

COMMENTARIES

ON THE

L A W S

OF

E N G L A N D.

BOOK THE FOURTH.

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O X F O R D,

PRINTED AT THE CLARENDON PRESS.

M. DCC. LXIX.

CHAPTER THE FOURTH.

OF OFFENCES AGAINST GOD AND RELIGION.

IN the present chapter we are to enter upon the detail of the several species of crimes and misdemeanors, with the punishment annexed to each by the laws of England. It was observed, in the beginning of this book^a, that crimes and misdemeanors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in it's social aggregate capacity. And in the very entrance of these commentaries^b it was shewn, that human laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society^c: and, of consequence, private vices, or the breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowlege and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, it's evil example makes it liable

^a See pag. 5.^c Beccar. ch. 8.^b See Vol. I. pag. 123, 124.

to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any shape is derogatory from sound morality, is not however taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompence is given. And yet drunkenness and lying are *in foro conscientiae* as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to the temporal punishments of human tribunals.

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

HAVING premised this caution, I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign

reign executive power of the state, or the king and his government; fourthly, such as more directly infringe the rights of the public or common wealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

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

I. Of this species the first is that of *apostacy*, or a total renunciation of christianity, by embracing either a false religion, or no religion at all. This offence can only take place in such as have once professed the true religion. The perversion of a christian to judaism, paganism, or other false religion, was punished by the emperors Constantius and Julian with confiscation of goods^d; to which the emperors Theodosius and Valenian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity^e. A punishment too severe for any temporal laws to inflict: and yet the zeal of our ancestors imported it into this country; for we find by Bracton^f, that in his time apostates were to be burnt to death. Doubtless the preservation of christianity, as a national religion, is, abstracted from it's own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the supreme being, and a firm persuasion that he superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our saviour Christ) these are the grand founda-

^d *Cod.* 1. 7. 1.

^e *Ibid.* 6.

^f *l.* 3. c. 9.

tion of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting: all moral evidence therefore, all confidence in human veracity, must be weakened by irreligion, and overthrown by infidelity. Wherefore all affronts to christianity, or endeavours to depreciate it's efficacy, are highly deserving of human punishment. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostacy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animæ*. But about the close of the last century, the civil liberties to which we were then restored being used as a cloke of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was found necessary again for the civil power to interpose, by not admitting those miscreants^s to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 W. III. c. 32. that if any person educated in, or having made profession of, the christian religion, shall by writing, printing, teaching, or advised speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years imprisonment without bail. To give room however for repentance; if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A S E C O N D offence is that of *heresy*; which consists not in a total denial of christianity, but of some of it's essential

^s *Miscreyantz* in our antient law-books is the name of unbelievers.

doctrines,

doctrines, publicly and obstinately avowed; being defined; “*sententia rerum divinarum humano sensu excogitata, palam docta, et pertinaciter defensa*”^h. And here it must also be acknowledged that particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines shall therefore be adjudged heresy, was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewodeⁱ, extends to the smallest deviations from the doctrines of holy church: “*haereticus est qui dubitat de fide catholica, et qui negligit servare ea, quae Romana ecclesia statuit, seu servare decreverat.*” Or, as the statute 2 Hen. IV. c. 15. expresses it in English, “teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church.” Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true, that the sanctimonious hypocrisy of the canonists went at first no farther than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigotted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderetur*^k: well

^h 1 Hal. P. C. 384.

^k Decretal. l. 5. t. 40. c. 27.

ⁱ cap. de haereticis.

knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichaeans by the emperors Theodosius and Justinian¹: hence also the constitution of the emperor Frederic mentioned by Lyndewode^m, adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitutionⁿ, ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou^o.

CHRISTIANITY being thus deformed by the daemon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our antient precedents^p a writ *de haeretico comburendo*, which is thought by some to be as antient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing

¹ *Cod. l. 1. tit. 5.*

^m *c. de haereticis.*

ⁿ *Cod. l. 5. 4.*

^o *Baldus in Cod. l. 5. 4.*

^p *F. N. B. 269.*

no process against him; the writ *de haeretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council¹.

BUT in the reign of Henry the fourth, when the eyes of the christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy²) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament³, which sharpened the edge of persecution to it's utmost keenness. For, by that statute, the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. V. c. 7. lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

AFTERWARDS, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated: for though what heresy *is*, was not then precisely defined, yet we are told in some points what it *is not*: the statute 25 Hen. VIII. c. 14. declaring, that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay chanel. For in six years afterwards, by statute 31 Hen. VIII. c. 14, the bloody law of the six articles was made, which established the six most contested points of popery, tran-

¹ 1 Hal. P. C. 395.

