London, it is enacted by 3 Jac. 1. 5. Par. 4, 5. That no Popish Recusant, &c. shall remain within the Compass of ten Miles of London under Pain of one hundred Pounds, except such Persons as at the Time of the said Act did use some Trade, Mystery, or manual Occupation in London, &c. and such as shall have their only Dwelling in London, &c. Also reputed Papists, refusing to make the Declaration mentioned in the precedent Sections, are to be removed from London, &c. by Force of 1 Will. & Mar. 9. which is set forth more at large in Cha. 14. Sect. 3.

Sect. 19. As to the first of the above mentioned Forfeitures, viz. That of two Parts of a Jointure or Dower, it is enacted by 3 Jac. 1. 5. Par. 10. That every married Woman being a Popish Recusant convicted. (her Husband notwithstanding convicted of Popish Recusancy) who shall not conform her self and remain conformed, but shall forbear to repair to some Church or usual Place of Common Prayer, and there to hear Divine Service and Sermon, if any then be, and receive the Sacrament of the Lord's Supper, according to the Laws of this Realm, within one Year next before the Death of her said Husband, shall forfeit to the King the Profits of two Parts of her Jointure and Dower of any Hereditaments of her said Husband, &c.

Sect. 20. As to the second of the above mentioned Forfeitures, viz. That of twenty Pounds, &c. for not receiving the Sacrament yearly after Conformity, it is enacted by 3 Jac. 1. 4. Par. 2, 3. That if any Popish Recusant convicted, who hath conformed himself to the Church, &c. shall not receive the Sacrament in his own Parish-Church, &c. within one Year after his Conformity, he shall forfeit twenty Pounds, and for the second Year forty Pounds, and for every Year after sixty Pounds, &c.

Sect. 21. As to the Third of the above mentioned Forfeitures, viz. That of one hundred Pounds for an unlawful Marriage, it is enacted by 3 Jac. 1. 5. Par. 13. That every Popish Recusant convicted, who shall be married to a Woman who is no Inheritrix, otherwise than according to the Church of England, shall forfeit one hundred Pounds.

Sect. 22. As to the fourth of the above mentioned Forfeitures, viz. That of one hundred Pounds for the Omission of a lawful Baptism, it is enacted by 3 Jac. 1. 5. Par. 14. That every Popish Recusant, who shall not cause his or her Child to be baptized, within one Month after its Birth, by a lawful Minister, &c. shall forfeit one hundred Pounds, &c.

Sect. 23. As to the Fifth of the above mentioned Forfeitures, viz. That of twenty Pounds for an unlawful Burial, it is enacted by 3 Jac. 1. 5. Par. 15. That if any Popish Recusant not being excommunicate, shall be buried in any other Place than in the Church or Church-yard, or not according to the Ecclesiastical Laws of this Realm, the Executors, &c. of such Recusant, knowing the same, or the Party that causeth him to be so buried, shall forfeit twenty Pounds, &c.

Sect. 24. As to the Inconvenience to which all such Offenders are liable, viz. That of having their Houses searched for Reliques, &c.

it is enacted by 3 Jac. 1. 5. Par. 26. *That any two Justices of Peace, and all Mayors, Bailiffs, and chief Officers of Cities, and Towns Corporate, in their respective Jurisdictions, may search the House and Lodgings of every Popish Recusant convicted for Popish Books and Reliques; and that if any Altar, Pix, Beads, Pictures, or such like Popish Relique, or any Popish Book, be found in the Custody of such Person, as in the Opinion of the said Justices, &c. shall be unmeet for him or her to have or use, it shall be defaced and burnt, if it be meet to be burnt; and if it be a Crucifix or other Relique of any Price, the same shall be defaced at the General Quarter-Sessions in the County where it shall be found, and then restored to the Owner.*

Sett. 25. As to the Inconvenience to which such Offenders being Females-Covert are liable, viz. that of being committed, it is enacted by 7 Jac. 1. 6. Par. 28. *That if any married Woman, being a Popish Recusant convicted, shall not within three Months after her Conviction conform her self and repair to Church and receive the Sacrament, &c. she may be committed to Prison by one of the Privy Council, or by the Bishop, if she be a Baroness; or if under that Degree, by two Justices of Peace, whereof one to be of the Quorum, there to remain till she perform, &c. unless the Husband will pay to the King ten Pounds a Month for her Offence, or else the third Part of all his Lands, &c. at the Choice of the Husband, &c.*

Sett. 26. And now I am to consider in the second Place, how far such Recusants make others liable to be punished; as to which it is to be observed, That the Husband of a Popish Recusant convicted is not only liable to the Forfeiture of ten Pounds a Month for the Absence of any of his Servants from Church, by Force of 1 Jac. 1. which is set forth more at large in the foregoing Chapter, *But is also utterly disabled by the ninth Paragraph of the said Statute, to exercise any Publick Office or Charge in the Common-wealth by himself or by his Deputy; (except such Husband himself, and his Children, which shall be above the Age of nine Years abiding with him, and his Servants in Household, shall once every Month at the least, not having any reasonable Excuse to the contrary, repair to some Church or Chapel usual for Divine Service, and there hear Divine Service; and the said Husband, and such his Children and Servants, as are of meet Age, receive the Sacrament of the Lord's Supper, at such Times as are limited by the Laws of this Realm, and do bring up his said Children in the true Religion.)*

Sett. 27. Also it is farther enacted by the said Statute of 3 Jac. 1. 5. Par. 26. *That the House of one whose Wife is a Popish Recusant convicted, may be searched by any two Justices of Peace, &c. for Popish Books, &c.*

### C H A P. XIII.

#### *Of Offences in saying or hearing Mass, or other Popish Service.*

Sett. 1. **A**S to the Offence in saying or hearing Mass, it is enacted by 23 El. 1. Par. 4. *That every Person who shall say or sing Mass, being thereof lawfully convicted, shall forfeit two hundred Marks, and be committed to Prison in the next Gaol, there to remain by the Space of one Year, and from thenceforth till he have paid the said Sum of two hundred Marks;*  
and



and that every Person, who shall willingly hear Mass, shall forfeit the Sum of one hundred Marks, and suffer a Year's Imprisonment.

*Sec̄. 2.* Also it is enacted by 11 & 12 Will. 3. 4. Par. 2, 3, 4, 5. That every Person, who shall apprehend any Popish Bishop, Priest, or Jesuit, and prosecute him to Conviction; or saying Mass, or exercising any other Part of the Function of a Popish Bishop or Priest, shall receive one hundred Pounds of the Sheriff, and that every such Popish Bishop, &c. (except, being a Foreigner, he be entered in the Secretary's Office, and officiate only in the House of a Foreign Minister,) shall be adjudged to perpetual Imprisonment.

## C H A P. XIV.

### *Of the Offence of not making a Declaration against Popery.*

**T**HE Offence of refusing to make a Declaration against some of the Principal Doctrines of the Popish Religion puts all Persons under the following Restraints:

1. From sitting in Parliament.
2. From holding a Place at Court.
3. From living within ten Miles of London.
4. From keeping Arms.

Also it puts them under a Disability of presenting to a Church.

*Sec̄. 1.* As to the first of the above mentioned Restraints, viz. That which relates to the sitting in Parliament, it is enacted by 30 Car. 2. Stat. 2. Chap. 1. That no Peer shall vote or make his Proxy in the House of Peers, or sit there during any Debate; and that no Member of the House of Commons shall vote or sit there during any Debate after the Speaker is chosen, until such Peer or Member shall take the Oaths of Allegiance and Supremacy, and make a Declaration of his Belief that there is no Transubstantiation in the Sacrament of the Lord's Supper; and that the Invocation or Adoration of the Virgin Mary, or any other Saint, and the Sacrifice of the Mass, as they are now used in the Church of Rome, are Superstitious and Idolatrous, &c. on Pain that every such Offender shall be adjudged a Popish Recusant convict, and disabled to hold or execute any Office, &c. or from thenceforth to sit or vote in either House of Parliament, to sue in Law or Equity, or to be Guardian, Executor or Administrator, or capable of any Legacy or Deed of Gift, and shall forfeit for every wilful Offence six hundred Pounds.

*Sec̄. 2.* As to the second of the above mentioned Restraints, viz. That which relates to the holding a Place at Court, it is enacted by the said Statute of 30 Ca. 2. Stat. 2. Par. 9, 12, 13. That every Person who shall be a sworn Servant to the King, shall take the said Oaths, and make and subscribe the said Declaration in Chancery, the next Term after he shall be so sworn a Servant, &c. And that if any such Person neglecting so to do, shall advisedly come into or remain in the Presence of the King or Queen, or shall come into the Court or House where they are or any of them reside, he shall suffer all the Penalties expressed in the foregoing Section, unless such Person so coming into

the King's Presence, &c. shall first have Licence so to do, by Warrant under the Hands and Seals of six Privy Counsellors, by Order of the Privy Council, upon some urgent Occasion therein to be expressed, which Licence shall not exceed ten Days, and shall be first filed, &c. in the Petty-Bag Office, for any Body to view without Fee, &c. and no Person be licenced for above thirty Days in one Year.

Sect. 3. As to the third of the above mentioned Restraints, viz. That which relates to the living within ten Miles of London, it is enacted by 1 Will. & Mar. 9: That every Justice of Peace in London and Westminster, and within ten Miles thereof, shall cause to be arrested and brought before him all reputed Papists, (except Foreigners, being Merchants, or menial Servants to some Ambassadour or publick Agent, and except all such as used some Trade, See Ch. 12. S. 18. Mystery, or some manual Occupation at the Time of the said Act, in London, &c. and also except all such Persons as had their Dwelling in London, &c. within six Months before the thirteenth of February 1688. and no Dwelling elsewhere, and certified their Names to the Sessions before the first of August 1689) and that every such Justice shall tender the said Declaration to every such Person, and that every such Person refusing the same, and afterwards remaining in London, &c. or within ten Miles thereof, or being certified to the King's Bench or Quarter-Sessions, at the next Term or Sessions, as having refused to make the said Declaration, and neglecting to make the same in such Court, shall suffer as a Popish Recusant convict, &c.

Sect. 4. As to the fourth of the above mentioned Restraints, viz. that which relates to the keeping Arms, it is enacted by 1 Will. & Mar. 15. That any two Justices of Peace may and ought to tender the said Declaration, to any Person whom they shall know or suspect, or have Information of, as being a Papist, or suspected to be such; and that no such Person so required, and not making and subscribing the said Declaration, or not appearing before the said See Ch. 12. S. 17. Justices upon Notice to him given, or left at his usual Abode, by one authorized by Warrant under the Hands and Seals of the said Justices, shall keep any Arms or Ammunition, or Horse above the Value of five Pounds, in his own Possession, or in the Possession of any other Person to his Use, (other than such necessary Weapons, as shall be allowed him by the Quarter-Sessions for the Defence of his House or Person) and that any two Justices of Peace, by Warrant under their Hands and Seals, may authorize any Person in the Day-time, with the Assistance of the Constable or his Deputy or the Tithing-man, to search for all such Arms, &c. and Horses, and seize them to the King's Use, and that the said Justices shall deliver the said Arms and Ammunition at the next Quarter-Sessions in open Court; and that whoever shall conceal, &c. or shall be aiding to the concealing any such Arms or Horses, shall be committed to the common Gaol by Warrant under the Hands and Seals of any two Justices of Peace, and also forfeit treble the Value; and that those who discover any such Arms or Ammunition, so as the same may be seized, shall have the full Value thereof, to be awarded, to them by the Sessions, &c. and that such Refusers of the said Declaration, &c. shall be discharged whenever they shall make the same.

Sect. 5. As to the above mentioned Disability of presenting to a Church, it is enacted by 1 Will. & Mar. 26. That whoever shall refuse to make the said Declaration upon such a Tender thereof as is prescribed by the said Act, shall be disabled to present to any Benefice, &c. But it seems needless to set forth the Clause of the said Statute relating to this Matter at large in this Place, inasmuch as by 12 Anna 14. All Persons whatsoever making Profession of the Popish Religion are under the like Disability, as will appear from Ch. 15. Sect. 6, 7, &c.

## C H A P. XV.

*Of Offences in promoting or encouraging the Popish Religion.*

**O**ffences in promoting or encouraging the Popish Religion seem to be reducible to the following Heads;

1. Giving or Receiving Popish Education
2. Professing the Popish Religion.
3. Buying or Selling Popish Books.

*SECT. 1.* The first Offence of this Kind, *viz.* That of giving or receiving Popish Education depends upon several Statutes; and first it is enacted by 1 Jac. 1. 4. Par. 6, 7. *That if any Person or Persons under the King's Obedience shall go, or send or cause to be sent, any Child or any other Person under their or any of their Government, beyond the Seas, out of the King's Obedience, to the Intent to enter into, or reside in, or repair to any College, &c. of any Popish Order, Profession or Calling, to be instructed, persuaded, or strengthened in the Popish Religion, or in any sort to profess the same, every such Person so sending such Child, &c. shall forfeit 100l. And every such Person so passing or being sent, &c. shall in respect of him or herself only, and not in respect of any of his Heirs or Posterity, be disabled to inherit, purchase, take, have or enjoy, any Profits, Hereditaments, Chattels, Debts, Legacies or Sums of Money, &c. whatsoever: And that all Estates, Terms, and other Interests whatsoever to be made, suffered or done, to the Use or Behoof of any such Person, or upon any Trust or Confidence, mediately or immediately to or for the Benefit or Relief of any such Person, shall be utterly void.*

*SECT. 2.* And it is farther enacted by 3 Jac. 1. 5. Par. 16. *That if the Children of any Subject within the Realm (the said Children not being Soldiers, Mariners, Merchants, or their Apprentices or Factors) shall be sent or go beyond Sea, to prevent their good Education in England, or for any other Cause, without the Licence of the King or six of his Privy Council (whereof the Principal Secretary to be one) under their Hands and Seals, that then every such Child shall take no Benefit by any Gift, Conveyance, Descent, Devise or otherwise of or to any Hereditament or Chattel, till such Child being of the Age of eighteen Years or above, take the Oath of Obedience before some Justice of Peace of the County, Liberty or Limit, where the Parent of such Child did and shall inhabit: And that in the mean Time the next of Kin to such Child, who shall be no Popish Recusant, shall have the said Hereditaments, &c. so given, &c. until such Child shall conform, &c. and take the said Oath and receive the Sacrament; and that after such Conformity, &c. he who hath received the Profits of the said Hereditaments, &c. shall account for the same, and in reasonable Time make Payment thereof, and restore the Value of the said Goods, &c. And that whoever shall send such Child over Seas, shall forfeit one hundred Pounds, which by 11 & 12 Will. 3. 4. Par. 6. shall be to the sole Use and Benefit of the Person who shall discover the Offence.*

*SECT. 3.* Also it is enacted by 3 Car. 1. 2. *That if any Person under the Obedience of the King shall go, or shall convey or send, or cause to be sent or conveyed,*

veyed, any Person out of the King's Dominions, into any Parts beyond the Seas, out of the King's Obedience, to the Intent to enter into, or be resident or trained up, in any Priory, Abbey, Nunnery, Popish University, College or School, or House of Jesuits, Priests, or in a private Popish Family, and shall be there by any Popish Person instructed, persuaded or strengthened in the Popish Religion in any Sort to profess the same, or shall convey or send, or cause to be conveyed or sent, any Thing towards the Maintenance of any Person so going or sent, and trained and instructed as is aforesaid, or under the Colour of any Charity towards the Relief of any Priory, &c. or religious House whatsoever; every Person so sending, &c. any such Person or Thing, and every Person passing or sent, being thereof convicted, &c. shall be disabled to prosecute any Suit in Law or Equity, or to be Executor or Administrator to any Person, or capable of any Legacy or Deed of Gift, or to bear any Office within the Realm. And shall forfeit all his Goods and Chattels, and shall forfeit all his Hereditaments, Offices and Estates of Freehold, during his Life.

The second Offence of this Kind, viz. That of professing the Popish Religion is punished with the following Disabilities,

1. Of taking an Estate in Lands.
2. Of presenting to a Church.

Also it is punished with the following Restraints,

1. From keeping School.
2. From with-holding a competent Maintenance from a Protestant Child.

Sect. 4. As to the first of the above mentioned Disabilities, viz. that of taking an Estate in Lands, it is enacted by 11 & 12 W. 3. 4. That every Person educated in or professing the Popish Religion, who shall not within six Months after the Age of eighteen Years, take the Oaths of Allegiance and Supremacy, and subscribe the Declaration against Popery mentioned in 30 Car. 2. Stat. 2. Chap. 1. in the Chancery, or King's Bench, or Quarter-Sessions of the County where such Person shall reside, shall in Respect of himself or herself only, and not in Respect of any of his or her Heirs or Posterity, be disabled to inherit or take by Descent, Devise or Limitation, in Possession, Reversion or Remainder, any Lands, Tenements or Hereditaments, in England or Wales, &c. And during the Life of such Person, and until he take the said Oaths, &c. his next of Kin being a Protestant, shall enjoy the same, without being accountable for the Profits, but shall not do wilful Waste under pain of forfeiting treble Damages to the Party so disabled: And all Papists, or Persons making Profession of the Popish Religion, are disabled to purchase in their own Names, or the Names of others, to their Use or in Trust for them: And all Estates, Terms and other Interest and Profits whatsoever, out of Lands made to their Use, or on any Trust, mediately or immediately, for their Benefit, are void.

Sect. 5. In the Construction hereof it was resolved by the House of Lords in Roper's Case, That the Devise of the Residue of Money arising from the Sale of an Estate appointed to be sold for Payment of Debts, &c. is within the Statute.

Sect. 6. As to the second of the above mentioned Disabilities, viz. that of presenting to a Church, which by 3 Jac. 1. 5 Par. 18, 19, 20, 21. and 1 Will. & Mar. 26. did extend only to Popish Recusants convicted, and Persons refusing to make the Declaration against Popery, mentioned in 30 Car. 2. Stat. 2. it is enacted by 12 Ann. 14. That every Papist, or Person making Profession of the Popish Religion, &c. and every Mortgagee, Trustee, or Person any ways intrusted by or for such Papist. &c. with or without Writing, shall be disabled to present to any Benefice, School, or Hospital, &c.

President of  
a Title made  
under these  
Statutes.  
Luc. 1101.

or to grant any Avoidance of any Benefice, Prebend or Ecclesiastical Living; and that in all such Cases the Universities shall present.

Sect. 7. Also by Force of the said Statute, The Ordinary may tender the Declaration against Transubstantiation to any reputed Papist making a Presentation, and upon a Refusal to take the same, the Presentation shall be void: Also the Ordinary may examine every Presentee upon Oath, Whether the Person who presented him, be the true Patron, or only a Trustee? And the Court, wherein a Quare Impedit shall be brought, may in like Manner examine the Parties, and a Bill may be brought in any Court of Equity to discover such secret Trusts, &c. and the Answer of such Persons upon any such Examination or Bill shall be good Evidence against such Patron, in respect of such a Presentation, but not as to any other Purpose.

Sect. 8. I do not know that any Resolution hath been given on either of the above mentioned Statutes of 1 Will. & Mar. or 12 Ann. However the Expositions which were made on 3 Jac. 1. seeming to be for the most Part applicable to these latter Statutes also, I shall take Notice of the principal of them; as,

Sect. 9. I. That where a Presentment is *pro hac vice* vested in the University by reason of the Patron's being a Popish Recusant at the Time when the Church became void, it shall not be devested again by his conforming himself to the Church.

Sect. 10. II. That such a Patron is only disabled to present, and that he continues Patron as to all other Purposes, and therefore that he shall confirm the Leases of the Incumbent, &c.

Sect. 11. III. That such a Person by being disabled to grant an Avoidance, is no way hindred from granting the Advowson itself in Fee, or for Life or Years, *bona Fide*, and for good Consideration.

Sect. 12. IV. That if an Advowson or Avoidance belonging to such a Person come into the King's Hands, by reason of an Outlawry, or Conviction of Recusancy, &c. the King, and not the University, shall present.

Sect. 13. As to the first of the above mentioned Restraints, *viz.* that which relates to the keeping School, it is enacted by the said Statute of 11 & 12 Will. 3. 4. Par. 3. That if any Papist, or Person making Profession of the Popish Religion, shall be convicted of keeping School, or taking upon themselves the Education or Government, or Boarding of Youth in any Place within this Realm, or the Dominions thereunto belonging, they shall be adjudged to perpetual Imprisonment.

Sect. 14. As to the second of the above mentioned Restraints, *viz.* that which relates to the Power of a Popish Parent over his Protestant Child, it is enacted by the said Statute of 11 & 12 Will. 3. 4. That if any Popish Parent, in order to compel a Protestant Child to a Change of Religion, shall refuse to allow such Child a sufficient Maintenance, suitable to the Degree and Ability of such Parent, and to the Age and Education of such Child, the Lord Chancellor upon Complaint may make such Order therein, as shall be agreeable to the Intent of the said Act.

Sect. 15. The third Offence of this Kind, *viz.* that of selling or buying Popish Books depends upon 3 Jac. 1. 5. Par. 25. by which it is enacted, That no Person shall bring from beyond the Seas, nor shall print, buy or sell any Popish Primers, Ladies Psalters, Manuals, Rosaries, Popish Catechisms, Missals, Breviaries, Portals, Legends and Lives of Saints, containing superstitious Matter, printed or written in any Language whatsoever, nor any other superstitious Books, printed or written in the English Tongue; on pain of forfeiting forty Shillings for every Book, &c. and the Books to be burnt.

## C H A P. XVI.

## Of Offences against the Established Church by Protestant Dissenters.

SECT. 1. BY 31 El. 1. *Obstinate Nonconformists were compellable to abjure the Realm, and were also subject to all the Penalties mentioned in the tenth and eleventh Chapters of this Book; and Dissenters were further restrained by 17 Ca. 2. 2. & 22 Ca. 2. 1. But at this Day by 1 Will. & Mar. 18. Par. 2. All Persons dissenting from the Church, (except Papists, and those who shall in Preaching or Writing deny the Doctrine of the Trinity,) are exempted from all Penal Laws relating to Religion, except 25 Car. 2. Chap. 2. (by which all Officers of Trust are bound to receive the Sacrament according to the Usage of the Church of England, and also to take the Oaths of Allegiance and Supremacy, and the Test;) and also except 30 Car. 2. Chap. 1. Stat. 2. (by which the Members of both Houses of Parliament, and all the King's Sworn Servants are bound to make a Declaration against Transubstantiation and the Invocation of Saints, and the Sacrifice of the Mass,) provided such Dissenters take the Oaths of Allegiance and Supremacy, and make the said Declaration against Transubstantiation, &c. and come to some Congregation for religious Worship in some Place registred either in the Bishop's Court, or at Sessions, the Doors whereof shall neither be locked, barred, nor bolted.*

SECT. 2. Also by Par. 8, 9, 10, 11, 12. *Dissenting Teachers are tolerated, if they take the said Oaths, &c. at the General or Quarter-Sessions to be held for the Place where such Persons live, and subscribe the thirty nine Articles of the Church of England, except those few scrupled ones concerning Church-Government and Infant-Baptism: And by 10 Ann. 2. Par. 7, 8, 9. They may qualify themselves as well during a Prosecution upon any Penal Statute, as before, and being qualified in one County may officiate in another, upon producing a Certificate and taking the said Oaths, &c. if required.*

SECT. 3. Also by the said Statute of 1 Will. & Mar. Par. 13, 14, 15. *Those, who scruple the taking of any Oath, are within the like Indulgence, provided they subscribe the aforesaid Declaration, and also a Declaration of Fidelity to the King, and against the deposing Doctrine and Papal Supremacy; and also profess their Faith in God the Father, and Jesus Christ his eternal Son, the true God, and the Holy Spirit, one God for evermore; and acknowledge the Holy Scriptures of the Old and New Testament to be given by Divine Inspiration.*

SECT. 4. Since this Statute a Prohibition lies to the Spiritual Court proceeding against Persons for Incontinency, who have been married in a licensed Conventicle.

## C H A P. XVII.

## Of High Treason.

OF Offences more immediately against Man, some are more immediately against the King, others more immediately against the Subject.

Offences more immediately against the King are either Capital or not Capital.

The Capital Offences of this Nature are either High Treason or Felonies.

*Señ. 1.* And first of High Treason, concerning which, before 25 *Ed. 3. 2.* there was great Diversity of Opinions, and many Offences were taken to be included in it, besides those expressed in the said Statute; as the killing of the King's <sup>a</sup> Father or Brother, or even of his <sup>b</sup> Messenger; producing the <sup>c</sup> Pope's Bull of Excommunication, and pleading it in Disability; refusing to accuse a Man in the King's Courts, and <sup>d</sup> summoning him to appear, and defend himself before a foreign Prince, and other such like Acts tending to diminish the Royal Dignity of the Crown.

<sup>a</sup> 3 Inft. 7.  
<sup>b</sup> 22 Aff. 49.  
<sup>c</sup> 30 Aff. 19.  
Bro. Treas. 14.  
<sup>d</sup> 3 Inft. 7.  
S. P. C. 1. b.

*Señ. 2.* But all Treasons were settled by the said Statute of 25 *Ed. 3. 1.* which by 1 *Mar. Sef. 1. Chap. 1.* was re-inforced, and again made the only Standard of Treason; and all Statutes between the said Statutes of 35 *Ed. 3.* and 1 *Mar.* which made any Offences High or Petit Treason, or Misprision of Treason, are abrogated, so that no Offence is at this Day to be esteemed High Treason, unless it be either declared to be such by the said Statute of 25 *Ed. 3.* or made such by some Statute since 1 *Mar.* and therefore I shall consider,

1. Such Offences as are High Treason within the said Statute of 25 *Ed. 3.* or other Statutes grounded thereon, and explaining the same.

2. Such as are made High Treason by subsequent Statutes.

And first, by the said Statute of 25 *Ed. 3.* there are four Kinds of High Treason.

1. That which immediately concerns the King, his Wife, or Children.

2. That which concerns his Office in the Administration of Justice.

3. That which concerns his Seal.

4. That which concerns his Coin: And these three last are called Interpretative Treasons.

*Señ. 3.* That of the first Kind is thus declared by the following Words of the said Statute of 25 *Ed. 3.* *Whereas divers Opinions have been before this Time, in what case Treason shall be said, and in what not, the King at the Request of the Lords and of the Commons, hath made a Declaration in the Manner as hereafter followeth; that is to say: When a Man doth compass or imagine the Death of our Lord the King, or of my Lady his Queen, or of their eldest Son and Heir: Or 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: Or if a Man do levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving them Aid and Comfort in the Realm or elsewhere, and thereof be provably attainted of open Deed by the People of their Condition.*

For the Explication of which I shall consider,

1. The Branch relating to the King and his Relations.

2. That concerning the levying of War, and adhering to the King's Enemies, &c.

3. That concerning an Overt Act.

As to the Branch relating to the King and his Relations, I shall consider the following Particulars:

1. Who may be guilty.

2. What is the Import of the Words, *Compass or imagine the King's Death.*

3. Who is a King within this Act.

4. What is the Extent of the Clause concerning the King's Relations.

Sett. 4. As to the first Point, viz. who may be guilty,

1. I shall take it for granted at this Day, That all Subjects of the Age of Discretion, and of <sup>a</sup> Sane Memory, whether they be <sup>b</sup> Ecclesiastical or Temporal, Men or Women, are included within those general Words *When a Man doth compass, &c.*

Sett. 5. II. Also it seems clear, That the Subjects of a foreign Prince coming into *England* and living under the Protection of our King, may, in respect of that local Ligeance which they owe to him, be guilty of High Treason, and indicted that they *contra Dominum Regem*, (the Words *naturalem Dominum suum*, being omitted) did compass, &c. *contra Ligeantiam suam Debitam*. And it is said, That even an Ambassadour committing a Treason against the King's Life, may be condemned and executed here, and that for other Treasons he shall be sent home. And it hath been holden, That there is no Need of the Words *contra ligeantiam suam debitam* in an Indictment for a Treason, which is made such by Statute, and is not a Treason in its own Nature. And that there is no Necessity for the Words *contra liguem supremum Dominum suum* in any Indictment of Treason.

Sett. 6. <sup>c</sup> But it seemeth that Aliens who in an hostile Manner invade the Kingdom, whether their King were at War or Peace with ours, and whether they come by themselves or in Company with *English* Traitors, cannot be punished as Traitors, but shall be dealt with by Martial Law.

Sett. 7. <sup>d</sup> It hath been resolved, That one born a natural Subject is bound to such an inseparable Allegiance to our King, that howsoever he may endeavour to renounce it, and transfer his Subjection from his natural to a foreign Prince, yet if he practise what in any other Subject would amount to High Treason, he shall suffer as a Traitor.

Sett. 8. As to the second Point, viz. the Import of the Words, *Compass or imagine the King's Death*, since the said Statute these Words have been so strictly followed, that where a King has been actually murdered, yet not the Killing him, but the Compassing his Death has in the Indictment been laid as the Treason, and the Killing as an Overt Act thereof.

Sett. 9. And such Compassing the King's Death may be manifested not only by Overt Acts of a direct Conspiracy to take away his Life, but also by such as shew such a Design, as cannot be executed without the apparent Peril thereof. as by <sup>e</sup> writing Letters to a foreign Prince, inciting him to invade the Realm; or assembling Men together in order to <sup>f</sup> imprison or <sup>g</sup> depose the King, or to <sup>h</sup> compel him by Force to yield to certain Demands, or to levy War *against his Person*.

Sett. 10. But it is possible that it may not be proved by an <sup>k</sup> Act, which directly causes the King's Death; as the Glancing of an Arrow did that of *William Rufus*, proving fatal merely through an unfortunate Accident, and being accompanied with no unlawful Circumstance.

Sett. 11. As to the third Point, viz. Who is a King within this Act. It seems agreed, That <sup>l</sup> every King for the Time being, in actual Possession of the Crown, is a King within the Meaning of this Statute: For there is a Necessity that the Realm should have a King, by whom and in whose Name the Laws shall be administered; and the King in Possession being the only Person, who either doth or can administer those Laws, must be the only Person, who has a Right to that Obedience, which is due to him who administers those Laws; and since by Vertue thereof he secures to Us the Safety of our Lives, Liberties and Properties, and all other Advantages of Government, he may justly claim Returns of Duty, Allegiance and Subjection.

<sup>a</sup> See Chap. 1.

<sup>b</sup> See Kellw. 181, 182, Sec.

3 Inst. 4.

Calvin's Case

6.

Dy. 145. Pl.

62

Bro Treas. 32.

3 Inst. 4, 5, 10.

H. P. C. 10, 15.

Hob. 271.

Sal 630, 631,

633.

1 Ro Re. 185.

Sal 630, 631.

Bro Treas.

1. 32.

H. P. C. 10, 15.

Calvin's Case

6. b.

3 Inst. 11.

Con. Dalf.

32.

Dy. 300. Pl.

38.

Co Lit. 129 a.

Kelynge 8.

In the Case of

the Regicides.

<sup>e</sup> Dy. 238 Pl.

29.

H. P. C. 11.

3 Inst. 14.

3 Inst. 6, 12.

38.

H. P. C. 11.

<sup>k</sup> Kely 20, 22.

H. P. C. 11.

Yet this was

made a Query

in Bro. Treas.

24.

<sup>l</sup> Kelynge 11.

Moor 621.

<sup>i</sup> Kelynge 19.

15, 17, 20, 21.

<sup>k</sup> 3 Inst. 6.

<sup>l</sup> H. P. C. 12.

3 Inst. 7.

9 Ed. 4. 1. b.



*Señt.* 12. And this plainly appears even by the prevailing Opinions in the Time of King *Edward* the Fourth, in whose Reign the Distinction between a King *de Jure* and *de Facto* seems first to have begun; and yet it was then laid down as a Principle, and taken for granted in the Arguments of *Bagot's* Case, That a Treason against *Henry* the Sixth, while he was King, in compassing his Death, was punishable after *Edward* the Fourth came to the Crown, from which it follows, that Allegiance was allowed to have been due to *Henry* the Sixth while he was King, because every Indictment of Treason must lay the Offence, *contra Ligeantiae Debitum*.

9 Ed. 4. r. b.  
Bro. Tresf.  
10, 32.  
3 Inst. 7.  
H. P. C. 12.  
Dal. ca. 89.  
f. 223.

*Señt.* 13. It was also settled, That all judicial Acts done by *Henry* the Sixth while he was King, and also all Pardons of Felony and Charters of Denization granted by him, were valid; but that a Pardon made by *Edward* the Fourth, before he was actually King, was void, even after he came to the Crown.

9 Ed. 4. r. h.  
2 a.  
Bro. Judg. 42.  
Charter of  
Pardon 22.  
9 Ed. 4. l. 2.  
11.  
9 Ed. 4. 2. a.

*Señt.* 14. And by the 11 H. 7. Chap. 1. it is declared, That all Subjects are bound by their Allegiance to serve their Prince and Sovereign Lord, the Time being, in his Wars, for the Defence of him and his Land, against every Rebellion, Power and Might reared against him, &c. and that it is against all Laws, Reason and good Conscience, that they should lose or forfeit any Thing for so doing: And it is enacted, That from thenceforth no Persons that attend on the King for the Time being, and do him true and faithful Allegiance in his Wars within the Realm or without, shall for the said Deed and true Duty of Allegiance be convict of any Offence.

*Señt.* 15. From hence it clearly follows:

I. That every King for the Time being has a Right to the People's Allegiance, because they are bound thereby to defend him in his Wars against every Power whatsoever.

*Señt.* 16. II. That one out of Possession is so far from having any Right to our Allegiance by Vertue of 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.

*Señt.* 17. It is true indeed, that after the Restoration of King *Charles* the Second, it was resolved, That all those who acted against, and kept him out of Possession, in Obedience to the Powers then in Being, were Traitors.

Kel. 14.

*Señt.* 18. But it ought to be considered, that it was first resolved by the same Judges, That King *Charles* the Second was King *de Facto* as well as *de Jure*, from his Father's Death; and it is apparent, that no other Person was in Possession of any Sovereign Power known to our Laws.

Kel. 14, 15.  
1 Keb. 315.  
1 Keb. 454.

*Señt.* 19. However, it is a general uncontested Rule, That upon the Death of a King in actual Possession of the Crown, his Heir is a King within the Act before his Coronation; for without a King to execute the Laws, Justice must fail; and therefore it is a Maxim, That the King never dies.

3 Inst. 7.  
H. P. C. 12.

*Señt.* 20. A titular King, as the Husband of a Queen Regnant, seems to be within the Words, yet is clearly not within the Meaning of this Law; and *è converso*, a Queen Regnant is not within the strict Words, and yet she is undoubtedly within the Meaning; for by the Words, *Our Lord the King*, is meant, any Person invested with the Regal Power.

1 Ma. Seff. 3.  
Ch. 1.  
H. P. C. 12.  
3 Inst. 8.

*Señt.* 21. By 1 Will. & Mar. Seff. 2. Chap. 2. Par. 9. Every Person that shall be reconciled to, or hold Communion with, the Church of Rome, or profess the Popish Religion, or marry a Papist, shall be excluded, and be for ever un-

unable to inherit, possess, or enjoy the Crown of this Realm, &c. And in every such Case the People of this Realm are absolved from their Allegiance, &c.

Sett. 22. As to the fourth Point, viz. The Extent of the Clause concerning the King's Relations, it is to be observed,

1. That no Queen or Princess Dowager is any Way within the Purview of it. 3 Inst. 8, 9.  
H. P. C. 12.

2. That if the Companion, ( by which Word is meant the Wife ) of the King or Prince, consent to an Adulterer, she is no less guilty of High Treason than he. 3 Inst. 8, 9.  
H. P. C. 12.

3. That under the Words, *Their eldest Son and Heir*, the Son of a Queen Regnant is included, and also the second Son after the Death of the first, and perhaps also a collateral Heir apparent, especially if he be declared such by Parliament. 3 Inst. 8, 9.  
H. P. C. 12.

And now we are come to the second general Branch of this Kind of High Treason, viz. That concerning the levying of War, &c. and adhering to the King's Enemies, &c. in treating whereof I shall consider.

1. What Acts shall be said to amount to a levying of War against the King.

2. What shall be said to be an Adherence to the King's Enemies.

Sett. 23. As to the first Point, it is to be observed, That not only those who directly rebel against the King, and take up Arms in order to dethrone him, but also in many other Cases, those who in a violent and forcible Manner withstand his lawful Authority, or endeavour to reform his Government, are said to levy War against him; and therefore,

Sett. 24. Those that hold a Fort or Castle against the King's Forces, or keep together armed Numbers of Men against the King's express Command, have been adjudged to levy War against him. But those who join themselves to Rebels, &c. for fear of Death, and retire as soon as they dare, seem to be no way guilty of this Offence. 3 Inst. 10.  
H. P. C. 14.  
Bro. Treas 24  
Dil. ch. 89.  
fo. 224.  
Moor 621.  
H. P. C. 14.  
3 Inst. 9, 10.  
2 And. 5.  
Kelynge 75,  
&c.

Sett. 25. II. Those also who make an Insurrection in order to redress a publick Grievance, whether it be a real or pretended one, and of their own Authority attempt with Force to redress it, are said to levy War against the King, altho' they have no direct Design against his Person, inasmuch as they insolently invade his Prerogative, by attempting to do that by private Authority, which he by publick Justice ought to do, which manifestly tends to a downright Rebellion; as where great Numbers by Force attempt to remove certain Persons from the King; or to lay violent Hands on a Privy Counsellor; or to revenge themselves against a Magistrate for executing his Office; or to bring down the Price of Victuals; or to reform the Law or Religion; or to pull down all Bawdy-houses; or to remove all Inclosures in general, &c. But where a Number of Men rise to remove a Grievance to their private Interest, as to pull down a particular Inclosure intrrenching upon their Common, &c. they are only Rioters. Moor 621.  
Cro. Ca. 583.  
Poph. 122,  
123.  
2 And. 4, 5.  
3 Inst. 9.  
1 Ven. 250,  
251.  
H. P. C. 14.  
Kelynge 76.  
1 Sid. 358.  
3 And. 66.  
Pop. 121.  
3 Inst. 9.  
H. P. C. 14.

Sett. 26. In a special Verdict, not only those who are expressly found to have been aiding and assisting a rebellious Insurrection, but perhaps also those who are only found to have acted in the Execution of the intended Violence, or to have attended the principal Offender from the Beginning, tho' they be not found to have known the Design of the Rising, shall be adjudged guilty of High Treason; but those who are found only to have suddenly join'd with them in the Streets, and to have flung up their Hats and hallowed with them, are guilty of no greater Offence than a Riot at most. Kelynge 75  
Moor 621,  
622.

*Sec.* 27. However it is certain, That a bare Conspiracy to levy such a War cannot amount to Treason, unless it be actually levied; yet it hath been resolved, that a Conspiracy to levy War against the King's Person may be alledged as an Overt Act of compassing his Death, and that in all Cases, if the Treason be actually compleated, the Conspirators, &c. are Traitors as much as the Actors: And || that there may be a Levying of War, where there is no actual Fighting.

*Sec.* 28. As to the second Point, (*viz.*) What shall be said to be an Adherence to the King's Enemies, &c. this is explained by the Words subsequent, *Giving Aid and Comfort to them*; from which it appears, that any Assistance given to Aliens in open Hostility against the King, as by surrendring a Castle of the King's to them for Reward, or selling them Arms, &c. or assisting\* the King's Enemies against his Allies; or cruising in a Ship with Enemies, to the Intent to destroy the King's Subjects, is clearly within this Branch; but there is no Necessity, expressly to alledge, that such Adherence † was against the King, for it is apparent; yet the special Manner of Adherence must be set forth: And it is said, that the Succouring a Rebel fled into another Realm is not within the Statute, because a Rebel is not properly an Enemy, and the Statute is taken strictly.

*Sec.* 29. As to the Branch relating to an Overt Act, I shall take it for granted, that some Overt Act must be alledged in every Indictment of High Treason, in compassing the Death of the King, &c. or levying War, or adhering to the King's Enemies; but there hath been some Question concerning what shall be said to be such an Overt Act, as to which I shall consider,

1. What Facts amount to such an Overt Act.
2. Whether any Words be sufficient.

*Sec.* 30. As to the first Point it seems clearly agreed by all, That conspiring the King's Death, and providing Weapons to effect it, or sending Letters to incite others to procure it, or actually assembling People in order to take the King into their Power, and all other such like notorious Facts, done in Pursuance of a treasonable Purpose against the King's Person, may be alledged as Overt Acts to prove the Compassing his Death.

*Sec.* 31. It has also been adjudged, That the <sup>a</sup> levying War against the King's Person; or the bare <sup>b</sup> consulting to levy such War; or meeting together and <sup>c</sup> consulting the Means to destroy the King and his Government; or <sup>d</sup> assembling with others, and procuring them to attempt the King's Death; or lifting <sup>e</sup> Men in Order to depose the King; or <sup>f</sup> printing treasonable Positions, as that the King is accountable to the People, and that they ought to take the Government into their own Hands, &c. or publishing <sup>g</sup> a Book to prove that <sup>h</sup> the King's Government is Antichristian and Heretical, &c. may be alledged as Overt Acts to prove the Compassing the King's Death.

*Sec.* 32. As to the second Point, *viz.* Whether any Words are sufficient Overt Acts? it has been holden, That <sup>h</sup> written Words in a Sermon or other Writing may amount to Overt Acts of compassing the King's Death, tho' the same neither actually were, nor ever were intended to be, preached or published; but this Opinion seems <sup>i</sup> to be over severe, for tho' it be true, that *scribere est agere*, yet surely it cannot with any Propriety be said, that to write in such a private Manner *est aperte agere*, and it seems rigorous to make that amount to a malicious Design against the King, which perhaps was only done by Way of Amusement or Diversion.

*Sec.*

Dalif. 14, 15.  
St. Tr. Vol. 4.  
f. 63, 97.  
H.P.C. 13, 14.  
Dy. 98 Pl. 56.  
Kely. 19, 20.  
Infra Sect. 31.  
Heil. 65.  
3 Inst. 9.  
|| Sal. 635.

3 Inst. 11.

3 Inst. 10.  
H. P. C. 14.  
Dalif. 89, 224.  
H. P. C. 115.  
Vide 2 Ven.  
3<sup>1</sup> 5, 316.  
\* Salk. 634,  
635.