² So called not from *lolum*, or tares, (which was afterwards devised, in order to justify the burning of them from Matth.

xiii. 30.) but from one Walter Lolhard, a German reformer. Mod. Un. Hist. xxvi. 13. Spelm. *Gloss.* 371.

³ 2 Hen. IV. c. 15.

substantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were “determined and resolved by the “most godly study, pain, and travail of his majesty: for which “his most humble and obedient subjects, the lords *spiritual* and “temporal and the commons, in parliament assembled, did not “only render and give unto his highness their most high and “heartly thanks,” but did also enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the christian religion.

I SHALL not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of queen Elizabeth; when the reformation was finally established with temper and decency, un sullied with party rancour, or personal caprice and resentment. By statute 1 Eliz. c. 1. all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; *viz.* as to the infliction of common censures, in the ecclesiastical courts; and, in case of burning the heretic, in the provincial synod only¹. Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also; though he agrees, that in either case the writ *de haeretico comburendo* was not demandable of common right, but grantable or otherwise merely at the king's discretion². But the principal point now gained, was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined, but only such tenets, which have been heretofore so declared, 1. By the words of the canonical scriptures; 2. By the first four general councils, or such others

¹ 5 Rep. 23. 12 Rep. 56 92.

² 1 Hal. P. C. 405.

as have only used the words of the holy scriptures ; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before ; though it might not have been the worse to have defined it in terms still more precise and particular : as a man continued still liable to be burnt, for what perhaps he did not understand to be heresy, till the ecclesiastical judge so interpreted the words of the canonical scriptures.

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

IN what I have now said I would not be understood to derogate from the just rights of the national church, or to favour a loose latitude of propagating any crude undigested sentiments in religious matters. Of propagating, I say ; for the bare entertaining them, without an endeavour to diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every thing is now as it should be : unless perhaps that heresy ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics, but not to exterminate or destroy them. It has also been thought proper for the

civil magistrate again to interpose, with regard to one species of heresy, very prevalent in modern times: for by statute 9 & 10 W. III. c. 32. if any person educated in the christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be God, or maintain that there are more Gods than one, he shall undergo the same penalties and incapacities, which were just now mentioned to be inflicted on apostacy by the same statute. And thus much for the crime of heresy.

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

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

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

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

NON-CONFORMISTS are of two sorts: first, such as absent themselves from the divine worship in the established church,

^v Vol. I. pag. 98.

through total irreligion, and attend the service of no other persuasion. These by the statutes of 1 Eliz. c. 2. 23 Eliz. c. 1. and 3 Jac. I. c. 4. forfeit one shilling to the poor every lord's day they so absent themselves, and 20 *l.* to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their houses, they forfeit 10 *l.* *per* month.

THE second species of non-conformists are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists and protestant dissenters: both of which were supposed to be equally schismatics in departing from the national church; with this difference, that the papists divide from us upon material, though erroneous, reasons; but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. However the laws against the former are much more severe than against the latter; the principles of the papists being deservedly looked upon to be subversive of the civil government, but not those of the protestant dissenters. As to the papists, their tenets are undoubtedly calculated for the introduction of all slavery, both civil and religious: but it may with justice be questioned, whether the spirit, the doctrines, and the practice of the sectaries are better calculated to make men good subjects. One thing is obvious to observe, that these have once within the compass of the last century, effected the ruin of our church and monarchy; which the papists have attempted indeed, but have never yet been able to execute. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such as threaten ruin or disturbance

turbance to the state. He is bound indeed to protect the established church, by admitting none but its genuine members to offices of trust and emolument : for, if every sect was to be indulged in a free communion of civil employments, the idea of a national establishment would at once be destroyed, and the episcopal church would be no longer the church of England. But, this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and colour of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

WITH regard therefore to *protestant dissenters*, although the experience of their turbulent disposition in former times occasioned several disabilities and restrictions (which I shall not undertake to justify) to be laid upon them by abundance of statutes^w, yet at length the legislature, with a spirit of true magnanimity, extended that indulgence to these sectaries, which they themselves, when in power, had held to be countenancing schism, and denied to the church of England. The penalties are all of them suspended by the statute 1 W. & M. st. 2. c. 18. commonly called the toleration act; which exempts all dissenters (except papists, and such as deny the trinity) from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation registered in the bishop's court or at the sessions, the doors whereof must be always open : and dissenting teachers are also to subscribe the thirty nine articles, except those relating to church government and infant baptism. Thus are all persons, who will approve themselves no papists or oppugners of the trinity, left at full liberty to act as their conscience shall direct them, in the matter of religious worship. But by statute

^w 31 Eliz. c. 1. 17 Car. II. c. 2. 22 Car. II. c. 1.