See Vaughan's  
Trial in the  
St. Tr. Vol. 4.  
f. 347, 348, &c.  
† St. Tr. V. 4.  
f. 347, 348.

3 Inst. 12, 13.  
S. l. 635.

H.P.C. 13.  
3 Inst. 13, 14.  
Bro. Treason  
24.

\*Kelynge 14,  
17.  
b Kelynge 20,  
21.

St. Tr. Vol. 3.  
f. 149 to 158.  
228. Vol. 4. f.  
63, 97, 207.  
277, 278, 282.  
Vol. 3. f. 179.  
Rulhw. Straf.  
fords Trial  
684.

c Kelynge 15.  
St. Tr. Vol. 3.  
fol. 126.

4 1 And. 106.  
e 2 Vent. 316.

f Kelynge 23.  
St. Tr. Vol. 1.  
fol. 977.

Vol. 3. f. 228.  
Supra Sect. 24  
g 2 Rol. Rep.  
89, 90.

h 2 Rol. Re. 89.  
i Cro. Ca. 125.  
2 Rol. Re. 89.

See the Reversal of the Attainder of Algernoon Sidney.

*Sett.* 33. But the great Question is, Whether Words only spoken can amount to an Overt Act of compassing the King's Death? Which having been questioned by some great Men, and denied by others, I dare not be peremptory concerning it.

S. P. C. 2.  
Kelynge 13.  
3 Inst. 14, 140.  
H. P. C. 13

*Sett.* 34. However it seems agreed, That Words spoken only in Contempt and Disgrace of the King, and not directly shewing any Purpose to rebel, or any Way to hurt his Person, or disturb his Government, as those which charge him with a personal Vice, as Drunkenness, &c. or a personal Defect, as Want of Wisdom, or Steadiness, &c. shall not be so far strained, as to be made Overt Acts of compassing his Death, &c.

Cro. Ca. 126.  
Cro. Ca. 125.  
125.

*Sett.* 35. Indeed it has been holden, That to affirm that another has a better Title than the King, is High Treason, because it tends to draw People from their Allegiance, and to create a Mutiny, &c. but perhaps this may be questioned, because it cannot certainly appear from such Words, whether the Speaker had a Design against the King's Person or no? However there can be no Doubt, but that such Discourses are highly punishable, as great Misdemeanors, and tending to raise Doubts, and disturb the Government.

Yelv. 107.  
2 Ro. Re. 90.  
Palm. 426.

*Sett.* 36. Also the following Words have been adjudged High Treason, If King *Henry* the Eighth will not take back his Wife, he shall not be King, but shall die; — If the King will arrest me for High Treason I will stab him; — If I knew that *Perkin Warbeck* was the Son of *Edward* the Fourth, I would take his Part against *Henry* the Seventh

2 Ro. Re. 185.  
14 H. 8. 12 a.

*Sett.* 37. But however the Laws may stand in relation to such conditional Words, or to loose \* Words spoken without relation to any Act, yet it seems clear, that Words joined to an Act may explain it, and that Words of Persuasion to kill the King, or manifesting an Agreement, or Consultation, or Directions to that Purpose, are sufficient Overt Acts of Compassing his Death; and it hath been strongly holden, that any <sup>a</sup> deliberate Words, which shew a direct Purpose against the King's Life, as these, If I meet the King I will kill him, being spoken maturely and advisedly, are sufficient Overt Acts of compassing or imagining his Death.

\* Salk. 631.  
2 Ven. 315.  
St. Tr. Vol. 4.  
fol. 30, 31.  
95. 172.

*Sett.* 38. <sup>b</sup> And since the Compassing or Imagining of the King's Death is the Treason, and Words be the most natural Means of expressing the Imagination of the Heart, why should they not be good Evidences of it? Besides it has been often adjudged, That falsely to charge a Man with speaking Treason is actionable, which could not be, if no Words could amount to Treason, as in the Arguments of those Cases it is clearly holden that they may, and not so much as made a Question.

2 J. Ro. Re. 185.  
Cro. Ca. 125.  
332.  
1 Lev. 57.  
Kelynge 13.  
St. Tr. Vol. 2.  
f. 133, 135.  
Vol. 3. fol.  
295. 1001.  
1 Keb. 14.  
34. 179. 231.  
Dalt. Ch. 89.  
fo. 223, 224.  
3 Mod. 53.  
see the Precedent cited Cro. Ca. 118. but St.

*Sett.* 39. Besides it is certain, That before the 25 *Ed.* 3. Words might amount to Treason; and it is a general Rule, That in doubtful Cases the Reason of the Common Law ought to govern the Construction of a Statute. Also <sup>c</sup> there can be no Doubt but that he, who by Command or Persuasion induces another to commit a Treason, is himself a Traitor; (for without Question by such Means he would be accessory to a Felony; and it is an uncontroverted Rule, That <sup>d</sup> whatever will make a Man an Accessary in Felony, will make him a Principal in Treason) and yet he does no Act but by Words.

<sup>b</sup> Yelv. 107, 197.  
Cro. Ja. 276, 406, 411.  
Hutt. 75.  
Winch. 124.  
1 Bull. 148.  
3 Bull. 225.  
1 Ro. Re. 444.

*Sett.* 40. As to Sir *Edward Coke's* Argument from 3 *H.* 7. 14 which makes the <sup>e</sup> Compassing the King's Death, or that of any of his Council, &c. by the King's Servants, Felony; from whence he infers, that in the Judgment of this Parliament, the Compassing the King's Death by bare Words could not be Treason before; it may be answered, That this Argument extends as well to the King's Servants Compassing his Death by any other

<sup>c</sup> S. P. C. 2. b.  
<sup>d</sup> H. P. C. 215.  
<sup>e</sup> 3 Inst. 38.

Act

Act whatever, as to their doing it by bare Words; for all are equally within the 3 H. 7. and yet none will contend, but that the former hath always been Treason.

H. P. C. 13.

Sec. 41. As to the Argument, that Compassing the King's Death by bare Words cannot amount to Treason, within 25 Ed. 3. because many late temporary Acts of Parliament have made it Treason, which would be needless if it were so before; it may be answered, That the principal End of those Statutes was to make it Treason to charge the King with Herefy or Schism, or Usurpation, or to affirm that it was lawful to take up Arms against him, which the *Romanists* were apt to be guilty of at the Beginning of the Reformation, and it may be questioned whether these be Overt Acts of High Treason within 25 E. 3.

Vide 2 Ro.  
Rep. 89, 90.

Sec. 42. Indeed it is recited in the Preamble of 1 Mar. Sess. 1. Chap. 1. *That the State of every King consists more assuredly in the Love of the Subject towards their Prince, than in the Dread of Laws made with rigorous Pains; and that Laws made for the Preservation of the Commonwealth without great Penalties are more often obeyed and kept, than Laws made with extream Punishments. And in special such Laws so made, where'y not the Ignorant but also the Learned, minding Honesty, are often trapped, yea many Times for Words only, without other Fact or Deed done or perpetrated; and thereupon the Queen calls to remembrance, that many, as well honourable Persons, as others of good Reputation, had then of late, (for Words only, without other Opinion, Fact, or Deed,) suffered shameful Death, and expresses her Pleasure, that the Severity of such like extream dangerous and painful Laws shall be abolished.* And then follows the enacting Clause, *That from thenceforth none Act or Offence, being by Act of Parliament or Statute made Treason, Petit Treason, or Misprision of Treason, by Words, Writing, Cyphering, Deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be High Treason, Petit Treason, or Misprision of Treason, but only such as be declared and expressed to be Treason, Petit Treason, or Misprision of Treason, by 25 Ed. 3. Nor that any Pains of Death, Penalty or Forfeiture, in any Ways ensue to any Offender for the doing any Treason, &c. other than such as by the said Statute of 25 Ed. 3. be ordained; any Statute since the said twenty-fifth Year of Ed. 3. or other Declaration to the contrary in anywise notwithstanding.*

Sec. 43. And it must be confessed, That this Statute *prima Facie* seems very much to favour the Opinion, That no Words whatsoever can of themselves amount to Overt Acts of High Treason, inasmuch as one of the principal Mischiefs intended to be redressed by it seems to be, that Men had often suffered as Traitors for Words only; yet the Force of this Objection will be very much lessened, if we consider, that the principal Purport of the said Statute of 1 Mar. seems to be, to make the 25 Ed. 3. according to the Intention of the Makers of it, the only Standard of Treason, and to abolish all subsequent Statutes, which had made any Offences Treason, which were not contained in the said Statute of 25 Ed. 3. but no Way to extenuate the Crimes mentioned in 25 Ed. 3. or to take away the Force of any natural Exposition thereof; for the first Part of the Preamble complains of such Laws as not only inflicted Punishments over severe for the Crimes intended to be restrained by them, but were also penned in such a Manner, as to be often apt to entrap the wisest by bare Words; but surely this can no Way be applicable to 25 Ed. 3. inasmuch as no Punishments can be thought extream for the Crimes therein restrained, and there can be no Danger from that Statute of any Man's being punished for unwary or innocent Words, inasmuch as there is no Colour to say, that any Words, as such, are punished within that Statute,

but only the most wicked Imagination of the Heart, which may be sometimes proved by the Evidence of Words: And it farther appears from the next Part of the Preamble of the said Statute of 1 Mar. that it has an Eye only to such Statutes as are above mentioned, inasmuch as it complains of Persons having suffered shameful Deaths for Words only, without other Opinion, Fact, or Deed, which is very applicable to those many Statutes in the Time of H. 8. as 26 H. 8. 13. and 35 H. 8. 3. and some others, which made bare Words High Treason, many of which were so far from purporting a Design against the King's Life, that they were scarce otherwise Criminal, than as they were prohibited by those Statutes; but surely this can have no Relation to 25 Ed. 3. either in punishing a Man for such Imaginations of the Heart as are most perversly wicked, or in suffering those Imaginations to be proved upon him from his own Mouth. Also it is farther remarkable, That the enacting Clause restrains only such Offences, as are made High Treason by Statutes subsequent to 25 Ed. 3. from being adjudged High Treason by Words, Writing, Cyphering, &c. and seems to leave the Offences contained in the said Statute to the same Construction which they had before.

*Sett.* 44. As to the Authority of Sir *Edward Coke* in his third Institutes it is of the less Weight, because he is said to have been some Time of the contrary Opinion. 3 Inst. 14, 140.  
1 Ro. Re. 186.

*Sett.* 45. Neither does it appear to me, That my Lord Chief Justice *Hale* was at all of this Opinion; for though in the latter Edition of his *Treatise of the Pleas of the Crown*, it be said, That compassing by bare Words is not an Overt Act, &c. yet in the first Edition published in the Year 1678 it is twice said, That it hath been adjudged that Words are an Overt Act. Old Edition,  
13, 16.

*Sett.* 46. The second Kind of High Treason concerning the King's Office in the Administration of Justice is expressed in the Words following: *If a Man slay the Chancellor, Treasurer, or the King's Justices of the one Bench or the other, Justices in Eyre, or Justices of Assize, and all other Justices assigned to hear and determine, being in their Places during their Offices.*

*Sett.* 47. It hath been holden, That this Part of the Statute shall not be extended by Equity, to any other high Officers of State besides these expressly named, nor even to these when they are not in actual Execution of their Offices, nor to any Attempt to kill them, nor even to the actual wounding of them, unless Death ensue. *See the next Chapter.* H. P. C. 17.  
3 Inst. 98, 138.

*Sett.* 48. The third Kind of High Treason, relating to the King's Seal, is said to have been High Treason at the Common Law, and is expressed in the following Words, *And if a Man counterfeit the King's Great or Privy Seal.* 3 Inst. 15.  
S. P. C. 23, 3.

*Sett.* 49. It hath been holden, That these Words extend to the Aiders and Consenters to such Counterfeiting, as well as to the Actors. H. P. C. 18.  
S. P. C. 3, 2.

*Sett.* 50. But not to an Intent or Compassing to do it, if it be not actually done. 3 Inst. 15.  
H. P. C. 18.

*Sett.* 51. Nor to the fixing of the Great Seal to a Patent without a Warrant for so doing. 3 Inst. 15.  
H. P. C. 18.  
Con. Dal.  
c. 89 f 225.

*Sett.* 52. <sup>a</sup> Nor to the razing of the Name of one Manor out of a Patent, and putting in that of another, nor to any artificial removing of the true Writing, and adding Matter altogether new: Nor, by the better Opinion, to the taking off the Wax impressed with the Great Seal from a true Patent, and fixing it to a Writing purporting a Grant from the King. \*Kelynge 80.  
3 Inst. 15.  
12 Co. 15,  
16, 17.  
3 Inst. 15, 16.  
2 Keb. 74.  
Br. Treas. 3.

*Sett.* 53. <sup>b</sup> Nor to the counterfeiting of the Sign-Manual, or Privy Signet, but this is made High Treason by 1 Mar. 6. 17, 48.  
40 Aff. 32.  
2 Il. 4, 25.

*Sett.* 54. The fourth Kind of High Treason concerning the Coin is expressed in these Words, *If a Man counterfeits the King's Money, and if a*

1. P. C. 8  
 Con. S P C. 3.  
 Letter B.  
 b. 1 Ro. Re. 50.  
 51.

*Man bring false Money into this Realm, counterfeit to the Money of England, as the Money called Luthburgh, or other like to the said Money of England, knowing the Money to be false, to merchandize or make Payment, in Deceit of our said Lord the King and his People.*

In treating hereof I shall consider,

1. The Branch relating to the counterfeiting of the King's Money.
2. That concerning the bringing of false Money into the Realm, &c.

In treating of the first Branch I shall shew,

1. What Degree of counterfeiting Money will amount to High Treason.
2. What shall be said to be the King's Money within this Act.

Bro. Treas.  
 27.  
 H. P. C. 20.  
 3 Inst. 16.  
 Contra 6 H. 7  
 13.  
 3 H. 7 10.  
 2 Inst. 375.  
 3 Inst. 17.  
 H. P. C. 127.  
 Kelynge 33.  
 Contra Dyer.  
 296.  
 H. P. C. 19.  
 \* 3 H. 7. 10. b.  
 H. P. C. 128.  
 Bro. Treas.  
 19.

*Seç. 55.* As to the Point of counterfeiting, it is said, That those, who coin Money without the King's Authority, are guilty of High Treason within this Act, whether they utter it or not; and that those, who have the King's Authority to coin Money, are guilty of High Treason, if they make it of baser Alloy than they ought; and that those also are guilty of the same Crime, who receive and comfort one who is known by them to be guilty thereof; but that Clippers, &c. are not within this Statute.

*Seç. 56.* \* But it seems, That those, who barely utter false Money made within the Realm, knowing it to be false, are neither guilty of High Treason, nor of a Misprison thereof, but only of a high Misprison: Yet by 8 & 9 Will. 3. 26. they are in some Cases made guilty of Felony, for which see the next Chapter.

*Seç. 57.* As to the second Point, viz. What shall be said to be the King's Money? It seems, That such only as is coined by the King's Authority either in Gold or Silver within the Realm, and consequently not brass Farthings, &c. shall come under this Denomination.

*Seç. 58.* But the Mischiefs intended to be remedied by this Statute, having been found by Experience not to have been sufficiently redressed by it, as thus restrained, the same have been farther provided for by subsequent Statutes.

*Seç. 59.* For by 1 M. Seç. 2. Ca. 6. *Those who forge any Foreign Coin of Gold or Silver, which shall be currant by Consent of the King, shall be guilty of High Treason.*

*Sect. 60.* And by 14 El. 3. *Those who forge Money not currant, &c. their Aiders and Abettors are guilty of Misprison of Treason.*

*Sect. 61.* By 5 El. 11. *Whoever shall wash, clip, round or file, And by 18 El. 1. Whoever shall impair, diminish, falsify, scale or lighten, for Lucre or Gain, the proper Money of this Realm, or that of other Realms made currant by Proclamation, shall be deemed as an Offender in Treason, and forfeit all his Chattels absolutely, and his Hereditaments for Life, but without Corruption of Blood or Loss of Dower.*

*Seç. 62.* By 8 & 9 W. 3. 25. made perpetual by 7 Annæ 25. *Whoever shall knowingly make or mend, or begin to make or mend, buy, sell, or have in his Possession any Mould or Press for coining; or convey such Instruments out of the King's Mint, or mark on the Edges any Coin currant, or counterfeit or colour or gild any Coin resembling the currant Coin of this Kingdom, or any round Blanks of base Metal, &c. shall be guilty of High Treason, but without Corruption of Blood or Loss of Dower; And by 7 Annæ 25. The Prosecution for such making, &c. may be at any Time within six Months.*

*Sect. 63.* And by Par. 5. *Such Instruments may be seized by any Person, and brought before a Justice of Peace, in Order to be produced in Evidence at the Trial of such Offenders; and after they shall be so produced, they shall be defaced and destroyed; and all false Money, which shall be so produced, shall be cut in Pieces.*

*Seç. 64.* By 6 & 7 Will. 3. 17. *Whoever shall apprehend a Coiner or Clipper, &c. and prosecute him to Conviction, shall receive of the Sheriff forty Pounds, &c. And, he who being guilty himself shall discover two or three more, shall have a Pardon.*

As to the second Branch concerning the bringing false Money into the Realm the following Particulars are observable

*Seç. 65.* I. That the Money so brought must be counterfeited according to the Similitude of *English Money*: But by 1 & 2. *Phil. & Mar.* 11. *It is made High Treason to bring into the Realm Money counterfeited according to the Similitude of foreign Coin currant here, to the Intent to merchandize therewith.* H. P. C. 21.  
S. P. C. 3

*Seç. 66.* II. That it must be brought by one, who knows it to be false.

*Seç. 67.* III. That it must be brought from a foreign Nation, and not from *Ireland*, or other Place subject to the Crown of *England*; for tho' to some Purposes they be distinct from the Realm of *England*, and consequently Money brought from thence may within the Letter of the Statute be said to be brought into the Realm, yet inasmuch as the counterfeiting is punishable there by the Laws of our King as much as in *England*, the bringing Money from such Places has been construed to be no more within the Act than if they were actually in *England*. 3 H. 7. 10.  
S. P. C. 3.  
3 Inst. 18.  
H. P. C. 12.  
Bro. Treas.  
19  
Dal. 89 f. 225.

*Seç. 68.* IV. That the bare uttering of such Money here by one who brought it not over, is not within this Branch; but by Force of an ancient Statute, if false Money be found in the Hands of a suspicious Person, he may be arrested till he have found his Warrant. 3 Inst. 18.  
H. P. C. 21.

*Seç. 69.* That it is not necessary that such false Money be actually paid away or merchandized withal, for the Words are to merchandize or make Payment, &c. which only import an Intention to do so, and are fully satisfied whether the Act intended be performed or not: But *Quare*, because both *Coke* and *Hale* seem to hold otherwise; however it is clear, that bringing over Money counterfeited according to the Similitude of foreign Coin is Treason within 1 & 2 *Phil. & Mar.* 11. 3 Inst. 18.  
H. P. C. 21.

*Seç. 70.* Also in the said Statute of 25 *Ed.* 2. there is this Clause, *And because that many other like Cases of Treason may happen in Time to come, which a Man cannot think nor declare at this present Time, it is accorded, That if any other Case, supposed Treason, which is not above specified, doth happen before any Justices, the Justices shall tarry without any going to Judgment of the Treason, till the Cause be shewed and declared before the King and his Parliament, whether it ought to be judged Treason or other Felony.*

*Seç. 71.* By Virtue of this Clause, many Offences which are not High Treason within this Statute, as the Murder of an Ambassador, &c. were declared by the Parliament to be High Treason, but these and all other such like Declarations are made void by 1 *Mar.* 1. And it seems that the Parliament have no such Power at this Day by Virtue of the said Clause, inasmuch as the said Statute of 1 *Mar.* expressly enacts, *That no Offence shall be deemed High Treason, but only such as is declared and expressed to be so by 25 Ed.* 2. and takes no Notice of the said Clause relating to the Parliament. 3 Inst 8  
12 Co. 16.

And now we are come to Offences, which have been made High Treason since the said Statute of 1 *Mar.* and in treating of these, we shall consider,

1. Offences in upholding or favouring the Power of the Pope.
2. Offences against the Protestant Succession.
3. Offence of lifting Men without the King's Licence.

And first, Offences in upholding, or favouring the Power of the Pope, seem reducible to the following Heads:

1. Extolling the Pope's Power.
2. Putting in Ure Popish Bulls.
3. Perverting others, or being perverted to Popery.



4. Receiving Popish Orders or Education in Popish Seminaries, and not submitting, &c.

5. Refusing a second Tender of the Oaths.

*Señ. 72.* And first, The Offence of extolling the Pope's Power is made High Treason by 5 *El.* 1. Par. 2 & 10. by which it is enacted, *That if any Person within the Queen's Dominions shall by Writing, Cyphering, Preaching or Teaching, Deed or Act, advisedly and wittingly bold or stand with, extol or set forth, maintain or defend, the Jurisdiction of the Bishop of Rome, hereto ore claimed in this Realm, or by any Speech, open Deed or Act, willingly or advisedly attribute any such Authority to the See of Rome, he shall be guilty of a Præmunire by the first Offence, of High Treason by the second, but without Corruption of Blood or Loss of Dower.*

D, c. 182.

*Señ. 73.* It has been holden, That he, who knowing the Effect of a Book written beyond Sea, brings it over and secretly sells it; and also, That he who by Report hearing the Contents thereof commends it; and also, That he, who knowing its Contents secretly conveys it to a Friend with an Intent to pervert him is in Danger of the Statute; and it has been resolved, That he, who having read the Book does afterwards in discoursing of it, allow it to be good; and also, That whoever writes or prints such a Book, and after publishes it, is clearly guilty: But it is said, That he, who having heard of the Contents barely buys and reads the Book, is not within the Statute.

Sav 46 Pl. 99.

*Señ. 74.* It has also been holden, That if one who is convicted and condemned for an Offence of this Nature, being afterwards demanded by the Judges, Whether he be still of the same Opinion? answer, That he is, he is guilty of High Treason, as having advisedly maintained the Pope's Power a second Time.

*Señ. 75.* The second Offence of this Kind, *viz.* That of putting in Ure a Popish Bull, is made High Treason by 13 *El.* 2. Par. 2 & 3. By which it is enacted, *That if any within the Queen's Dominions shall put in Ure, any Bull or Instrument of Absolution or Reconciliation obtained from the See of Rome; or shall take upon him by Colour thereof to absolve or reconcile any Person; or to grant or promise any Absolution or Reconciliation, or shall willingly receive any such Absolution or Reconciliation, or shall obtain from the See of Rome any Bull or Writing whatsoever or publish, or any Ways put the same in Ure, he is guilty of High Treason.* And by Par. 4. *Accessaries after the Offence incur a Præmunire.* And by Par. 5, 6. *Those who within six Weeks disclose not an Offer of such Bulls, &c. to some Privy Counsellor, &c. are guilty of a Misprision of Treason.*

*Señ. 76.* The third Offence of this Kind, *viz.* That of perverting others, or being perverted to Popery, is made High Treason by 23 *El.* 1. Par 2 & 3 *Jac.* 1. 4. Par. 22, 22. by which it is enacted, *That if any one shall pretend to have Power, or shall put in Practice to withdraw a Subject from his natural Obedience to the King, or to withdraw them for that Intent to the Romish Religion, or to move to promise any Obedience to any foreign Power, or to do any Overt Act to that Intent, or to reconcile one to the See of Rome; and if any Person shall by any Means be willingly withdrawn, or promise Obedience, as aforesaid, he is guilty of High Treason.*

See Cawley  
187.

*Señ. 77.* But by 3 *Jac.* 1. 4. *If any Person, who is reconciled to the See of Rome beyond the Seas, return into the Realm and submit himself, &c. and take the Oaths within six Days after his Return, he is excused.*

Savil, j. Pl. 9.

*Señ. 78.* It seemeth that the bare pretending to such a Power, without any farther Act in endeavouring to perswade Persons from their Allegiance, or the bare endeavouring so to perswade them, without any Pretence of such a Power, is High Treason with in these Acts.

1 *Señ. 79.*

*Señ. 79.* The fourth Offence of this Kind, viz. That of receiving Popish Orders or Education, &c. is made High Treason by 27 *El.* 2. Par. 3. by which it is enacted, *That if any Ecclesiastick born in the Queen's Dominions, and ordained or professed by Popish Authority, shall remain in the Queen's Dominions, or come from beyond Sea, and not submit to some Bishop or Justice of Peace within three Days, and take the Oaths, &c. he shall be guilty of High Treason.*

*Señ. 80.* And by Par. 5. *If any Subject, not being an Ecclesiastick, shall not return from a Popish Seminary within six Months after a Proclamation to that Purpose in London, and submit, &c. within two Days, he shall be guilty of High Treason, whenever he shall otherwise return.*

*Señ. 81.* And by Par. 13. *If any Subject shall know that any such Priest is within the Realm and not discover him to some Justice of Peace, &c. within twelve Days, he shall be fined and imprisoned at the Queen's Will; and if any Justice of Peace, &c. to whom such Matter shall be discovered, shall not give Information to some of the Privy Council, &c. within twenty eight Days, he shall forfeit two hundred Marks.*

In the Construction of this Statute it hath been resolved,

*Señ. 82.* I. That in an Indictment grounded on this Statute against a Priest remaining here beyond the Time limited by the Statute, it must be alledged, That he was born in the Realm, &c. and also that he was ordained, &c. by Authority challenged or pretended from the See of Rome; but that there is no need to shew in what Place in particular he was born, or whether he were ordained within the Realm, or beyond Sea. Poph 94

*Señ. 83.* II. That one in Popish Orders, being in a Ship in Order to go to Ireland, and driven by a Storm into England, and immediately apprehended, is not guilty of High Treason within this Act; for his Design of going to Ireland was prevented, & *nil efficit conatus, nisi sequatur effectus*, and he was forced into England by the Act of God, and against his Will; neither can he be said to remain here within the Intent of the Statute, because he was compelled to it by Reason of the Prosecution. Raym 377

*Señ. 84.* The fifth Offence of this Nature, viz. That of refusing a second Tender of the Oaths, is made High Treason by 5 *El.* 1. Par. 11, 12 & 20. by which it is enacted, *That if any Person, who shall have a Charge, Cure, or Office in the Church, or an Office or Ministry in an Ecclesiastical Court, or if any Person who shall willfully refuse to observe the Rites of the Church of England, after having been admonished by the Ordinary, &c. or that shall say or hear private Mass, &c. shall refuse a second Tender of the Oaths, he shall be guilty of High Treason, but without Corruption of Blood.* Vid. infra Ch. 19.

*Señ. 85.* Secondly, Offences against the Protestant Succession made High Treason are twofold:

1. Denying the Power of the Parliament to limit the Succession of the Crown, which is made High Treason, by 4 *Anna* 8. Par. 1, 2. and 6 *Anna* 7. Par. 1, 2. whereby it is enacted, *That whoever shall maliciously, advisedly and directly by Writing or Printing declare, maintain and affirm, That the pretended Prince of Wales, or any other, hath any Right or Title to the Crown, otherwise than according to 1 W. & M. ch. 2. or 12 W. 3. ch. 2. or that the Kings of this Realm, by the Authority of Parliament, are not able to make Laws to limit and bind the Crown and the Descent and Government thereof, shall be guilty of High Treason, and that those that maliciously and directly affirm the same by Preaching, Teaching or advised speaking, shall be guilty of a Praemunire.*

2. Endeavouring maliciously, advisedly and directly to hinder any Person, who shall be next in Succession, according to 1 *W. & M.* and 12 *W.* 3. which is made High Treason by 1 *Anna* 17.

*Sec.* 86. 3. The Offence of lifting Men without the King's Licence is made High Treason by 12 *Anna* 11. by which it is enacted, *That every Subject shall be guilty of High Treason, who shall in the Kingdom of Great Britain or Ireland list or enter himself in the Service of any foreign Prince or Person as a Soldier, or procure another to be so listed, or to go beyond Sea with such Intent without the King's Licence, or in the French King's Service even with our King's Licence, until the said French King shall have disbanded all his English Regiments, &c.* But this Act is to continue but for three Years.

## C H A P. XVIII.

### Of Felonies more immediately against the King.

**F**elonies more immediately against the King are of five Kinds:

1. Offences relating to the Coin or Bullion.
2. Offences against the King's Council.
3. The Offence of passing beyond Sea to serve a foreign Prince.
4. Imbezilling the King's Armour.
5. The Offence of relieving a Popish Priest.

Felonies relating to the Coin or Bullion are of three kinds:

1. The Offence of debasing it.
2. The Offence of unlawfully diminishing it.
3. The Offence of endeavouring by extraordinary Means to increase it.

*Sec.* 1. And first, The Offence of debasing the Coin or Bullion was provided against by many ancient Statutes, which seem to be obsolete at this Day; for the Importation of ill Money was made Felony by 17 *Ed.* 3. <sup>1 Inst. 92, 93.</sup> N. 15. (which was never printed,) and so was the Payments of Blanks, (which were made of a base Alloy,) by 2 *H.* 6. 9. and the coining or bringing in Gally Half-pence, Suskins or Doskins, by 3 *H.* 5. 1. However it is made High Treason to bring in false Money, &c. by 25 *Ed.* 3. <sup>Supra Ch 17.</sup> and 1 & 2 *Ph. & Mar.* 11. And by 8 & 9 *Will.* 3. 25. Par. 6. *It is made Felony to blanch Copper for Sale, or to mix blanched Copper with Silver, or knowingly to buy or sell, or offer to Sale blanched Copper alone, or mixt with Silver, or knowingly and fraudulently to buy, &c. any Mixture which shall be heavier than Silver, and look, and touch, and wear like Standard Gold, but be manifestly worse, or to receive or pay any Counterfeit milled Money, &c. at a lower Rate than the same by its Denomination doth import, or was coined or counterfeited for.*

*Seç. 2.* Secondly, The Offence of diminishing the Coin or Bullion of the Kingdom has been always thought to be of very ill Consequence, as tending to impoverish the Nation, and to embarras Trade; and with an Eye to those Inconveniencies it was made Felony by 17 *Ed. 3.* N. 15. (which was never printed) to transport Silver, except Plate carried over by Great Men to serve their Houses; also the Transportation thereof was prohibited by many other Statutes, as 27 *Ed. 3.* 14. 5 *Rich. 2.* 2 2 *H. 4.* 16. 2 *H. 6.* 6. and 3 *H. 8.* 1. But this general Restraint being found by Experience to be inconvenient to Trade; which by exporting Money to one Market may bring back such Goods, as will more than make up the Loss, from another, it was enacted by 15 *Ca. 2.* 7 Par. 12. *That an Person might export any foreign Coin or Bullion without Duty, first making an Entry thereof in the Custom-House.*

*p. ph. 149.  
Hob. 270.*

*3 Inst. 21, 93.*

*Seç. 3.* But this Licence having been often abused by the Transportation of such Silver, which having been coined into *English Money* or wrought into Plate, was afterwards melted down into the Form of foreign Coin or Bullion, it was, in Order to prevent this Mischief, enacted by 6 & 7 *Will. 3.* 17. Par. 3. *That none shall cast or make Ingots or Bars of Silver in Imitation of Spanish, under Pain of five hundred Pounds.* And it is farther enacted by the said Statute, Par. 5. *That no Person shall transport, or cause to be transported, any molten Silver, but only such as shall be marked or stamped at Goldsmith's-Hall &c. nor even that without a Certificate under the Hands of one of the Wardens of the Goldsmiths Company, that Oath hath been made by the Owner or Owners thereof, and likewise by one credible Witness, that the same is lawful Silver, and that no Part thereof was (before the same was molten) the currant Coin of this Realm, nor Clippings thereof, nor Plate wrought within this Kingdom, &c.*

*Seç. 4.* Also it is farther enacted, Par. 6. *That any Officer of the Custom-House may seize any molten Silver, which shall be put on Board any Vessel, without having such Mark or Stamp, and also such Certificate, as is above mentioned.*

*Seç. 5.* And it is farther enacted, Par. 7. *That if any Broker, not being a trading Goldsmith, or Refiner of Silver, shall buy or sell any Bullion or molten Silver, he shall suffer Imprisonment for six Months without Bail.*

*Seç. 6.* Also it is farther enacted, Par. 13, 14. *That if a Doubt shall arise upon Bullion shipped to be exported, whether the same be English or Foreign, the Proof shall lie upon the Owner, &c. And that if any Person shall enter or ship any Bullion, by the said Act allowed to be exported, other than in the Name of the true Owner, Proprietor or Importer, the Exporter shall forfeit the same, or the full Value thereof.*

*Seç. 7.* Thirdly, The Endeavours of some Persons in making Use of extraordinary Methods for the producing of Gold and Silver, were found by Experience to be so prejudicial to the Publick, both from the lavish Waste of many valuable Materials, and also from the Ruin of many Families, which had been occasioned by such Useless Expences, that it was thought necessary to put a Check to such Practices by some severe Law, and for that Purpose it was made Felony, by 5 *H. 4.* 4. *to multiply Gold or Silver, or to use the Art of Craft or Multiplication.* And it was holden, That the practising to find out the Philosophers Stone, by which it is imagined that all Metals may be made Gold, was Felony within this Statute: But this Restraint having been found to have no other Effect, upon the unaccountable Vanity of those, who fancied such Attempts to be practicable, but only to send them beyond Sea, to try their Experiments with Impunity in other Countries, the Statute of 5 *H. 4.* was at last wholly repealed by 1 *Will. & Mar.* 30.

*Dyer 88.  
Pl. 105.*

*Seç. 8.*

*Seç.* 8. As to the second Kind of Felonies more immediately against the King, viz. those which are against his Council, it is enacted by 3 H. 7. 14. *That if any sworn Servant in the Chequer-Roll of the King's Household, under the State of a Lord, make any Confederacy, Compassing Conspiracy or Imagination with any Person to destroy or murder the King, or any Lord of this Realm, or any other Person sworn to the King's Council, he shall be guilty of Felony*

*Seç.* 9. And it is farther enacted by 9 Anna, *That if any Person shall attempt to kill, assault, strike or wound any Privy Counsellor in Execution of his Office, he shall suffer as a Felon without Clergy.*

*Seç.* 10. As to the third Offence of this Kind (viz.) That of passing beyond Sea to serve a foreign Prince, it is enacted by 3 Jac. 1. 4. Par. 18, 19, 20, 21. *That every Subject, who shall go out of the Realm to serve any foreign Prince or State, or shall pass over the Seas, and there voluntarily serve any such foreign Prince or State, not having before his going taken the Oath of Obedience, shall suffer as a Felon; and that if any Gentleman, or Person of higher Degree, or any Person who hath born any Office or Charge in Camp or Army, shall go out of the Realm to serve such foreign Prince, &c. without being bound with two Sureties in a Bond, conditioned that he shall not be reconciled to the See of Rome, nor enter into any Conspiracy against the King, he shall be a Felon.*

*Seç.* 11. Note, That by 1 Will. & Mar. Seç. 1. Chap. 8. this Oath of Obedience is taken away, and the new Oaths of Allegiance and Supremacy enjoined in the Room thereof.

*Seç.* 12. As to the fourth Offence of this Kind, viz. That of imbezilling the King's Armour, it is enacted by 31 El. 4. *That if any Person, having the Charge or Custody of the King's Armour, Ordnance, or Munition, &c. or of any Victuals provided for the victualling of any Soldiers or Mariners, &c. shall for Lucre and Gain, or wittingly, advisedly, and of Purpose to hinder or impeach the King's Service, imbezil, purloin, or convey away any of the same Armour, &c. to the Value of twenty Shillings, he shall be judged guilty of Felony.*

*Seç.* 13. *But such Offender must be prosecuted within the Year next after the Offence done; neither shall he forfeit his Hereditaments any longer than during his Life; nor shall his Blood be corrupted, or his Wife lose her Dower.*

*Seç.* 14. As to the fifth Offence of this Kind, viz. That of relieving a Popish Priest, it is enacted by 27 El. 2. Par. 4. *That whoever shall wittingly and willingly receive, relieve, comfort, aid or maintain any Jesuit, Seminary, or other Popish Priest, &c. being at Liberty or out of Hold, knowing him to be such a Jesuit, &c. shall for such Offence be adjudged a Felon without Benefit of Clergy.*

## C H A P. XIX

### Of Præmunire.

Offences more immediately against the King, not capital, come generally under the Titles of *Præmunire*, *Misprision*, and *Contempts*. In treating of *Præmunire* I shall consider,

1. What Offences come under this Notion.
2. How they are punished.

And first, Offences coming under the Notion of *Præmunire*, seem to be reducible to the following general Heads;

1. Offences against the Prerogative of the Crown.
2. Offences against the Authority of the King and Parliament.

Those of the first Kind seem to come under the following Particulars;

1. Making Use of Papal Bulls.
2. Derogating from the King's Common Law Courts.
3. Appealing to *Rome* from any of the King's Courts.
4. Exercising the Jurisdiction of a Suffragan without the Appointment of the Bishop of the Diocese.
5. Refusing to elect or consecrate the Person nominated by the King to a Bishoprick.
6. Maintaining the Pope's Power.
7. Bringing in *Agnus Dei*.
8. Contributing to the Maintenance of a Popish Seminary.
9. Refusing the Oaths.

*Sett.* 1. But inasmuch as these Offences depend chiefly upon Statutes made for the Preservation of the Sovereignty of the Crown from the Inroachments of the See of *Rome*, I shall, in order to shew the Reasonableness of these Laws, take a short View of those Usurpations, which made them necessary.

*Sett.* 2. It is the general Opinion, That Christianity was first planted in this Island by some of the Eastern Church, which is very probable, from the ancient *Britains* observing *Easter* always on the fourteenth Day of the Month, according to the Custom of the East.

*Sett.* 3. But the *Saxons* being converted about the Year 600. by Persons sent from *Rome*, and wholly devoted to the Interest thereof, it cannot be expected that such an Opportunity of enlarging the Jurisdiction of that See should wholly be neglected.

*Sett.* 4. \* And yet *Parsons*, in his Attempt to answer Sir *Edward Coke's* fifth Report concerning the King's Ecclesiastical Authority, is scarce able to produce any Instances of the Papal Power in this Kingdom before the *Norman* Conquest. Indeed he tells us, That four or five Persons were made Bishops by the Pope at the first Conversion, but offers not any Example thereof between the Year 669, and the Conquest; and it is certain, That all Bishopricks were then conferred by the Kings Delivery of a Ring and a Pastoral Staff.

*Sett.* 5. † Neither is he able to produce any Instance, that looks like an Appeal to *Rome* before the Conquest, except in the Case of two Bishops, and he is forced to own, That even one of the Bishops was deposed by two Kings, and could get no Relief against either of them, notwithstanding the Pope's utmost Application in his Favour.

*Sett.* 6. Nor can he shew more than four or five Instances of Exemptions from ordinary Jurisdiction, granted or confirmed by Popes to Religious Houses in those Days, which plainly shews that his Concurrence was not thought necessary; and it appears, That our ancient Kings, of their own Authority, exempted some Abbeys from Episcopal Jurisdiction; and it hath always been a received Rule, even in the Times of Popery, That the Chancellor shall visit a Church of the King's Foundation, notwithstanding it be not specially exempted.

Davis 88. con.  
Selden's *Janus Anglo-rum* 27.

\* *Parsons* ch. 6. Par. 12, 20, 21, 22, 24, 25, 57, 59.  
See *Barrow* from Page 258. to 262.

† *Ro. Ab.* 882.  
1 *Inst.* 134. a. 344. a.  
Selden's *Janus Anglo-rum* 42, 65.

† *Parsons* ch. 6. Par. 29, 30, 31, 32, 50, 51, 52, 53, 54, 55, 56.  
See *Barrow* from Page 242 to 258.

Selden's *Janus Anglo-rum* 59, 67, 68.

*Parsons* ch. 6. from Par. 37. to 48.  
1 *H.* 7. 25.  
21 *Ed.* 3. 60. a. b.  
1 *Inst.* 244. a.  
F. N. B. 42. a.  
27 *Ed.* 3. 85. a.  
6 *H.* 7. 14. a.  
2 *Rot. Abr.*

*Sett.* 7.

230, 231.

*Señt.* 7. But the Pope, having favoured and supported *William* the first in his Invasion of the Kingdom, took that Opportunity of enlarging his Incroachments, and in this King's Reign began to send his Legates hither; and prevailed at first with *Henry* the first, and afterwards with King *John*, to give up the Donation of Bishopricks; and in the Time of King *Stephen*, gained the Prerogative of Appeals; and, in the Time of *Henry* the second, exempted all Clerks from the Secular Power.

Davis 89.  
Davis 90, 91.  
2 RoI. Re. 107.  
Palm. 25, 26.  
Selden's Jan-  
nus Anglo-  
rum 67.

*Señt.* 8. Indeed this King did at first strenuously withstand these Innovations, and abolished most of them by the Constitutions of *Clarendon*: But upon the Death of *Becket*, who, for having violently opposed the King, was slain by some of his Servants, the Pope got such an Advantage over the King, that he was never after able effectually to execute those Laws.

Selden's Epi-  
nomis, cap. 8.  
Dav Rep. 91.

*Señt.* 9. And not long after this, by a general Excommunication of the King and People, for several Years, because they would not suffer an Archbishop to be imposed upon them, King *John* was reduced to such Straits, that he was obliged to surrender his Kingdoms to the Pope, and to receive them again, to hold of him for the Rent of a Thousand Marks.

2 Inst. 584.

Dav. 95.

*Señt.* 10. And in the following Reign of *Henry* the third, partly from the Profits of our best Church Benefices, which were generally given to *Italians*, and others residing at the Court of *Rome*, and partly from the Taxes imposed by the Pope, there went yearly out of the Kingdom Seventy thousand Pounds Sterling

2 Inst 580.

*Señt.* 11. The Nation being under this Necessity was obliged to provide for the Prerogative of the Prince and the Liberties of the People, by many strict Laws. And in the Reign of *Edward* the first, Religious Houses were prohibited, under high Penalties, to send any Thing to their Superiors beyond Seas; and it was declared by Parliament, That the Pope's taking upon him to dispose of *English* Benefices to Aliens was an Incroachment not to be endured; and soon after, these Grievances produced those more severe Laws against the above mentioned Offences of this Nature, the Particulars whereof are before set forth.

See Register  
54. 2.  
3 Inst. 117.

*Señt.* 12. And first the Offence of making use of Papal Bulls is made a *Præmunire* by many ancient as well as later Statutes; for it is enacted by 25 Ed. 3. called the Statute of Provisors, *That whoever shall by a Papal Provision disturb any Patron to present to a Benefice, &c. shall be fined and imprisoned till he make full Renunciation, &c.* And it is farther enacted by 25 Ed. 3. Stat. 5. Chap. 22. *That if any one purchase a Provision of an Abbey or Priory, he shall be out of the King's Protection.* And by 38 Ed. 3. & 12 R. 2. 15. & 13 R. 2. Stat. 2. Chap. 2. *That whoever shall accept a Benefice contrary to 25 Ed. 3. shall be banished.* And by 13 R. 2. Stat. 2. Chap. 3. *That whoever shall bring a Sentence of Excommunication against any Person for executing the said Statute of 25 Ed. 3. shall suffer Pain of Life and Member.* And by 16 R. 2. 5. *That whoever shall purchase or pursue, or cause to be purchased or pursued, in the Court of Rome or elsewhere, any Translations, Proseses, Sentences of Excommunication, Bulls, Instruments or other Things contrary to the Tenor of that Statute, which touch the King, against him, his Crown, his Regality or his Realm, or bring them within this Realm, or receive them, &c. shall be out of the King's Protection, and their Lands and Tenements, Goods and Chattels forfeited to the King; and they shall be attacked by their Bodies, &c.* And by 2 H. 4. 3. *That whoever shall purchase from Rome a Provision of Exemption from ordinary Obedience; and by 2 H. 4. 4. That whoever shall put in Execution Bulls purchased by those of the Order of Cîteaux to be discharged of Tithes, shall incur the like Penalty.* Also Offenders

of this Nature are farther restrained by 6 H. 4. 1. 7. H. 4. 8. 9 H. 4. 8. & 3 H. 5. 4. *By which the Statutes above mentioned are enforced and explained.* And it is farther enacted by 23 H. 8. 21. Sect. 22. *That whoever shall sue for, or execute any Licence, Dispensation, or Faculty from the See of Rome; and by 28 H. 8. 16. (by which all Bulls, Briefs, &c. heretofore obtained from Rome, are made void) That whoever shall use, alledge, or plead the same in any Court, unless they were confirmed by that Statute, or afterwards by the King, shall incur the like Penalty.* Yet it hath been holden, That the alledging of an ancient Boll in order to induce another principal Matter, whereon to ground a Title without claiming any Thing from the Bull it self, is not within this Statute.

2 Lev. 251.

Sect. 13. By 13 El. 2. those who purchase any Bull, &c. from Rome, are guilty of High Treason. But those ancient Statutes still continue in force; and it is in the Election of the Crown to proceed either upon them, or 13 El. Also by the said Statute of 13 El. *The Aiders, Comforters, and Maintainers of such Offenders after the Offence, to the Intent to uphold the said usurped Power, incur a Præmunire.*

Vide supra Chap. 17. Davis 84.

Sect. 14. The second Offence of this Nature, viz. That of derogating from the King's Common Law Courts, is said to have been a High Offence at Common Law, and is made a Præmunire by many ancient Statutes; for by 27 Ed. 3. 1. & 38 Ed. 3. of Provisors, *If any Subject draw any out of the Realm in Plea, whereof the Cognizance pertains to the King's Court, or of Things whereof Judgments be given in the King's Court, or sue in any other Court to defeat or impeach the Judgments given in the King's Court, he shall be warned to appear, &c. in proper Person, at a Day containing the space of two Months; at which if he appear not, he and his Proctors, &c. shall be put out of the King's Protection, his Lands and Chattels forfeited, his Body imprisoned and ransomed at the King's Will &c.*

2 Rol. Abr. 176. O. 3. 477. P. 1. 3.

Rastal's Entr. 466 b. 467 b. B. 2 C. 48. S. 9. 3 Inst. 125. Bro. Præmunire 3.

Sect. 15. And by 16 Rich. 2. 5. *Both those who shall pursue or cause to be pursued in the Court of Rome or elsewhere, any Processes or Instruments, or other Things whatsoever which touch the King, against him, his Crown, and Regality or his Realm, and also those who shall bring, receive, notify or execute them, and their Abettors, &c. shall be put out of the King's Protection, &c.*

Sect. 16. In the Construction of these Statutes it was holden, That certain Commissioners of Sewers for summoning one before them who had got a Judgment at Law, and imprisoning him till he would release it, were guilty of a Præmunire.

2 Bulst 199. 3 Inst 125. Cro Ja. 316.

Sect. 17. Also there have been formerly many strong Opinions, That || Suits in Equity to relieve against a Judgment at Law are within these Statutes; especially if the End thereof be to controvert the very Point determined at Law, or to seek Relief after Judgment in a Case wherein the Law may relieve, as against Excessiveness of Damages, &c. But it seems to be generally agreed at this Day, That no such Suit is within the Intention of the said Statutes.

|| 3 Inst. 123. 124.

See 4 H. 4. Ch. 23. 2 Chan. Cases 97.

Dy. 201. Pl. 64. 301. 2. 1 Lev. 241. 242.

Hard. 125. 1 Danv. Abr.

764. Pl. 2. 1 Sid. 467.

1 Mod. 59. 3 Keb. 221.

Sect. 18. It hath been said, That \* Suits in the Admiralty or Ecclesiastical Courts within the Realm are within 16 R. 2. 5. (by Force of those Words, or elsewhere) if they concern Matters, the Cognizance whereof belongs to the Common Law; as where a Bishop deprives an Incumbent of a Donative, or excommunicates a Man for hunting in his Parks, &c. or where † Commissioners of Sewers imprison a Man for not releasing a Judgment at Law.

† 2 Bulst 399. 1 Ro. Re. 190.

Sect. 19. But it seemeth, That a Suit in those Courts for a Matter which appears not by the Libel it self, but only by the Defendant's Plea,

\* 3 Inst. 120. 121, 122. Bro. Præmun.

OF 5. 12, 16. 31.

15 H. 7. 9. 4.



or other Matter subsequent, to be of temporal Cognizance, (as where a Plaintiff libels for Tithes, and the Defendant pleads that they were severed from the nine Parts, by which they became a Lay Fee) is not within the Statute, because it appears not that either the Plaintiff or the Judge knew that they were severed.

*Seç.* 20. The third Offence of this Nature, (*viz.*) That of appealing to Rome from any of the King's Courts, is made a Præmunire by 24 H. 8. 12. and 25 H. 8. 19. by which it is enacted, *That all such Appeals, as formerly were made to Rome, shall from henceforth be made to the High Court of Chancery.*

*Seç.* 21. The fourth Offence of this Nature, (*viz.*) That of exercising the Jurisdiction of a Suffragan, without the Appointment of the Bishop of the Diocese, is made a Præmunire by 26 H. 8. 14. which sets forth at large for what Towns such Suffragans may be nominated by the King, and also how they may be nominated, consecrated and commissioned.

*Seç.* 22. The fifth Offence of this Nature, (*viz.*) That of refusing to elect or consecrate the Person nominated by the King to a Bishoprick, is made a Præmunire by 25 H. 8. 28. by which it is enacted, *That if any Dean and Chapter refuse to elect the Person named in the King's Letter for a Bishoprick, and to certify such Election to the King within twenty Days after the Licence shall come to their Hands, or if any Archbishop or Bishop after such Election (or Nomination by the King in Default thereof certified unto them by the King) shall refuse within twenty Days to confirm and consecrate the Person so signified to them, they incur a Præmunire.*

*Seç.* 23. The sixth Offence of this Nature, (*viz.*) That of maintaining the Pope's Power, is made a Præmunire upon the first Conviction, and and High Treason upon the second.

*Seç.* 24. The seventh Offence of this Nature, (*viz.*) That of bringing in *Agnus Dei*, is made a Præmunire by 13 El. 2. Par. 7, 8. by which it is enacted, *That if any one shall bring into the Realm, &c. any Agnus Dei, Crosses, Pictures, Beads, or such like superstitious Things pretended to be hallowed by the Bishop of Rome, &c. and shall deliver or offer the same to any Subject to be worn or used in any wise; or if any one shall receive the same to such Intent, and not clear himself by discovering the Offender, &c. he shall incur a Præmunire.*

*Seç.* 25. *And so shall a Justice of Peace in the same County, who having any Offence in that Act declared unto him, shall not declare it to a Privy Counsellor, within sixteen Days.*

*Seç.* 26. The eighth Offence of this Nature, (*viz.*) That of contributing to the Maintenance of a Popish Seminary, is made a Præmunire by 27 El. 2. Par. 6.

*Seç.* 27. The ninth Offence of this Nature, (*viz.*) That of refusing the Oaths, is made a Præmunire by several Statutes, for by 1 El. 1. Par. 19. it is enacted, *That all Ecclesiastical Persons, and all Ecclesiastical and Temporal Officers, and all Persons having the King's Fees or Wages; and by Par. 26. That all Persons taking Orders, or any Degree in any University within the Realm, shall take the Oath of Supremacy under Pain of losing their Benefices and Offices.* And it is farther enacted by 5 El. 1. Par. 5. *That all the Persons above mentioned, who are required by the said Statute of 1 El. 1. to take the said Oath, and all School masters publick and private, Barristers, Benchers, Readers, Ancients in any House of Court, &c. Attorneys, Sheriffs, and Officers belonging to the Common or any other Law, or to the Crown, or to any Court whatsoever, shall take the said Oath in open Court, before they shall be admitted to any such Vocation or Office, &c. And if they belong not to any Court. That then they shall take the same before such Person as shall admit them to such Vocation, &c. or before Commissioners appointed under the Great Seal, &c. And it is farther enacted,*

enacted, Par. 6. That any Bishop may tender the said Oath to any spiritual Person within his Diocese, as well in Places exempt as others; and by Par. 7. That Commissioners may be appointed by the Lord Chancellor to tender the same to such Persons as by their Commission they shall be authorized to tender it unto; and by Par. 8. That if any Person, compellable by either of the said Acts, or appointed by such Commissioners to take the said Oath, shall refuse to take it on a Tender thereof, he shall incur a Præmunire. And by Par. 9. That such Refusal shall be certified within forty Days before the King in his Court of King's Bench, by those who have Authority to tender the said Oath, under the Penalty of one hundred Pounds; and that the Sheriff of the County, wherein the said Court shall sit, may impanel a Jury who shall inquire of such Refusal in such Manner, as if it had happened in the same County.

In the Construction of these Statutes it hath been resolved:

Sec̄. 28. I. That the Obligation to take the said Oath continued after the Death of Queen Elizabeth, tho' the Statutes say nothing of her Successors; and the like Resolution also has been made in Relation to the Oaths appointed by subsequent Statutes. Raym. 212.  
1 Vent. 171.  
2 Keb. 825.

Sec̄. 29. II. That in a Commission authorizing Persons to tender the said Oath, a general Description of the Persons to whom it shall be tendered is sufficient, without naming them particularly by their Names. Raym. 445.

Sec̄. 30. III. That if the Person who tendered the Oath as Bishop, was not a Bishop at that Time, the Defendant may give it in Evidence upon the general Issue. Dy. 234 Pl.  
15.

Sec̄. 31. IV. That the said Oath must in Substance be taken in the very Words expressed in the Acts, and can not be qualified with any Reserve whatever: Yet it hath been resolved, That to use the Words [In Conscience] instead of [In my Conscience] or [Sea of Rome] instead of [See of Rome] makes no material Variance. 1 Bulst. 197.  
198.  
1 Vent. 172.  
173.

Sec̄. 32. V. That a Certificate of a Refusal of the said Oath made to the Judges of the said Court of the King's Bench by Name, and not to the King in his said Court, is sufficient within the Meaning of the Statute. Raym. 445.

Sec̄. 33. VI. That an Ecclesiastical Person is well described in such a Certificate by the Addition of *Legum Doctor, & Sacris Ordinibus constitutus*, without adding *Clericus*, &c. Dy. 234 Pl.  
15.

Sec̄. 34. VII. That such a Certificate being entered of Record, as brought into Court such a Day and Year *per A. B. Cancellar. of such a Bishop* is good, without entering that it was so brought *per Mandatum Episcopi*. Dy. 234 Pl.  
15.

Sec̄. 35. VIII. That the Trial must be by a Jury of the County, wherein the Oaths were refused; for the Statute only authorizes an Indictment by a Jury of the County, wherein the Court sits. Dy. 234 Pl.  
15.

Sec̄. 36. IX. That any Misrecital of the very Words of the Oath, in an Indictment for not taking it, is erroneous. See the Books  
above cited.

Sec̄. 37. By 3 Jac. 1. 4. Par. 13, 14. Any Bishop, or two Justices of Peace, whereof one is to be of the Quorum, might tender the Oath of Obedience therein prescribed, to any Person above the Age of eighteen Years, being under the Degree of Nobility, and convicted or indicted of Recusancy, or not having received the Sacrament twice in the Year past, and also to any suspected Stranger who shall not purge himself upon Oath; and shall certify the Names of such as take the said Oath to the next Quarter-Sessions, and commit those who refuse it till the next Assizes or Sessions, where the same shall be again tendered; and if the said Persons, or any other Persons whatsoever of the Age of eighteen Years, other than Noblemen or Noblewomen, shall there refuse to take it, they incur a Præmunire, unless they be Females Covert, who shall be committed till they take it.

*Señ. 38.* By Par. 41. *The Lords of the Council in like manner may tender the said Oath to any Nobleman or Woman, of the Age of eighteen Years, who refusing the same incur a Præmunire, Femer Covert excepted.*

See *Caw'ey*  
246, &c.

*Señ. 39.* By 7 Jac. 1. 6. Par. 2, 26, 27. *All Persons whatsoever, as well Ecclesiastical as Temporal, of what Estate, Dignity, Pre-eminence, Sex, Quality or Degree soever he or she shall be, above the Age of eighteen Years, being in that Act mentioned and intended, shall take the said Oath, and any Privy Counsellor or Bishop, within his Diocese, may require any Baron or Baroness, of the Age of eighteen Years, and any two Justices of the Peace, whereof one to be of the Quorum, may require any other Person of that Age to take it. And if any Person of or above the said Age and Degree shall be presented, &c. for not coming to Church, &c. then three of the Privy Council, whereof the Lord Chancellor, &c. to be one, shall require such Person to take the said Oath. And if any Person whatsoever, of the said Age and under the said Degree, shall be presented, &c. for not coming to Church, &c. or if the Minister, &c. shall complain to any Justice of Peace, &c. and the Justice shall find Cause of Suspicion, then any one Justice of Peace shall require such Person to take the said Oath, &c. And all such Persons refusing a Tender of the said Oath, shall be bound over to the Assizes or Sessions, where if they refuse again, they incur a Præmunire: And Par. 27. All such Refusers are disabled to execute any publick Place of Judicature, or bear any other Office, (being no Office of Inheritance or ministerial Function) or to practise the Common or Civil Law, Physick or Surgery, or the Art of an Apothecary.*

12 Co. 130,  
131.

*Señ. 40.* In the Construction of these Statutes it hath been resolved, That the Justices of Peace, &c. may send their Warrant to bring such Persons before them, but that they cannot authorize the Constable to break open the Doors to take them.

*Señ. 41.* But by 1 Will. & Mar. the Oaths of Supremacy and Obedience prescribed by these Acts were abrogated, and the following Oath and Declaration substituted in their Room.

**I** A. B. do sincerely promise and swear, That I will be faithful and bear true Allegiance to his Majesty King George:

**I** A. B. do swear, That I do from my Heart abhor, detest and abjure, as impious and heretical, that damnable Doctrine and Position, that Princes excommunicated or deprived by the Pope, or any Authority of the See of Rome, may be deposed or murdered by their Subjects, or any other whatsoever:

And I do declare, That no foreign Prince, Person, Prelate, State, or Potentate, hath or ought to have, any Jurisdiction, Power, Superiority, Preeminence or Authority Ecclesiastical or Spiritual, within this Realm.

*Señ. 42.* And by Par. 3, 4, 5. *All Persons who are required to take, or authorized to tender the said abrogated Oaths, or either of them, are in like manner required and authorized to take and tender the said Oath and Declaration, under the same Penalties, &c. See Chap. 24.*

*Señ. 43.* By 7 Will. 3. 24. *Serjeants at Law, Counsellors, Attorneys, Solicitors, Proctors, Clerks or Notaries, practising as such in any Court whatsoever, without taking the said Oaths and subscribing the said Declaration, incur a Præmunire.*

*Señ. 44.* And now I am in the second Place to consider those Offences against the Authority of King and Parliament, which come under the Notion of Præmunire, as to which it is enacted by 6 Ann. 7. *That if any Person shall maliciously and directly, by Preaching, Teaching, or advised Speaking, de Vere, maintain and affirm, that the pretended Prince of Wales, hath*

any Right or Title to the Crown of these Realms, or that any other Person or Persons hath or have any Right or Title to the same, otherwise than according to 1 Will. & Mar. 2. and 12 Will. 2. and the Acts then lately made in England and Scotland, mutually for the Union of the two Kingdoms; or that the Kings or Queens of this Realm, with the Authority of Parliament, are not able to make Laws to limit the Crown and the Descent, &c. thereof shall incur a Præmunire.

*Sec̄. 45.* As to the second general Point of this Chapter, viz. In what manner Offences of this Nature are punished, it is to be observed, That most of the Statutes of Præmunire refer the Punishment to 16 Rich. 2. 5. which enacts, That those who offend against the Purport thereof shall be put out of the King's Protection, and their Lands and Tenements, Goods and Chattels forfeited to our Lord the King: And that they be attached by their Bodies if they may be found, and brought before the King and his Council, there to answer to the Cases aforesaid, or that Process be mad against them by Præmunire factas, in manner as is ordained in other Statutes of Provisors.

*Sec̄. 46* Inasmuch as this Statute expressly saith, that such Offenders shall be put out of the King's Protection, and also the Statute of 25 Ed. 3. Stat. 5. Chap. 22. had farther added, That any one might do with a Purchaser of the Provisions, therein prohibited as with the King's Enemy, and that he who should offend against such an one in Body, Lands, or Goods, should be excused, it was formerly holden, That a Person attainted in a Præmunire might lawfully be slain by any one, as being the King's Enemy and out of the Protection of the Laws, but the later Opinions seem to have disapproved of this Severity; however it is expressly enacted by 5 El. 1. Par. 21, 22. That it shall not be lawful to kill any Person attainted in Præmunire, saving such Pains of Death or other Hur: or Punishment, as heretofore might, without Danger of Law, be done upon any Person that shall send or bring into the Realm, or within the same shall execute, any Process, &c. from the See of Rome.

*Sec̄. 47.* But howsoever the Law may stand in Relation to such Persons as are within the Exception of this Act, it is certain that no Person whatsoever attainted of any Præmunire can bring an Action for any Injury whatsoever; and that no one knowing him to be guilty can with Safety give him Aid, Comfort, or Relief

*Sec̄. 48.* But it hath been resolved, That those general Words in the Statute 16 Rich. 2. 5. That all the Lands and Tenements shall be forfeited, extend to Land entailed, after the Death of the Offender.

*Sec̄. 49* Also it hath been resolved, That a Statute, by appointing that an Offender shall incur the Penalty and Danger mentioned in the 16 Rich. 2. 5. does not confine the Prosecution for the Offence to the particular Process thereby given.

1 Inst. 130.  
12 Co. 68.  
3 Inst. 128.  
Bro. Cor. 197.

1 Inst. 130.  
Sec 1 El. 1.  
Par. 39.

1 Inst. 130.  
3 Inst. 126.  
2 Lev. 169.

1 Vent. 173.

## C H A P. XX.

### Of Misprision of Treason.

*Sec̄. 1.* **T**HE Word Misprision has not any certain Signification, but is generally applied to all such high Offences as are under the Degree of Capital, and nearly bordering thereupon; and it is said that a Misprision is contained in every Treason or Felony whatsoever,

2 R. 3. 10. b.  
S. P. C. 37. b.  
Bro. Cor. 174.  
Treat. 23, 31.

ever, and that one who is guilty of Felony or Treason may be proceeded against for a Misprision only, if the King please.

Offences of this Kind are generally said to be twofold :

1. Negative, which consist in the Omission of something which ought to be done.
2. Positive, which consist in some Misdemeanour actually committed.

*Sec.* 2. The negative Misprision more immediately against the King is commonly called Misprision of Treason, which is an Offence consisting in the bare Knowledge and Concealment of High Treason, (whether it be such by 25 *Ed.* 3. or subsequent Statutes) without any Degree of Assent thereto; and this is declared to be a Misprision only by 2 & 3 *Mar.* 10. But at Law any Delay in discovering High Treason, whatever Excuses the Party might have for it, was deemed an Assent to it, and consequently High Treason.

*Sec.* 3. And at this Day, if the Concealment of High Treason be accompanied with any Circumstances, which shew an Approbation thereof, it amounts to High Treason; as if one, having Notice before-hand that Persons design'd to meet in order to conspire against the Government, go into their Company and hear their treasonable Consultation and conceal it; or if one, who has been once accidentally in such Company, and heard such Discourse, meet the same Company a second Time, and hear such like Discourse, and conceal it.

*Sec.* 4. Also whoever receives and comforts a Traitor, knowing him to be such, whether by counterfeiting of Coin, or otherwise, is himself a principal Traitor; for such a Receipt of a Felon makes the Receiver an Accessary to the Felony, and whatever makes an Accessary in Felony, makes a Principal in Treason.

*Sec.* 5. Neither can a Person, who has Knowledge of a Treason, secure himself by discovering that there will be a Rising in general, without disclosing the very Persons intending to rise; nor even by discovering of these to a private Person, who is no Magistrate.

*Sec.* 6. But it seems that one who is only told in general that there will be a Rising, without knowing any of the Persons, or Particulars of the Design, is not bound to make any Discovery at all.

*Sec.* 7. There is one positive Misprision which is made Misprision of Treason, by 14 *El.* 3. by which it is enacted, That those who forge foreign Coin, not currant here, are guilty of Misprision of Treason, &c.

## C H A P. XXI.

### Of Contempts against the King's Courts.

Other positive Misprisions more immediately against the King seem reducible to the following Heads :

1. Contempts against his Palace or Courts of Justice.
2. Contempts against his Prerogative.

3. Contempts against his Person or Government.
4. Contempts against his Title.

*Sect. 1.* And first, Contempts against the King's Palace, &c. have always been look'd upon as very high Misprisions, and by the ancient Law before the Conquest, Fighting in the King's Palace was a capital Offence; and by 33 H. 8. 12. Par. 7. Malitious Striking in the King's Palace, whereby any Blood shall be shed, is punishable with the Loss of Hand, perpetual Imprisonment, and Fine at the King's Pleasure.

3 Inst. 140.  
Poph. 206.

*Sect. 2.* It seems questionable from the Construction of this whole Act, and the general Tenor of the Law-Books, whether Striking in a Palace, wherein the King is not at the Time actually resident, be within the Statute; and it is said that the Instance which is given in the third Institute, of a Person's Hand being cut off for Striking in the Tower, is not warranted by the Record.

*See the first Paragraph of the Act.*  
S. P. C. 38. a.  
Bro Pain. 16.  
Dal. cap 90.  
6 Mod. 75, 76.  
3 Inst. 140.

*Sect. 3.* However it is certain, That by the Common Law which continues to this Day, Striking in *Westminster Hall*, where the King is only present, as represented by his Judges, and by their Administration distributing Justice to his People, is more penal than any Striking in another Place in his actual Presence; for the latter is not punished with the Loss of Hand, unless some Blood be drawn, nor even then with the Loss of Lands or Goods: But if a Person draw his Sword on any Judge, in the Presence of the Court of King's Bench, Chancery, Common Pleas, or Exchequer, or before the Justices of Assize, or Oyer and Terminer, whether he strike or not, or strike a Juror, or any other Person, with or without a Weapon, he shall lose his Hand and his Goods, and the Profits of his Lands during Life, and suffer perpetual Imprisonment, <sup>a</sup> if the Indictment lay the Offence as done *coram Domino Rege*.

2 Inst. 549.  
3 Inst. 140.  
S. P. C. 38. a.  
Dal. ch 90.  
Cro. El. 405.

*Sect. 4.* <sup>b</sup> Neither can one who is guilty of such Offence excuse the same, by shewing that the Person so struck by him gave him the first Assault.

41 Aff. 25.  
22 E. 3. 18. a.  
Dy. 188. Pl. 10.  
*See B. 2 Ch. 48. S. 11.*  
Dilif. 23.  
2 Rol. Ab. 76.  
Pl. 2. 3.  
H. P. C. 131, 132.

*Sect. 5.* <sup>c</sup> Also he who rescues a Prisoner from any of the Courts above-mentioned, without striking a Blow, shall forfeit his Goods and the Profits of his Lands, and suffer Imprisonment during Life, but not lose his Hand, because he did not strike.

1 Keb. 751.  
12 Co. 71.  
<sup>a</sup> Owen 120.  
Cro. Eliz. 405.  
<sup>b</sup> Levin. 106.  
6 Mod. 172.  
Noy 104.  
Cro. Ja. 367.

*Sect. 6.* <sup>d</sup> And he who makes an Affray in the Palace-Yard near the said Courts, but out of their View, shall be imprisoned during the King's Pleasure, and severely fined, but not lose his Hand.

22 E. 3. 13. a.  
3 Inst. 141.  
con. H. P. C. 131.

*Sect. 7.* And not only those who are guilty of such an actual Violence, but also those who disturb such Courts by threatening or reproachful Words to any Judge sitting in them, are guilty of a high Misprison; and in the Time of Edward the First, one *William de Bruce*, who, upon hearing Judgment given against him in the Exchequer, said to the Chief Baron, *Roger, Roger, Thou hast had thy Will of me, which of a long Time thou hast sought, and I will remember it*, was for these Words imprisoned during the King's Pleasure, and ordered to walk from the King's Bench to the Exchequer, bareheaded and ungirt, and to ask Forgiveness, &c. And in the Time of Charles the First, one *Harrison*, for rushing into the Court of Common Pleas, and saying to Justice *Hutton* sitting there, *I do accuse Mr. Justice Hutton of High Treason*, was fined five thousand Pounds, and imprisoned during the King's Pleasure, and ordered to go to all the Courts of *Westminster-Hall* with a Paper on his Head, shewing his Offence, and to make his Submission, &c. And these Cases are the more remarkable, because in the first, the Offender was of a very honourable Family; and in

<sup>d</sup> Cro. El. 405.  
Cro. Ca. 373.  
*Sir W. Jon.* 345.  
Owen 120.  
3 Inst. 142.  
Moor 819.

Cro. Ca. 521.  
504.  
Hutt. 131.  
Poph 135.

the second, a Bachelor of Divinity, and yet condemned to such corporal Punishment, the lowest of which is in Judgment of Law higher than the greatest Fine whatever.

Hob. 210.  
Moore 563.  
Poph. 135.

*Seç. 8.* Also all who reflect on the Justice of Honour of those High Courts seem to be indictable and highly finable; as if one charge an Exemplification under the great Seal to be contrary to the Original.

1 Lev. 167.  
1 K. b. 338.

*Seç. 9.* Also he who gives another the Lie in *Westminster-Hall*, sitting the Courts, shall be bound to his good Behaviour.

3 Inst. 147.  
12 Co. 71.

*Seç. 10.* And he, who makes an Affray in the Presence of any of the King's inferior Courts of Justice, is highly finable, but not punishable with Loss of Hand, &c.

1 Cro. E. 78.  
2 R. A. 78.  
Pl. 4 6  
1 S. d. 144  
con. 2 Rol.  
Ab. 78 Pl. 4  
Owen 113.  
Moore 473.  
Cro. El. 581  
d Raym. 68  
1 K. b. 451.  
465

*Seç. 11.* And he who speaks contemptuous and reproachful Words to the Judge of such a Court in Execution of his Office is <sup>a</sup> immediately finable by such Judge, or, as some say, may be <sup>b</sup> indicted, &c. as <sup>c</sup> if one give the Lie to a Judge of a Court-Leet in the Face of the Court, or being <sup>d</sup> admonished by him to pull off his Hat, say, *I do not value what you can do*, or tell him in the Face of the Court that he is <sup>e</sup> forsworn, or call <sup>f</sup> him Fool, &c. or <sup>g</sup> say, *If I can not have Justice here, I will have it elsewhere.*

2 Rol. Ab.  
78 Pl. 4.  
1 Cro. E. 78.  
Moore 247.  
1 Sid. 144.  
1 K. b. 508.  
2 Rol. Ab.  
78 Pl. 3.  
1 Rol. Re. 235

*Seç. 12.* And it was formerly <sup>h</sup> holden that a Man might be indicted for a Slander of the Justice of the Nation, by reflecting on a Sentence given in any Court Ecclesiastical or Temporal, whether directly, as where one said that such a Sentence given by the High Commission Court, was against Law; or obliquely, as where one said that such a Sentence was just, but that the Testimonies on which it was founded were false, or the *Affidavits* equivocating.

Hob. 202.  
Moore 819

*Seç. 13.* But it seems the better Opinion at this Day, That a Man can not be indicted for any scandalous or contemptuous Words spoken of or to such Officers, not being in the actual Execution of their Office; for such an Offence seems rather to proceed from ill Breeding than a Contempt of the Government; and tho' it may be a Cause to bind a Man to his Good Behaviour, yet it does not seem to be of such Consequence as to be a sufficient Ground of a publick Prosecution, as for an Offence against the common Peace, &c. And agreeably hereto it hath been resolved, That a Man shall not be indicted for saying, <sup>i</sup> *That whenever a Burgeß of such a Town puts on his Gown, Satan enters into him*; or, <sup>k</sup> *That the Mayor and Aldermen of such a Town are as great Villains as any that rob on the Highway*; or, <sup>l</sup> *That the Justices of Peace understand no more of the Statutes of Excise than this Jug, nor one of twenty of the Parliament-Men who made them*; or, <sup>m</sup> *That such a Justice of Peace is a Fool, and Ass, and a Coxcomb, for making such a Warrant, and understands no more Law than a Slick-hill*, or, <sup>n</sup> *That he is not fit to be a Justice of Peace; for that he will do right or wrong, according as his Affections lead him*; or, <sup>o</sup> *That such an Order is a Numsnt Order, and that the Justice deserves to be hanged who made it*; or, <sup>p</sup> *That such a Justice of Peace is a forsworn Wretch, and that he will sting his Purse at him*; or for <sup>q</sup> saying to a Mayor of a Town, *Tou, Mr. Ma or, I do not care a Fart for you; Tou, Mr. Mayor, are a Rogue and a Rascal*; or, for <sup>r</sup> saying, *That the Justices of Peace have nothing to do with the Excise.*

1 Ven. 10.

1 Mod. 35.  
2 K. b. 594.  
5 Mod. 203.  
1 K. b. 494.  
5 Mod. 204.  
2 Ven. 16.  
Queen and Wrightson.  
S. l. 696.  
Queen and Soley.  
Sol. 697.  
Queen and Legasley.  
Queen and Broxham.  
6 Mod. 124.  
Salk. 697.

1 Ven. 10.

*Seç. 14.* And not only those who disturb the Administration of Justice by direct Contempts offered to the King's Courts, but also all such as are guilty of any injurious Treatment of those Persons who are under the more immediate Protection of those Courts, are highly punishable by Fine and Imprisonment; as if a Man assault or threaten his Adversary for suing him, or a Counsellor or Attorney for being employed against him

3 Inst. 142.  
H. P. C. 131.  
Litch. 220.

or

or a Juror for giving a Verdict against him, or a Goaler for keeping a Prisoner in safe Custody.

*Señ. 15.* Also all who endeavour to stifle the Truth, and prevent the due Execution of Justice, are highly punishable, as those who being examined before the Privy Council concerning their Knowledge of a Crime, whereof a third Person is accused, disclose what passed in such Examination, in order to suppress a farther Discovery; and also all those who dissuade, or but endeavour to dissuade a Witness from giving Evidence against a Person indicted, &c. or who advise a Prisoner to stand mute on his Arraignment, &c. And it was anciently holden, that if one of the Grand Inquest discover to any Persons indicted the Evidence against them, he is an Accessary to the Offence, whether Treason or Felony; and at this Day it is agreed, that he is guilty of a high Misprision, punishable by Fine and Imprisonment.

<sup>a</sup> Rol. Ab. 76  
D. 2.

Hob 27:

R. ym. 376.  
Trial per Pais  
164.  
H. P. C. 137.  
2 Rol. Ab 77.  
F. 2.  
S. P. C. 11.  
A. 36 B.  
27 Aff 63.  
Bro. Cor. 113.  
H. P. C. 137.  
3 Inst 22. 106.  
See 3 Leon.  
407.

C H A P. XXII.

*Of Contempts against the Kings Prerogative.*

*Señ. 1.* **C**ontempts against the King's Prerogative are of so various a Nature, that they can not well be reduced to any certain Heads; however, the Principal of them seem to come under the following Particulars:

1. Refusing to assist the King for the Good of the Publick.
2. Preferring the Interests of a foreign Prince to that of our own.
3. Disobeying the King's lawful Commands or Prohibitions.

<sup>a</sup> Moore 778.  
Pl. 1080.  
Noy 102.  
<sup>b</sup>S. P. C. 38. A.  
Fitz Coro.  
161.

*Señ. 2.* First therefore, It is a high Offence for any Subject to deny the King that Assistance for the Good of the Publick, either in his Councils or Wars, which by the Law he is bound to give him; as for a Peer not to <sup>a</sup> come to the Parliament at the Day of Summons, or to <sup>b</sup> depart from thence without the King's Licence; or for a <sup>c</sup> Privy Counsellor to refuse to give his Advice on an Affair of State; or for any <sup>d</sup> private Subject to refuse to serve the King in Person, if he be able, or to find another, if he be not able, in the Defence of the Realm, against Rebels and foreign Invaders; or, as some say, to refuse to serve the King for Pay in his Wars abroad.

<sup>c</sup> 2 Rol. Ab.  
211. A. 1.  
<sup>d</sup> 2 Rol. A.  
165 X 166.  
Bro. Tenure  
44. 73.  
See 1 Ed. 3.  
ch. 5.  
18 Ed. 3 ch 7.  
25 Ed. 3 ch 8.  
4 H. 4. ch. 13.  
11 H 7.  
ch. 1 & 18.  
Cro. Ca. 11.  
Crompt. Ju-  
rid. 83 b 84.  
3 Inst. 144.

*Señ. 3.* Secondly, It is so high an Offence to prefer the Interests of a foreign Prince to that of our own, that it is criminal to do any Thing which may but incline a Man so to do; as to receive a Pension from a foreign Prince without the Leave of our King.

*Señ. 4.* Thirdly, It is also a high Crime to disobey the King's lawful Commands or Prohibitions as by obstinately refusing Obedience to his Writs; or contemning a Summons from his Council to appear before them; or not answering such Questions in relation to a Matter wherein the Interest of the State is concerned, as shall be proposed by the Privy Council; or refusing to give Evidence to a Grand Jury concerning a Crime (for which the Court may impose an immediate Fine); or not returning from beyond Sea upon the King's Letters to that Purpose; (for which the Offender's Lands shall be seized till he return, and when he

Cro. Ca 153.  
Cro. Ca. 257.  
Hob 235.  
12 Co. 94.  
11 Sal. 278. Pl. 2  
Dy. 176. Pl.  
30, 31, 128.  
Pl. 61, 74. b.  
Moore 109,  
779 Lane 43.  
3 Inst. 179.  
Savil. 7, 8.



2 Rol. Ab.  
208. O.

F. N. B. 85.  
1 Chan. Cases  
116.  
3 Inst. 178.

Cro. Eliz.  
655.  
Book 2. Ch  
16. S. 2.

does return he shall be fined) or assembling at a Turnament against the King's exprefs Prohibition; or going beyond Sea against the King's Will exprefly fignified, either by the Writ, *Ne exeat Regnum*, (which may be directed as well to a Layman as to a Clergyman, and on the Suggestion of a private as well as of a publick Matter) or under the Great or Privy Seal or Signet, or by Proclamation.

*Seft.* 5. Also every Contempt of a Statute is indictable, if no other Punishment be limited.

## C H A P. XXIII.

### *Of Contempts against the King's Person or Government.*

*Seft.* 1. **A**LL Contempts against the King's Person or Government are very highly criminal, and punishable with Fine and Imprisonment, and sometimes with the Pillory, by the Discretion of the Judges, upon Consideration of all the Circumstances of the Case; but inasmuch as it is generally obvious to common Sense, in what Cases and to what Degree a Man is guilty of this Offence, and it would be endless to enumerate all the Particulars, I shall content my self with glancing at some of the most general Heads; as,

*Seft.* 2. I. The charging the Government with Oppression or weak Administration; as by saying, *That Merchants are screwed up here in England more than in Turkey*; or, *That it is a good World when beggarly Priests are made Lords, &c.*

*Seft.* 3. II. The doing an Act which impliedly encourages Rebellion; as by absolving Persons at the Gallows, who being condemned for High Treason, shew no Sign of Repentance, but persist in justifying the Fact; or by drinking to the pious Memory of a Person executed for High Treason.

*Seft.* 4. III. Endeavouring to frighten the King into a Change of his Measures with threats of the Uneasiness of his Subjects; as by subscribing a Petition to him, in which it is intimated, that if it be denied, many Thousands will be discontented, &c.

*Seft.* 5. IV. Spreading false Rumours concerning the King's Intentions; as that he designs to grant a Toleration to Papists, &c.

*Seft.* 6. V. Charging him with a Breach of his Coronation Oath.

*Seft.* 7. VI. Speaking contemptuously of him; as by cursing him, &c. or giving out that he wants Wisdom, Valour or Steadiness; or in general, doing any Thing which may lessen him in the Esteem of his Subjects, and weaken his Government, or raise Jealousies between him and his People.

*Seft.* 8. Also it is said to be an Offence, for which a Man may be indicted, to refuse in a foreign Port to pay the usual Customs, because it may cause a Breach between our King and the King of the Country.

1 Syd. 143.  
Pl. 23.

S 4 Cro Ca  
117, &c.

Noy 105.

Cro. Ja. 38.

Cro. Ja. 37.  
Moore 756.  
Noy 101.

5 Mod. 363.

3 Mod 52.

Cro. Ca. 168.  
2 Keb 336.

## C H A P. XXIV.

*Of Contempts against the King's Title.*

**C**ontempts against the King's Title are of two Kinds,

1. Denying his Title.
2. Refusing to take the Oaths required by Law for the Support of his Government.

*Sect. 1.* The first Offence of this Kind, *viz.* That of denying the King's Title, hath by some been carried so high as to be adjudged an Overt-Act of Compassing his Death; however, it is certainly most highly criminal, and punishable with Fine and Imprisonment, and also such infamous corporal Punishment as to the Discretion of the Court shall seem proper, according to the Heinousness of the Crime and the Circumstances of the Parties; as if a Man in Writing or Discourse shall maintain that the King is an Usurper, or that another hath a better Title to the Crown, &c. for such like Insinuations manifestly tend to raise Tumults and Disorders in the State, and to alienate the Affections of the People from the Prince, and incline them to favour the Pretensions of another; and it is highly presumptuous for private Persons to intermeddle with Matters of so high a Nature; and it will be impossible to preserve the Peace of a Government, unless Subjects will quietly submit themselves to those whom Providence has placed over them, and prefer the publick Good to their own private Inclinations and Opinions: For otherwise, whenever the Title to the Crown shall happen to be contested, it will be impossible to end the Difference without perpetual civil Broils and Diffensions, and the Prince who prevails will be tempted to esteem those of the contrary Party rather as Enemies than Subjects, If he finds them ready and desirous to lay hold of all Opportunities to disturb his Government, and shake off their forc'd Obedience. And since there is no Tribunal but that of Heaven, to which Princes can appeal for the Decision of their Titles, when that seems so far to have declared in Favour of one as to give him quiet Possession of the Throne, the publick Peace, which is the End of all Government, requires a dutiful Submission to him; and it is the highest Madness to give up that Ease and Security which we may enjoy from a peaceful Obedience, in exchange for that Disorder, Uncertainty, and Bloodshed, which cannot but be expected from an Attempt to wrest the Sceptre out of the Hands of our Prince; and it is the highest Ingratitude to make no other return but Disloyalty and Rebellion, for all the Happiness we can enjoy under a just Administration; and it is the greatest of Absurdities to think that the Good of the Community, for the sake of which all Government was instituted, ought not to be preferred before the disputed Title of a particular Person or Family: All we can desire from Government, is the secure Enjoyment of what we may call our own, and whether this, or that Competitor to the Crown be the Instrument of this Happiness to us, seems little to concern us. Let the Title of one out of Possession of the Throne be never so plausible, it must have

Yelv. 107.  
2 Rol. Re. 90.  
Palm 424.

its original Foundation from some positive Law; which, when it cannot take Effect without involving a Nation in Discord and Confusion, the avoiding whereof is the very End of all Laws, it must give way to the publick Necessity of the State; for there can be no human Institution whatsoever, but must be limited by this implicit Reserve from the first Principles of Reason, that where-ever the Execution of it shall be absolutely inconsistent with the Happiness of the People for whose sake it was ordained, it ought so far to be suspended.

*Seç.* 2. For this and many other such like Reasons, the Law has always had a most tender Regard for the Security of the Prince in Possession of the Crown, and as it has made it High Treason to compass his Death, &c. as appears from Chap. 17. *Seç.* 11, &c. so hath it also made it highly Penal in any inferiour Degree to disturb or disquiet his Government.

As to the second Kind of Offences of this Nature, *viz.* That of refusing to take the Oaths required by Law for the Support of the King's Government; I shall consider,

1. The Offence of refusing the Oaths required for this Purpose by the Common Law.

2. The Offence of refusing the Oaths required by Statute.

*Finch of Law*  
241, 242.