5 Geo. I. c. 4. no mayor, or principal magistrate, must appear at any dissenting meeting with the ensigns of his office^x, on pain of disability to hold that or any other office: the legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, and humility.

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

LET us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. Persons professing the popish religion, besides the former penalties for not frequenting their parish church, are by several statutes, too numerous to be here recited^y, disabled from taking any lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any

^x Sir Humphrey Edwin, a lord mayor of London, had the imprudence soon after the toleration-act to go to a presbyterian meeting-house in his formalities: which is alluded to by dean Swift, in his *tale of a tub*,

under the allegory of *Jack* getting on a great horse, and eating custard.

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

avoidance of the same, in prejudice of the two universities; they may not keep or teach any school under pain of perpetual imprisonment; they are liable also in some instances to pay double taxes; and, if they willingly say or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons, who, from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish church from their infancy, and publicly profess it's errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes any thing to their maintenance when there; both the sender, the sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostacy, or perversion, where a person is reconciled to the see of Rome or procures others to be reconciled, the offence amounts to high treason.

2. Popish recusants, convicted in a court of law of not attending the service of the church of England, are subject to the following disabilities, penalties, and forfeitures, over and above those before-mentioned. They can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100 *l*; they can bring no action at law, or suit in equity; they are not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they may not come to court, under pain of 100 *l*. No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, shall forfeit two thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor have any part of his goods; and during the
coverture

coverture may be kept in prison, unless her husband redeems her at the rate of 10 *l.* a month, or the third part of all his lands. And, lastly, as a feme-covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's licence, they shall be guilty of felony, and suffer death as felons. There is also an inferior species of recusancy, (refusing to make the declaration against popery enjoined by statute 30 Car. II. st. 2. when tendered by the proper magistrate) which, if the party resides within ten miles of London, makes him an absolute recusant convict; or, if at a greater distance, suspends him from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being, of a lay papist. But, 3. The remaining species or degree, *viz.* popish priests, are in a still more dangerous condition. By statute 11 & 12 W. III. c. 4. popish priests or bishops, celebrating mass or exercising any parts of their functions in England, except in the houses of ambassadors, are liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2. any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, or shall be in England three days without conforming and taking the oaths, is guilty of high treason: and all persons harbouring him are guilty of felony without the benefit of clergy.

THIS is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes², that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed, (what foreigners who only judge from our statute book are not fully apprized of) that these laws

² Sp. L. b. 19. c. 27.

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

IN order the better to secure the established church against perils from non-conformists of all denominations, infidels, turks, jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the *corporation* and *test* acts: by the

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

THUS much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, *pro salute animae*; while the temporal courts resent the public affront to religion and morality, on

^a Stat. 13 Car. II. §. 2. c. 1.

^b Stat. 25 Car. II. c. 2.

which

which all government must depend for support, and correct more for the sake of example than private amendment.

IV. THE fourth species of offences therefore, more immediately against God and religion, is that of *blasphemy* against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment^c: for christianity is part of the laws of England^d.

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

^c Hawk. P. C. 7.

^d 1 Ventr. 293. 2 Strange, 834.

be jestingly or profanely used, the offender shall forfeit 10*l*, one moiety to the king, and the other to the informer.

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

^e *Cod. l. 9. t. 18.*

^f *Exod. xxii. 18.*

^g 3 *Inst. 44.*

^h *Sp. L. b. 12. c. 5.*

ⁱ *Mr Addison, Spect. N° 117.*

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

VII. A SEVENTH species of offenders in this class are all *religious impostors*: such as falsely pretend an extraordinary com-

^k Voltaire *Siecl. Louis xiv.* Mod. Univ. and witchcraft among the crimes punish-
Hist. xxv. 215. Yet Vouglans, (*de droit* able in France.
criminel, 353. 459.) still reckons up sorcery

mission from heaven ; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment ¹.

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

¹ 1 Hawk. P. C. 7.

ⁿ See Vol. II. pag. 279.

^m 3 Inst. 156.

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

^o c. 24.

cessity or charity, on forfeiture of 5 s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings.

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

XI. THE last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness*: either by frequenting houses of ill fame, which is an indictable offence^p; or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment^q. In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes; but also the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy^r. But at the restoration, when men from an abhorrence of the hypocrisy of the late times fell into a contrary extreme, of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the celibacy of it's first compilers. The temporal

^p Poph. 208.

^r Scobell. 121.

^q 1 Siderf. 168.

courts therefore take no cognizance of the crime of adultery, otherwise than as a private injury^t.

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

^t See Vol. III. pag. 139.

^u See Vol. I. pag. 458.

^v Dalt. just. ch. 11.