*Seç.* 3. As to the first Particular, it seems to be a high Contempt at the Common Law to refuse to take the Oath of Allegiance to the King, which all Laymen above the Age of twelve Years are bound to take at the Torn or Court-Leet, &c. and surely nothing can be more unreasonable than to deny the King, whose Government we are happy under, all proper Assurances of our Fidelity to him, for how can we expect to enjoy the Privileges of Subjects from one to whom we refuse to acknowledge our selves Subjects, or hope for Protection from one, whom we provoke to esteem us as his Enemies, or blame that Government for treating us as Malecontents, to which we give so just a Cause to suspect our Fidelity? If we consult the Law of God, that will tell us, *That the Powers that be are ordained of God*; If we will hear the Voice of Reason, that will convince us, that not only the Peace and Safety of the Community, but also our own Preservation requires us to pay a dutiful Obedience to those who govern us; and can we think it unlawful to engage our selves to do what it is our Duty to do? If we will consult the Practice of all Nations, that will shew us, that even Conquest, which is the weakest of all Titles, has always been esteemed to give the Conqueror such a Right to the Obedience of the Conquered, that upon his taking them into his Protection, they have in all Ages been ready to promise a reciprocal Obedience; and if we will consult our own Laws, we shall find them to direct us to pay our Allegiance to the King who governs us, as has been fully proved in the Chapter of High Treason.

*Seç.* 4. As to the second Kind of Offences of this Nature, *viz.* That of refusing the Oaths required by the Statute for the Support of the Government, I shall consider,

1. The Offence of refusing the Oaths of Allegiance and Supremacy.

2. The Offence of refusing the Oath of Abjuration.

*Seç.* 5. As to the first of these Offences, *viz.* That of refusing the Oaths of Allegiance and Supremacy, which since the Reformation of Religion have been thought necessary to be required from all Persons, especially from those who are intrusted with an Office, in order to secure our Princes from the Intrigues of Popes, who have often taken upon them to dispense with Oaths of Allegiance made to such Princes whom they are pleased to call Hereticks, and to perswade the People that they may lawfully

fully depose those who have so far incurred the Displeasure of the Bishop of Rome, as to be excommunicated by him, it having been shewn already in Chap. 8. under what Penalties Officers are bound to take the said Oaths and in Chap. 19. S. 27. &c. how far all Persons whatsoever are compellable to take them under Pain of incurring a *Premunire*, I shall only take Notice in this Place, of the Method of Proceeding on 1 *Will. & Mar. 8.* by which it is enacted, *That Persons refusing the said Oaths being tendered to them by Persons lawfully authorized to tender the same, shall be committed by the Persons making such a Tender for three Months, unless they shall pay such Sum not exceeding 40 s. as the Persons who shall make such Tender shall require of them, and if they refuse again at the End of the three Months, that they shall be imprisoned six Months, or pay a Sum not above ten nor under five Pounds, and also find Sureties for their good Behaviour and Appearance at the next Assizes, where if they refuse the said Oaths, they shall be incapable of any Office, and continue bound to their good Behaviour, and if they refuse the Declaration mentioned in 30 Ca. 2. they shall suffer as Popish Recusants convicted.*

*Seç. 5.* It seems to be the Intention of this Statute, to give the Government an Election to proceed either on the mild Method therein prescribed, or the more severe one appointed by the former Laws, according to the Circumstances of the Case, and Quality of the Offender, &c.

*Seç. 6.* As to the second Offence of this Kind, *viz.* That of refusing the Oath of Abjuration, the same depends on those Laws, which the Nation has been of late under a Necessity of establishing, by adding a new Limitation to the Law relating to the Succession of the Crown, excluding all Papists from a Possibility of inheriting it; who, if they be true to their Engagements to their own Religion, cannot but be false to those they may make to ours, and can never be expected to execute those Laws, which they cannot but think void, as being repugnant to the Laws of God; or to defend that Faith which they think damnable; or to observe those Oaths, which seem to them to have been ordained for the Support of Irreligion. And from these Considerations they have been disabled from inheriting the Crown, it seeming of absolute Necessity in our present Circumstances for the good of the Community, to make such an Alteration in the Law, which like all other humane Laws depending merely on the Policy of Men, seems to have nothing in it so sacred as to oblige the People unalterably to abide by it to the Hazard of their common Safety, Peace and Happiness, for the sake whereof it was at first ordained: For surely, there cannot be so much Danger to the common Good from such an Alteration, as must needs follow from the Government of a Prince, whose Conscience is under the Influence of those, who are implacable Enemies to the Religion of his Country, and who thinks himself bound by his Duty to God and his Church, to promote that Interest, which his People think themselves under the like Obligations to oppose: From which unhappy Circumstances nothing can be expected but endless Factions and Discords, and irreconcilable Jealousies and Distrusts between Prince and People, which if they break not into an open Rupture, will at least be attended with such Convulsions and Uneasinesses, as render a State of Government scarce one Degree more secure than a State of Anarchy and Confusion

*Seç. 7.* For the remedying of such like Inconveniences, it having been thought proper to exclude all Papists from the Crown, it was likewise thought expedient to secure the present Settlement, by obliging all Officers, &c. to take the Oath of Abjuration, as to which it is enacted  
by

by 13 and 14 Will. 6. and 1 Geor. 13. That all Persons who shall be admitted, &c. into any Office Civil or Military, (not being an Office of Inheritance, executed by a lawful Deputy) or shall receive any Pay, Salary, Fee or Wages, by Reason of any Patent or Grant from the King, or that have a Command or Place of Trust under the King, &c. or shall be admitted into any Service or Employment in the King's Household or Family, or of his Royal Highness George Prince of Wales, or her Royal Highness the Princess of Wales, or their Issue, and all Ecclesiastical Persons, Heads or Governors, of what Denomination soever, and all other Members of Colleges and Halls in any University, that shall be of the Foundation, or enjoy any Exhibition, being of, or as soon as they shall attain the Age of eighteen Years, and all Persons teaching or reading to Pupils in any University or elsewhere, and all School-masters and Ushers, and all Preachers and Teachers of separate Congregations, High or Chief Constables, and every Person who shall act as Serjeant at Law, Counsellor at Law, Barrister, Advocate, Attorney, Solicitor, Proctor, Clerk, or Notary, by practising in any Manner as such, in any Court or Courts whatsoever within that Part of Great Britain called England, shall within three Months after they shall be admitted into, or enter upon any such Preferment, Benefice, Office, or Place, or come into such Capacity, or take upon them such Practice, Employment or Business, take and subscribe the Oaths of Allegiance, Supremacy and Abjuration, at one of the Courts at Westminster, or at the General Quarter-Sessions of the Peace where they shall reside, or otherwise they shall be ipso facto adjudged incapable, and disabled in Law, to have, occupy, or enjoy the said Offices, &c. and if they shall by themselves, or Deputy or Trustee, execute any the said Offices, &c. and shall be thereof convicted, &c. they shall be disabled to prosecute any Suit at Law or Equity, or to be Guardians, Executors, or Administrators, or capable of any Legacy or Deed of Gift, or to be in any Office within this Realm, or to vote at any Election for Members of Parliament, and shall forfeit five hundred Pounds, &c.

Sett. 9. And it is farther enacted by the said Statute, That any two Justices of Peace, or any other Person or Persons who shall be by the King for that Purpose specially appointed by Order in the Privy Council, or by Commission under the Great Seal, may administer and tender the said Oaths to any Person whatsoever, whom they shall suspect to be dangerous or disaffected; and that if any Person to whom the said Oaths shall be so tendered, shall neglect or refuse to take the same; or if any Person being summoned by the said Justices, &c. in order to take the said Oaths, either in proper Person, or by Notice left at his Place of Abode with one of the Family, shall neglect or refuse to appear, &c. such Refusal shall be certified at Sessions, &c. and from thence to the King's Bench or Chancery, &c. and every such Person so neglecting to take the said Oaths, shall be adjudged a Popish Recusant convicted, &c.

Sett. 10. And it is farther enacted by the said Statute, That if any Member of either University shall neglect to take and subscribe the said Oaths according to the Intent of the said Act, or to produce a Certificate thereof, under the Hand of some proper Officer of the respective Court, and cause the same to be entered in the Register of the proper College or Hall, within one Month after his having taken and subscribed the said Oaths; and if the Persons in whom the Right of Election of such Member shall be, do neglect to elect some fitting Person in his stead within twelve Months, &c. that then the King may, under the Great Seal or Sign Manual, nominate some fitting Person qualified according to the local Statutes of such College, &c. and if the Head of any College, &c. shall neglect to admit such Nominee, by the Space of ten Days after such Admission shall be demanded of him, that then the local Visitor shall admit the said Nominee; and if such Visitor shall neglect or refuse to admit such Person within the Space of one Month after the same shall be demanded, that then the Court of King's

*Bench may issue a Writ of Mandamus to such Visitor to admit such Nominee, &c.*

*Seç. 11.* And it is farther enacted by the said Statute, That no Peer shall vote or make his Proxy, or sit in the House of Peers during any Debate, and that no Member of the House of Commons shall vote or sit during any Debate in the said House, after the Speaker is chosen, until he shall have taken the said Oaths, &c. under Pain of the Disabilities and Forfeitures above mentioned, &c.

C H A P. XXV.

*Of Felony.*

**O**ffences more immediately against the Subject are either Capital or not Capital.

The Capital are either by the Common Law or by Statute.

*Seç. 1.* Those by the Common Law come generally under the Title of Felony, which, *ex vi Termini*, signifies *quodlibet crimen felleo animo perpetratum*, and can be expressed by no Periphrasis, or Word equivalent, without the Word *Felonice*. 1 Inst. 391.

*Seç. 2.* Felony is said to be included in High Treason, and consequently a Pardon of Felony discharges an Indictment of High Treason, if it want the Word *Proditione*. H. P. C. 12.  
3 H. 7. 10. 2.  
3 Inst. 15.

*Seç. 3.* It is always accompanied with an evil Intention, and therefore shall not be imputed to a mere Mistake or Mis-animadversion, as where Persons break open a Door, in order to execute a Warrant, which will not justify such a Proceeding; *Affectio enim tua nomen imponit operi tuo; item crimen non contrahitur nisi nocendi voluntas intercedat.* Brac. lib. 1.  
ca. 4. But the bare Intention to commit a Felony is so very criminal, That at the Common Law it was punishable, as Felony, where it missed its Effect through some Accident, no way lessening the Guilt of the Offender; but it seems agreed at this Day, That Felony shall not be imputed to a bare Intention to commit it, yet it is certain that the Party may be very severely fined for such an Intention. S. P. C. 17. 1.  
27. b.  
1 Lev. 246.  
1 Sid. 230.  
231.  
5 Mod. 206

C H A P. XXVI.

*Of casual Death and of Deodands.*

**O**F Capital Offences at Common Law more immediately against the Subject, there are three principal Kinds:

1. Such as are committed against his Life.
2. Such as are against his Goods.
3. Such as are against his Habitation.

*Señ. 1.* There is another mix'd Kind of Capital Offences, which consists in the Hinderance of the due Process of publick Justice, which I shall consider in the second Book, wherein I shall treat of the Means of bringing Offenders to their due Punishment.

Brañ lib. 3.  
cap 4.

*Señ. 2.* Offences against the Life of a Man come under the general Name of Homicide, which in our Law signifies the killing of a Man by a Man.

Crom. 31. a.

*Señ. 3.* But before I treat hereof, it may not be improper to consider the killing of a Man merely *per Infortunium*, occasioned by some Animal or Thing without Life, without the Default of Procurement of another Man, as where one is killed by a Fall from a Horse or Cart, &c. which, though it be not properly Homicide, nor punishable as a Crime, yet is taken Notice of by the Law, as far as the Nature of the Thing will bear, in order to raise the greater Abhorrence of Murder, and the unhappy Instrument or Occasion of such Death is called a Deodand, and forfeited to the King, in order to be disposed of in pious Uses by the King's Almoner; as also are all such Weapons whereby one Man kills another.

S. P. C. 21. a.  
3 Inst. 58.  
H. P. C. 34.  
Pult. 125. a.  
Dal. cap. 97.

*Señ. 4.* It seems clearly settled, That a Horse, &c. killing an Infant within the Age of Discretion, are as much forfeited as if he were of Age: But formerly it was holden, That a Horse or Cart, by a Fall from which an Infant was slain, were not forfeited, perhaps for this Reason, because the Misfortune might rather seem owing to the Indiscretion of the Infant than any Default in the Horse, &c. But this Distinction has not been allowed of late; for the Law does not ground the Forfeiture on any Default in the Things forfeited, since it extends it to Things without Life, to which 'tis plain, that no manner of Fault can be imputed.

2 Keb. 719,  
806.

S. P. C. 20. b.  
Pult. 124. b.  
1 Sid 206,  
207.  
1 Lev. 136.  
Raym. 97.  
6 Mod. 187.  
1 Keb. 723,  
745.

*Señ. 5.* Also by the Opinion of our ancient Authors, Things fix'd to a Freehold, as the Wheel of a Mill, a Bell hanging in a Steeple, &c. may be Deodands, but by the later Resolutions they cannot, unless they were severed before the Accident happened.

S. P. C. 21.  
Pult. 125. a.  
3 Inst. 58.  
H. P. C. 33.  
Cro. Jac. 483.  
2 Rol. Re. 23.  
Popham 136.  
Salk. 220.

*Señ. 6.* However, as it is agreed by all, a Ship in salt Water, whether in the open Sea or within the Body of a County, from which a Man falls and is drowned, is not forfeited, because Persons at Sea are continually exposed to so many Perils, that the Law imputes such Misfortunes happening there, rather to them than to the Ship. Also it seems clear, That when a Man riding on a Horse over a River is drowned through the Violence of the Stream, the Horse is not forfeited, because not that, but the Waters caused his Death: But it is said, That a Ship by a Fall from which a Man is drowned in the fresh Water shall be forfeited, but not the Merchandize therein, because they no way contribute to his Death. And by the same Reason it seems, That if a Man riding on the Shafts of a Waggon fall to the Ground and break his Neck, the Horses and Waggon only are forfeited, and not the Loading, because it no way contributed to his Death; for which Cause, where a Thing not in Motion causes a Man's Death, that Part thereof only which is the immediate Cause is forfeited. As where one climbing upon the Wheel of a Cart while it stands still, falls from it and dies of the Fall, the Wheel only is forfeited: But if he had been killed by a Bruise from one of the Wheels being in Motion, the Loading also would have been forfeited, because the Weight thereof made the Hurt the greater; and it is a general Rule, That where ever the Thing which is the Occasion of a Man's Death is in Motion at the Time, not only that Part thereof, which immediately wounds him, but all Things which move together with it,

Salk 220.

and help to make the Wound more dangerous are forfeited also; for the Rule is, *Omnia quæque movent ad Mortem, sunt Deodanda.*

*Sett.* 7. In all these Cafes, if the Party wounded die not of his Wound within a Year and a Day after he received it, there shall be nothing forfeited, for the Law does not look on such a Wound as the Cause of a Man's Death, after which he lives so long: But if the Party die within that Time, the Forfeiture shall have Relation to the Wound given, and cannot be saved by any Alienation or other Act whatsoever in the mean Time.

*Sett.* 8. However, nothing can be forfeited as a Deodand, nor seized as such, till it be found by the Coroner's Inquest to have caused a Man's Death; but after such Inquisition, the Sheriff is answerable for the Value of it, and may levy the same on the Town where it fell, and therefore the Inquest ought to find the Value of it.

H. P. C. 55.  
S. P. C. 21. b.

Dalt. ca. 97.  
Pl. Com. 260.  
Kellw. 68. b.

5 Co. 110. b.  
Co. Li. 115. a.  
Dal. cap. 97.  
S. P. C. 21. a.  
Pult. 125. a.  
See 4 Ed. 1. de  
Officio Coronatoris.

## C H A P. XXVII.

### Of Felo de fe.

**H**omicide properly so called, is either against a Man's own Life, or that of another.

In treating of Homicide against a Man's own Life, I shall consider:

1. In what Cafes a Man shall be said to be a *Felo de fe.*
2. What he shall forfeit for this Offence.

*Sett.* 1. As to the first Point, I shall take it for granted, That in this as well as in all other Felonies, the Offender ought to be of the Age of Discretion, and *Compos Mentis*, and therefore that an Infant killing himself under the Age of Discretion, or a Lunatick during his Lunacy, cannot be a *Felo de fe.*

Crom. 30. a. b.  
31. a.  
H. P. C. 28.  
Dal. cap. 92.  
3 Inst. 54.

*Sett.* 2. But here I cannot but take Notice of a strange Notion, which has unaccountably prevailed of late, That every one who kills himself, must be *Non Compos* of Course; for it is said to be impossible, That a Man in his Senses should do a Thing so contrary to Nature and all Sense and Reason.

3 Mod. 100.

*Sett.* 3. If this Argument be good, Self-Murder can be no Crime, for a Madman can be guilty of none: But it is wonderful that the Repugnancy to Nature and Reason, which is the highest Aggravation of this Offence, should be thought to make it impossible to be any Crime at all, which cannot but be the necessary Consequence of this Position, That none but a Madman can be guilty of it. May it not with as much Reason be argued, That the Murder of a Child or of a Parent is against Nature and Reason, and consequently that no Man in his Senses can commit it? But has a Man therefore no Use of his Reason, because he acts against right Reason? Why may not the Passions of Grief and Discontent tempt a Man knowingly to act against the Principles of Nature and Reason in this Case, as those of Love, Hatred and Revenge, and such like, are too well known to do in others?

*Sett.* 4.



*Señ. 4.* However our Laws have always had such an Abhorrence of this Crime, that not only he who kills himself with a deliberate and direct Purpose of so doing, but also in some Cases he who maliciously attempts to kill another, and in Pursuance of such Attempt unwillingly kills himself, shall be adjudged in the Eye of the Law a *Felo de se*; for where-ever Death is caused by an Act done with a murderous Intent, it makes the Offender a Murderer; and therefore if *A.* discharge a Gun at *B.* with an Intent to kill him, and the Gun break and kill *A.* or if *A.* strike *B.* to the Ground, and then hastily falling upon him wound himself with a Knife which *B.* happens to have in his Hand and die, in both these Cases *A.* is *Felo de se*, for he is the only Agent.

Dal. cap. 92.

44 E. 3. 44.

44 Aff. 55.

Bro. Cor. 12.

14.

Dalt. cap. 92

S. P. C. 16.

2. 20.

H. P. C. 28, 29.

Pult. 119. b.

Crom. 28.

Con. 3 Inst. 54.

But the Case

there is not

rightly stated,

as it is in the

Books.

Kellw. 136. a.

*Señ. 5.* But if *B.* being so assaulted had been driven to the Wall, and holden up a Pitch-fork or Knife, standing in his Defence, and *A.* had hastily run upon the same and been slain, *B.* should be adjudged to kill him in his own Defence. And for the same Reason perhaps in the Case above, if *B.* after he had fallen to the Ground, had holden up his Knife or Sword in his Defence, and *A.* had fallen thereon and been slain, *B.* should be judged to kill him *se defendendo*; for here *B.* exerts his Strength in his own Defence, and by so doing occasions the mortal Wound received by *A.*

*Señ. 6.* He, who kills another upon his Desire or Command, is in the Judgment of the Law as much a Murderer, as if he had done it merely of his own Head, and the Person killed is not looked upon as a *Felo de se*, inasmuch as his Assent was merely void, as being against the Laws of God and Man: But where two Persons agree to die together, and one of them at the Persuasion of the other buys Ratsbane, and mixes it in a Potion, and both drink of it, and he who bought and made the Potion, survives by using proper Remedies, and the other dies, perhaps it is the better Opinion, That he who dies shall be adjudged a *Felo de se*, because all that happened was originally owing to his own wicked Purpose, and the other only put it in his Power to execute it in that particular Manner.

Moore 754.

Pl. 1041.

S. P. C. 189.

F. G. 262,

263.

H. P. C. 29.

Plow. Com.

262, 263.

S. P. C. 188. a.

Crom. 31. a.

3 Inst. 55.

19 H. 6. 47. a.

8 E. 4. 24. b.

Raym. 7.

Plow. Com.

243, 259,

323. b.

Plow. Com.

261. b. 262. a.

5 Co. 110. b.

3 Inst. 54.

1 Saund. 362.

1 Sid. 150,

162.

2 Mod. 53.

3 Mod. 100.

241, 242.

Con. 1 Lev. 8.

1 Keb. 67, 68.

4 Plow. Com.

260.

H. P. C. 29.

5 Co. 110.

4 H. P. C. 29.

3 Inst. 55.

*Señ. 7.* <sup>a</sup> As to the second Point, *viz.* What such an Offender shall forfeit, it seems clear that he shall forfeit all Chattels Real or Personal, which he hath in his own Right, and also all such Chattels Real whereof he is possessed either jointly with his Wife, or in her Right; and also all Bonds and other Personal Things in Action belonging solely to himself; and also all Personal Things in Action, and, as some say, entire Chattels in Possession, to which he was intituled jointly with another, on any Account except that of Merchandize: But it is said, That he shall forfeit a Moiety only of such joint Chattels as may be severed, and nothing at all of what he was possessed of as Executor or Administrator.

*Señ. 8.* <sup>b</sup> However the Blood of a *Felo de se* is not corrupted, nor his Lands of Inheritance forfeited, nor his Wife barred of her Dower.

*Señ. 9.* <sup>c</sup> Also no Part of the Personal Estate is vested in the King, before the Self-Murder is found by some Inquisition; and consequently the Forfeiture thereof is saved by a Pardon of the Offence before such Finding.

*Señ. 10.* <sup>d</sup> But if there be no such Pardon, the whole is forfeited immediately after such Inquisition, from the Time such mortal Wound was given, and all intermediate Alienations are avoided.

*Señ. 11.* <sup>e</sup> And such Inquisitions ought to be by the Coroner *super visum Corporis*, if the Body can be found; and an Inquisition so taken, as some say, cannot be traversed.

*Sett.* 12. But if the Body cannot be found, so that the Coroner, who has Authority only *super visum Corporis*, cannot proceed, the Inquiry may be by Justices of Peace, (who by their Commission have a general Power to inquire of all Felonies) or in the King's-Bench, if the Felony were committed in the County where the said Court sits; and such Inquisitions are traversable by the Executor, &c.

3 Inst. 55.  
H. P. C. 39.  
2 Lev. 141.

*Sett.* 13. Also all Inquisitions of this Offence being in the Nature of Indictments, ought particularly and certainly to set forth the Circumstances of the Fact, as the particular Manner of the Wound, and that it was mortal, &c. and in the Conclusion add, That the Party in such manner murdered himself.

Sal. 377.

*Sett.* 14. Therefore if either the Premises be insufficient, as if it be found that the Party flung himself into the Water, & sic seipsum emergit, which is Nonfence, (because *emergeo* signifies only to rise out of the Water) or if there be wanting the proper Conclusion, & sic seipsum *murdravit*, the Inquisition is not good.

3 Lev. 140.  
3 Mod. 100.

2 Lev. 152.  
contra Salk.

*Sett.* 15. Yet if it be full in Substance, the Coroner may be served with a Rule to amend a Defect in Form.

377.  
1 Sid. 225, 259  
3 Mod. 101.  
1 Keb. 907.  
See 1 Saund.  
273. for Pro-  
cess from the  
Crown-Office on  
such an Inquisi-  
tion against a  
Debit of a  
Felo de se.

C H A P. XXVIII.

Of Justifiable Homicide.

**H**omicide against the Life of another either amounts to Felony, or does not.

That which amounts not to Felony, is either justifiable and causes no Forfeiture at all, or excusable and causes the Forfeiture of the Party's Goods.

And first of Justifiable Homicide, concerning which I shall premise these general Rules:

*Sett.* 1. I. It must be owing to some unavoidable Necessity, to which the Person who kills another must be reduced without any manner of Fault in himself.

Vid. *Sett.* 22.

*Sett.* 2. II. There must be no Malice coloured under Pretence of Necessity; for where-ever a Person, who kills another, acts in Truth upon Malice, and takes Occasion from the Appearance of Necessity to execute his own private Revenge, he is guilty of Murder.

2 Rol. Rep.  
120, 121.  
Kelynge 28.  
H. P. C. 38.  
Bract. lib. 3.  
Cap. 4.

*Sett.* 3. III. According to the Opinion of the old <sup>a</sup> Books, (which in this respect seem to be contradicted by <sup>b</sup> others more modern) it seems, That one may set forth a Fact, amounting to justifiable Homicide, in a Special Plea to an Indictment or Appeal of Murder; and that the same being found true, he shall be dismissed, without being arraigned or enforced to Plead Not guilty. And indeed it seems extremely hard, That a Sheriff or Judge who condemn or execute a Criminal, &c. should be forced on a frivolous Prosecution, to hold up their Hands at the Bar for it, &c. But it is agreed, That no one can plead a Fact amounting to Homicide *se defendendo*, or by Misadventure, but that in such a Case the Defendant must plead Not guilty, and give the Special Matter in Evi-

21 Ed. 1. de  
Malefactor  
in Parcib.

2 22 Aff. 55.  
27 Aff. 41.  
37 H. 6. 20.  
21, 2.  
Bro. Appeal,  
5, 129.  
Bro. Coro.  
57, 87, 89. b.  
35 H. 6. 11. b.  
58.  
Bro. Appeal.  
122.

T

3 Inst. 316. 2 Inst. 283 H P C. 38. Bro. Coro. 1.

dence: And it is also agreed, That where a Special Fact, amounting to justifiable Homicide, is found by the Jury, the Party is to be dismissed, without being obliged to purchase any Pardon, &c.

Justifiable Homicide is either of a publick or private Nature.

That of a publick Nature, is such as is occasioned by the due Execution or Advancement of publick Justice.

That of a private Nature is such as happens in the just Defence of a Man's Person, House, or Goods.

And first, I shall consider justifiable Homicide in the due Execution of publick Justice, as to which the following Rules must be observed:

*Sect. 4.* I. The Judgment, by Virtue whereof any Person is put to Death, must be given by one who has Jurisdiction in the Cause; for otherwise both Judge and Officer may be guilty of Felony.

Dalt. cap. 98.  
10 Co. 76.  
22 E. 4. 33. a.  
H. P. C. 35.

*Sect. 5.* And therefore if the Court of Common Pleas give Judgment on an Appeal of Death, or Justices of Peace on an Indictment of Treason and award Execution, which is executed, both the Judges who give, and the Officers who execute the Sentence, are guilty of Felony, because these Courts having no more Jurisdiction over these Crimes than mere private Persons, their Proceedings thereon are merely void, and without any Foundation.

*Sect. 6.* But if the Justices of Peace, on an Indictment of Trespass, arraign a Man of Felony, and condemn him, and he be executed, the Justices only are guilty of Felony, and not the Officers who execute their Sentence; for the Justices had a Jurisdiction over the Offence, and their Proceedings were irregular and erroneous only, but not void.

H. P. C. 35.  
Dalt. cap. 98.

*Sect. 7.* II. The Judgment must be executed by the lawful Officer.

*Sect. 8.* <sup>a</sup> Indeed it was formerly holden, That any one might as lawfully kill a Person attainted of Treason or Felony, as a Wolf or other wild Beast; and anciently a Person condemned in an Appeal of Death, was delivered to the Relations of the Deceased, in order to be executed by them.

<sup>a</sup> 1 Inst. 128. b.  
<sup>b</sup> Aff. pl. 3.  
S. P. C. 13. a.  
196  
<sup>c</sup> 1 H. 4. 12. a.  
Plow. Com.  
306. b.

*Sect. 9.* <sup>b</sup> But at this Day, as it seems agreed, if the Judge, who gives the Sentence of Death, and, *a fortiori*, if any private Person execute the same, or if the proper Officer himself do it without a lawful Command, they are guilty of Felony.

<sup>b</sup> 1 Inst. 131.  
<sup>c</sup> 27 Aff. 41.  
Bro. Appeal.  
69.  
Coro. 67, 197.  
<sup>d</sup> 1 Inst. 128. b.

*Sect. 10.* <sup>c</sup> III. The Execution must be pursuant of, and warranted by the Judgment, otherwise it is without Authority; and consequently if a Sheriff behead a Man where it is no Part of the Sentence to cut off the Head, he is guilty of Felony.

Dalt. ca. 98.  
H. P. C. 35.  
<sup>e</sup> 35 H. 6. 58. b.  
Bro. Appeal.  
5.  
S. P. C. 13.  
H. P. C. 36,  
272.

And now we are come to Justifiable Homicide in the due Advancement of publick Justice, which I shall consider:

1. In Relation to criminal,
2. In Relation to civil Causes.

And first, Homicide in the Advancement of publick Justice in criminal Causes may be justified in several Cases; as,

*Sect. 11.* I. If a Person, having actually committed a Felony, will not suffer himself to be arrested, but stand on his own Defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private Persons or publick Officers, with or without a Warrant from a Magistrate, he may be lawfully slain by them.

22 Aff. 55.  
Bro. Cor. 87,  
89.  
S. P. C. 13.  
3 Inst. 221.  
Dal. cap. 98.  
H. P. C. 36.  
Crom. 30.  
Fitz. Coro.  
192, 258.

*Sett.* 12. II. If an innocent Person be indicted of a Felony, where, in Truth, no Felony was committed, and will not suffer himself to be arrested by the Officer who has a Warrant to that Purpose, he may lawfully be killed by him, if he cannot otherwise be taken; for there is a Charge against him, upon Record to which at his Peril he is bound to answer.

*See the Authorities above cited.*  
Fitz. Coro. 179, 161.

*Sett.* 13. III. If a Criminal, endeavouring to break the Gaol, assault his Gaoler, he may be lawfully killed by him in the Affray.

*Sett.* 14. IV. If those who are engaged in a Riot, or a Forcible Entry, or Detainer, stand in their Defence, and continue the Force in Opposition to the Command of a Justice of Peace, &c. or resist such Justice endeavouring to arrest them, the killing of them may be justified; and so perhaps may the killing of dangerous Rioters by any private Persons, who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private Person seems to be authorized by the Law to arm himself for the Purposes aforesaid.

Crom. 30. b. 158. b.  
H. P. C. 37.

Poph. 121.

*Sett.* 15. V. If Trespasses in a Forest, Chace, Park, or Warren, or any inclosed Ground wherein Deer are kept, will not render themselves to the Keepers, upon an Hue and Cry made to stand to the King's Peace, but fly from, or defend themselves against them, they may be slain by Force of the Statute *de Malefactoribus in Parcibus*, and 3 and 4 *Will. & Mar.* 10.

S. P. C. 13. b.  
Crom. 30. b.  
Dyer 326.  
Pl. 3.

*Sett.* 16. VI. If either of the Parties fighting in a Combat allowed by Law, for the Trial of some special Cases, be slain, he who kills him is justified, and the Death of the other is imputed to the just Judgment of God, who is presumed to give the Victory to him who fights in Maintenance of the Truth.

Dalt. cap. 98.  
Plow. Com. 9. b.  
3 Inst. 221.  
37 H. 6. 21. a.

Secondly, Homicide in the Advancement of Justice in civil Causes, may also be justified in some Cases.

*Sett.* 17. <sup>a</sup> As where a Sheriff, &c. attempting to make a lawful Arrest in a civil Action, or to retake one who has been arrested and made his Escape, is resisted by the Party, and unavoidably kills him in the Affray.

<sup>a</sup> 1 Rol. Re. 189.  
H. P. C. 37.  
3 Inst. 56.

*Sett.* 18. <sup>b</sup> And in such Case the Officer is not bound to give back, but may stand his Ground and attack the Party.

Crom. 24. a.  
Dalt. cap. 98.  
<sup>b</sup> H. P. C. 37.

*Sett.* 19. But no private Person of his own Authority can arrest a Man for a civil Matter, as he may for Felony, &c.

Crom. 30. b.

*Sett.* 20. Neither can the Sheriff himself lawfully kill those who barely fly from the Execution of any civil Process.

H. P. C. 37.

And now I am to consider Justifiable Homicide of a private Nature, in the just Defence of a Man's Person, House or Goods, in treating whereof I shall shew,

1. In what Cases the killing of a Wrong-doer may be justified by Reason of such Defence.
2. Where the killing of an innocent Person may be so justified.

*Sett.* 21. And first the killing of a Wrong-doer, in the making of such Defence, may be justified in many Cases; as where a Man kills one who assaults him in the Highway to rob or murder him; or the Owner of a House, or any of his Servants, or Lodgers, &c. kill one who attempts to burn it, or to commit in it Murder, Robbery, or other Felony; or a Woman kills one who attempts to ravish her; or a Servant coming suddenly and finding his Master robbed and slain, falls upon the Murderer immediately and kills him; for he does it in the Height of his

24 H. 8. c. 5.  
Dalt. cap. 98.  
H. P. C. 32.  
S. P. C. 14.  
Bro. Coro. 100, 102.  
Fitz. Coro. 179, 192, 194, 261, 305.  
Cro. Ca. 544.  
26 Aff. 23.  
Bro. Cor. 100.  
SUR- Crom. 26. b.

Surprize, and under just Apprehensions of the like Attempt upon himself: But in other Circumstances he could not have justified the killing of such an one, but ought to have apprehended him, &c.

*Señ.* 22. Neither shall a Man in any Case justify the killing another by a Pretence of Necessity, unless he were himself wholly without Fault in bringing that Necessity upon himself; for if a Man, in Defence of an Injury done by himself, kill any Person whatsoever, he is guilty of Manslaughter at least; as where divers Rioters wrongfully detain a House by Force, and kill those who attack it from without, and endeavour to burn it.

*Señ.* 23. Neither can a Man justify the killing another in Defence of his House or Goods, or even of his Person, from a bare private Trespass; and therefore he that kills another, who claiming a Title to his House, attempts to enter it by Force, and shoots at it, or that breaks open his Windows in order to arrest him, or that persists in breaking his Hedges after he is forbidden, is guilty of Manslaughter; and he who in his own Defence kills another that assaults him in his House in the Day-time, and plainly appears to intend to beat him only, is guilty of Homicide *se defendendo*, for which he forfeits his Goods, but is pardoned of Course; yet it seems, That a private Person, and, *a fortiori*, an Officer of Justice, who happens unavoidably to kill another in endeavouring to defend himself from, or suppress dangerous Rioters, may justify the Fact, inasmuch as he only does his Duty in Aid of the publick Justice.

*Señ.* 24. And I can see no Reason why a Person, who without Provocation is assaulted by another in any Place whatsoever, in such a Manner as plainly shews an Intent to murder him, as by discharging a Pistol, or pushing at him with a drawn Sword, &c. may not justify killing such an Assailant, as much as if he had attempted to rob him: For is not he, who attempts to murder me, more injurious than he who barely attempts to rob me? And can it be more justifiable to fight for my Goods, than for my Life? And it is not only highly agreeable to Reason, that a Man in such Circumstances may lawfully kill another, but it seems also to be confirmed by the general Tenor of our Law-Books, which speaking of Homicide *se defendendo*, suppose it done in some Quarrel or Affray; from whence it seems reasonable to conclude, That where the Law judges a Man guilty of Homicide *se defendendo*, there must be some precedent Quarrel, in which both Parties always are, or at least may justly be supposed to have been, in some Fault, so that the Necessity, to which a Man is at length reduced to kill another, is in some Measure presumed to have been owing to himself: For it cannot be imagined, That the Law, which is founded on the highest Reason, will adjudge a Man to forfeit all his Goods, and put him to the Necessity of purchasing his Pardon, without some Appearance of a Fault. And though it may be said, That there is none in Chance-medley, and yet that the Party's Goods are also forfeited by that. I answer, That Chance-medley may be intended to proceed from some Negligence, or at least want of sufficient Caution in the Party, who is so unfortunate as to commit it, so that he doth not seem to be altogether faultless. Besides, one of the Reasons given in our Law-Books for which Homicide *se defendendo* forfeits Goods, is because thereby a true Man is killed; but it seems absurd, That he who apparently attempts to murder another, which is the most heinous of all Felonies, should be esteemed such, when those who attempt other Felonies, which seem to be much less criminal, are allowed to be killed as downright Villains, not deserving the Protection or Regard of the Law.

*Señ.*

Sec. 25. However, perhaps in all these Cases, there ought to be a Distinction between an Assault in the Highway and an Assault in a Town; for in the first Case it is said, That the Person assaulted may justify killing the other without giving back at all: But that in the second Case, he ought to retreat as far as he can without apparently hazarding his Life, in respect of the Probability of getting Assistance.

N. Bondlo 47.  
Crom. 27. b.  
28. a.  
Dal. cap. 98.  
H. P. C. 47.

II. Also the killing of an innocent Person, in the Defence of a Man's self, is said to be justifiable in some special Cases, as,

Sec. 26. I If two be shipwreck'd together, and one of them get upon a Plank to save himself, and the other also, having no other Means to save his Life, get upon the same Plank, and finding it not able to support them both, thrust the other from it, whereby he is drowned, it seems that he, who thus preserves his own Life at the Expence of that of another, may justify the Fact by the inevitable Necessity of the Case.

Dal. cap. 98.

Sec. 27. If a Man be awakened in the Night with an Alarm that Thieves are in his House, and searching for them in the dark with his Sword drawn, happen to kill a Person lying hid in Part of the House, who in Truth had no ill Design, and was brought thither by a Servant in order to assist in cleaning the House, it seemeth that he may justify the Fact, inasmuch as it hath not the Appearance of a Fault.

Cro. Car. 238.  
March. 5.

C H A P. XXIX.

Of Excusable Homicide

Excusable Homicide is either *per infortunium*, or *se defendendo*.

In treating of which, I shall first shew the Nature of each of them distinctly, and then consider those Properties wherein they both agree.

Sec. 1. And first of Homicide *per Infortunium*, or by Misadventure, which is where a Man in doing a lawful Act, without any Intent of Hurt, unfortunately chances to kill another; as,

3 Inst. 56.  
H. P. C. 31.

Sec. 2. I. Where a Labourer being at Work with a Hatchet, the Head thereof flies off, and kills one who stands by.

6 Ed. 4. 7. b.  
Bro. Coro. 59.

Sec. 3. II. Where a third Person whips a Horse on which a Man is riding, whereupon he springs out, and runs over a Child and kills him, in which Case the Rider is guilty of Homicide *per infortunium*; and he who gave the Blow, of Manslaughter.

14<sup>B</sup>  
H. P. C. 58. 59.

Sec. 4. III. Where a Workman, having first given loud Warning to all Persons to stand clear, flings down a Piece of Timber from a private House standing out of the Road, and thereby kills one who happens to be underneath: (But if any Person fling down such a Piece of Timber idly in Play, or even a Workman fling it down in the Streets of a Town, where the Danger is apparent in respect of the number of People continually passing by, he is guilty of Manslaughter.)

Kelynge 40.  
Brañt. lib. 3.  
cap. 4.  
Dal. ca. 96.  
H. P. C. 31.  
Bro. Coro.  
229.

Sec. 5. IV. Where a Schoolmaster in correcting his Scholar, or a Father his Son, or a Master his Servant, or an Officer in whipping a Criminal condemned to such Punishment, happens to occasion his Death; (yet if such Persons in their Correction be so barbarous, as to exceed all Bounds of Moderation, and thereby cause the Party's Death, they are guilty of Manslaughter at the least; and if they make use of

Brañt. lib. 1.  
ca. 4.  
H. P. C. 31.  
Crom. 28. b.  
Dal. cap. 96.  
Kellw. 136.

- Kelynge 65. Vide 5 Mod. 287, 288, &c. an Instrument improper for Correction, and apparently indangering the Party's Life, as an iron Bar, or Sword, &c. or kick him to the Ground, and then stamp on his Belly and kill him, they are guilty of Murder.)
- Kellw. 108. Bro. Cor. 148. Vid. Kelynge 41. Sect. 6. V. Where one lawfully using an innocent Diversion, as shooting at Butts, or at a Bird, &c. by the glancing of an Arrow, or such like Accident, kills another.
- Kellw. 108, 136. Crom. 29. a. 11 H. 7. 23. a. Sect. 7. VI. Where a Person happens to kill another in playing a Match of Foot-ball, Wrestling, or such like Sports which are attended with no apparent Danger of Life, and intended only for the Trial, Exercise, and Improvement, of the Strength, Courage, and Activity of the Parties.
- 11 H. 7. 23. a. 3 Inst. 160. Kellw. 108, 136. H. P. C. 31. Dale. cap. 96. Hob. 134. Cromp. 29. a. Con Bro. Cor. 32. b H. P. C. 31. H. P. C. 32. c H. P. C. 58. Sect. 8. VII. Where one kills another in fighting at Barriers or Tilting by the King's Command, which by the better Opinion, secures him from being guilty of Felony, by Reason of any such unfortunate Accident.
- Con. Hob. 134. Dale. cap. 98. H. P. C. 57. Aley 12. Sect. 9. b But if a Person kill another by shooting at a Deer, &c. in a third Person's Park, in the doing whereof he is a Trespasser; or by shooting off a Gun, or throwing Stones in a City or Highway, or other Place where Men usually resort; or c by throwing Stones at another wantonly in Play, which is a dangerous Sport, and has not the least Appearance of any good Intent; or by doing any other such idle Action as cannot but indanger the bodily Hurt of some one or other; or by tilting or playing at Hand sword without the King's Command; or by parrying with naked Swords covered with Buttons at the Points, or with Swords in the Scabbards, or such like rash Sports, which cannot be used without the manifest Hazard of Life, he is guilty of Manslaughter.
- H. P. C. 52, 57. Sect. 10. And if a Man happen to kill another, in the Execution of a malicious and deliberate Purpose to do him a personal Hurt, by wounding or beating him; or in the wilful Commission of any unlawful Act, which necessarily tends to raise Tumults and Quarrels, and consequently cannot but be attended with the Danger of personal Hurt to some one or other; as by committing a Riot, robbing a Park, &c. he shall be adjudged guilty of Murder.
- Kelynge 117. 3 Inst. 56. Kelynge 117. Supra Ch. 27. Sect. 4. H. P. C. 52. Sect. 11. And a *fortiori*, he shall come under the same Construction, who in the Pursuance of a deliberate Intention to commit a Felony, chances to kill a Man, as by shooting at tame Fowl, with an Intent to steal them, &c. for such Persons are by no Means favoured, and they must at their Peril take care of the Consequence of their Actions; and it is a general Rule, That where-ever a Man intending to commit one Felony, happens to commit another, he is as much guilty as if he had intended the Felony which he actually commits.
- H. P. C. 32. 44. 3 Inst. 57. Dale. cap. 93. 11 H. 7. 23. a. Bro. Coro. 229. Dale. cap. 97. Sect. 12. Neither shall he be adjudged guilty of a less Crime, who kills another, in doing such a wilful Act, as shews him to be as dangerous as a wild Beast, and an Enemy to Mankind in general; as by going deliberately with a Horse used to strike, or discharging a Gun, among a Multitude of People, or throwing a great Stone or Piece of Timber from a House into a Street, through which he knows that many are passing; and it is no Excuse that he intended no Harm to any one in particular, or that he meant to do it only for Sport, or to frighten the People, &c.
- Vide supra. Ch. 28. S. 23, 24. H. P. C. 40, 42. S. F. G. 15. Sect. 13. And now I am to consider Homicide *se defendendo*, which seems to be where one, who has no other possible Means of preserving his Life from one who combats with him on a sudden Quarrel, or of defending his Person from one who attempts to beat him, (especially if such Attempt

Attempt be made upon him in his own House,) kills the Person by whom he is reduced to such an inevitable Necessity.

*Señ. 14.* And not only he who on an Assault retreats to a Wall, or some such Streight, beyond which he can go no farther, before he kills the other, is judged by the Law to act upon unavoidable Necessity: But also he who being assaulted in such a Manner, and in such a Place, that he cannot go back without manifestly indangering his Life, kills the other without retreating at all.

Bro. Coro.  
125.  
43 Aff. 37.  
3 Inst. 56.  
H. P. C. 41.

*Señ. 15.* And notwithstanding a Person who retreats from an Assault to the Wall, give the other Wounds in his Retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of Homicide *se defendendo* only.

H. P. C. 41.  
Crom. 28.  
S. P. C. 15. a.

*Señ. 16.* And an Officer who kills one that resists him in the Execution of his Office, and even a private Person, that kills one who feloniously assaults him in the Highway, may justify the Fact without ever giving back at all.

H. P. C. 41.  
3 Inst. 56.  
Crom. 28. a.  
Vide supra.  
Ch. 28. S. 11.

*Señ. 17.* According to some good Opinions, even he who gives another the first Blow on a sudden Quarrel, if he afterwards do what he can to avoid killing him, is not guilty of Felony; yet such a Person seems to be too much favoured by this Opinion, inasmuch as the Necessity to which he is at last reduced, was at the first so much owing to his own Fault. And it is now agreed, That if a Man strike another upon Malice Prepenſe, and then fly to the Wall, and there kill him in his own Defence, he is guilty of Murder.

S. P. C. 15. a.  
Crom. 28. a.

Dalt. cap. 98.

Kelvng 58.  
H. P. C. 42.  
Dalt. cap. 98.

*Señ. 18.* Thus far of each kind of excusable Homicide distinctly considered, and now I am to consider those Properties wherein they both agree.

*Señ. 19.* And first it seems clear, That neither of these Homicides are Felonies, because they are not accompanied with a felonious Intent, which is necessary in every Felony.

3 Inst. 56.

2 Inst. 149.

Fitz. coro.

116.

11 H. 4. 93.

Pl. 54.

Bro. coro. 80.

15 Aff. Pl. 7.

vide infra.

S. 24.

*Sect. 20.* And from hence it seems plainly to follow, That they were never punishable with Loss of Life: And the same also farther appears from the Writ *de Odio & Atia*, by Vertue whereof, if any Person committed for killing another, were found guilty of either of these Homicides, and no other Crime, he might be bailed; and indeed it seems to be against natural Justice to condemn a Man to Death, for what is owing rather to his Misfortune than his Fault.

*Sect. 21.* It is true indeed, That some of our best Authors have argued from the Statute of *Marlbridge*, ch. 26. which enacts, That *Murdrum de cætero non adjudicetur, ubi Infortunium tantummodo adjudicatum est, &c.* that before this Statute Homicides by Misadventure, or *se defendendo*, were adjudged Murder, and consequently punished by Death.

2 Inst. 56.

S. P. C. 16 C.

*Sect. 22.* But to this it may be answered, That Murder in those Days, signified only the private killing of a Man by one, who was neither seen nor heard by any Witness, for which the Offender, if found, was to be tried by Ordeal, and if he could not be found, the Town in which the Fact was done, was to be amerced sixty six Marks, unless it could be proved that the Person killed was an *Englishman*; for otherwise it was presumed that he was a *Dane* or *Norman*, who in those Days were often privately made away by the *English*. And it being a Doubt whether Homicide by Misadventure, &c. were to be esteemed Murder in this Sense, it seems to have been the chief Intent of the Makers of this Statute to settle this Question.

Bract. 134 b.

Kelvng 121.

Bract. 135. a.



- H.P.C. 98. 99. Sect. 23. II. However it is certain, That notwithstanding neither of these Offences be Felonies, yet a Person guilty of them is not bailable by Justices of Peace, but must be committed till the next coming of the Justices of Eyre or Gaol-Delivery.
- 3 Inst. 315.  
Dalc. cap. 98.
- Regist. 133. b. Sect. 24. Indeed anciently a Person, committed for the Death of a Man, might sue out the Writ *de Odio & Atia*, which by *Magna Charta* 26. is grantable without Fee; and if thereon, by an Inquest taken by the Sheriff, he were found to have done the Fact by Misadventure, or *se defendendo*, he might be mainprized by twelve Men, upon the Writ *de ponendo in Ballium*. But such Writs and Enquiries were taken away by the Statute of *Gloucester*, 9 and 28 *Ed. 3. 9.* And though perhaps they were again revived by 42 *Ed. 3. 1.* which makes all Statutes, contrary to *Magna Charta*, void; yet at this Day they seem to be obsolete, and indeed useless, inasmuch as the Party may probably be sooner delivered in the usual Course, by the coming of the Justices of Gaol-Delivery.
- 2 Inst. 42, 315.  
9 Co. 56.  
4 Inst. 182.  
Brañ. 123.  
Fleta B. 1.  
Ch. 25.
- S. P. C. 77. G. Sect. 25. III. It is also agreed, That no one can excuse the killing another, by setting forth in a special Plea, that he did it by Misadventure, or *se defendendo*, but that he must plead Not guilty, and give the special Matter in Evidence. And that where-ever a Person is found guilty of such Homicide, either upon a special Indictment for the same, or by a Verdict setting forth the Circumstances of the Case on a general Indictment of Murder or Homicide, he shall be discharged out of Prison upon Bail and forfeit his Goods: But that upon removing the Record by *Certiorari* into Chancery, he shall have his Pardon of Course, without staying for any Warrant from the King to that Purpose, as shall be more fully shewn. B. 2. Ch. 37. S. 1.
- 2 Inst. 43, 315.  
9 Co. 56.  
Co. Bail and Mainprize, c. 10.  
Vide supra.  
Ch. 28. S. 3.
- 4 H. 7. 2. a.  
Kellw. 53. a.  
108. b.  
2 Inst. 316.  
S. P. C. 15. b.  
16. b.  
Fitz. coro.  
297, 354, 361.  
Dalc. cap. 96.  
98.  
F. N. B. 246.  
C. H.

## C H A P. XXX.

## Of Manslaughter.

**H**omicide against the Life of another, amounting to Felony, is either with or without Malice.

- 3 Inst. 55, 57. Sect. 1. That which is without Malice is called Manslaughter, or sometimes Chance-medley, by which we understand such killing as happens either on a sudden Quarrel, or in the Commission of an unlawful Act, without any deliberate Intention of doing any Mischief at all.
- Dalc. cap. 94.  
H. P. C. 56, 57.
- H. P. C. 217. Sect. 2. And from hence it follows, That there can be no Accessaries to this Offence before the Fact, because it must be done without Premeditation.
- B. 2. Ch. 29.  
S. 24.

Sect. 3. But the Learning relating to this Head being for the most part co-incident with that of others, it will be superfluous to enlarge on it here; and therefore I shall refer the Reader to other Chapter s for the particular Case, as to the following Chapter of Murder, from Section 21 to 32. for those concerning Duelling; and to the said Chapter, Sections 47, 48, 49 and to Chapter 28. Sections 14, 15. for such as happen in a Riot, &c. and to Chapter 29 from Section 6 to Section 13. for such as fall out in the Execution of a rash, unlawful Action.

Sect. 4.

*Sett.* 4. But there is a particular kind of Manslaughter proper to be considered here, from which the Benefit of the Clergy is taken away by *1 Jac. 1, 8. Where any Person shall stab or thrust any Person or Persons that hath not then any Weapon drawn, or that hath not then first striken, the Party which shall so stab or thrust, so as the Person or Persons so stabbed or thrust, shall thereof die within the Space of six Months then next following, although it cannot be proved that the same was done of Malice fore-thought.*

*Sett.* 5. It is generally holden, That this Statute is but declarative of the Common Law, and in the Construction thereof, the following Points have been resolved. 1 Bull. 87. Kelynge 55.

*Sett.* 6. I. That where-ever a Person who happens to kill another, was struck by him in the Quarrel before he gave the mortal Wound, he is out of the Statute, though he himself gave the first Blow. 1 Jon. 240. Vide 3 Lev. 266.

*Sett.* 7. II. That he only who actually gives the Stroke, and not any of those who may be said to do it by Construction of Law, as being present, and aiding and abetting the Fact, are within the Statute, from whence it follows, That if it cannot be proved by whom the Stroke was given, none can be found guilty within the Statute. H. P. C. 58. Sec B. 2. Ch. 33. S. 98. Salk. 542, 543. Aley 44.

*Sett.* 8. III. That the Killing of a Man with a Hammer, or such like Instrument, which cannot come properly under the Words Thrust, or Stab, is not a Killing within the Statute; but it seems that the discharging a Pistol, or throwing a Pot, or other dangerous Weapon at the Party, is within the Equity of the Words, *having a Weapon drawn*; for Penal Statutes are construed strictly against the Subject, and favourably and equitably for him. 1 Jones 432. 3 Lev. 266.

*Sett.* 9. IV. That there is no need to lay the Conclusion of the Indictment *contra formam Statuti*, because the Statute makes no new Offence, but only takes away the Privilege of the Clergy from an old one, and leaves it to the Judgment of the Common Law; from whence it follows, That a Person indicted on the Statute, may be found guilty of Manslaughter generally. Also from the same Ground it hath been resolved, That if both an Indictment lay, and a Verdict also find, a Fact to be *contra formam Statuti* which cannot possibly be so, as that *A.* and *B.* aided and abetted *C. contra formam Statuti*, yet neither such Indictment nor Verdict are void, but *A.* and *B.* shall be dealt with in the same Manner as they should have been, if those Words *contra formam Statuti* had been wholly omitted, because the Substance of the Indictment being found, they may be rejected as Surplus and Senseless: And, *a fortiori*, therefore it is certain, that they shall do no Hurt to an Indictment or Verdict containing a Fact which may be within the Statute. H. P. C. 58. Sec B. 2. Ch. 25. S. 117. H. P. C. 58. 266. Aley 47. Cro. Jac. 283.

*Sett.* 10. V. How far the Words *contra formam Statuti*, supply a Defect in an Indictment, which does not specially pursue the Statute, See B. 2. Ch. 25. S. 116.

## C H A P. XXXI.

## Of Murder.

**H**omicide against the Life of another, amounting to Felony with Malice, is either Murder or Petit Treason.

*Seçt.* 1. And first of Murder, which antiently signified only the private Killing of a Man, for which by Force of a Law introduced by King *Canutus* for the Preservation of his *Danes*, the Town or Hundred where the Fact were done, was to be amerced to the King, unless they could prove that the Person slain were an *Englishman*, (which Proof was called *Engleschire*) or could produce the Offender, &c. And in those Days, the open wilful Killing of a Man through Anger or Malice, &c. was not called Murder, but voluntary Homicide.

Braçt. 134. b.  
135. a.  
Kelynge 121.  
&c.

Braçt. 121. a.

S. P. C. 18. b.  
19. a.

*Seçt.* 2. But the said Law concerning *Engleschire* having been abolished by 14 *Ed.* 3. 4. the Killing of any *Englishman* or Foreigner through Malice prepenſe, whether committed openly or secretly, was by Degrees called Murder; and 13 *Ric.* 2. 1. which restrains the King's Pardon in certain Cafes, does in the Preamble, under the general Name of Murder, include all ſuch Homicide as ſhall not be pardoned without ſpecial Words; and in the Body of the Act expreſſes the ſame by Murder, or Killing by Await, Affault, or Malice prepenſed. And doubtleſs the Makers of 23 *H.* 8. cap. 1. which excluded all wilful Murder of Malice prepenſe from the Benefit of the Clergy, intended to include open, as well as private, Homicide within the Word Murder.

*Seçt.* 3. By Murder therefore at this Day we underſtand, the wilful Killing of any Subject whatſoever, through Malice fore-thought, whether the Perſon ſlain be an *Englishman* or Foreigner.

And for the better underſtanding hereof, I ſhall examine the following Particulars :

1. In what Cafes a Man may be ſaid to kill another.
2. In what Places ſuch Killing is within the Cognizance of the Law.
3. Who are ſuch Perſons by killing of whom a Man may commit Murder.
4. What Killing ſhall be adjudged to be Malice prepenſe, or Murder.

*Seçt.* 4. As to the firſt Point, *viz.* In what Cafes a Man may be ſaid to kill another; not only he who by a Wound or Blow, or by Poiſoning, Strangling, or Famifhing, &c. direçtly cauſes another's Death, but alſo in many Cafes, he who by wilfully and deliberately doing a Thing which apparently endangers another's Life, thereby occaſions his Death, ſhall be adjudged to kill him.

3 Inſt. 48.  
H. P. C. 53.  
Palm. 54<sup>8</sup>.

Crom. 24. b.  
Pult. 122. a. b.  
Dalt. cap. 93.

*Seçt.* 5. And ſuch was the Caſe of him who carried his ſick Father, againſt his Will, in a cold froſty Seaſon, from one Town to another, by Reaſon whereof he died.

*Sett.* 6. Such also was the Case of the Harlot, who being delivered of a Child, left it in an Orchard covered only with Leaves, in which Condition it was struck by a Kite, and died thereof.

*Gram.* 24. b.  
*Dal. cap.* 93.

*Sett.* 7. And in some Cases a Man shall be said, in the Judgment of the Law, to kill one who is in Truth actually killed by another, or by himself; as where one by Duress <sup>a</sup> of Imprisonment compels a Man to accuse an innocent Person, who on his Evidence is condemned and executed; or where one incites a <sup>b</sup> Madman to kill himself or another; or where one lays <sup>c</sup> Poison, with an Intent to kill one Man, which is afterwards accidentally taken by another, who dies thereof.

<sup>a</sup> S. P. C. 36. c.  
<sup>3</sup> *Inft.* 91.  
<sup>b</sup> *Dal. cap.* 93.  
*Supra* Ch. 1.  
*S.* 7.  
<sup>c</sup> *Plow. Com.*  
474.  
<sup>9</sup> *Go.* 81.

*Sett.* 8. Also he who wilfully neglects to prevent a Mischief, which he may, and ought to provide against, is, as some have said, in Judgment of the Law, the actual Cause of the Damage which ensues; and therefore if a Man have an Ox or Horse, which he knows to be mischievous, by being used to gore or strike at those who come near them, and do not tie them up, but leave them to their Liberty, and they afterwards kill a Man, according to some Opinions, the Owner may be indicted, as having himself feloniously killed him; and this is agreeable to the *Mosaic* Law. However, as it is agreed by all, such a Person is certainly guilty of a very gross Misdemeanour.

*Ritz Corone*  
311.  
*S. P. C.* 17. a.  
*Gram.* 24. b.  
*Dal. cap.* 93.  
*Pult.* 122. b.  
*H. P. C.* 53.

*Sett.* 9. Also it is agreed, That no Person shall be adjudged by any Act whatever to kill another, who doth not die thereof within a Year and a Day after; in the Computation whereof, the whole Day on which the Hurt was done shall be reckoned the first.

*Exodus* c. 21.  
v. 29.

*Sett.* 10. But if a Person hurt by another, die thereof within a Year and a Day, it is no Excuse for the other that he might have recovered, if he had not neglected to take care of himself.

*H. P. C.* 55.  
*Pult.* 123. a.  
*Dal. cap.* 97.  
*S. P. C.* 21. d.

*Sett.* 11. As to the second Point, *viz.* In what Places such killing is within the Conuance of the Law, it seems, That the Killing of one who is both wounded and dies out of the Realm, or wounded out of the Realm, and dies here, cannot be determined at Common Law, because it cannot be tried by a Jury of the Neighbourhood where the Fact was done. But it is agreed, That the Death of one who is both wounded and dies beyond Sea; and it is said by some, That the Death of him who dies here of a Wound given there, may be heard and determined before the Constable and Marshal, according to the Civil Law, if the King please to appoint a Constable. And it seemeth also to be clear, That such a Fact being examined by the Privy Council, may by Force of 33 *H.* 8. 23. be tried (in Relation to the principal Offenders, but not as to the Accessaries) before Commissioners appointed by the King in any County in *England*.

<sup>3</sup> *Inft.* 53.  
*Kelynge* 26.  
<sup>1</sup> *Keb.* 17.

*Sett.* 12. A Murder at Sea was anciently cognizable only by the Civil Law, but now by Force of 27 *H.* 8. 4. and 28 *H.* 8. 15. it may be tried and determined before the King's Commissioners in any County of *England* according to the Course of the Common Law; yet the Killing of one who dies at Land of a Wound received at Sea, is neither determinable at Common Law nor by Force of either of these Statutes; but it seems, that it may be tried by the Constable and Marshal, or before Commissioners appointed, in Pursuance of the aforesaid Statute of 33 *H.* 8. 23.

<sup>3</sup> *Inft.* 48.  
<sup>2</sup> *Inft.* 51.  
*Co. Lit.* 75.  
*S. P. C.* 65. a.  
*Bro. Appeal.*  
153.  
*Cro. Car.* 247.  
*B. 2. Ch.* 23.  
*S.* 12.  
<sup>3</sup> *Keb.* 785.  
*Pl.* 34.

*Sett.* 13. It is said by some, That the Death of one who died in one County, of the Wound given in another, was not indictable at all at Common Law, because the Offence was not compleat in either County, and the Jury could enquire only of what happened in their own County. But it hath been holden by others, That if the Corps were carried into

*Con;* 3. *K. b.*  
785. *Pl.* 34.  
<sup>1</sup> *And.* 195.

<sup>3</sup> *Inft.* 48, 49.

<sup>1</sup> *Leon.* 270.  
*H. P. C.* 54.  
<sup>3</sup> *Inft.* 48.

<sup>3</sup> *Inft.* 48, 49.

*Bro. Coro.*  
140, 141, 147.  
*Indictm.* 13.

<sup>45</sup>  
*S. P. C.* 90. c.  
the *H.* 7. 10. a

Finch. Law. 411.  
S. P. C. 182.  
c. 15 Aff Pl. 9.  
Bro. Appeal.  
3, 80, 83, 85,  
149.

the County where the Stroke was given, the whole might be enquired of by a Jury of the same County: And it is agreed, That an Appeal might be brought in either County, and the Fact tried by a Jury returned jointly from each: And at this Day by Force of 2 and 3 Ed. 6. 24. the whole is triable by a Jury of the County wherein the Death shall happen, on an Indictment found, or Appeal brought, in the same County.

Gro. Car. 247.  
1 Jon. 255.  
1 Lev. 118.  
Litch. 12. 118.

*Seçt.* 14. Also by Force of 26 H. 8. 6. a Murder in *Wales* may be enquired of in an adjoining *English* County, but Appeals must still be brought in the proper County.

3 Inst. 50.

*Seçt.* 15. As to the third Point, *viz.* Who are such Persons by killing of whom a Man may commit Murder; it is agreed, That the malicious Killing of any Person, whatsoever Nation or Religion he be of, or of whatsoever Crime attainted, is Murder.

Brañt. 121.  
S. P. C. 21.  
Bro. Coro. 91.  
H. P. C. 53.  
Fitz. Coro.  
183, 263  
23 Aff Pl. 94.  
B. 2. Ch. 29.  
S. 18.  
3 Inst. 50.  
3 Aff. 2.  
Bro. Coro. 68.  
Dist. cap. 93.  
Exodus c. 21.  
v. 22, 23.

*Seçt.* 16. And it was anciently holden, That the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child, was Murder: But at this Day, it is said to be a great Misprision only, and not Murder, unless the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions to the contrary. And in this Respect also, the Common Law seems to be agreeable to the *Mosaical*, which as to the Purpose is thus expressed, *If Men strive and hurt a Woman with Child, so that her Fruit depart from her, and yet no Mischief follow, he shall be surely punished, according as the Woman's Husband will lay upon him, and he shall pay as the Judges determine; And if any Mischief follow, then thou shalt give Life for Life.*

Dy. r. 186.  
3 Inst. 51.

*Seçt.* 17. It seems also agreed, That where one counsels a Woman to kill her Child when it shall be born, who afterwards does kill it in Pursuance of such Advice, he is an Accessary to the Murder.

Kelynge 127.

*Seçt.* 18. As to the fourth Point, *viz.* What Killing shall be adjudged of Malice prepense or Murder; it is to be observed, That any formed Design of doing Mischief may be called Malice; and therefore that not such Killing only as proceeds from premeditated Hatred or Revenge against the Person killed, but also in many other Cases, such as is accompanied with those Circumstances that shew the Heart to be perversly wicked, is adjudged to be of Malice prepense, and consequently Murder.

Kelynge 130.

*Seçt.* 19. And according to this Notion, I shall consider,  
1. Such Murder as is occasioned through an express Purpose to do some personal Injury to him, who is slain in particular, which seems to be most properly called express Malice.

Kelynge 129,  
130.

2. Such as happens in the Execution of an unlawful Action, principally intended for some other Purpose, and not to do a personal Injury to him in particular who is slain, in which Case the Malice seems to be most properly said to be implied.

*Seçt.* 20. As to Murder in the first Sense, such Acts as shew a direct and deliberate Intent to kill another, as Poisoning, Stabbing, and such like, are so clearly Murder, that I know not any Questions relating thereto worth explaining: But the Cases, which have born Dispute, have generally happened in the following Instances;

1. In Duelling.
2. In killing another without any Provocation, or but upon a slight one.
3. In killing one whom the Person killing intended to hurt in a less Degree.

Bulk. 86, 87.

*Seçt.* 21. As to the first Instance of this Kind, it seems agreed, That where-ever two Persons in cool Blood meet and fight on a precedent Quarrel,

rel, and one of them is killed, the other is guilty of Murder, and cannot help himself by alledging that he was <sup>a</sup> first struck by the Deceased; or that he had often <sup>b</sup> declined to meet him, and was prevailed upon to do it by his Importunity; or that it was his only Intent to vindicate his Reputation; or that he meant not to kill, but only to disarm, his Adversary: For since he deliberately engaged in an Act highly unlawful, in Defiance of the Laws, he must at his Peril abide the Consequences thereof.

*Seç.* 22. And from hence it clearly follows, That if two Persons quarrel over Night, and appoint to fight the next Day; or quarrel in the Morning, and agree to fight in the Afternoon; or such a considerable Time after, by which, in common Intendment, it must be presumed that the Blood was cooled, and then they meet and fight, and one kill the other, he is guilty of Murder.

*Seç.* 23. And where ever it appears from the whole Circumstances of the Case, That he who kills another on a sudden Quarrel, was Master of his Temper at the Time, he is guilty of Murder; as if after the Quarrel he fall into other Discourse and talk calmly thereon; or perhaps if he have so much Consideration, as to say, That the Place where in the Quarrel happens is not convenient for Fighting; or that if he should fight at present, he should have the Disadvantage by reason of the Height of his Shoes, &c.

*Seç.* 24. And if *A.* on a Quarrel with *B.* tell him that he will not strike him, but that he will give *B.* a Pot of Ale to strike him, and thereupon *B.* strike, and *A.* kill him, he is guilty of Murder; for he shall not elude the Justice of the Law by such a Pretence to cover his Malice.

*Seç.* 25. In like Manner if *B.* challenge *A.* and *A.* refuse to meet him, but in order to evade the Law tell *B.* that he shall go the next Day to such a Town about his Business, and accordingly *B.* meet him the next Day in the Road to the same Town, and assault him, whereupon they fight, and *A.* kills *B.* he seems guilty of Murder, unless it appear by the whole Circumstances that he gave *B.* such Information accidentally, and not with a Design to give him an Opportunity of Fighting.

*Seç.* 26. And at this Day it seems to be settled, That if a Man assault another with Malice prepense, and after be driven by him to the Wall, and kill him there in his own Defence, he is guilty of Murder, in respect of his first Intent.

*Seç.* 27. And it hath been adjudged, That even upon a sudden Quarrel, if a Man be so far provoked by any bare Words or Gestures of another, as to make a Push at him with a Sword, or to strike at him with any other such Weapon as manifestly indangers his Life, before the other's Sword is drawn, and thereupon a Fight ensue, and he who made such Assault kill the other, he is guilty of Murder; because that by assaulting the other in such an outrageous Manner, without giving him an Opportunity to defend himself, he shewed that he intended not to fight with him, but to kill him, which violent Revenge is no more excused by such a slight Provocation, than if there had been none at all.

*Seç.* 28. But it is said, That if he who draws upon another in a sudden Quarrel, make no Pass at him till his Sword is drawn, and then fight with him, and kill him, he is guilty of Manslaughter only, because that by neglecting the Opportunity of killing the other before he was on

<sup>a</sup> 2 Bull. 147.  
Crom. 22. b.  
<sup>b</sup> 1 Rol. Rep.  
360.  
3 Bull. 171.  
H. P. C. 48.

3 Inst. 51.  
H. P. C. 48.  
Kelynge 56.  
1 Lev. 180.

Kelynge 56.  
1 Sid. 177.

1 Lev. 180.

H. P. C. 48.

Con. Crom.  
22. b.  
H. P. C. 48.

Crom. 22. b.  
Dalt. cap. 97.  
H. P. C. 47.  
Kelynge 58,  
129.

Crom 23. a. b.  
Dalt. cap. 97.  
Kelynge 61. and  
Mawgridge's  
Case.

Kelynge 55.  
61. 131.

his Guard, and in a Condition to defend himself, with like Hazard to both, he shew'd that his Intent was not so much to kill, as to combat with the other, in Compliance with those common Notions of Honour, which prevailing over Reason, during the Time that a Man is under the Transports of a sudden Passion, so far mitigate his Offence in Fighting, That it shall not be adjudged to be of Malice prepense.

<sup>a</sup> Rol. Re. 461.

H. P. C. 48.  
<sup>3</sup> Inst. 51.

*Sect. 29.* And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a Weapon, and go into the Field, and there one kill the other, he is guilty of Manslaughter only, because he did it in the Heat of Blood.

Crom. 23. a.  
Dalt. cap. 93.  
H. P. C. 49.  
<sup>1</sup> Rol. Rep. 360.  
<sup>3</sup> Bull. 171.

*Sect. 30.* And such an Indulgence is shewn to the Frailties of humane Nature, That where two Persons who have formerly fought on Malice, are afterwards to all Appearance reconciled, and fight again on a fresh Quarrel, it shall not be presumed that they were moved by the old Grudge, unless it appear by the whole Circumstances of the Fact.

H. P. C. 51.  
Dalt. cap. 93.

*Sect. 31.* But the Law so far abhors all Duelling in cold Blood, That not only the Principal who actually kills the other, but also his Seconds are guilty of Murder, whether they fought or not; and some have gone so far as to hold, That the Seconds of the Person killed are also equally guilty, in Respect of that Countenance which they give to their Principals in the Execution of their Purpose, by accompanying them therein, and being ready to bear a Part with them: But some have thought this rather too severe a Construction to make a Man by such Reasoning the Murderer of his Friend, to whom he was so far from intending any Mischief, that he was ready to hazard his own Life in his Quarrel.

H. P. C. 51.

*Sect. 32.* And now I am to consider the second Instance of this kind, viz. Such Murder as happens in killing another without any Provocation, or but upon a slight one; as to which it is to be observed, That where-ever it appears that a Man killed another, it shall be intended, *prima facie*, that he did it maliciously, unless he can make out the contrary, by shewing that he did it on a sudden Provocation, &c.

Kelynge 27.

<sup>a</sup> Kelynge 135.  
<sup>2</sup> Rol. Rep. 460, 461.  
<sup>b</sup> Kelynge 131, &c.  
Dalt. cap. 93.  
<sup>c</sup> Cro. El. 779.  
Noy. 171.  
<sup>1</sup> Sid. 277.  
<sup>1</sup> Levin. 180.  
Hob. 121.  
Con. 1 Jon. 432. a.  
Kelynge 131.

*Sect. 33.* Also it seems to be agreed, That no <sup>a</sup> Breach of a Man's Word or Promise, no Trespas either to <sup>b</sup> Lands or Goods, no Affront by bare <sup>c</sup> Words or Gestures, however false or malicious it may be, and aggravated with the most provoking Circumstances, will excuse him from being guilty of Murder, who is so far transported thereby, as immediately to attack the Person who offends him, in such a Manner as manifestly endangers his Life, without giving him Time to put himself upon his Guard, if he kills him in Pursuance of such Assault, whether the Person slain did at all fight in his Defence or not; for so base and cruel a Revenge cannot have too severe a Construction.

Kelynge 55,  
61, 131.

Kelynge 61, 136.

Cro. Jac. 296.  
12 Co. 87.

<sup>a</sup> Kelynge 137.

<sup>1</sup> Vent. 158,  
159.

Raym 212.  
<sup>2</sup> Keb. 829.

<sup>b</sup> Kelynge 135.  
<sup>3</sup> Mod. 68.

*Sect. 34.* But if a Person so provoked, had beaten the other only in such a Manner, that it might plainly appear that he meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his Guard, and then in fighting with him had killed him, he had been guilty of Manslaughter only.

*Sect. 35.* And of the like Offence shall he be adjudged guilty, who seeing two Persons fighting together on a private Quarrel, whether sudden or malicious, takes Part with one of them, and kills the other.

*Sect. 36.* Neither can he be thought guilty of a greater Crime, who <sup>a</sup> finding a Man in Bed with his Wife, or being actually <sup>b</sup> struck by him, or pulled by the Nose, or fillipped upon the Forehead, immediately kills him;

him; or <sup>c</sup> who happens to kill another in a Contention for the Wall; or <sup>d</sup> in the Defence of his Person from an unlawful Arrest; or <sup>e</sup> in the Defence of his House from those who claiming a Title to it attempt forcibly to enter it, and to that Purpose shoot at it, &c. or in <sup>f</sup> the Defence of his Possession of a Room in a Publick House, from those who attempt to turn him out of it, and thereupon draw their Swords upon him; in which Case the killing the Assailant hath been holden by some to be justifiable: But it is certain, That it can amount to no more than Manlaughter.

*Sect.* 37. Nor was he judged criminal in a higher Degree, who seeing his Son's Nose bloody, and being told by him, That he had been beaten by such a Boy, ran three Quarters of a Mile, and having found the Boy, beat him with a small Cudgel, whereof he afterwards died.

*Sect.* 38. And now we are come to the third Instance of this kind, *viz.* Such Murder as happens in killing one whom the Person killing, intended to hurt in a less Degree; as to which it is to be observed, That where-ever a Person in cool Blood by way of Revenge, unlawfully and deliberately beats another in such a Manner, that he afterwards dies thereof, he is guilty of Murder, however unwilling he might have been to have gone so far.

*Sect.* 39. Also it seems, That he, who upon a sudden Provocation executeth his Revenge in such a cruel Manner, as shews a cruel and deliberate Intent to do Mischief, is guilty of Murder, if Death ensue; as where the Keeper of a Park finding a Boy stealing Wood, tied him to a Horse's Tail and beat him, whereupon the Horse ran away and killed him.

*Sect.* 40. And now I am to consider the second general Branch of this Head, *viz.* In what Cases such killing shall be adjudged Murder, which happens in the Execution of an unlawful Action, principally intended for some other Purpose, and not to do a personal Injury to him in particular who happens to be slain; and this I shall consider in the following Instances:

1. Where the principal Intention is to commit another Felony.
2. Where the principal Design is to commit a bare Breach of the Peace, not intended against the Person of him who happens to be slain.
3. Where the chief Motive is to assist a third Person.
4. Where the direct Design is to escape from an Arrest.
5. Where the principal Purpose is to usurp an illegal Authority.
6. Where no Mischief is intended at all.

*Sect.* 41. As to the first Particular, *viz.* Such killing as happens in the Execution of an unlawful Action, whereof the principal Intention was to commit another Felony; it seems agreed, That where-ever a Man happens to kill another in the Execution of a deliberate Purpose to commit any Felony, he is guilty of Murder; as where a Person shooting at tame Fowl, with an Intent to steal them, accidentally kills a Man; or where one sets upon a Man to rob him, and kills him in making Resistance; or where a Person shooting at, or fighting with one Man, with a Design to murder him, misses him and kills another.

H. P. C. 57.  
3 Inst. 55.  
Kelynge 137.  
H. P. C. 57.  
Crom. 27. a.  
Kelynge 51.

H. P. C. 48.  
Cro. Jac. 296.  
12 Co. 87.  
1 Vent. 159.

Kelyn, Maw-  
gidge's Case.  
H. P. C. 49.  
50, 51, 52.

Cro. Car. 131.  
1 Jon. 198.  
Palm. 545.  
H. P. C. 49.

H. P. C. 50.  
Kelynge 117.  
H. P. C. 46, 50.  
Dalt. cap. 93.  
Moore 87.  
Pl. com. 101.



*Seçt.* 42. And not only in such Cafes where the very Act of a Perfon, having fuch a felonious Intent, is the immediate Cause of a third Perfon's Death, but alfo where it any Way occasionally caufes fuch a Misfortune, it makes him guilty of Murder; and fuch was the Cafe of the Husband, who gave a poisoned Apple to his Wife, who eat not enough of it to kill her, but innocently, and againft the Husband's Will and Perfwaſion, gave Part of it to a Child who died thereof; fuch alfo was the Cafe of the Wife, who mixed Ratsbane in a Potion ſent by an Apothecary to her Husband, which did not kill him, but afterwards killed the Apothecary, who to vindicate his Reputation taſted it himſelf, having firſt ſtirred it about. Neither is it material in this Cafe, That the ſtirring of the Potion might make the Operation of the Poiſon more forcible than otherwiſe it would have been; for inasmuch as fuch a murderous Intention, which of it ſelf perhaps in ſtrictneſs might juſtly be made puniſhable with Death, proves now in the Event the Cause of the King's loſing a Subject, it ſhall be as ſeverely puniſhed as if it had had the intended Effect, the miſſing whereof is not owing to any want of Malice, but of Power.

Pl. Crom. 473.  
3 Inſt. 51.

9 Co. 81.

*Seçt.* 43. But if one happen to be poisoned by Ratsbane laid in order to deſtroy Vermine, the Perſon by whom he is ſo killed is guilty of Homicide *per infortunium* only, becauſe his Intentions were wholly innocent.

Pl. Crom. 474.  
9 Co. 81. b.

*Seçt.* 44. Alſo if a third Perſon accidentally happen to be kill'd by one engaged in a Combat with another upon a ſudden Quarrel, it ſeems that he who kills him is guilty of Manſlaughter only; but it hath been adjudged, That if a Juſtice of Peace, Conſtable, or Watchman, or even a private Perſon, be killed in endeavouring to part thoſe whom he ſees fighting, the Perſon by whom he is killed, is guilty of Murder; and that he cannot excuſe himſelf by alledging that what he did was in a ſudden Affray in the Heat of Blood, and through the Violence of Paſſion; for he who carries his Reſentments ſo high, as not only to execute his Revenge againſt thoſe who have affronted him, but even againſt ſuch as have no otherwiſe offended him but by doing their Duty, and endeavouring to reſtrain him from breaking through his, ſhews ſuch an obſtinate Contempt of the Laws, that he is no more to be favoured, than if he had acted in cool Blood.

H. P. C. 50.

H. P. C. 45.  
3 Inſt. 52.  
Dal. cap. 93.  
Fitz. coro.  
180.  
Savil. 67.  
Kelynge 66.  
22 Aff. 71.  
H. P. C. 50.  
4 Co. 40. b.  
9 Co. 68.  
Crom. 25. a. b.

*Seçt.* 45. Yet it hath been reſolved, That if the third Perſon ſlain in ſuch a ſudden Affray do not give Notice for what Purpose he comes, by commanding the Parties in the King's Name to keep the Peace, or otherwiſe manifeſtly ſhewing his Intention to be not to take Part in the Quarrel, but to appeaſe it, he who kills him is guilty of Manſlaughter only, for he might ſuſpect that he came to ſide with his Adverſary.

Kelynge 66.

*Seçt.* 46. As to the ſecond Inſtance of this kind, *viz.* Such killing as happens in the Execution of an unlawful Action, where the principal Deſign is to commit a bare Breach of the Peace, not intended againſt the Perſon of him who happens to be ſlain; it ſeems clear, That regularly where divers Perſons reſolve generally to reſiſt all Oppoſers in the Commiſſion of any Breach of the Peace, and to execute it in ſuch a Manner as naturally tends to raiſe Tumults and Affrays, as by committing a violent Deſſeiſin with great Numbers of People, hunting in a Park, &c. and in ſo doing happen to kill a Man, they are all guilty of Murder; for they muſt at their Peril abide the Event of their Actions, who wilfully engage in ſuch bold Diſturbances of the Publick Peace, in open Oppoſition to, and Deſiance of, the Juſtice of the Nation.

Savil. 67.  
Moore 86.  
Palm 35.  
Crom. 24. b.  
25. a.  
H. P. C. 47.  
5 Mod. 289.  
Dyer 128.  
Pl. 60.  
S. P. C. 17. b.

*Sect. 47.* Yet where divers Rioters having forcible Possession of a House, afterwards killed the Person whom they had ejected, as he was endeavouring in the Night forcibly to regain the Possession, and to fire the House, they were adjudged guilty of Manslaughter only, notwithstanding they did the Fact in Maintenance of a deliberate Injury, perhaps for this Reason, because the Person slain was so much in Fault himself.

Crom. 28. b.  
H. P. C. 56.

*Sect. 48.* But if in such, or any other Quarrel, whether it were sudden or premeditated, a Justice of Peace, Constable, or Watchman, or even a private Person, be slain in endeavouring to keep the Peace and suppress the Affray, he who kills him is guilty of Murder; for notwithstanding it was not his primary Intention to commit a Felony, yet inasmuch as he persists in a less Offence with so much Obstinacy, as to go on in it to the Hazard of the Lives of those who no otherwise offend him, but by doing their Duty in Maintenance of the Law, which therefore affords them its more immediate Protection, he seems to be in this Respect equally criminal, as if his Intention had been to commit a Felony.

H. P. C. 45.  
Dalt. cap. 93.  
3 Inst. 52.  
Kelynge 66.  
22 Aff. 71.  
4 Co. 40. b.  
9 Co. 68.  
Crom. 25.

*Sect. 49.* As to the third Instance of this kind, viz. such Killing, as happens in the Execution of an unlawful Action, the principal Motive whereof was to assist a third Person, it seems clear, That if a Master maliciously intending to kill another take his Servants with him, without acquainting them with his Purpose, and meet his Adversary and fight with him, and the Servants seeing their Master engaged take part with him, and kill the other, they are guilty of Manslaughter only, but the Master of Murder.

Pl. Crom. 100,  
101. a.  
Crom. 23.  
Dalt. cap. 93.  
H. P. C. 51,  
52.

*Sect. 50.* And therefore it follows, *a fortiori*, That if a Man's Servant, or Friend, or even a Stranger, coming suddenly, see him fighting with another and side with him, and kill the other; or seeing his Sword broken send him another, wherewith he kills the other, he is guilty of Manslaughter only.

Crom. 26. b.  
H. P. C. 57.  
Dalt. cap. 94.  
1 Rol. Rep.  
407. 408.  
3 Bull. 206.  
H. P. C. 52.

*Sect. 51.* Yet in this very Case if the Person killed were a Bailiff, or other Officer of Justice, resisted by the Master, &c. in the due Execution of his Duty, such Friend or Servant, &c. are guilty of Murder, whether they knew that the Person slain were an Officer or not.

Kelynge 67,  
86, 87.

*Sect. 52.* But perhaps it may be objected, That in this last Case there seems to be no more Malice than in the former; and such third Person being wholly ignorant that the Party killed was an Officer, seems to be no more in Fault than if he had been a private Person.

*Sect. 53.* To this it may be answered, That all Fighting is highly unlawful, and that he, who on a sudden seeing Persons engaged in it, is so far from endeavouring to part them, as every good Subject ought, that he takes part with one Side, and fights in the Quarrel, without knowing the Cause of it, shews a high Contempt of the Laws, and a Readiness to break through them on a small Occasion, and must at his Peril take heed what he does, and consequently might perhaps in strict Justice be adjudged in the foregoing Cases to act with Malice, which doth not always signify a particular ill Will against the Person killed, as appears by many of the above mentioned Cases; and though such Person be favoured in respect of the Suddenness of the Occasion, where both the Quarrel and the Persons are private, yet he must not expect such Indulgence, where the Fight, in which he so rashly engages, was begun in open Opposition to the Justice of the Nation, and a Person happens to be killed thereby who engaged in Maintenance thereof, and on that Account is under its more particular Care; and may justly challenge, that his

1 Sid. 160.  
Noy. 50.

Plow Com.  
100.

Opposers be made Examples to deter others from joining in such unwarrantable Quarrels.

Kelynge 60,  
137.  
Crom. 27. a.  
Dent's Case  
lately ad-  
judged.

*Sect. 54.* But if a Man seeing another arrested and restrained from his Liberty, under Colour of a Preſs-Warrant or Civil Proceſs, &c. by thoſe who in Truth have no ſuch Authority, happen to kill ſuch Trefpaſſers in reſcuing the Perſon oppreſſed, he ſhall be adjudged guilty of Manſlaughter only, notwithstanding the injured Perſon ſubmitted to them, and endeavoured not to reſcue himſelf, and the Perſon who reſcued him, did not know that he was illegally arreſted; for ſince in the Event it appears, that the Perſons ſlain were Trefpaſſers, covering their Violence with a Shew of Juſtice, he who kills them is indulged by the Law, which in theſe Caſes judges by the Event, which thoſe who engage in ſuch unlawful Actions muſt abide at their Peril.

Dal. cap. 97.  
H. P. C. 45.  
Crom. 24. a.

*Sect. 55.* As to the fourth Inſtance of this kind, *viz.* Such Killing as happens in the Execution of an unlawful Action, whereof the direct Deſign was to eſcape from an Arreſt, it ſeems to be agreed, That whoever kills a Sheriff, or any of his Officers, in the lawful Execution of a Civil Proceſs, as on arreſting a Perſon upon a *Capias*, &c. is guilty of Murder.

9 Co. 68.  
Cro. Jac. 280.  
9 Co. 66.  
Cro. Jac. 280.  
B. 2. Ch. 13.  
S. 28.  
6 Co. 68. b.  
69. a.  
Cro. Jac. 486.  
9 Co. 69.

*Sect. 56.* Neither is it any Excuse to ſuch a Perſon that the Proceſs was erroneous, (for it is not void by being ſo,) or that the Arreſt was in the Night, or that the Officer did not tell him for what cauſe he arreſted him, and out of what Court, (which is not neceſſary when prevented by the Party's Reſiſtance;) or that the Officer did not ſhew his Warrant, which he is not bound to do at all, if he be a Bailiff commonly known, nor without a Demand, if he be a ſpecial one.

Yet the Killing of an Officer in ſome Caſes will be Manſlaughter only, as,

Cro. Car. 372.  
1 Jon 346.  
1 Lev. 91.  
12 Co. 49.

*Sect. 57.* I. Where the Warrant by which he acts gives him no Authority to arreſt the Party; as where a Bailiff arreſts *J. S.* a Baronet, who never was knighted, by Force of a Warrant to arreſt *J. S.* Knight.

H. P. C. 46.

*Seſt. 58.* II. Where a good Warrant is executed in an unlawful Manner; as if a Bailiff be killed in breaking open a Door or Window to arreſt a Man; or perhaps if he arreſt one on a *Sunday* ſince *29 Ca. 2. 7.* by which all ſuch Arreſts are made unlawful.

Supra Ch. 28.  
S. 5.

*Sect. 59.* As to the fifth Inſtance of this kind, *viz.* Such Killing as happens in the Execution of an unlawful Action, whereof the principal Purpoſe was to uſurp an illegal Authority, it ſeems clear, That if Perſons take upon them to put others to Death, either by Vertue of a new Commiſſion wholly unknown to our Laws, or by Vertue of any known Jurisdiction, which clearly extends not to Caſes of this Nature; as if the Court of Common Pleas cauſe a Man to be executed for Treason or Felony, or the Court Martial, in Time of Peace, put a Man to Death by the Martial Law, both the Judges and Officers are guilty of Murder.

H. P. C. 46.

*Sect. 60.* But where Perſons act by Vertue of a Commiſſion, which if it were ſtrictly regular would undoubtedly give them full Authority, but happens to be defective only in ſome Point of Form, it ſeems that they are no way criminal.

Vide ſupra.  
Ch. 29 S. 12.

*Seſt. 61.* As to the ſixth Inſtance of this kind, *viz.* Such Killing as happens in the Execution of an unlawful Action, where no Miſchief was intended at all, it is ſaid, That if a Perſon happen to occaſion the Death of another, Inadviſedly doing any idle wanton Action, which cannot but be attended with the manifeſt Danger of ſome other; as by riding with a Horſe

Horfe known to be used to kick among a Multitude of People, by which he means no more than to divert himself by putting them into a Fright, he is guilty of Murther.

*Señ. 62.* Also it has been anciently holden, That if a Person not duly authorized to be a Physician or Surgeon, undertake a Cure, and the Patient die under his Hand, he is guilty of Felony; but inasmuch as the Books wherein this Opinion is holden, were written before the Statute of 23 H. 8. which first excluded such felonious killing, as may be called willful Murther of Malice prepenſe, from the Benefit of Clergy, it may be well questioned, whether such Killing shall be said to be of Malice prepenſe, within the Intent of that Statute; however it is certainly highly rash and presumptuous for unskilfull Persons to undertake Matters of this Nature; and indeed the Law can not be well too severe in this Case, in order to deter ignorant People from endeavouring to get a Livelihood by such Practice, which can not be followed without the manifest Hazard of the Lives of those who have to do with them; But surely the charitable Endeavours of those Gentlemen who study to qualify themselves to give Advice of this Kind, in order to assist their poor Neighbours, can by no Means deserve so severe a Construction from their happening to fall into some Mistakes in their Prescriptions, from which the most learned and experienced can not always be secure.

S. P. C. 16. b.  
Pult. 22. b.  
Crom. 27.  
43 Ed. 3 33. b.  
Fitz. Coron.  
(163)

See Dal. ch. 93.

*For other Particulars relating to this Head, see the Chapter of Principals and Accessaries, in the Second Book.*

## C H A P. XXXII.

### Of Petit Treason.

*Señ. 1.* **A**T Common Law not only the Offences specified in 25 Ed. 3. but many others also were esteemed Petit Treasons, which are not so at this Day; as <sup>a</sup> Piracy by a Subject; <sup>b</sup> Discovery of the King's Counsel by one of the Grand Jury; an <sup>c</sup> Attempt by a Wife to kill her Husband, &c. But by 25 Ed. 3. no Offence shall be adjudged Petit Treason, except in the following Instances:

3 Inst. 20, 21.  
\* 40 Aff. Pl.  
35.  
Infra Ch. 37.  
S. 2.  
b 27 Aff. 63.  
3 Inst. 22.  
Dalt. ca. 91.  
c S.P.C. 10. b.

1. Where a Servant kills his Master.
2. Where a Wife kills her Husband.
3. Where an Ecclesiastical Man, secular, or religious, kills his Prelate to whom he owes Obedience.

*Señ. 2.* And this Statute has been so strictly construed, that no other Case whatsoever, which cannot be brought within the Meaning of these Words, however it may be in its own Nature more heinous, shall, by Parity of Reason, be expounded to be within the Equity of them; and therefore the Murther of a Father by a Son shall not be punished as Petit Treason, unless the Son may by a reasonable Construction come under the word Servant, serving the Father for Meat, Drink, Clothes, or Wages, in which Case he shall be indicted by the Name of a Servant.

Dalt. 14.  
3 Inst. 20.  
H. P. C. 24.  
Dalt. ca. 91.  
Crom. 91. b.

- Sect. 2.* Yet the Murther of a Mistrefs, or of a Master's Wife, has been adjudged Petit Treason within this Statute, for notwithstanding the Persons slain can in neither of these Cafes, in good Grammar, come under the word Master, yet they are clearly within the Meaning thereof, being used here to signify any Person to whom another stands related as a Servant.
- Sect. 4.* Also the Murther of a Person by one who was his Servant, upon Malice conceived during the Service, tho' it be not within the express Words, is within the Meaning of them, inasmuch as it is but the Execution of the treasonable Intention of the Party, while he was a Servant.
- Sect. 5.* Also the Procuring, Aiding, or Abetting, of any of these Offences, is clearly punishable within the Meaning of this Act, in the same manner as it was before; for the plain Intent of the Statutes is only to restrain the Judges from proceeding against other Crimes, as Petit Treasons, but no way to alter the Law as to these.
- Sect. 6.* And therefore it seems agreed, That Persons accused of Petit Treason shall be construed to be either not guilty at all, or Principal or Accessary, according to the known Rules of Law in other Cafes; and from hence it follows, That if the Fact appear to have been done upon a sudden Falling out, or in the Party's necessary Self defence, &c. it cannot be Petit Treason: For inasmuch as all Petit Treason implies Murther, and is the highest Degree thereof, where-ever the Circumstances do not make the Offence Murther, they can not make it Petit Treason; and *vice versa*, generally where-ever the Circumstances are such as will make the Killing of a Stranger by a Stranger Murther, they make the Killing of a Husband, or Master, &c. Petit Treason: Yet it hath been adjudged, That if a Wife or Servant, procure a Stranger to kill the Husband, or Master, in the Absence of such Wife, or Servant, neither the Procurer nor Actor are guilty of Petit Treason, but of Murther only; because it is an allowed Maxim, That the Offence of an Accessary can never be of a higher Kind than that of the Principal; but it seems clear, That if the Wife or Servant be either actually present, when the Crime is done, or present only in Judgment of Law, as being in the same House, but not in the same Room, (in which Case the Hopes of their immediate Assistance encourages and imboldens the Murtherer to commit the Fact, which otherwise perhaps he would not have dared to do, and makes them guilty in the same Degree, as if they had actually stood by with their Swords drawn, ready to second the Villany,) such Wife, or Servant, being Principals as much as the Stranger, are guilty of Petit Treason, and the Stranger of Murther; but it is said, That if a Wife procure a Servant to kill the Husband, both are guilty of Petit Treason: And even if a Stranger procure a Wife, or Servant, to kill the Husband, or Master, it seems that he may be indicted as Accessary to Petit Treason.

## C H A P. XXXIII.

## Of Simple Larceny.

AND now we are come to Offences against the Goods of another, which are generally called Larcenies, from the Latin Word *Latrocinium*, of which there are two Kinds :

1. Simple Larceny.
2. Mix'd Larceny.

Simple Larceny is also of two Kinds,

1. Grand Larceny.
2. Petit Larceny.

*Seç.* 1. Simple Grand Larceny is a felonious and fraudulent taking and carrying away, by any Person, of the mere personal Goods of another, not from the Person, nor out of his House, above the Value of twelve Pence. H. P. C. 60.  
Dal. c. 101.

For the better Explication of which Definition, I shall in Order consider the several Parts of it; as,

1. What shall be said to be a felonious and fraudulent taking.
2. What shall be said to be a carrying away.
3. By whom the Offence may be committed.
4. What are such Goods, the Taking whereof may be felonious.
5. How far such Goods ought to belong to another.
6. Of what Value they must be.

*Seç.* 2. As to the first Particular, *viz.* What shall be said to be a felonious and fraudulent Taking, it is to be observed, That all Felony includes Trespass, and that every Indictment of Larceny must have the Words *Felonice cepit*, as well as *asportavit*; from whence it follows, That if the Party be guilty of no Trespass in taking the Goods, he cannot be guilty of Felony in carrying them away. Kelynge 24.  
Bro. Coro. 45,  
48, 58, 137,  
160.  
H. P. C. 61.

*Seç.* 3. And from this Ground it hath been holden, That one who finds such Goods as I have lost, and converts them to his own Use *Animo furandi*, is no Felon; and, *a fortiori*, therefore it must follow, That one who has the actual Possession of my Goods by my Delivery, for a special Purpose, as a Carrier who receives them, in order to carry them to a certain Place; or Tailor who has them in order to make me a Suit of Clothes; or a Friend who is intrusted with them to keep for my Use, cannot be said to steal them, by imbeziling of them afterwards. 3 Inst. 103.  
H. P. C. 61.  
13 Ed. 4. 9. 10.  
S. P. C. 25. a.  
3 Inst. 108.

*Seç.* 4. And herein our Law differs from the Civil, which, agreeably to the *Mosaical* Law, having no capital Punishment for bare Thefts, deals with Offences of this Kind as such, as in strict Justice most certainly it may; but our Law, which punishes all Theft with Death, if the Thing stoln be above the Value of twelve Pence, and with corporal Punishment if under, rather chuses to deal with them as civil than criminal Offences, perhaps for this Reason in the above mentioned Case, concerning Goods lost, because the Party is not much aggrieved where nothing is taken but what he had lost before; and for this Cause in the other Cases, S. P. C. 25.  
See Exod. 22.

concerning the imbeziling of Goods delivered to another by the Owner, because the Party being intrusted with the whole Possession, it may be presumed that both the Offender and his Offence are known, and consequently the Person injured is supposed to have a Remedy by Action against him, from which Consideration some have made it Part of the Definition of Larceny, that it be committed without the Knowledge of the Owner; and it seems rigorous to have Recourse to severe Laws, where probably more gentle ones will be effectual.

*Señt.* 5. And agreeably hereto it has been resolved, That even those who have the Possession of Goods by the Delivery of the Party, may be guilty of Felony by taking away Part thereof, with an Intent to steal it: as if a Carrier open a Pack and take out Part of the Goods; or a Weaver who has received Silk to work; or a Miller who has Corn to grind, take out Part, with an Intent to steal it; in which Cases it may not only be said that such Possession of a Part distinct from the Whole was gained by Wrong, and not delivered by the Owner, but also that it was obtained basely, fraudulently, and clandestinely, in Hopes to prevent its being discovered at all, or fix'd upon any one when discovered.

*Señt.* 6. Also it seems generally agreed, That one who has the bare Charge, or the special Use of Goods, but not the Possession of them as a Shepherd who looks after my Sheep; or a Butler who takes care of my Plate, or a Servant who keeps a Key to my Chamber, or a Guest who has a Piece of Plate set before him in an Inn, may be guilty of Felony, in fraudulently taking away the same; for in all these Cases the Offence may as properly come under the Word *Cepit*; the Injury to the Owner is as great, and the Fraud as secret, and the Villany more base, than if it had been done by a Stranger.

*Señt.* 7. Also it seems clear, That if a Carrier, after he has brought the Goods to the Place appointed, take them away again secretly *animo furandi*, he is guilty of Felony, because the Possession which he received from the Owner being determined, his second Taking is in all Respects the same as if he were a mere Stranger.

*Señt.* 8. And not only he who first lays his Hands on my Goods himself, but in many Cases he who receives them from another, may be guilty of feloniously taking them; as if a Person intending to steal my Horse, take out a Replevin, and thereby have the Horse delivered to him by the Sheriff; or if one intending to rife my Goods, get Possession from the Sheriff, by Vertue of a Judgment obtained, without any the least Colour of Title, upon false Affidavits, &c. in which Cases the making Use of legal Procefs is so far from extenuating, that it highly aggravates the Offence, by the Abuse put on the Law, in making it serve the Purposes of Oppression and Injustice.

*Señt.* 9. Also he who steals my Goods from J. S. who had stolln them before, may be indicted, or appealed, as having stolln them from me, because in Judgment of Law, the Possession as well as Property always continued in me. And for this Cause, he who steals my Goods in the County of B. and carries them to the County of C. may be indicted or appealed in the County of C. as well as that of B. because the Possession still continuing in me, every Moment's Continuance of the Trespass is as much a Wrong to it, and may come under the Word *Cepit*, as much as the first Taking. Yet a Pirate carrying the Goods whereof he robbed me at Sea, into any County, can not be indicted for Felony there, because the original Taking was not such a Felony whereof the Common Law takes Conufance.

Sec. 10. It seems not to have been clearly settled before 3 & 4 Will. & Mar. 9. whether a Lodger, who stole the Furniture of his Lodgings, were indictable as a Felon, inasmuch as he had a kind of special Property in the Goods, and was to pay the greater Rent in Consideration of them; but if it had appeared clearly, from the whole Circumstances of the Case, that the first Intention of the Party in coming to the House, was not to have the Conveniency of lodging in it, but only, under the Colour thereof, to have the better Opportunity of rifling it, and to elude the Justice of the Law, by endeavouring to keep out of the Letter of it, by gaining a Possession of the Goods with the Consent of the Owner, I can not see any good Reason why such a Person should not be esteemed as much a Felon as a mere Stranger, inasmuch as his whole Design was to defraud the Law, and the Consent of the Owner was grounded on a Supposition of his coming as a Lodger, and could never have been gain'd if the Truth had appeared, which the Party shall get no Advantage by falsifying: And it brings a Contempt upon the Justice of the Nation to suffer its Laws to be evaded by such little Contrivances: However this Question is now settled by the said Statute, which hath enacted and declared, *That if any Person or Persons shall take away with an Intent to steal, imbezil or purloin any Chattel, Bedding, or Forniture, which by Contract or Agreement he or they are to use, or shall be let to him or them to use, in or with such Lodging, such Taking, Imbeziling, or Purloining, shall be to all Intents and Purposes taken, reputed, and adjudged to be Larceny and Felony, and the Offender shall suffer as in Case of Felony.*

Kelynge 24.  
81.  
Shower 50.  
57.

Sec. 11. It is recited by 21 H. 8 7. *That before the Time of the said Statute, divers, as well Noblemen, as other the King's Subjects, had, upon Confidence and Trust, delivered unto their Servants their Caskets, and other Jewels, Money, Goods and Chattels, safely to keep, to the Use of their said Masters or Mistresses, and after such Delivery the said Servants had withdrawn themselves, and gone away from their said Masters or Mistresses, with the said Caskets, Jewels, Money, Goods and Chattels, or Part thereof, to the Intent to steal the same, and defraud their said Masters or Mistresses thereof, and sometime being with their said Masters or Mistresses, had converted the said Jewels, Money, and other Chattels, or Part thereof, to their own Use, which Misbehaviour so done, was doubtful in the Common Law, whether it were Felony or not; and by reason thereof the aforesaid Servants had been in great Boldness to commit such or the like Offences. And thereupon it is enacted, That all and singular such Servants, (being of the Age of eighteen Years, and not Apprentices) to whom any such Caskets, Jewels, Money, Goods or Chattels by his or their said Masters or Mistresses shall from thenceforth so be delivered to keep, That if any such Servant or Servants withdraw him or them from their said Masters or Mistresses, and go away with the said Caskets, Jewels, Money, Goods or Chattels, or any Part thereof, to the Intent to steal the same, and defraud his or their said Masters or Mistresses thereof, contrary to the Trust and Confidence to him or them put, by his or their said Masters and Mistresses, or else being in the Service of his said Master or Mistress, without Assent or Commandment of his Master or Mistress he imbezil the same Caskets, Jewels, Money, Goods or Chattels, or any Part thereof, or otherwise convert the same to his own Use, with like Purpose to steal it, That if the said Caskets, Jewels, Money, Goods, or Chattels, that any such Servant shall so go away with, or which he shall imbezil with Purpose to steal it, as is aforesaid, be of the Value of 40 s. or above, That then the same false, fraudulent, and untrue Act and Demeanour, from thenceforth, shall be deemed and adjudged Felony, &c.*

In the Construction of this Statute the following Opinions have been holden.



*Sett.* 12. I. That it extends only to such as were Servants to the Owner of the Goods, both at the Time when they were delivered, and also at the Time when they were stoln.

*Sett.* 13. II. That it is strictly confined to such Goods as are delivered to keep, and therefore that a Receiver, who having received his Master's Rents, runs away with them; or a Servant who being intrusted to sell Goods, or to receive Money due on a Bond, sells the Goods, &c. and departs with the Money, is not within the Statute; but that a Servant, who receives his Master's Goods from another Servant to keep for the Master, is as much guilty as if he had received them from the Master's own Hands, because such a Delivery is looked upon as a Delivery by the Master.

*Sett.* 14. III. That it includes not the wasting or consuming of Goods, howsoever wilful it may be; nor the taking away of an Obligation, or any other bare *Chose* in Action.

*Sett.* 15. IV. That it extends not to the Taking of such Things whereof the actual Property is not in the Master at the Time; and therefore, That if a Servant having Money, or Corn, &c. delivered to him, melt down the Money of his own Head, without the Command of his Master, into a Piece of Plate; or turn the Corn into Malt, and then run away with them, that he is not within the Statute, because the Property of these Things is so far changed, by altering them in such a Manner, that they can not be known again, and the Master can not afterwards take them without a Trespass; but it is agreed, That if a Servant make a Suit of Clothes of Cloth, or a Pair of Shoes of Leather, delivered to him by the Master, and then run away with them, that he is within the Statute, because the Property is no way altered; and even in the first Case, whether the very Taking of the Plate, or Malt, be within the Statute or not; yet I can see no Reason, why the whole Act of the Servant taken together, should not be looked upon as a Conversion of the Master's Goods to his own Use, with an Intent to steal them, which brings it within the express Letter of the Statute: And it has been resolved, That a Servant who changes his Master's Money from Silver to Gold, and then runs away with it, &c. is within the Statute; and I can see no good Distinction between that and the present Case.

*Sett.* 16. The Benefit of the Clergy was taken away from all Felonies within this Statute, by 27 *H. 8.* 17. and restored by 1 *Ed. 6.* 12. but taken away again by 12 *Anna 7.* from all such as shall be committed in a Dwelling-house, or Out-house.

*Sett.* 17. By 7 *Jac. 1.* 7. *If any Sorter, Kember, Carder, or Spinster of Wool, or Weaver of Yarn made of such Wool, shall imbezil any Wool or Yarn delivered to him to be wrought, and shall be thereof convicted before two Justices of Peace, according to the Method prescribed by that Statute, he shall be whipped, &c.*

*Sett.* 18. As to the second Particular, *viz.* What shall be said to be such a Carrying away of the Thing stoln, as will bring the Case within the Word *Asportavit*, which is necessary in every Indictment of Larceny, it seems that any the least removing of the Thing taken from the Place where it was before, is sufficient for this Purpose, tho' it be not quite carried off; and upon this Ground the Guest, who, having taken off the Sheets from his Bed, with an Intent to steal them, carried them into the Hall, and was apprehended before he could get out of the House, was adjudged guilty of Larceny; so also was he who having taken a Horse in

Dal. ca. 102.  
H. P. C. 63.

Dy. 5. Pl. 2, 3.  
H. P. C. 62, 63.  
3 Inst. 105.  
Dal. c. 102.

Dy. 5. Pl. 3.

H. P. C. 63.  
Dal. ca. 102  
Dy. 5.

5 H. 7. 16. a.  
Crom. 50.  
Dal. ca. 102.

See Crom. 50.  
Dal. ca. 102.

3 Inst. 108.  
2 Vent. 215.

27 Aff. 39.  
S. P. C. 26 a.  
Bro. Corio.  
107.

3 Inst. 109.  
Dal. ca. 102.

a Close with an Intent to steal him, was apprehended before he could get him out of the Close; neither is he less guilty who pulls off the Wool from another's Sheep, or strips their Skins, with an Intent to steal them; or he who intending to steal Plate takes it out of a Trunk where-in it was, and lays it on the Floor, and is surprized before he can carry it off.

Dalif. 21.  
Crom. 36. a.  
Kelynge 31.

*Sect. 19.* As to the third Particular, *viz.* By whom Larceny may be committed, It is certain that a Feme Covert may be guilty thereof by stealing the Goods of a Stranger, but not by stealing her Husband's, because a Husband and Wife are considered but as one Person in Law; and the Husband, by endowing his Wife at the Marriage with all his worldly Goods, gives her a kind of Interest in them; for which Cause, even a Stranger can not commit Larceny in taking the Goods of the Husband by the Delivery of his Wife; as he may by taking away the Wife by Force and against her Will, together with the Goods of the Husband.

Sup. Ch. 1.  
S. 9, 10, 11.  
Pult. 127.  
H. P. C. 65.  
Bro. Co. 142.  
Dal. ca. 104.  
13 Aff. 5.  
18 Ed. 3. 32. a  
Bro. Coro. 77.  
S. P. C. 94. B.  
Dal. ca. 104.  
Crom. 35.

*Sect. 20.* It is said to be no Felony for one reduced to extream Necessity, to take so much of another's Victuals as will save him from starving, but if such his Necessity be owing to his Unthriftiness, surely it is far from being any Excuse.

Dalt. ca. 99.  
Crom 33. a.  
See Proverbs,  
ch. 6. v. 30.

As to the fourth Point, *viz.* What are such Goods, the stealing whereof may amount to Felony, the following Particulars are to be observed.

*Sect. 21.* I. They ought to be no way annexed to the Freehold, and therefore it is no Larceny, but a bare Trespass, to steal Corn, or Grass, growing, or Apples on a Tree, or Lead on a Church, or House, but it is Larceny to take them, being severed from the Freehold, whether by the Owner, or even by the Thief himself, if he sever them at one Time and then come again at another Time and take them: And the general Reason of this Distinction between Chattels fix'd to a Freehold and those lying loose, perhaps may be this; because the former, not being to be removed without Trouble and Difficulty, are not so liable to be stoln, and therefore need not to be secured by so severe Laws as the others require.

12 Aff. 32.  
Bro. Coro. 77.  
1 Mod. 89.  
H. P. C. 66.  
Allen 83.  
2 Keb. 875.  
Pl. 37.  
1 Vent. 187.  
Crom 37. a.  
18 H. 8. 2.  
S. P. C. 25. b.

*Sect. 22.* II. They ought to have some Worth in themselves, and not to derive their whole Value from the Relation they bear to some other Thing, which can not be stoln, as Paper or Parchment on which are written Assurances concerning Lands, or Obligations, or Covenants, or other Securities for a Debt, or other *Chose* in Action: And the Reason wherefore there can be no Felony in taking away any such Thing seems to be, because, generally speaking, they being of no manner of use to any but the Owner, are not supposed to be so much in danger of being stoln, and therefore need not to be provided for in so strict a manner as those Things which are of a known Price, and every Body's Money; and for the like Reason it is no Felony to take away a Villain, or an Infant in Ward, &c.

H. P. C. 66,  
67.  
3 Inst. 109.  
Bro. Coro.  
155.  
S. P. C. 25. b.  
Crom. 27. b.

*Sect. 23.* III. They ought not to be Things of a base Nature, as Dogs, Cats, Bears, Foxes, Monkeys, Ferrets, and the like, which, howsoever they may be valued by the Owner, shall never be so highly regarded by the Law, that for their sakes a Man shall die; as he may for stealing a Hawk, known by him to be reclaimed, not only by Force of the Statute of 37 Ed. 3. 19. but also at Common Law, in respect of that very high Value which was formerly set upon that Bird.

H. P. C. 66.  
S. P. C. 25.  
Bro. Coro.  
155.

H. P. C. 66.  
3 Inst. 109.  
7 Co. 18. a.  
3 H. 8. 3. b.  
Crom. 36. a. b.  
Dalt. ca. 103.

*Sect. 24.* As to the fifth Point, *viz.* How far the Goods taken away ought to belong to another; it seems agreed, That the taking of Goods

Bro. Coro.  
190.

- H. P. C. 67 whereof no one had a Property at the Time, can not be Felony; and therefore, That he who takes away Treasure-trove, or a Wreck, Waif, or Stray, before they have been seized by the Persons who have a Right thereto, is not guilty of Felony, and shall be only punished by Fine, &c.
- Sett.* 25. Neither shall he who takes Fish in a River, or other great Water, wherein they are at their natural Liberty, be guilty of Felony, as he may be who takes them out of a Trunk or Pond, &c.
- Sett.* 26. Upon the like Ground it seems clear, That a Man can not commit Felony by taking Deer, Hares, or Conies, in a Forest, Chase, or Warren, or old Pigeons being out of the House, &c. But it is agreed, That one may commit Larceny in taking such or any other Creatures *feræ naturæ*, if they be fit for Food, and reduced to Tameness, and known by him to be so; and it seems the most plausible Opinion, That it is Felony to steal wild Pigeons in a Dove-house shut up, or Hares or Deer in a House, or even in a Park, inclosed in such a manner that the Owner may take them whenever he pleases, without the least Danger of their escaping, in which Case they are as much in his Power as Fish in a Pond, or young Pigeons, or Hawks in a Nest, &c. in taking of which, for the like Reason, it seems to be agreed, that Felony may be committed.
- Sett.* 27. Also it seems clear, That one may commit Felony by taking away Swans marked or pinioned, or those which are unmarked, if they be kept in a Pond or private River; neither do I see why it is not as much Felony to steal the Eggs of such Swans or Hawks, as it is to steal their young Ones, unless it be because 11 H, 7, 17. has appointed a less Punishment for this Offence.
- Sett.* 28. However, there is no Doubt but that the Taking of Domestic Beasts, as Horses, Mares, Colts, &c. or of any Creatures whatsoever, which are *domitæ Naturæ*, and fit for Food, as Ducks, Hens, Geese, Turkeys, Peacocks, or their Eggs, or young Ones, may be Felony.
- Sett.* 29. Also it is said, That there may be Felony in taking Goods the Owner whereof is unknown, in which Case the King shall have the Goods, and the Offender shall be indicted for taking *Bona cujusdam Hominis ignoti*; and it seems, That in some Cases the Law will rather feign a Property, where in Strictness there is none, than suffer an Offender to escape; and therefore it is said, That he who takes away the Goods of a Chapel, or Abbey, in Time of Vacation, may be indicted in the first Case, for stealing *Bona Capellæ*, being in the Custody of such and such, and in the second, for stealing *Bona Domus & Ecclesiæ*, &c. and *a fortiori* therefore it follows, That he who steals Goods belonging to a Parish-Church, may be indicted for stealing *Bona Parochianorum*; and it hath been adjudged, That he who takes off a Shroud from a dead Corps, may be indicted as having stoln it from him who was the Owner thereof when it was put on, for a dead Man can have no Property.
- Sett.* 30. And there is a special Case wherein it is said, That a Man may commit Larceny by taking of Things, whereof the absolute Property is in himself; as if A. deliver Goods to B. being a Tailor, or Carrier, &c. and afterwards, with an Intent to make him answer for them, fraudulently and secretly take them away; for B. had a special Kind of Property in the Goods so delivered to him, in respect whereof, if a Stranger had stoln them, he might have been indicted generally, as having stoln B. s Goods, and the Injury is altogether as great, and the Fraud as base, where they are taken away by the very Owner.

*Sect.* 31. As to the sixth<sup>d</sup> Point, *viz.* of what Value the Goods stoln must be, if they be but of the Value of 12 *d.* or under, the Offence can be but Petit Larceny.

<sup>d</sup> 22 Aff. 39.  
Bro. Coro. 84  
85.  
S. P. C. 24.  
H. K.  
C. 69, 70.

<sup>2</sup> Rol Re. 78. Dal. ca. 101. <sup>2</sup> Infl. 189. Kelynge 62 H. P.

*Sect.* 32. Yet <sup>e</sup> if two Persons, or more, together, steal Goods above the Value of twelve Pence, every one of them is guilty of Grand Larceny, for each Person is as much an Offender as if he had been alone.

<sup>e</sup> S.P.C. 24.K.  
Dal. ca. 101.  
H. P. C. 70.  
Crom. 36. a.

*Sect.* 33. Also it <sup>f</sup> seems the currant Opinion of all the old Books, That if one at several Times steal several Parcels of Goods, each under the Value of twelve Pence, but amounting in the whole to more, from the same Person, and be found guilty thereof on the same Indictment, he shall have Judgment of Death as for Grand Larceny, but this Severity is seldom practised.

<sup>f</sup> S. P. C. 24.  
I. K.  
Crom. 36. a.  
Dal. ca. 101.  
H. P. C. 70.

<sup>2</sup> Keb. 719.

In what Cases simple Larceny is excluded from the Benefit of the Clergy will be shewn hereafter in the second Book, in the Chapter concerning Clergy.

*Sect.* 34. And now we are come to Petit Larceny, which seems to agree with Grand Larceny in all the Particulars above-mentioned, except only the Value of the Goods. so that where-ever an Offence would amount to Grand Larceny, if the Thing stoln were above the Value of twelve Pence, it is Petit Larceny, if it be but of that Value, or under.

H. P. C. 69.

*Sect.* 35. And if one be indicted for stealing Goods to the Value of ten Shillings, and the Jury find specially that he is guilty, but that the Goods are worth but ten Pence, he shall not have Judgment of Death, but only as for Petit Larceny.

Bro Coro. 84,  
184.  
S. P. C. 24. L.  
Dal. ca. 101.  
Crom. 36. a.  
Hertl. 66.

*Sect.* 36. It seems that all Petit Larceny is Felony, and consequently requires the word *Felonice*, in an Indictment for it; yet it is certain, That it is not punished with the Loss of Life, or Lands, but only with the Forfeiture of Goods and Chattels, and whipping, or other corporal Punishment.

<sup>7</sup> H. 8. 23.  
Bro. Coro. 2.  
219.  
Appeal. 72.  
<sup>143</sup>  
H. P. C. 70.  
Con. S. P. C.  
24 b.  
Dal. ca. 101.

C H A P. XXXIV.

Of Robbery.

*Sect.* 1. **M**IXT or complicated Larceny is such as hath a farther Degree of Guilt in it, as being a Taking from the Person of a Man, or from his House.

*Sect.* 2. Larceny from the Person of a Man either puts him in Fear, and then it is called Robbery; or does not put him in Fear, and then it is called barely, Larceny from the Person.

*Sect.* 3. Robbery is a felonious and violent Taking away from the Person of another, Goods or Money to any Value, putting him in Fear.

H. P. C. 71.  
<sup>3</sup> Infl. 68.

In the Explication whereof, I shall consider the following Particulars :

1. What Taking away will satisfy the Word *Cepit* in an Indictment for this Offence.
2. What shall be said to be a Taking away from the Person.
3. What kind of Taking shall be said to be violent.
4. In what Respects Robbery differs from other Larcenies.

*Sect. 4.* As to the first Point, *viz.* What Taking away will satisfy the Word *Cepit* in an Indictment for Robbery ; it seems clear, That he who receives my Money by my Delivery, either whilst I am under the Terror of his Assault, or afterwards while I think my self bound in Conscience to give it him by an Oath to that Purpose, which in my Fear I was compelled by him to take, may in the Eye of the Law, as properly be said to take it from me, as he who actually takes it out of my Pocket with his own Hands.

H. P. C. 72.  
44. E. 3. 14. b.  
4 H. 4. 3. 2.  
Dalt. cap. 100.  
S. P. C. 27. f.  
Crom. 34. a.  
3 Inst. 68.  
Fitz. Cor. 464.

*Sect. 5.* Neither can he, who has once actually compleated the Offence, by taking my Goods in such a Manner into his Possession, afterwards purge it by any Re-delivery, &c.

3 Inst. 69.  
H. P. C. 72.

*Sect. 6.* But he who only attacks me in order to rob me, but does not take my Goods into his Possession, though he go so far as to cut off the Girdle of my Purse, by Reason whereof it falls to the Ground, is not guilty of Robbery ; but highly punishable by Fine and Imprisonment, &c. for so enormous a Breach of the Peace.

S. P. C. 27. g.  
Crom. 34.  
3 Inst. 69.  
Dalt. cap. 100.  
H. P. C. 71, 72.

*Sect. 7.* Yet in some Cases a Man may be said to rob me, where in Truth he never actually had any of my Goods in his Possession ; as where I am robbed by several in one Gang, and one of them only takes my Money, in which Case, in Judgment of Law, every one of the Company shall be said to take it, in respect of that Encouragement which they give to one another, through the Hopes of mutual Assistance in their Enterprize : Nay, though they miss of their first intended Prize, and one of them afterwards ride from the rest, and rob a third Person in the same High-way without their Knowledge out of their View, and then return to them, all are guilty of Robbery ; for they came together with an Intent to rob, and to assist one another in so doing.

Crom. 34. 1. b

1 And. 116.  
Pudsey's Case.  
Crom 34.  
Dalt. cap. 100.  
H. P. C. 72.  
B. 2 Ch. 29.  
S. 8.

*Sect. 8.* As to the second Point, *viz.* What shall be said to be a Taking away from the Person ; not only the Taking away a Horse from a Man whereon he is actually riding, or Money out his Pocket, but also the Taking of any Thing from him openly and before his Face, which is under his immediate and personal Care and Protection, may properly enough be said to be a Taking from the Person : And therefore he who having first assaulted me takes away my Horse standing by me, or having put me in Fear, drives my Cattle in my Presence out of my Pasture, or takes up my Purse which in my Fright I cast into a Bush, or my Hat which fell from my Head, or robs my Servant of my Money before my Face, may be indicted as having taken such Things from my Person.

S. P. C. 27. d.  
Crom. 34. 35.  
Dalt. cap. 100.  
3 Inst. 69.  
H. P. C. 73.

Sty. Rep. 156.

*Sect. 9.* As to the third Point, *viz.* What kind of Taking shall be said to be violent ; where-ever a Person assaults another with such Circumstances of Terror as put him into Fear, and causes him by Reason of such Fear to part with his Money, the Taking thereof is adjudged Robbery, whether there were any Weapon drawn or not, or whether the Person assaulted delivered his Money upon the other's Command, or afterwards gave it him upon his ceasing to use Force, and begging an Alms ; for he

H. P. C. 71, 72.

Crom. 34. b.  
Dalt. cap. 100.

was

was put into Fear by his Assault, and gives him his Money to get rid of him.

*Secſ. 10.* And ſome have gone ſo far as to hold, That if a Man, meeting another going with his Goods to Market in order to ſell them, compel him to ſell them to him againſt his Will, he is guilty of Robbery, though he give for them more than they are worth : But perhaps this Opinion is too ſevere, becauſe the Grievance to the Parry ſeems rather to proceed from the Perverſeneſs of his Humour, than from any real Injury done to him ; and there ſeems to be no ſuch Enormity in the Intention of the Wrong doer, as is implied in the Notion of Felony.

*Crom. 34. b.  
35.  
Dalt. cap. 100.*

*Secſ. 11.* However it is certain, That the Claim of Property, in the Thing taken away, without any Colour, is no manner of Excufe.

*H. P. C. firſt  
Edition 62.*

As to the fourth Point, *viz.* In what Reſpects Robbery differs from other Larcenies.

*Secſ. 12.* I. No other Larceny ſhall have Judgment of Death, unleſs the Thing ſtoln be above the Value of twelve Pence ; but Robbery ſhall have ſuch Judgment, how ſmall ſoever the Value may be of the Thing taken away.

*S. P. C. 27. a.  
Crom. 33. b.  
Dalt. cap. 100.  
H. P. C. 74.*

*Secſ. 13.* II. Other Larcenies, whether from the Perſon or not, ſhall not be ſuppoſed to be done with Violence or Terror, but Robbery is always laid as done on an Assault with Violence, and putting the Parry in Fear, which is properly thus expreſſed in an Indictment, — *à Perſona J. S. violenter & felonice cepit & aſportavit in magnum prædicti J. S. Terrorem.*

*H. P. C. 74.  
3 Inſt. 68.  
Kelynge 70.*

*Secſ. 14.* III. But they all agree in this, That the Offenders had the Benefit of the Clergy at the Common Law, but many of them are at this Day excluded in many Caſes by Statute ; for which ſee the Chapter in the ſecond Book concerning Clergy.

C H A P. XXXV.

*Of Larceny from the Perſon*

*Secſ. 1.* Larceny from the Perſon of a Man without putting him in Fear, is either done privily without his Knowledge, (in which Caſe it is excluded from the Benefit of the Clergy by 8 *El. 4*) or openly and avowedly before his Face ; as if one take off my Hat from my Head, and run away with it, or come into my Shop and cheapen Goods, and run away with them without paying for them, which is agreed not to be Robbery, and as it ſeems is more properly indictable as a Trefpaſs than Felony, unleſs the Offender were either unknown, or immediately fled the Country if he were known ; otherwiſe I have a Remedy againſt him in the ordinary Courſe of Civil Juſtice ; and it ſeems rigorous to make ſuch Offences capital, which probably may ſufficiently be provided againſt by more gentle Methods.

*Dy. 224. Pl.  
30.  
3 Rol. Re. 154.  
H. P. C. 73.  
74, 75  
Crom 34. b.  
Dalt. cap. 100.  
Raym. 275,  
276.*

*Secſ. 2.* However it is certain, That all open Larcenies from the Perſon are within the Benefit of the Clergy, except ſuch as are committed in a Dwelling Houſe, &c. to the Value of forty Shillings, from which it is taken away by 12 *Anne.*

*Señ. 3.* Also a private Larceny from the Person shall have the Benefit of the Clergy, unless it be laid in the Indictment as done *clam* and *secretè*, &c. in exact Pursuance of the Words of 8 *El.* 4.

*Señ. 4.* And no such Larceny shall have Judgment of Death but only as of Petit Larceny, if the Jury find the Offender guilty under the Value of twelve Pence; for the Statute does not alter the Nature of the Offence, or make that capital which was not so before, but only leaves the Offender to the Judgment of the Common Law.

## C H A P. XXXVI.

*Of Larceny from the House.*

*Señ. 1.* **T**HE other Branch of complicated Larceny, is that which is from the Habitation of a Man, which though it seem to have a higher Degree of Guilt than simple Larceny, yet I do not find it distinguished from it by the Common Law, either as to the Circumstances above mentioned, which are requisite to constitute the Offence, or as to the Punishment.

*Señ. 2.* However it is at this Day excluded from the Benefit of the Clergy in many Cases by several Acts of Parliament, which I shall particularly consider in the second Book in the Chapter concerning Clergy.

## C H A P. XXXVII.

*Of Piracy.*

*Señ. 1.* **T**O what has been said concerning such Larcenies as are Felonies by the Common Law, it may not be improper to add somewhat concerning Piracy and Depredation at Sea, which is a capital Offence by the Civil Law.

*Señ. 2.* It is said, That before 25 *Ed.* 3. this Offence was punished at Common Law as Petit Treason, if committed by a Subject, and as Felony, if committed by a Foreigner: However it seems agreed, that after that Statute by which all Treason is confined to the Particulars therein set down, it was cognizable only by the Civil Law.

*Señ. 3.* But this proving very inconvenient, because by that Law no Offender shall have Judgment of Death, without his own Confession, or direct Proof by Eye-Witnesses, it was enacted by 28 *H.* 8. 15. *That all Felonies and Robberies, &c. upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have or pretend to have Power, Authority or Jurisdiction, shall be inquired, tried, heard, determined and judged in such Shires and Places in the Realm, as shall be limited by the King's Commission or Commissions to be directed for the same, in like Form and Condition, as if any such Offence or Offences had been committed or done in or upon the Land, and such Commissions shall be had under the King's Great Seal, directed to the Admiral or Admirals,*

rals, or to his or their Lieutenant, Deputy and Deputies, and to three or four such other substantial Persons, as shall be named or appointed by the Lord Chancellor of England for the Time being, from Time to Time, and as oft as Need shall require, to hear and determine such Offences, after the common Course of the Laws of this Land used for Felonies and Robberies, &c. done and committed upon the Land within this Realm.

*Seçt. 4.* And it is farther enacted by the said Statute, That if any Person or Persons happen to be indicted for any such Offence done, or hereafter to be done, upon the Seas, or in any other Place above limited, that then such Order, Process, Judgment and Execution, shall be used, had, done and made, to and against every such Person and Persons so being indicted, as against Felons, &c. for any Felony, &c. upon the Land, by the Laws of the Land is accustomed.

*Seçt. 5.* And it is farther enacted by the said Statute, That such as shall be convicted of any such Offence by Verdict, Confession, or Process by Authority of any such Commission, shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attainted and convicted of such Offence done upon the Land, and also that they shall be excluded from the Benefit of the Clergy.

*See the Ch. of Clergy.*

In the Exposition of this Act it has been holden,

*Seçt. 6.* 1. That it does not alter the Nature of the Offence, so as to make that which was before a Felony only by the Civil Law, now become a Felony by the Common Law; for the Offence must still be alleged as done upon the Sea, and is no Way cognisable by the Common Law, but only by Vertue of this Statute, which by ordaining that in some Respects it shall have the like Trial and Punishment, as are used for Felony at Common Law, shall not be carried so far as to make it also agree with it in other Particulars which are not mentioned: And from hence it follows, That this Offence remains as before of a special Nature, and that it shall not be included in a general Pardon of all Felonies, which, as it was before this Statute, to be expounded of no Felonies which are such only by the Civil Law, shall continue still to have the same Construction.

3 Inst. 112,  
113.  
H. P. C. 77.

Moore 756.  
3 Inst. 112.  
Co. Lit. 39e.  
H. P. C. 77.

*Seçt. 7.* From the same Ground also it follows, That no Persons shall, in Respect of this Statute, be construed to be, or punished as, Accessaries to Piracy before or after, as they might have been if it had been made a Felony by the Statute, whereby all those would incidentally have been made Accessaries in the like Cases, in which they would have been Accessaries to a Felony at Common Law; And from hence it follows, That Accessaries to Piracy, being neither expressly named in the Statute, nor by Construction included in it, remain as they were before, and were triable by the Civil Law, if their Offence were committed on the Sea, but if on the Land, by no Law until 11 and 12 Wil. 3. 7. for 2 and 3 E. 6. 24. which provides against Accessaries in one County to a Felony in another, extends not to Accessaries to an Offence committed in no County, but on the Sea; but by the said Statute of 11 and 12 Wil. they are triable in like Manner as the Principals are by the Statute of 28 H. 8.

3 Inst. 112.  
H. P. C. 77.  
215.

*Seçt. 8.* From the same Ground also it follows, That an Attainder for this Offence corrupts not the Blood, inasmuch as the Statute only says that the Offender shall suffer such Pains of Death, &c. as if he were attainted of a Felony at Common Law; but says not that the Blood shall be corrupted, &c.

3 Inst. 112.  
H. P. C. 77.  
B. 2. Ch. 23.  
S. 12.

*Seçt. 9.* Yet it has been resolved, That an Offender standing mute on an Arraignment by Force of this Statute, shall have Judgment of Pain Fort & dure; for the Words of the Statute are, That a Commission shall be directed

3 Inst. 114.  
Dyer 241.  
Pl. 49 3e8.  
Pl. 73.



directed, &c. to hear and determine such Offences after the common Course of the Laws of the Land, &c.

*3 Inst. 112.*  
*5 P. C. 114. 1.*  
*1 Rol. Re. 175.*  
*3 Inst. 113.*  
Sect. 10. II. It has been holden, That the Indictment for this Offence must alledge the Fact to be done upon the Sea, and must have both the Words *Felonice* and *Piraticè*: And that no Offence is punishable by the Vertue of this Act as Piracy, which would not have been Felony if done on the Land, and consequently that the Taking of an Enemy's Ship by an Enemy, is not within the Statute.

*Mores 756.*  
*1 Rol. Re. 175.*  
*5 P. C. 77.*  
*3 Inst. 113.*  
Sect. 11. III. It is agreed, That this Statute extends not to Offences done in Creeks or Ports within the Body of a County, because they are, and always were, cognizable by the Common Law.

Sect. 12. It is enacted by 11 and 12 Wil. 3. 7. which was continued by 1 Georg. 25. for five Years, and from thence to the End of the next Sessions of Parliament, That all Piracies, Felonies and Robberies committed in or upon the Sea, or in any Place where the Admiral has Jurisdiction, may be tried and determined at Sea or upon the Land, in any of his Majesty's Islands, or Plantations, &c. to be appointed by the King's Commission under the Great Seal, or the Seal of the Admiralty, directed to any of the Admirals, &c. and such Persons and Officers by Name, or for the Time being, as his Majesty shall think fit, who shall have Power jointly or severally, by Warrant under Hand and Seal of any of them, to commit any Person against whom Information of any such Offences shall be given upon Oath, and to call a Court of Admiralty, which shall consist of seven Persons at the least, and shall proceed in the Trial of the said Offenders, according to such Directions as are set forth at large in the said Statute.

Sect. 13. And it is farther enacted by the said Statute, Par. 8. That if any of his Majesty's natural born Subjects or Denizens of this Kingdom, shall commit any Piracy or Robbery, or any Act of Hostility, against other his Majesty's Subjects upon the Sea, under Colour of any Commission from any foreign Prince or State, or Pretence of Authority from any Person whatsoever, such Offender and Offenders, and every of them, shall be deemed, adjudged and taken to be Pirates, Felons and Robbers; and they and every of them being duly convicted thereof, according to this Act, or the aforesaid Statute of King Henry the Eighth, shall have and suffer such Pains of Death, Loss of Lands, Goods and Chattels, as Pirates, Felons and Robbers upon the Seas ought to have and suffer.

Sect. 14. And it is farther enacted by the said Statute, That if any Commander or Master of any Ship, or any Seaman or Mariner, shall in any Place where the Admiral hath Jurisdiction, betray his Trust and turn Pirate, Enemy or Rebel, and piratically and feloniously run away with his or their Ship or Ships, or any Barge, Boat, Ordnance, Ammunition, Goods or Merchandizes, or yield them up voluntarily to any Pirate, or bring any seducing Message from any Pirate, Enemy or Rebel, or consult, combine, or confederate with, or attempt or endeavour to corrupt, any Commander, Master, Officer or Mariner to yield up or run away with any Ship, Goods or Merchandize, or turn Pirate, or go over to Pirates, or if any Person shall lay violent Hands on his Commander, whereby to hinder him from fighting in Defence of his Ship and Goods committed to his Trust, or that shall confine his Master, or make or endeavour to make a Revolt in his Ship, shall be adjudged to be a Pirate, Felon, and Robber; and being convicted thereof, according to the Direction of this Act, shall have and suffer Pains of Death, Loss of Lands, Goods and Chattels, as Pirates, Felons and Robbers upon the Seas ought to have and suffer.

Sect. 15. And it is farther enacted by the said Statute, That all and every Person and Persons whatsoever, who shall either on the Land or upon the Seas, wittingly or knowingly set forth any Pirate, or aid and assist, or maintain, procure, command, counsel, or advise any Person or Persons whatsoever, to do or

commit

commit any Piracies or Robberies upon the Seas; and such Person or Persons shall thereupon do or commit any such Piracy or Robbery, then all and every such Person or Persons whatsoever, so as aforesaid, setting forth any Pirate, or aiding or assisting, maintaining, procuring, commanding, counselling or advising the same, either on the Land or upon the Sea shall be adjudged to be Accessary to such Piracy and Robbery done and committed: And further, That after any Piracy or Robbery is or shall be committed by any Pirate or Robber whatsoever, every Person or Persons, who, knowing that such Pirate or Robber has done or committed such Piracy and Robbery, shall on the Land or upon the Sea receive, entertain, or conceal any such Pirate or Robber, or receive or take into his Custody, any Ship, Vessel Goods or Chattels, which have been by any such Pirate or Robber piratically and feloniously taken, shall be, by this Statute likewise adjudged to be Accessary to such Piracy and Robbery: And that all such Accessaries to such Piracies and Robberies, shall be enquired of, tried, heard, determined and adjudged according to the common Course of the Law, according to the said Statute of 28 H. 8. as the Principals of such Piracies and Robberies may be, and no otherwise; and being thereupon attainted, shall suffer such Pains of Death, Loss of Lands, Goods and Chattels, and in like Manner as the Principals of such Piracies, Robberies and Felonies, ought to suffer according to the said Statute of H. 8. which is declared to be in full Force, any Thing in this last Act to the contrary notwithstanding.

Sect. 16. And by 4 Georg. 11. All Persons who shall commit any Offence for which they ought to be adjudged Pirates, Felons, or Robbers, by 11 & 12 Guli. 3. may be tried and judged for every such Offence, according to the Form of 28 H. 8. and shall be excluded from their Clergy.

C H A P. XXXVIII.

Of Burglary.

AND now we are come to Offences against the Habitation of a Man, which are of two kinds:

1. Burglary.
2. Arson.

H. P. C. 79.  
22 Aff 95.  
Bro. Cor. 93.  
3 Inst. 63.  
S. P. C. 30. 2  
Dalt. cap. 99  
Crom 31. 2.

Sect. 1. Burglary is a Felony at the Common Law, in breaking and entering the Mansion House of another, or (as some say,) the Walls or Gates of a walled Town in the Night, to the Intent to commit some Felony within the same, whether the felonious Intent be executed or not.

For the better Understanding whereof, I shall consider the following Particulars:

1. What shall be accounted Night-time for this Purpose.
2. Whether there must be both an actual Entry and Breaking.
3. What Breaking is sufficient.
4. What Entry.
5. In what Place this Offence may be committed.
6. What Degree of Guilt is required in the principal Intention.

Sect. 2. As to the first Point, viz. What shall be accounted Night-Time for this Purpose; there are some Opinions, That Burglary may be committed at any Time after Sun-set, and before Sun-rising; but it seems the much better Opinion, That the Word *Noctanter*, which is precisely

Dalt cap 99.  
S. P. C. 30. 2.  
Crom. 33. 2.  
H. P. C. 79.  
3 Inst. 63.  
Savil. 47.  
Crom. 32. 1.  
7 Co. 6.

necessary in every Indictment; for this Offence cannot be satisfied in a legal Sense, if it appear upon the Evidence, that there was so much Day-light at the Time, that a Man's Countenance might be discerned thereby.

Dalt. cap. 99.  
Crom. 32. a.

Dyer 99. a.  
S. P. C. 30. a.  
3 Inst. 64.  
H. P. C. 80.

Con. Dalt.  
cap. 99.  
Crom. 31. b.

3 Inst. 64.  
H. P. C. 80.

H. P. C. 80.  
82.

Con. Dalt. 99.

Crom. 34. a.  
H. P. C. 81.  
Dalt. cap. 99.  
1 And. 115.  
H. P. C. 80.  
Dalt. cap. 99.  
Savil. 47.

Dalt. cap. 99.  
Kelynge 67.  
H. P. C. 81.  
82.  
Hutt. 20.

Crom. 32. a.  
Con. 1. And.  
115.

Kelynge 42.

Kelynge 63.

Crom. 32. b.  
Dalt. cap. 99.  
H. P. C. 81.

*Sect. 3.* As to the second Point, *viz.* Whether there must be both an Entry and Breaking; notwithstanding some loose Opinions to the contrary, there seems to be no good Cause to doubt but that both are required to compleat this Offence, for the Words, *fregit* and *intravit*, being both of them precisely necessary in the Indictment, both must be satisfied: And *à fortiori* therefore there can be no Burglary, where there is neither of them; as if on a bare Assault upon a House the Owner fling out his Money.

*Sect. 4.* As to the third Point, *viz.* What Breaking is sufficient; it seems agreed, That such a Breaking as is implied by Law in every unlawful Entry on the Possession of another, whether it lie open or be inclosed, and will maintain a common Indictment, or Action of Trespafs *Quare clausum fregit*, will not satisfy the Words *Felonice & Burglariter fregit*, except in some special Cases, in which it is accompanied with such Circumstances as make it as heinous as an actual Breaking: And from hence it follows, That if one enter into a House by a Door which he finds open, or through a Hole which was made there before, and steal Goods, &c. or draw any Thing out of a House through a Door or Window which were open before, or enter into a House by the Doors open in the Day-time, and lie there till Night, and then rob and go away, without breaking any Part of the House, he is not guilty of Burglary. But it is certain, That he would have been guilty thereof if he had opened the Window, or unlocked the Door, or broken a Hole in the Wall, and then had entred, &c. or if having entered by a Door which he found open, or having lain in the House by the Owner's Consent, he had but unlatched a Chamber Door; or if he had come down by the Chimney: (in which Case though it might be said, That the House was open there, and so not actually broken; yet it was as much inclosed as the Nature of the Thing would bear.) And according to some Opinions, he would have been in like manner guilty, if upon an Assault made by him upon the House, with an Intent to rob it, the Owner had opened the Door in order to drive him off, and thereupon he had entered: (in which Case, as some say, the opening of the Door by the Owner, being occasioned by the felonious Attempt of the other, is as much imputable to him as if it had been actually done by his own Hands.)

*Sect. 5.* And it has also been resolved, That where divers Persons came to a House with an Intent to rob it, and knocked at the Door, pretending to have Business with the Owner, and being by that Means let in, rifled the House, they were guilty of Burglary: Also it hath been adjudged, That those were no less guilty, who, having a Design to rob a House, took Lodgings in it, and then fell on the Landlord and robbed him; for the Law will not endure to have its Justice defrauded by such Evasions. And for the like Reason, *à fortiori*, it has been resolved, That, where Persons, intending to rob a House, raised a Hue and Cry, and prevailed with a Constable to make a Search in the House, and having got in by that Means, with the Owner's Consent, bound the Constable, and robbed the Inhabitants, they were guilty of Burglary; for there cannot be a greater Affront to publick Justice, than to make Use of legal Process as a Stale for such villainous Purposes; and therefore the whole Act is esteemed tortious *ab initio*.

*Sect. 6.* It is recited by 12 Anne 7. That there had been some Doubt, Whether the entering into a Mansion-House, without breaking the same, with an Intent to commit some Felony, and breaking the said House in the Night-time to get out, were Burglary: And thereupon it is declared and enacted, That if any Person shall enter into the Mansion or Dwelling House of another by Day or by Night, without breaking the same, with an Intent to commit Felony, or being in such a House, shall commit any Felony, and shall in the Night-time break the said House to get out of the same, such Person is, and shall be taken to be, guilty of Burglary, and ousted of the Benefit of Clergy, in the same Manner as if such Person had broken and entered the said House in the Night-time, with an Intent to commit Felony there.

*Sect. 7.* As to the fourth Point, viz. What Entry is sufficient to this Purpose; it seems agreed, That any the least Entry, either with the whole, or but with Part of the Body, or with any Instrument, or Weapon, will satisfy the Word *Intravit* in an Indictment of Burglary; as if one do but put his Foot over a Threshold, or his Hand, or a Hook, or Pistol, within a Window, or turn the Key of a Door which is locked on the Inside, or discharge a loaded Gun into a House, &c.

*Sect. 8.* Nay, it is certain, That in some Cases one may be guilty of Burglary, who never made any actual Entry at all; as where divers come to commit a Burglary together, and some stand to watch in adjacent Places, and the others enter, and rob, &c. for in all such Cases, the Act of one is in Judgment of Law the Act of all.

*Sect. 9.* And upon the like Ground, it seems difficult to find a Reason, why a Servant, who, confederating with a Rogue, lets him in to rob a House, &c. should not be guilty of Burglary as much as he; for it is clear, That if the Servant were out of the House, the Entry of the other would be adjudged to be his also; and what Difference is there, when he is in the House?

*Sect. 10.* As to the fifth Point, viz. In what Place this Offence may be committed, it seems to be the current Opinion at this Day, That it can be only in a Dwelling-House, and that the Indictment for it must necessarily alledge the Fact *in Domo mansionali*. And Sir Edward Coke seems to say, That the Breaking a Church, &c. is therefore Burglary, because the Church is the Mansion-House of God: But I can find nothing in the more ancient Authors to countenance this Nicety; for the general Tenor of the old Books seems to be, That Burglary may be committed in breaking Houses, or Churches, or the Walls, or Gates of a Town. And *Stauforde* and *Anderson* mention Precedents of Indictments of Burglary *in Domo*, without adding *Mansionali*: However, the constant Course of late Precedents and Opinions makes it certainly a very dangerous, if not an incurable, Fault, to omit the Word *Mansionalis* in an Indictment of Burglary in a House; and therefore without Question, it ought always to be inserted where the Truth of the Case will bear it. But sure it cannot be necessary or proper to have any such Word in an Indictment of Burglary in a Church, which, by all the Books above cited, seems to be taken as a distinct Burglary from that in a House.

*Sect. 11.* However it is agreed by all, That a House wherein a Man dwells but for Part of the Year, or a House which one has hired to live in, and brought Part of his Goods into, but has not yet lodged in; or a Chamber in one of the Inns of Court wherein a Person usually lodges, or a House which a Man's Wife hires without his Privity, and lives in by her self without him, may be called his Dwelling-House; and will sufficiently satisfy the Words *Domus mansionalis* in the Indictment, whether any Person were actually therein, or not, at the Time of the Offence.

*Sect.*  
3 Inst. 64.

Dalt. cap. 99.  
H. P. C. 81.  
1 And. 115.

Crom. 31, 32.

Crom. 32. a.  
Con. 1 And.  
115.

Crom. 32. a.  
H. P. C. 80, 81.

Con. H. P. C.  
81.  
Dalt. cap. 99.

4 Co. 40. a.  
3 Inst. 64, 67.  
H. P. C. 82,  
86.

3 Inst. 64.  
H. P. C. 82.

Brañ. 144. b.  
Bro. Coro. 93.  
22 Aff. 39 95.  
Dalt. cap. 99.  
27 Aff. 38.  
1 And. 302.  
S. P. C. 30.  
Popb. 42.

Dalt. cap. 99.

Crom. 33. b.  
Dalt. cap. 99.  
H. P. C. 82.  
Moore 660.  
Pl. 903.

4 Co. 40. a.  
Cro. Car. 474.  
1 Jon. 394.  
H. P. C. 82.

K-lyng 54.  
Popb. 42 52.

- 3 Inst. 64.  
Dalt. cap. 99.  
Bro. Cor. 180  
Crom. 32. b.
- H. P. C. 82.  
Kelynge 27,  
52, 83.
- Con. Kelynge  
83.
- Vide supra.  
Sect. 11.  
Crom. 33. a.  
Dalt. cap. 99.
- Co. Lic. 48. b.  
H. P. C. 83.
- Kelynge 83.
- H. P. C. 82,  
83.  
22 Aff. 95.  
Bro. Coro. 93.  
S. P. C. 30.  
Dalt. cap. 99.  
Crom. 31.
- Dy 99. Pl. 58.  
Dalt. 22.  
3 Inst. 65.
- Sect. 12.* Also all Out-Buildings, as Barns, Stables, Dairy-Houses, &c. adjoining to a House, are looked upon as Part thereof, and consequently Burglary may be committed in them; but if they be removed at any Distance from the House, it seems that it has not been usual of late to proceed against Offences therein as Burglaries.
- Sect. 13.* If several Persons dwell in one House as Servants, Guests, or Tenants at Will, or otherwise having no fix'd and certain Interest in any Part thereof, and a Burglary be committed in any of their Apartments; it seems clear, that the Indictment shall lay the Offence in the Mansion-House of the Proprietor, &c. But if one hire a distinct Apartment in a House for his Lodging for a certain Time, and a Burglary be committed therein, I can see no good Reason why the Indictment may not lay the Offence in *Domo mansionali* of such Lodger; for it seems to be agreed, That an Indictment for a Burglary committed in a Chamber in one of the Inns of Court, may lay the Offence in *Domo mansionali* of the Owner of the Chamber; and why may not such an Apartment, with as much Propriety, be called the Mansion-House of him that takes it, during the Time that he has a certain Interest in it? For so long as it is severed by the Lease, it seems in the Eye of the Law to be as distinct from the other Parts of the House, as if the Person who rents it, had a Freehold or Inheritance in it. And as to the Objection, That he goes into the House by the same Door with the other Inhabitants, and therefore is but an Inmate, and the whole ought to be considered but as one House; I answer, That he must have some Way to his Apartment as incident to his Interest in it, and that such Way lying through a Door which is common to him with others, doth not make the Apartment it self in any Respect less his own, than a Way through a Door belonging to himself only would have done.
- Sect. 14.* And if the Law be so in this Case, it seems to me very reasonable also, That if such a Lodger take also a Cellar in the said House, a Burglary committed in such Cellar, may be alledged in *Domo mansionali* of the Lodger, whether the Cellar had any Communication with the House or not; for since it seems to be agreed, That a Barn or Stable, or other Out-Building near to a House, shall be looked on as Part thereof, why should not such a Cellar have the like Estimation? *Sed Quere*, for *Kelynge* seems to incline to a different Opinion.
- Sect. 15.* However it is agreed by all, That if one hire a Part of a House to lodge in, which is actually divided from the rest, and have a Door of its own to the Street, a Burglary therein may be alledged in *Domo mansionali* of such Person.
- Sect. 16.* But if he had taken it as a Shop or Work-house for his Use in the Day-time only, it seems that a Felony therein cannot be alledged in a Mansion-House; not of him that lets it, because it is severed by the Lease from that Part of the House which belongs to him, nor of him to whom it is let, because he takes it not to lodge in.
- Sect. 17.* From what has been said it clearly appears, That no Burglary can be committed by breaking into any Ground inclosed' or Booth, or Tent, &c. for there seems to be no Colour from any Authority ancient or modern, to make any Offence Burglary that is not done either against some House, or Church, or the Walls, or Gates of some Town.
- Sect. 18.* As to the sixth Point, *viz.* What Degree of Guilt is required in the principal Intention of the Offender, it seems clear, That there can be no Burglary but where the Indictment both expressly alledges, and the Verdict also finds, an Intention to commit some Felony; for if it appear that

that the Offender meant only to commit a Trespass, as to beat the Party, &c. he is not guilty of Burglary. However, it seems much the better Opinion, That an Intention to commit a Rape, or such other Crime which is made Felony by Statute, and was a Trespass only at Common Law, will make a Man guilty of Burglary, as much as if such Offence were a Felony at Common Law, because where-ever a Statute makes any Offence Felony, it incidentally gives it all the Properties of a Felony at Common Law.

Kelynge 30.  
H.P.C. 83, 84  
Crom. 32 a b.  
Con. Dalt.  
cap 99.  
H. P. C. 215.  
Infra Ch. 40.  
Sect. 3.

C H A P. XXXIX.

Of Arson.

**A**RSON is a Felony at Common Law, in maliciously and voluntarily burning the House of another by Night or by Day.

Bro. Coro.  
135, 155.  
S. P. C. 36.  
3 Inst. 66.  
Dal. cap. 105.  
2 Inst. 188.  
11 Co. 29.

For the better Explication whereof I shall consider:

1. What is such a House in which Arson may be committed.
2. Whether this Offence may be committed in the Offender's own House.
3. How much of the House ought to be burnt.
4. With what Degrees of Malice.

*Sect. 1.* As to the first Point, viz. What is such a House in which Arson may be committed; it seems agreed, That not only a Mansion-House, and the principal Parts thereof, but also any other House, and the Out-buildings, as Barns, and Stables, adjoining thereto; and also Barns full of Corn, whether they be adjoining to any House or not, are so far secured by Law, that the malicious burning of them is Arson; and it is said, That in an Indictment they are well expressed by the Word *Domus*, without adding *Mansionalis*.

3 Inst. 67.  
4 Co. 20.  
Dal. ca. 105.  
11 H. 7. 1.  
Bro. Coro.  
226.  
S. P. C. 36.  
H. P. C. 86.

*Sect. 2.* But it seems that at this Day the Burning of the Frame of a House, or of a Stack of Corn, &c. is not accounted Arson, because it cannot come under the Word *Domus*, which seems at present to be thought necessary in every Indictment of Arson; yet it is said, That anciently the Burning a Stack of Corn was accounted Arson. And at this Day by 43 El. 13. it is Felony without the Benefit of a Clergy, wilfully and of Malice to burn or cause to be burned, or aid, procure, or consent to the Burning of any Barn, Stack of Corn, or Grain, in the Counties of Northumberland, Cumberland, Westmorland and Durham. And by 22 and 23 Ca. 2. 7. it is Felony, in the Night-time, maliciously, unlawfully, and willingly to burn or cause to be burned any Stacks or Ricks of Corn, Hay, or Grain, Barns, or other Houses, or Buildings, or Kilns, in any Place whatsoever: But the Offender may avoid Judgment of Death by chusing Transportation, and may be proceeded against by any three Justices of Peace, according to the Method prescribed by the Statute, which is set forth more at large in Chap. 46.

H. P. C. 86.  
3 Inst. 67.  
3 Inst. 67.  
Britt. fo. 16.  
S. P. C. 36.  
Dal. cap. 105.

*Sect. 3.* As to the second Point, viz. Whether Arson may be committed in the Offender's own House, it seems clearly agreed, That one seized in Fee, or but possessed for Years, of a House standing by it self at

1 Jon. 351.  
Cro. Ca. 177.

a Distance from all others, cannot commit Felony in burning the same: Also it seems the much stronger Opinion, That a Man so seized or possessed of a House in a Town, who burns his own with an Intent to burn his Neighbour's, but in the Event burns his own only, is not guilty of Arson; for by the general Tenor of the Books speaking of this Offence, it seems to be supposed to be done in the House of another, and not of the Offender: Neither shall any Act, which is only a Crime in Respect of the Injury which it does, or may do, to another, be made a Felony by Reason of an Intention thereby to commit a Felony, if such Intention be not executed: However this is certainly an Offence highly punishable, in Regard of the Malice thereof, and the great Danger to the Publick which attends it, and the Offender may be severely fined and imprisoned during the King's Pleasure, and set on the Pillory, and bound to his good Behaviour during Life.

3 Inst. 67.  
Dal. cap. 105

Cro. Ca. 338.  
1 Inst. 351.  
H. P. C. 85.  
Kelynge 29

*Seçt.* 4. As to the third Point, *viz.* How much of such House ought to be burnt, it seems to be clearly agreed, That neither a bare Intention to burn a House, nor even an actual Attempt to do it by putting a Fire to Part of a House, will amount to Felony, if no Part of it be burnt; for the Indictment must have the Words *Incendit & combussit*: But it is certain, That if any Part of the House be burnt, the Offender is guilty of Felony, notwithstanding the Fire afterwards be put out, or go out of it self.

H. P. C. 85.  
Dal. cap. 105.  
3 Inst. 66.

*Seçt.* 5. As to the fourth Point, *viz.* With what Degrees of Malice such House ought to be burnt; it seems clear, That if the Fire happened through Negligence or Mischance, it cannot make him, who is the unfortunate Cause of it, guilty of Arson; for the Indictment must alledge the Offence to have been done *Voluntariè ex malitiâ suâ præcogitatâ & felonice*. Yet if one maliciously intending only to burn the House of *A.* happen thereby to burn the House of *B.* it is certain that he may be indicted as having maliciously burned the House of *B.* for where a felonious Design against one Man misses its Aim, and takes Effect upon another, it shall have the like Construction as if it had been levelled against him who suffers by it.

3 Inst. 67.  
H. P. C. 85.  
Plow. Com.  
475.

## C H A P. XL.

### Of Felonies by Statute.

Offences more immediately against the Subject, made capital by Statute, and not reduced to any of the foregoing Heads, are such as are committed;

1. Against Women.
2. Against the Rights of Marriage.
3. Against the Members of a Man's Body.
4. Against Records.
5. Against Cattle.
6. By Purveyors.
7. By Soldiers and Mariners.
8. By Hunters.

9. By Forgers of false Deeds.
10. By Gaolers.
11. By Transporters of Sheep or Wool.
12. By Servants.
13. By Egyptians.
14. By Cutters of Pow-dike.
15. By Trespassers on the Borders, and Rioters.
16. By Bankrupts.
17. By Counterfeiters of Bank-Notes, Exchequer-Bills, Stamps, South-Sea Bonds, Lottery Orders, &c.

In treating hereof, I shall first consider such Points as relate to them all in general, and then descend to each Crime in particular, in the Order before set down.

As to what relates to them all in general, I will shew,

1. Where an Offence shall be said to be made Felony by Statute.
2. What is incidentally implied in every such Statute.

*Sett.* 1. As to the first Point it seems clear, That not only those Crimes which are made Felonies in express Words, but also all those which are decreed to have or undergo, Judgment of Life and Member by any Statute, become Felonies thereby, whether the Word Felony were omitted or mentioned.

Bro. Coro.  
204.  
3 Inst. 91.  
2 Inst. 434.  
Co. Lit. 391.  
Hob. 293.

*Sett.* 2. But an Offence shall never be made Felony by the Construction of any doubtful and ambiguous Words of a Statute, and therefore, if it be only prohibited under Pain of forfeiting all that a Man has, or of forfeiting Body and Goods, or of being at the King's Will for Body, Land, and Goods, it shall amount to no more than a high Misdemeanour, punishable by Imprisonment, &c.

Co. Lit. 391.  
Hob. 270.  
293.  
3 Inst. 146.

*Sett.* 3. Also where a Statute makes a second Offence Felony, or subject to a heavier Punishment than the first; it is always implied, That such second Offence ought to be committed after a Conviction for the first; from whence it follows, That if it be not so laid in the Indictment, it shall be punished but as the first Offence; for the gentler Method shall first be tried, which perhaps may prove effectual.

H. P. C. 8.  
2 Bull. 349.  
Dy. 323. Pl.  
31.  
1 Leon. 295.

*Sett.* 4. As to the second Point, *viz.* What is incidentally implied in every Statute, making an Offence Felony; it seems clear, That every such Statute does by necessary Consequence subject the Offender to the like Attainder and Forfeiture, &c. and also does require the like Construction, as to those who shall be accounted Accessaries before or after, and to all other Intents and Purposes, as is incident to a Felony at Common Law.

3 Inst. 47, 59.  
90.  
Crompt. 42.  
Pl. 13.  
H. P. C. 215.  
Dalif. 11, 12.  
B. 2. Ch. 29.  
S. 13. 14.  
Salk 542, 543

*Sett.* 5. Yet where such a Statute saves the Corruption of Blood, it impliedly saves the Descent of the Land of the Offender to his Heir: Also where it saves the Land to the Heir, it prevents the Corruption of Blood so far: And it is said, That in both Cases it saves the Wife's Dower, because where-ever an Heir takes as Heir, he shall not avoid a Title of Dower in Respect of the same Inheritance. But notwithstanding such a Saving the Land shall be forfeited for the Life of the Offender.

3 Inst. 47.  
H. P. C. 8.

*Sett.* 6. If one commit an Offence which is made Felony by Statute, and then the Statute be repealed, he cannot be punished as a Felon in Respect of that Statute.

Bro. Coro.  
203.

3 Inst. 47.



## C H A P. XLI.

## Of Rape.

**O**FFENCES against Women made Felonies by Statute are of two Kinds.

1. Rape.
2. Forcible Marriage.

In treating of Rape, I shall consider,

1. What shall be called a Rape.
2. How it is punished.

- Co. Lit.* 190.  
*3 Inst.* 60.  
*2 Inst.* 180.  
*12 Co.* 37.  
*3 Inst.* 59, 60.  
*H. P. C.* 117.  
*Rushworth*  
*Collect. Part.*  
*2 Vol. I.* 94.  
*3 Inst.* 59.  
*Del. ca.* 105.  
*Bro. Parliam.*  
*ment* 55.  
*5 Ed.* 4. 6. 2.
- Rushworth*  
*Coll. Part.* 2.  
*Vol. 1.* 100.  
*Braff.* 147.  
*S. P. C.* 24.  
*Braff.* 148.  
*Finch.* 204.  
*Dal. cap.* 107.
- Rushworth*  
*Coll. Part.* 2.  
*Vol. 1.* 100.  
*Braff.* 147. 2.  
*Dalt. ca.* 107.  
*Crompt.* 100. 2.  
*Dy.* 304 Pl.  
 51.  
*Cro. Ca.* 332.
- B. 2. Ch.* 29.  
*S.* 7. 89.  
*Dalt. ca.* 107.
- Secf.* 1. As to the first Point, It seems that Rape is an Offence in having unlawful and carnal Knowledge of a Woman, by Force and against her Will: But it is said, That no Assault upon a Woman in order to ravish her, howsoever shameless and outrageous it may be, if it proceed not to some Degree of Penetration, and also of Emission, can amount to a Rape; however it is said, That Emission is, *primâ facie*, an Evidence of Penetration.
- Secf.* 2. Offences of this Nature are not any way mitigated, by shewing that the Woman at last yielded to the Violence, if such her Consent was forced by Fear of Death, or of Durefs: Nor is it any Excuse, that she consented after the Fact, or that she was a common Strumpet; for she is still under the Protection of the Law, and may be forced. But it was anciently said, to be no Rape to force a Man's own Concubine. Also it hath been said by some to be no Rape to force a Woman who conceives at the Time; for it is said, That if she had not consented, she could not have conceived: But this Opinion seems very questionable, not only because the previous Violence is no way extenuated by such a subsequent Consent, but also because if it were necessary to shew that the Woman did not conceive, this Offender could not be tried till such Time as it might appear whether she did or not, and likewise because the Philosophy of this Notion may very well be doubted of.
- Secf.* 3. It is a strong, but not a conclusive Presumption against a Woman, That she made no Complaint in a reasonable Time after the Fact.
- Secf.* 4. It was a Question before 18 *El.* 7. Whether a Rape could be committed on a Child of the Age of six or seven Years; but by that Statute, *whosoever shall unlawfully and carnally know and abuse any Woman-Child under the Age of ten Years, shall suffer as a Felon without Clergy.*
- Secf.* 5. Upon an Indictment for this Offence, it is no way material whether such Child consented, or were forced; yet it must be proved, That the Offender entered into her Body, &c.
- Secf.* 6. All who are present and actually assist a Man to commit a Rape, may be indicted as principal Offenders, whether they be Men or Women.

*Sect.* 7. As to the second Point, *viz.* How Rape is punished, it is said, that of old Time it was Felony, and consequently punishable with Death, especially if the Party ravished were a Virgin, unless such Virgin would accept of the Offender for her Husband, in which Case she might save his Life by marrying him. But afterwards it was looked upon as a great Misdemeanour only, but not Felony; and the Offender was punished with the Loss of his Eyes and Testicles: And by the Statute of *Westm.* 1 13. It was reduced to a Trespass, subjecting the Offender to two Years Imprisonment, and a Fine at the Kings Will. But the Smallness of the Punishment proving a great Encouragement to the Offence, it was made Felony again, by the Statute of *Westminster* 2. 34. and by 18 *El.* 7. it is excluded from the Benefit of the Clergy.

*Bract.* 147,  
148.  
*S. P. C.* 21. b.  
22. 27.  
2 *Inst.* 187.  
*Dalc. cap.* 99.  
*Crom.* 32.  
con.  
*Co. Li.* 123. b.  
*Fleta lib.* 1.  
*cap.* 40.  
3 *Inst.* 180.  
*Quere Fitz.*  
*Uclagary* 49.  
*Bro. Coro.*  
169.

## C H A P. XLII.

## Of Forcible Marriage.

*Sect.* 1. **T**HE marrying a Woman of Substance by Force, and other Offences of the like Nature, were made Felonies by 3 *H.* 7. 2. which was enacted in the following Words:

*Sect.* 2. *Where Women as well Maidens as Widows and Wives, having Substances, some in Goods moveable, and some in Lands and Tenements, and some being Heirs Apparent unto their Ancestors, for the Lucre of such Substances, be oftentimes taken by Mis-doers, contrary to their Will, and after married to such Mis-doers, or to other by their Assent, or defiled, to the great Displeasure of God, and contrary to the King's Laws, and Disparagement of the said Women, and utter Heaviness and Discomfort of their Friends, and to the evil Ensamle of all other: It is therefore ordained, established and enacted by our Sovereign Lord the King, by the Advice of the Lords Spiritual and Temporal, and the Commons in the said Parliament assembled, and by Authority of the same, That what Person or Persons from henceforth that taketh any Woman (so) against her Will unlawfully, that is to say, Maid, Widow, or Wife, that such Taking, Procuring, and Abetting to the same, and also receiving wittingly the same Woman so taken against her Will, and knowing the same, be Felony: And that such Mis-doers, Takers, and Procurators to the same, and Receiters, knowing the said Offence in Form aforesaid, be henceforth reputed and judged as principal Felons: Provided alway, that this Act extend not no any Person taking any Woman, only claiming her as his Ward or Bond-Woman.*

*Sect.* 3. And by 39 *El.* 9. All Persons who shall be Principals, or Procurers or Accessories before such Offence committed, are concluded from the Benefit of the Clergy.

In the Construction of the said Statute of 3 *H.* 7. 2. the following Points have been resolved.

*Sect.* 4. 1. That the Indictment must expressly set forth, both that the Woman taken away had Land or Goods, or was Heir apparent, and also that she was married or defiled, because no other Case is within the Preamble of the Statute to which the enacting Clause clearly refers; for it does not say, That what Person, &c. that taketh any Woman against her Will, but what Person that taketh any Woman so against her Will.

*Hob.* 182.  
*Cro. Ca.* 485.  
*Dalif.* 22.  
1 *And.* 115.  
3 *Inst.* 68.  
*H. P. C.* 118.  
*Savil* 59  
12 *Co.* 20,  
110.

- Sect. 5.* II. That the Indictment ought also to alledge, That the taking was for Lucre, because the Words of the Preamble are so, but that it needs not set forth, That it was with an Intention to marry or de-
- Hob. 182.  
Cro. Ca. 485,  
489. file the Party, because the Words of the Statute neither require such an Intention, nor does the Want thereof any Way lessen the Injury.
- Hob 182.  
Cro. Ca. 485. *Sect. 6.* III. That it is no manner of Excuse, That the Woman at first was taken away with her own Consent, because if she afterwards refuse to continue with the Offender, and be forced against her Will, she may from that Time as properly be said to be taken against her Will, as if she had never given any Consent at all; for till the Force was put upon her, she was in her own Power.
- Cro. Ca. 493.  
3 Keb. 193.  
2 Vent. 243,  
244. *Sect. 7.* IV. That it is not material whether a Woman so taken away, be at last married, or defiled, with her own Consent or not, if she were under the Force at the Time, because the Offender is in both Cases equally within the Words of the Statute, and shall not be construed to be out of the Meaning of it, for having prevailed over the Weakness of a Woman, whom by so base Means he got into his Power.
- 3 Inst. 61.  
Dalif. 22.  
S. P. C. 44. *Sect. 8.* V. That those who after the Fact receive the Offender, but not the Woman, are not Principals within this Statute, because the Words are, *receiving wittingly the same Woman so taken, &c.* but it seems clearly, That they are Accessaries after the Offence, according to the known Rules of Common Law.
- Cro. Ca. 482.  
H. P. C. 119. *Sect. 9.* VI. That those who are only privy to the Marriage, but no way Parties to the Forcible taking away, or consenting thereto, are not within the Statute.
- Cro. Ca. 488.  
Hob. 183;  
H. P. C. 119. *Sect. 10.* VII. That where a Woman is taken by Force in the County of *A.* and married in the County of *B.* the Offender may be indicted and found guilty in the County of *B.* because the continuing of the Force there amounts to a Forcible Taking within the Statute.

## C H A P. XLIII.

## Of Offences against the Rights of Marriage.

- Cro. El. 94. *Sect. 1.* **O**ffences against the Rights of Marriage, at Common Law, are looked upon as Spiritual Offences, and punishable only by the Ecclesiastical Law, but one of them is made Felony, but not excluded from the Benefit of the Clergy, by 1 Jac. 1. 11. by which it is enacted, *That if any Person or Persons, within his Majesty's Dominions of England and Wales, being married, do marry any Person or Persons, the former Husband or Wife being alive, that then every such Offence shall be Felony, and the Person and Persons so offending, shall suffer Death as in Cases of Felony. And the Party and Parties so offending, shall receive such and the like Proceeding, Trial, and Execution, in such County, where such Person or Persons shall be apprehended, as if the Offence had been committed in such County, where such Person or Persons shall be taken or apprehended.*
- Sect. 2.* But it is provided by the said Statute, *That nothing therein contained, shall extend to any Person or Persons whose Husband or Wife shall be continually remaining beyond the Seas by the Space of seven Tears together, or whose*  
Husband

## Chap. 44. Offences against the Members of a Man's Body.

III

Husband or Wife shall absent him or her self, the one from the other, by the Space of seven Years together in any Parts within his Majesty's Dominions, the one of them not knowing the other to be living within that Time.

Sect. 3. And it is farther provided, That the said Statute shall not extend to any Person or Persons who shall be at the Time of such Marriage divorced by Sentence in the Ecclesiastical Court, or to any Person or Persons where the former Marriage shall be by Sentence in the Ecclesiastical Court declared to be void and of no effect: Nor to any Person or Persons, for, or by Reason of, any former Marriage had or made within Age of Consent.

Sect. 4. Also it is farther provided, That no Attainder for this Offence shall make or work any Corruption of Blood, Loss of Dower, or Disinherison of Heir or Heirs.

In the Construction of this Statute it has been holden,

Sect. 5. I. That not only those who are divorced à vinculo Matrimonii, but also those who are divorced only à Mensa & Thoro Causa Adulterii or Sevitie, are within the Exception in this Statute, notwithstanding there be not the Word Divortiamus, but only the Word Separamus, in the Sentence; because the Statute, being penal, shall be construed favourably, and such Separations are taken for Divorces in common Understanding.

3 Inst. 89.  
H. P. C. 122.  
Kelynge 27.  
Cro. Ca. 461,  
462. This is  
made a Query.

Sect. 6. II. Where either of the Parties were within the Age of Consent at the Time of the first Marriage, that not only such Person as was within such Age, but also the other who was above it, is within the Exception of the Statute, because the Power of disagreeing to such Marriage is equal on both Sides.

3 Inst. 89.  
H. P. C. 121.  
1 Rol. Ab.  
340. Pl. 13,  
141 Pl. 14,  
15, 16, 17.  
Co. Lit. 79.

Sect. 7. III. That if the first Marriage were beyond Sea, and the later in England, the Party may be indicted for it here, because it is the later Marriage that makes the Offence; but if the first Marriage were in England, and the latter beyond Sea, it is said that the Offender cannot be indicted here; *sed quere*, why not? for the Words of the Statute are, *That the Parties so offending shall receive such and the like Proceeding, Trial, and Execution, in such County where such Person or Person shall be apprehended, as if the Offence had been committed in such County, where such Person or Persons shall be taken or apprehended.*

1 Sid. 171.  
Kelynge 88

## C H A P. XLIV.

### Of Offences against the Members of a Man's Body.

IN treating of Offences against the Members of a Man's Body, I shall consider,

1. What Offences of this Nature are esteemed Mahims.
2. How they are punished by the Common Law.
3. How they are punished by Statute.

Fleta. lib. c. 40.  
Brit. 48  
Braft. 144. b.

Sect. 1. As to the first Point, it seems that such a Hurt of any Part of a Man's Body, whereby he is rendered less able in Fighting, either to defend himself or annoy his Adversary, is properly Mahim.

145  
S. P. C. 38. b.  
Co. Lit. 126,  
128

Sect. 2. And therefore the cutting off, or disabling, or weakening a Man's Hand, or Finger, or striking out his Eye or Foretooth, or castrating him, are said to be Mahims, but the cutting off his Ear, or

3 Inst. 62, 118.  
Fitz. Coro.  
142, 458.

I

25 Ed. 3. 94.  
See the Authors  
above cited.  
Nose,

Nose, &c. are not esteemed Mahims, because they do not weaken, but only disfigure him.

Braet. 144. b.  
Fleta, lib. 1.  
cap. 40.  
S. P. C. 37. a.  
3 Inst. 62, 118  
H. P. C. 133.

*Sect. 3.* As to the second Point, *viz.* How such Offences are to be punished, it is to be observed, that all Mahim is Felony; and it is said, That anciently Castration was punished with Death, and other Mahims with the Loss of Member for Member; but afterwards no Mahim was punished in any Case with the Loss of Life or Member, but only with Fine and Imprisonment.

See 5 H. 4. c. 5.

*Sect. 4.* As to the third Point, *viz.* How such Offences are punished by Statute, it is enacted by 22 and 23 Ca. 2. cap. 1. *That if any Person shall on Purpose and of Malice fore-thought, 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 Subject of his Majesty, with Intention in so doing to maim or Disfigure, in any the Manners before mentioned, such his Majesty's Subject, That then and in every such Case the Person or Persons, so offending, their Counsellors, Aiders and Abettors, knowing of, and privy to the Offence, as aforesaid, shall be and are by the said Statute declared to be Felons, and shall suffer Death as in Cases of Felony without Benefit of Clergy.*

*Sect. 5.* But it is provided by the said Statute, *That no Attainder of such Felony shall extend to corrupt the Blood, or forfeit the Dower of the Wife, or the Lands Goods or Chattels of the Offender.*

*Sect. 6.* If a Man attack another of Malice forethought, in order to murder him with a Bill, or any other such like Instrument, which cannot but endanger the Maiming him, and in such Attack happen not to kill, but only to maim him, he may be indicted on this Statute, together with all those who were his Abettors, &c. and it shall be left to the Jury on the Evidence, whether there were a Design to murder by maiming, and consequently a malicious Intent to maim as well as to kill, in which Case the Offence is in the Statute, tho' the primary Intention was Murder.

## C H A P. XLV.

### Of Offences against Records.

3 Inst. 71, 72.

*Sect. 1.* **A**T Common Law the imbezilling, defacing, or altering any Record, without due Authority, was an Offence highly punishable by Fine and Imprisonment, &c. and in many Cases it was made Felony by the following Clause of 8 H. 6. 12.

*Sect. 2.* *It is ordained, That if any Record or Parcel of the same, Writ, Return, Panel, Process, or Warrant of Attorney, in the King's Courts of Chancery, Exchequer, the one Bench or the other, or in his Treasury, be willingly stoln, taken away, withdrawn, or avoided, by any Clerk, or by other Person, because whereof any Judgment shall be reversed: That such Stealer, Taker-away, Withdrawer, or Avoider, their Procurators, Counsellors, and Abettors, thereof indicted, and by Process thereupon made, thereof duly convict by their own Confession, or by Inquest to be taken of lawful Men, (whereof the one half shall be of the Men of any Court of the same Courts, and the other half of other) shall be judged for Felons, and shall incur the Pain of Felony: And that the Judges of the said Courts, of the one Bench or of the other, have Power to hear and determine such Defaults before them, and thereof to make due Punishment, as afore is said.*

In the Construction of this Clause, it hath been holden :

3 Inst. 71.

*Sect. 3.* I. That it extends only to the Courts which are expressly named; and to the Court of Chancery, so far only as it proceeds according to the Course of the Common Law.

*Sect. 4.* II. That it extends not to such Offence by the Judges of any Court; for whereas it begins with expressly naming Clerks which are inferior to them, it shall not be intended to include them under the general Words following; however by 8 R. 2. 4. *Judges as well as Clerks are to pay a Fine to the King, and make Satisfaction to the Party for falsely entering Pleas, or raising Rolls, or changing Verdicts to the Dishonour of any one;* And they are highly punishable at Common Law for other Offences of like Nature, as for inserting a Bill of Indictment not found by the Jury among those which were found, and such like. And Justice *Ingham* in the Reign of *Edward* the first was fined eight hundred Marks for raising a Fine of thirteen Shillings and four Pence, set on a poor Man, and making it six Shillings and eight Pence.

3 Inst. 72.

2 R. 3. 10.  
3 Mod. 66.  
Bro. Cor. 174.  
Tregs 31.  
Con. Bro.  
Presentment  
23. Indictment 14. 50.  
3 Inst. 72.

*Sect. 5.* III. That not only such an Alteration whereby a Judgment is actually reversed, but also such whereby it is reversible, whether it were made before or after the Judgment was given, or whether it be or be not afterwards amended by the Court, is within this Act; for those Words in the Statute *whereby any Judgment shall be reversed*, are taken to have the same Purport, as if it were said, *whereby any Judgment shall be annulled, or lose its Force or Effect*; for it is plain, That the Statute cannot intend that the Judgment must be actually reversed by Writ of Error, because it speaks of stealing or carrying away, or avoiding of Records, which makes it impossible that the Judgment should be reversed at all, because no Writ of Error can remove a Judgment which appears not. And it has been holden, That if *A. B.* be outlawed by the Name of *A. C.* and afterwards the Record be rased, and *A. B.* inserted, the Offence is within the Statute, because the Record against *A. C.* is annulled, and the Judgment prevented, which might have been given on a Writ of Error for this Defect.

2 Rol. Re. 81.

2 R. 3. 10.  
S. P. C. 36. b.  
3 Inst. 72.  
11 Kep 34. b.

*Sect. 6.* IV. If the Offence were committed partly in one County, and partly in another, but not so as to amount to a compleat Offence within the Statute in either, That the Party cannot be indicted for a Felony, because the Counties cannot join in an Indictment, and that which is done in one cannot be found in another, but that he may be indicted for a Misprison in either County.

2 R. 3. 10. b.  
11.  
S. P. C. 36.  
3 Inst. 73.

*Sect. 7.* V. That the Act, by making those who are Accessary before the Fact principal Felons, does not mean any way to favour those who are Accessary after, but to leave them to the general Construction of the Law.

3 Inst. 72.  
Con. S. P. C.  
44 d.

*Sect. 8.* VI. That by the last Clause of the Act, the Justices of either Bench have a Concurrent Authority, and that they which shall first enquire shall proceed; and that if the Offence were committed in the County where the Benches sit, they need no other Commission; but if it were done in another County, that they must have a special Commission: And if in *London*, that they shall have a Commission in which the Mayor shall be omitted, for the Charters of the City, which require that he shall be a Principal in every Commission, extend not to such Causes which are specially limited to particular Judges.

3 Inst. 73.

3 Inst. 72.  
2 R. 3. 10. a.

*Sect. 9.* By 21 Jac. 1. 26. *It is made Felony without the Benefit of Clergy, but not so as to corrupt the Blood, to acknowledge or procure to be acknowledged, any Fine, Recovery, Deed enrolled, Statute, Recognizance, Bail, or Judgment in the Name of any other Person or Persons not privy and consenting to the same.*

2 Jon. 64.  
 Concern in the  
 Report of the  
 same Case.  
 1 Ven. 301,  
 302.  
 1 Ven. 302.

*Señ. 10.* In the Construction hereof it has been holden, That if a Man personate another in the County of *A.* in putting in Bail before a Judge, and the Bail be filed in the County of *B.* the Trial shall be in the County of *A.* Also it seems the bare personating of Bail before a Judge is no Felony, unless the Bail be filed.

*Señ. 11.* Also it is enacted by 4 & 5 Will. & Mar. 4. That any Person or Persons who shall before any Commissioner authorized to take Bail, by Vertue of the said Statute, in Actions depending in the Courts of King's Bench, Common Pleas, or Exchequer, represent, or personate any other Person or Persons, whereby the Person or Persons so represented and personated, may be liable to the Payment of any Sum or Sums of Money or Debt, or Damages, to be recovered in the same Suit or Action, wherein such Person or Persons are represented and personated, as if they had really acknowledged and entered into the same, being lawfully convicted thereof, shall be adjudged Felons.

## C H A P. XLVI.

## Of Offences relating to Cattle.

**B**Y 22 & 23 Car. 2. 7. it is made Felony, Maliciously, unlawfully, and willingly, to kill or destroy any Horses, Sheep, or other Cattle of any Person or Persons whatsoever in the Night-time, but Liberty is given to the Offender to avoid Judgment of Death, by chusing Judgment of Transportation for seven Years; and any three Justices of Peace for the County, Division, City, Town-corporate, or Place, whereof one to be of the Quorum, are authorized to enquire as well by the Oaths of twelve lawful Men, of the same County, as by Examination of Witnesses upon Oath, or by any lawful Ways or Means, which to them shall seem meet, of the said Offences, and in Order thereunto to issue out Warrants, as well for the Summoning of Jurors, as for the apprehending of all Persons, who shall or may be suspected thereof, and to take their Examination touching the same, as also to cause all such other Persons as to them shall seem likely to make Discovery thereof, to appear before them, and to give Information upon Oath concerning their Knowledge of the Premises, so as no Person so to be examined shall in any wise be proceeded against for any Offence concerning which he shall be so examined as a Witness, and shall upon such his Examination make a true Discovery of: And if any Person who shall be thought likely to make such Discovery, being summoned by the said Justices, refuse to appear, or to be examined as a Witness, he may be committed by the said Justices to the County-Gaol, till he shall submit to be examined. Provided, That no Person shall be questioned for any Offence against the Statute, unless he be proceeded against within six Months after the Offence committed.

## C H A P. XLVII.

## Of Offences by Purveyors.

*Señ. 1.* **A**nciently the King's Court was supplied with Necessaries from the ancient Demesnes of the Crown, which were manured for that Purpose, and in respect thereof the Tenants of those Lands had many Privileges, which they still enjoy; but this Method being found to

1 Inst. 543.

be troublesome and inconvenient, was by Degrees difused, and afterwards the King used to appoint certain Officers to buy in Provisions for his Household, who were called, Purveyors, and claimed many Privileges by the Prerogative of the Crown, and seem to have had the Pre-emption of all such Victuals as were bought by any one to sell again.

*Señt. 2.* By *Magna Charta*, chap. 21. *The King shall not take the Timber of any Person against his Will, and by many subsequent Statutes, several Offences of Purveyors were made Felonies, as if they took Things above the Value of twelve Pence, against the Will of the Owner, without Warrant, or without such Appraisement as was directed by those Statutes, or without paying for them, &c.*

*Señt. 3.* But these Laws having been found by Experience not to have sufficiently provided against the Oppressions of Persons employed for making Provisions for the King's Household, Carriages, and other Purveyance for his Majesty, and several Counties having found themselves obliged to submit to sundry Rates and Taxes, and Compositions to redeem themselves from such Vexations and Oppressions, as it is recited by 12 Car. 2. 24. Par. 12. it was enacted by the said Statute, *That from thenceforth no Sum or Sums of Money, or other Thing shall be taken, raised, taxed, rated, imposed, paid, or levied, for or in regard of any Provision, Carriages, or Purveyance for his Majesty, his Heirs or Successors.*

*Señt. 4.* And it is farther enacted by the said Statute, Par. 12. *That no Person or Persons by any Warrant, Commission, or Authority under the great Seal, or otherwise by Colour of buying or making Provision or Purveyance for his Majesty, or any Queen of England for the Time being, or of any the Children of any King or Queen of England for the Time being, or that shall be, or for his, their, or any of their Household, shall take any Timber, Fuel, Cattle, Corn, Grain, Malt, Hay, Straw, Victual, Cart, Carriage, or other Thing whatsoever, of any the Subjects of his Majesty, his Heirs, or Successors, without the free and full Consent of the Owner or Owners thereof, had and obtained without Menace or Enforcement; nor shall summon, warn, take, use, or require any the said Subjects to furnish or find any Horses, Oxen, or Cattle, Carts, Ploughs, Wains, or other Carriages, for the Use of his Majesty, his Heirs or Successors, or of any Queen of England, or of any Child, or Children of any of the Kings or Queens of England for the Time being, for the carrying the Goods of his Majesty, his Heirs or Successors, or the said Queens, or Children, or any of them, without such full and free Consent as aforesaid, any Law, Statute, Custom, or Usage to the contrary notwithstanding.*

*Señt. 5.* And it is further enacted Par. 14. *That no Pre-emption shall be allowed or claimed in the Behal of his Majesty, or of any of his Heirs or Successors, or of any of the Queens of England, or of any of the Children of the Royal Family for the Time being, in Market or out of Market, but that it be free to all and every the Subjects of his Majesty, to sell, dispose, or employ his said Goods to any other Person or Persons, as him listeth, any Pretence of making Provision or Purveyance of Victual, Carriages, or other Thing for his Majesty, his Heirs or Successors, or of the said Queens, or Children, or any Pretence of Pre-emption in their, or any of their Behalvs notwithstanding. And if any Person or Persons shall make Provision or Purveyance for his Majesty, his Heirs or Successors, or any the Queens, or Children aforesaid, or impress, or take any such Carriages, or other Things aforesaid, on any Pretence or Colour of any Warrant aforesaid, under the Great Seal, or otherwise, contrary to the Intent hereof, it shall be lawful for the Justices of Peace, or such two, or one of them as dwell near, and to the Constables of such Parish or Village where such Occasion shall happen, at the Request of the Party grieved; to commit or cause to be committed, the Party or Parties so doing and offending, to Goal, till the next Sessions, there to be indicted and proceeded against for the same, &c.*

Noy 102.

28 E. 1. ch. 2.  
1567. 2. ch. 2. 3.  
4. 5. 6.  
1 Ed. 3. ch. 2.  
2 Inst. 82.  
Dat. ca. 107.  
Com. 48.  
1 Bull. 95, 57.

See Mo. 762,  
770, 778.  
Noy 101.

Señt.



*Sect. 6.* But this absolute and universal Restraint of all Kinds of Purveyance having been found by Experience inconvenient, it was enacted by 13 & 14 Car. 2. 20. which has been often continued by subsequent Statutes, That the Officers of the Navy may press Carriages for the Use of his Majesty's Navy and Ordnance, according to the Regulations prescribed by that Statute, and the like was enacted by 1 Jac. 2. 10. in relation to the King's Royal Progresses, &c.

## C H A P. XLVIII.

*Of Offences by Soldiers and Mariners.*

**O**ffences by Soldiers or Mariners, made Felony by Statute, are of three Kinds.

1. Wandering without a Testimonial.
2. Departing from the King's Service without Licence.
3. Destroying a Ship.

*Sect. 1.* The first of these Offences depends upon 39 El. 17. by which it is recited, *That divers licentious Persons contemning both Laws, Magistrates, and Religion, had used to wander up and down in all Parts of the Realm, under the Name of Soldiers and Mariners, abusing the Title of that honourable Profession, to countenance their wicked Behaviours, and that such Persons had used to assemble themselves weaponed in the Highways, and elsewhere in Troops, to the great Terror and Astonishment of her Majesty's true Subjects, the Impeachment of her Laws, and the Disturbance of the Peace and Tranquility of this Realm: And that many hainous Outrages, Robberies, and horrible Murders had been daily committed by such dissolute Persons; and thereupon it is enacted, That all idle and wandering Soldiers or Mariners, or idle Persons which shall be wandering as Soldiers or Mariners, shall settle themselves in some Service, Labour, or other lawful Course of Life, without wandering, or otherwise repair to the Places where they were born, or to their Dwelling-Places, if they have any, and there remain, betaking themselves to some lawful Trade or Course of Life, as aforesaid; upon Pain, That all Persons offending contrary to this Act, shall suffer as in case of Felony, without Clergy.*

*Sect. 2.* And it is farther enacted, *That every idle and wandering Soldier or Mariner, which, coming from his Captain from the Seas, or from beyond the Seas, shall not have a Testimonial under the Hand of some one Justice of the Peace, of, or near, the Place where he landed, setting down therein the Place and Time, where and when he landed, and the Place of his Dwelling or Birth, unto which he is to pass as aforesaid, and a convenient Time therein limited for his Passage, or having such Testimonial, shall wilfully exceed the Time therein limited, above fourteen Days: And also, as well every such idle and wandering Soldier or Mariner, as every other idle Person wandering, as Soldier or Mariner, which shall at any Time hereafter forge or counterfeit any such Testimonial, or have with him or them any such Testimonial forged, or counterfeited as aforesaid, knowing the same to be counterfeited or forged, in all these Cases, every such Act or Acts to be Felony, and the Offenders to suffer, as aforesaid, without any Benefit of Clergy.*

*Señ. 3.* And it is farther enacted, That it shall be lawful for the Justices of Assizes, Justices of Gaol-Delivery, and the Justices of Peace of every County, and all Justices of Peace in Towns corporate, having Authority to hear and determine Felonies, to hear and determine all such Offences in their general Sessions, and to execute the Offenders, which shall be convicted before them as in Cases of Felony is accustomed, except some honest Freeholder, &c. will take such Offender into his Service for one whole Year, and also be bound by Recognizance of ten Pounds, to keep the said Person for one whole Year, and bring him to the next Sessions for the Peace and Gaol Delivery next ensuing after the said Year; and if any such Person so retained, depart within the Year, without the Licence of him that so retained him, then, to be indicted, tried, and judged as a Felon, and not to have the Benefit of the Clergy.

*Señ. 4.* But it is provided by the said Statute, That if any such idle and wandering Person, as aforesaid, shall happen to fall sick by the Way, so that by reason of his Weakness he can not travel to his Journey's End within the Time limited within his Testimonial, no such Person to be within the Danger of this Statute, so as he settle himself in some lawful course of Life, as aforesaid, or repair, as aforesaid, to the Place where he was born, or was last abiding, within convenient Time after the Recovery of his Sickness, and there remain as aforesaid.

*Señ. 5.* And it is farther provided by the said Statute, That if such Soldier or Mariner repairing to his Place of Birth, &c. can not get work, he shall be set to work by two Justices of Peace, &c.

*Señ. 6.* And it is farther provided, That if such Soldier or Mariner resort to some Justice of the Peace next adjoining to his Place of Landing, or to such his direct Way home, and make known unto the said Justice his Poverty; that the said Justice, upon perfect Notice thereof had, may licence the same Soldier or Mariner to pass the next and direct Way to the Place where he is to repair, and to limit him so much Time only, as shall be necessary for his Travel thither; and that in such case his Licence being so made, and he pursuing the Form of such his Licence, shall and may, for his necessary Relief in his Travel, ask and take the Relief that any Person shall willingly give him.

*Señ. 7.* The second Offence of this Kind, viz. That of departing from the King's Service without Licence. depends upon several Statutes; for it was enacted by 18 H. 6. 19. that Soldiers retained in the manner prescribed by that Act, departing from their Captains without Licence, shall be guilty of Felony; but this Statute is now of little use, because the Method of retaining Soldiers therein referred to, is disused.

*Señ. 8.* However by 7 H. 7. 1. and 3 H. 5. 8. still in force, If any Soldier, being no Captain, immediately retained with the King, who shall be in Wages and retained, or take any Prest to serve the King upon the Sea, or upon the Land beyond the Sea, depart out of the King's Service, without Licence of his Captain, he shall suffer as a Felon, without the Benefit of the Clergy. And all Justices of Peace in every Shire in England, where any such Offenders be taken, have Power to enquire of the said Offences, and the same to hear and determine, as they may do of Felony, Trespasses, and of other Offences expressed in the King's Commission to them made, as though the said Offences were done in the same Shire.

*Señ. 9.* And by 2 Ed. 6. 2. If any Soldier, serving the King in his Wars, in any his Dominions, or on the Seas, or beyond the Seas, or in Scotland, depart without Licence of the Lieutenant, or Admiral, or Captain, &c. with Booty, or otherwise, being in the Enemy's Country, or elsewhere in the King's Service, or out of any Garrison where he shall be appointed to serve, he shall be adjudged a Felon, and excluded from his Clergy; and the Justices of eve-

3 Inst. 86.  
6 Co. 27.  
Co. Lit. 71.  
Dist. ca. 107.  
Cro. Ca. 71.  
Hutt 134.

3 Inst. 86.  
Dist. ca. 107  
2 And. 151.  
3 Mod. 124.  
See also the  
other Books  
above cited.

3 Inst. 86.  
6 Co. 67.

ry Shire where such Offender shall be taken, may enquire of and determine the Offence, &c.

Sec̄. 10. The third Offence of this Kind, viz. That of destroying a Ship, depends upon 22 & 23 Car. 2. 11. and 1 Anne 9. by which it is enacted, That if any Captain, Master, Mariner or other Officer, belonging to any Ship, shall wilfully cast away, burn, or otherwise destroy the Ship to which he belongeth, or procure the same to be done, to the Prejudice of the Owner or Owners thereof or of any Merchant or Merchants that shall load Goods thereon, he shall suffer as a Felon, without the Benefit of the Clergy, and if the Offence were committed in the Admiral's Jurisdiction, shall be tried in the Manner prescribed by 28 H. 8. 15.

## C H A P. XLIX.

## Of Offences by Hunters.

3 Inst. 76, 77.  
Dal. ca. 29.

**I**T is recited by 1 H. 7. 7. That many great Outrages, Murthers, Insurrections and Rebellions had often been occasion'd by Persons in great Numbers, with painted Faces, Visors, and otherwise disguised, and riotously, and in manner of War arrayed, hunting as well by Night as by Day; and thereupon it is enacted, That as often as Information shall be made of any such unlawful Huntings by Night, or with painted Faces, to any of the King's Council, or to any Justice of Peace of the County, of any Person suspected thereof, any of the same Council, or Justices, to whom such Information shall be made, may make a Warrant to arrest such Person, and may also examine him of the said Hunting, and of the said Doers in that Behalf; and if the same Person wilfully conceal the said Huntings, or any Person with him defective therein, that then the same Concealment be Felony; and if he then confess the Truth, and all that he shall be examined of, and knoweth in that behalf, that then the said Offences of Huntings be against the King but Trespas finable, by reason of the same Confession, at the next general Sessions of the Peace to be holden in the same County, by the King's Justices of the same Sessions, there to be seffed. And if any Rescous or Disobedience be made to any Person having Authority to do Execution or Justice, by any such Warrant, by any Person, the which so should be arrested, so that the Execution of the same Warrant there be not had, that then the same Rescous and Disobedience, be Felony; and if any Person or Persons shall be convict of any such Huntings, with painted Faces, Visors, or otherwise disguised, to the Intent they should not be known, or of unlawful Hunting in Time of Night, that then the same Person or Persons so convict, to have like Punition, as he or they should have, if he or they were convict of Felony.

C H A P. L.

Of Offences by Forgers of False Deeds.

**BY** 5 El. chap. 14. If a Man be convict or condemned of forging or publishing a forged Deed, and after such Conviction or Condemnation, do commit the like Offence, he is made guilty of Felony, and excluded from the Benefit of Clergy; as shall more fully be shewn in the Chapter of Forgery.

C H A P. LI.

Of Offences by Gaolers.

**BY** 14 E. 3. 10. If any Keeper of a Prison, or Under-Keeper, by too great Duress of Imprisonment, and by Pain, make any Prisoner that he hath in his Ward, to become an Appellor against his Will, he is guilty of Felony; And it is said to be no Way material, whether the Approvement be true or false, or whether the Appellee be acquitted or condemned; but at Law this Offence was esteemed a Misprision only, unless the Appellee were hanged, by reason of the Appeal.

S. P. C. 36. C. 1 In 7. 91.

C H A P. LII.

Of Offences by Transporters of Sheep or Wool.

**SECT.** 1. **BY** some old Statutes, and 13 & 14 Car. 2. 18. the Exportation of Wool was made Felony; but by 7 & 8 W. 3. 28. it is reduced to a Misdemeanour only, and it is subjected to severe Penalties by many late Statutes.

3 Inst. 95. 96.  
1 W. & M. Sell 1. c. 10. 32.  
7 & 8 W. 3. c. 28.  
9 & 10 W. 3. c. 40.  
11 & 12 W. 3. c. 10.

**SECT.** 2. It is enacted by 8 El. 3. That no Person or Persons shall bring, deliver, send, receive, or take, or procure to be brought, delivered, sent, or received, into any Ship or Bottom, any Rams, Sheep, or Lambs, or any manner of other Kind of Sheep, being alive, to be carried and conveyed out of this Realm of England, Wales, or Ireland, or out of any of the King's Dominions, on Pain that every such Person or Persons, their Aiders, Abettors, Procurers and Comforters, shall for the first Offence forfeit all his Goods for ever, whereof the one Moiety shall be to the King, the other Moiety to him that will sue for the same: And further, That every such Offender shall suffer Imprisonment by the Space of one whole Year, without Bail or Mainprize, and at the Year's End, shall in some open Market-Town, in the Fulness of the Market, on the Market-Day, have his left Hand cut off, and that to be nailed up, in the openest Place of such Market;

and

and that every Person or Persons estfoons offending against this Statute, shall be adjudged a Felon, &c.

## C H A P. LIII.

## Of Offences by Servants.

**I**T is recited by 33 H. 6. 1. That divers Household-Servants, as well of Lords, as of other Persons of good Degree, had then of late, shortly after the Death of their said Lords and Masters, violently, and riotously, taken and spoiled the Goods which were of their said Lords and Masters at the Time of their Death, and the same distributed among themselves; and thereupon it is enacted, That after Information made to the Chancellor by the Executors of any such Person, or two of them, of such Riot, Taking, and Spoil; the Chancellor, by the Advice of the two Chief Justices, and Chief Baron, or two of them, may make out Writs to such Sheriffs as shall be thought necessary, commanding them to make such Proclamation, as by the said Statute is directed, for the Offenders to appear in the King's Bench at such a Day, whereupon, if they make Default, they shall be attainted of Felony; but if they appear, they shall be committed or bailed, till they have answered the said Executors in such Actions, which the said Executors will declare against them, or any of them, for the Riot, Taking, and Spoiling aforesaid.

## C H A P. LIV.

## Of Offences by Egyptians.

**B**Y 1 & 2 Ph. & Mar. 4. All outlandish Persons, called Egyptians, being of the Age of thirteen Years, who shall be transported into this Realm of England or Wales, and continue within the same by the Space of one Month; and by 5 El. 20. All Persons being of the Age of fourteen Years, who shall be seen or found within this Realm of England or Wales, in any Company or Fellowship of Vagabonds, commonly called, or calling themselves, Egyptians, or counterfeiting, transforming, or disguising themselves by their Apparel, Speech, or other Behaviour, like unto such Vagabonds, commonly called, or calling themselves, Egyptians, and shall continue and remain in the same, either at one Time, or at several Times, by the Space of one Month, shall suffer as Felons, without the Benefit of the Clergy.

## C H A P. LV.

*Of Offences by Cutters of Pow-dike.*

**I**T is recited by 22 H. 8. 11. which was repealed by 1 Ed. 6. and revived by 2 and 3 Ph. and Mar. 19. That divers Persons had maliciously at sundry times cut down and broken up, divers Parts of the Dike, called the new Pow-dike in Marshland, in the County of Norfolk, and the broken Dike, otherwise called Oldfelde-Dike by Marshland, in the Isle of Ely, in the County of Cambridge: By Reason whereof the Ground within the Country of Marshland in the Counties aforesaid, had been many times drowned; and the Inhabitants had not only been put to great Charges and Expences, but also had lost much Cattle, and also many People had been drowned in their Beds. And thereupon it is enacted, That every such perverse and malicious cutting down, and breaking up of, any Part or Parts of the said Dikes, or of any other Bank, being parcel of the Rind and uttermost Part of the said Country of Marshland, by any Person or Persons, otherwise than in working upon the said Bank or Dikes, for the repairing, fortifying, and amending of the same, shall be adjudged Felony, and that the Justices of Peace of the said Counties of Norfolk and Cambridge, within the said Isle, shall have full Power at their Sessions to cause Enquiry to be made of every such Offence, to award like Process, Judgment, and Execution, as they have used to do upon other Felonies, being Felony at Common Law.

## C H A P. LVI.

*Of Offences by Trespassers on the Borders, and Rioters.*

**I**T is recited by 43 El. 13. That then of late Years many of the Queen's Subjects dwelling in the Counties of Cumberland, Westmorland, and the Bishoprick of Durham, had been taken, some from their own Houses, and other in travelling on the Highway, or otherwise, and been carried away as Prisoners, and kept barbarously, and cruelly, until they had been redeemed by great Ransoms; and also, that then of late Time there had been many Incurfions, Robberies and burning and spoiling of Towns, Villages, and Houses, within the said Counties, so that divers of the Queen's Subjects, in the said Counties, had been enforced to pay a certain Rate of Money, Corn, Cattle, or other Consideration, commonly called Black-mail, to divers inhabiting upon or near the Borders, being Men of Name, and friended and allied with divers in those Parts, who were commonly known to be great Robbers, and Spoil-Takers, within the said Counties, to the End thereby to be by them protected from the Danger of such as used to rob and steal in those Parts; and thereupon it is enacted, That whosoever shall at any Time hereafter without good and lawful Warrant or Authority, take any of her Majesty's Subjects against his or their Will or Wills, and carry them out of the same Counties, or detain, force, or imprison him, or them, as Prisoners, or against his or their Wills, to ransom them, or to make Prey or

Spoil of his or their Person, or Goods, upon deadly Feud or otherwise: Or whosoever shall be privy, consenting, aiding, or assisting unto any such Taking, Detaining, or Carrying away, or procure the Taking, Detaining or Carrying away, of any such Person or Persons, Prisoners as aforesaid: Or whosoever shall take, receive, or carry, to the Use of himself, or willingly to the Use of any other, any Money, Corn, Cattle, or other Consideration, commonly called Black-maile, for the protecting, or defending of him or them, or his or their Lands, Tenements, Goods, or Chattels, from such Thefts, Spoils, and Robberies, as is aforesaid: Or whosoever shall give any such Money, Corn, Cattle, or other Consideration, called Black-maile, for such Protection as is aforesaid, and shall be of the said several Offences, or of any of them, indicted and lawfully convicted, or shall stand mute, or shall challenge peremptorily above the Number of twenty, before the Justices of Assizes, Justices of Gaol-Delivery, Justices of Oyer and Terminer, or Justices of Peace, within any of the said Counties, at some of their General Sessions within some of the said Counties to be holden, shall be reputed, adjudged, and taken to be as Felons, and shall suffer Pains of Death, without any Benefit of Clergy, &c.

Notorious Rioters in some Cases, are made guilty of Felony by 2 Georg. 5. as is shewn at large in the Chapter of Riots.

For the Suppression of Thieves and Robbers called Moss-Troopers, see 13 and 14 Ca 2. 22. which is continued by 12 Anne for eleven Years, and from thence to the End of the first Sessions of the next Parliament.

## C H A P. LVII.

## Of Offences by Bankrupts.

Sect. 1. **I**T is enacted by 4 Anne 17. which was continued by 7 Anne for seven Years, and from thence to the End of the next Session, That if any Person or Persons who after the 24th of June 1706, shall become Bankrupt, and against whom a Commission of Bankrupt shall be awarded, shall not within thirty Days next after Notice thereof in Writing, left at the usual Place of Abode of such Person or Persons, and Notice given in the Gazette, that such Commission is issued, and of the Time and Place of Meeting of the Commissioners, surrender him, her, or themselves to the said Commissioners or some of them, and submit to be examined, from Time to Time, upon Oath, by and before the said Commissioners, or the major Part of them, and in all Things conform to the several Statutes which had then been made concerning Bankrupts, and also upon such Examination fully and truly disclose and discover, how, and in what manner, and to whom, and upon what Consideration, he, she, or they, hath or have disposed, assigned, or transferred, any of his, her, or their Goods, Wares, Merchandizes, Money, or other Effects, or Estate, and all Books, Papers, and Writings, relating thereunto, of which he, she, or they were possessed, or in or to which he, she, or they were any way interested, or intitled, or which any Person or Persons, had, hath, or have had, in Trust for him, her or them, or for his, her, or their Use, at any Time before or after the issuing out of the said Commission, and also deliver up unto the said Commissioners, or the major Part of the Commissioners by the said Commission authorized, all such Part of his, her, or their, the said Bankrupts Goods, Wares, Merchandizes, Effects and Estate, and all Books, Papers, and Writings, relating thereunto, as at the Time of such Examination shall be in his, her, or their Possession, Custody, or Power

Power, (his, her, or their Wives and Childrens necessary wearing Apparel only excepted.) then he, she, or they, the said Bankrupt, in Case of any Default or wilful Omission therein, or in any the Premises, and being thereof lawfully convicted by Indictment or Information, shall suffer as a Felon, without the Benefit of Clergy.

*Sec̄. 2.* But it is provided by the said Statute, That the Lord Chancellor may enlarge the Time for such Persons surrendering themselves, and discovering their Estates, for any Time as he shall think fit, not exceeding sixty Days, so as such Order for so enlarging the Time, be made five Days before the Time on which such Persons were so to surrender themselves, &c.

*Sec̄. 3.* And it is farther enacted by 5 *Annæ* 22. That if any Person or Persons who shall become Bankrupt, or any other Person or Persons, by or with his, her, or their Order, Consent, or Privity, shall after the 25th of April 1707, remove, carry away, conceal, destroy, or imbecil any of the Goods, Wares, Merchandizes, Moneys, or Effects, whereof he, she, or they, or any Person or Persons in Trust for him, her, or them, is, or are possessed, or intituled unto, to the Value of twenty Pounds or upwards, or any Books of Accompts, Bonds, Bills, Notes, Papers, or Writings relating thereunto, with Intent to defraud his, her, or their Creditors, every such Person and Persons so becoming Bankrupt, and being thereof lawfully convicted, shall suffer as a Felon without Benefit of Clergy.

C H A P. LVIII.

*Of Offences by Counterfeiters of Bank-Notes, Exchequer-Bills, Stamps, South-Sea Bonds, Lottery-Orders, &c.*

*Sec̄. 1.* **A**ND first as to Counterfeiters of Bank-Notes, it is enacted by 8 and 9 *Will.* 3. 19. Par. 36. That the forging or counterfeiting the Common Seal of the Governor and Company of the Bank of England, or of any sealed Bank-Bill, made or given out in the Name of the said Governor and Company, for the Payment of any Sum of Money, or of any Bank-Note of any Sort whatsoever, signed for the said Governor and Company of the Bank of England, or the altering or rasing any Endorsment on any Bank-Bill, or Note of any Sort, shall be adjudged to be Felony without Benefit of Clergy.

*Sec̄. 2.* Secondly, As to Counterfeiters of Exchequer-Bills, it is enacted by 7 and 8 *Wil.* 3. 31. Par. 78. That if any Person or Persons shall forge or counterfeit any such Bill of Credit, as by the said Statute the Commissioners of the Treasury were authorized to issue out, or tender in Payment any forged or counterfeited Bill of Credit, or demand Money thereupon at the Exchequer, (knowing the Bill so tendered, or whereupon the Money shall be so demanded, to be actually forged or counterfeited) and with Intention to defraud his Majesty, or any other Person or Persons, every such Person or Persons so offending shall be adjudged a Felon.

*Sec̄. 3.* And the like was enacted by 8 and 9 *Wil.* 3. 23. in relation to the Exchequer Bills issued out by Authority of that Statute, and the Offenders are excluded from the Benefit of the Clergy, as appears from *Washington*; but this Part of the Statute is omitted out of the last Volume of the Statutes at large.

*Sec̄. 4.* And it is farther enacted by 5 *Annæ* 13. Par. 22. That if any Person or Persons shall forge or counterfeit any Exchequer-Bill, to be issued by  
Vertue



*Vertue of that Statute, or any Endorsement thereon, or tender in Payment any such forged or counterfeit Exchequer-Bill, or with such counterfeit Endorsement, or demand to have the same exchanged for ready Money by the Governor and Company of the Bank of England or their Successors, (knowing the Bill so tendered or demanded to be exchanged, or the Endorsement thereon, to be forged or counterfeit) and with Intention to defraud her Majesty, her Heirs or Successors, or the said Governor and Company, or their Successors, or any Person or Persons, Body Politick or Corporate, then every such Person or Persons of offending, (being thereof lawfully convicted) shall be adjudged a Felon, and suffer as in Cases of Felony, without Benefit of Clergy.*

*Señ. 5* And the like is enacted by 7 *Annæ* 7. and also by 9 *Annæ* 7. and by 1 *Georg.* 12. in Relation to Exchequer-Bills made forth in Pursuance of those Acts.

*Señ. 6.* As to Counterfeiters of Stamps, it is enacted by 9 and 10 *Will.* 3. 25. Par. 59. *That if any Person or Persons whatsoever shall counterfeit or forge any Stamp or Mark to resemble any Stamp or Mark which shall be provided, made or used in Pursuance of that Act, or shall counterfeit or resemble the Impression of the same, upon any Vellum, Parchment or Paper, thereby to defraud his Majesty, his Heirs or Successors, of any of the said Duties upon Vellum, Parchment or Paper, or shall utter, vend, or sell Vellum, Parchment or Paper, with such counterfeit Mark or Marks thereupon, knowing such Mark or Marks to be counterfeit, that the Person so offending being thereof convicted in due Form of Law, shall be judged a Felon, and shall suffer Death, as in Cases of Felony, without the Benefit of Clergy.*

*Señ. 7.* And the like is enacted by 10 *Annæ* 19. in Relation to the Stamps to be provided in Pursuance of that Act, with this Addition, *That those who shall privately and fraudulently use any Stamps or Marks thereby to defraud her Majesty of any Duty upon Vellum, Parchment or Paper by the said Act granted, shall be adjudged in like manner guilty.*

And the like is enacted by 10 *Annæ* 26. and by 12 *Annæ* 9. and also by 12 *Annæ* 19. In relation to the Stamps or Marks to be provided in Pursuance of those Statutes.

*Señ. 8.* As to Counterfeiters of South-Sea Bonds, it is enacted by 9 *Annæ* 21. *That if any Person or Persons shall forge or counterfeit the common Seal of the South-Sea Company, or shall forge, counterfeit or alter any Bond or Obligation under the common Seal of the said Company, or shall offer to dispose of, or pay away any such forged, counterfeited, or altered Bond, (knowing the same to be such) or shall demand the Money therein contained, or pretended to be due thereon, or any Part thereof, of the said Company, or any of their Officers, knowing the same to be forged, counterfeited, or altered, with Intention to defraud the said Company, or any other Person or Persons, every such Offender shall suffer as a Felon without the Benefit of the Clergy.*

*Señ. 9.* As to Counterfeiters of Lottery-Orders, it is enacted by 12 *Annæ* 2. *That if any Person or Persons shall forge or counterfeit any Lottery-Order, made in Pursuance of 9 Annæ 6 or 23. or 10 Annæ 19 or 26. or alter the Number or principal Sum of any such Order, or counterfeit the Hand of any Person to such Order, thereby to procure a fraudulent Assignment, or sell any such Order, knowing the same to be forged or counterfeit, or knowing that the Name of the Owner is forged, in order to procure such fraudulent Assignment, then all and every such Person or Persons being therefore convicted, shall suffer as in Cases of Felony, without Benefit of Clergy.*

## C H A P. LIX.

## Of Misprision of Felony.

Offences more immediately against the Subject, not capital, are either Misprision of Felony, or other inferior Offences

*Señ. 1.* It is said, That every Felony includes Misprision of Felony, and may be proceeded against as a Misprision only if the King please, as hath been shewn already in Chapter 20. Bro. Treas. 25.  
2 Ric. 3. 10.  
S. P. C. 32. d.

*Señ. 2.* But generally Misprision of Felony is taken for a Concealment of Felony, or a procuring of the Concealment thereof, whether it be Felony by the Common Law, or by Statute. H. P. C. 129.  
S. P. C. 37 c.  
3 Inst. 139.

*Señ. 3.* For this Offence every common Person is punishable by Fine and Imprisonment at Common Law. And by the Statute of *Westm. 1. 9.* *If the Sheriff, Coroner, or any other Bailiff within a Franchise or without, for Reward or for Prayer, or for Fear, or for any manner of Affinity, conceal, consent, or procure to conceal the Felonies done in their Liberties; or otherwise will not attach nor arrest such Felons (there as they may) or otherwise will not do their Office, for Favour borne to such Mis-doers, and be attainted thereof, they shall have one Year's Imprisonment, and after make a grievous Fine at the King's Pleasure if they have wherewith; and if they have not wherewith, they shall have Imprisonment of three Years.* Bro. Treas. 25.  
3 Inst. 173.

*Señ. 4.* By 3 H. 7. 1. *The Justices of the Peace of every Shire of this Realm, for the Time being, may take by their Discretion an Inquest, whereof every Man shall have Lands and Tenements to the yearly Value of forty Shillings at the least, to enquire of the Concealments of other Inquests taken before them, and afore other, of such Matters and Offences as are to be enquired and presented afore Justices of Peace, whereof Complaint shall be made by Bill or by Bills, as well within Franchise as without. And if any such Concealment be found of any Inquest, as is afore rehearsed, had or made within the Year after the same Concealment, every Person of the same Inquest to be amerced for the Concealment, by Discretion of the same Justices of the Peace, the said Amerciaments to be seised in plain Sessions.*

*Señ. 5.* To this Title of Misprision of Felony, That of Theftbote seems not improperly reducible, which is where one not only knows of a Felony, but takes his Goods again, or other amends, not to prosecute. S. P. C. 40.  
Ch. 43.  
3 Inst. 134.  
H. P. C. 130.

*Señ. 6.* This Offence is very nearly allied to Felony, and is said to have been anciently punished as such: But at this Day, it is punishable only with Ransom and Imprisonment, unless it were accompanied with some Degree of Maintenance given to the Felon, which makes the Party an Accessary after the Fact. S. P. C. 40. b.  
Fitz. Coro. 353.  
3 Inst. 134.  
2 And. 47. 48.  
Cro. Eliz. 536.  
B. 2. Ch. 29.  
S. 26. &c.

*Señ. 7.* But the bare Taking of one's own Goods again, which have been stoln, is no Offence at all, unless some Favour be shewn to the Thief.

\*Bro. Cor. 122. 42 Aff. Pl. 5. H. P. C. 130. Cro. El. 486. Pl. 3. 1 Rol. Ab. 67. Pl. 27. Fitz. Affize 346.