COMMENTARIES

ON

The Laws of England.

BOOK THE FOURTH.

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ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS.

FROM THE LAST LONDON EDITION.

WITH THE LAST CORRECTIONS OF THE AUTHOR; AND WITH

NOTES AND ADDITIONS

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CHAPTER THE TWENTY-EIGHTH.

OF THE BENEFIT OF CLERGY.

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

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

But the clergy, increasing in wealth, power, honor, number, and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right; and as a right of

the highest nature, indefeasible, and *jure divino* [a]. By their canons therefore and constitutions they endeavoured at, and where they met with easy princes obtained, a vast extension of these exemptions: as well in regard to the crimes themselves, of which the list became quite universal [b]; as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

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

Originally the law was held, that no man should be admitted to the privilege of clergy, but such as had the *habitum et tonsuram clericalem* [e]. But in process of time a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of

a The principal argument, upon which they founded this exemption, was that text of scripture; "touch not mine anointed, and do my prophets no harm." (Keilw. 181.)

b See Vol. III. pag. 62.

c Keilw. 180.

d 2 Hal. P. C. 377.

e 2 Hal. P. C. 372. M. Paris, A. D. 1250. See Vol. I. pag. 24.

ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by statute 4 Henry VII. c. 13. a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs, that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders: and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1. and 32 Hen. VIII. c. 3. but it is held[f] to have been virtually restored by statute 1 Edw. VI. c. 12. which statute also enacts that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burnt in the hand,) for all offences then clergyable to commoners, and also for the crimes of housebreaking, highway-robbery, horsestealing, and robbing of churches (1).

[f] Hob. 294. 2 Hal. P. C. 375.

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(1) Upon the conviction of the duchess of Kingston for bigamy, it was argued by the attorney-general Thurlow, that peeresses were not entitled by 1 Edw. VI. c. 12. like peers, to the privilege of peerage; but it was the unanimous opinion of the judges, that a peeress

After this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession *f*. This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first the party himself was required to make oath of his own innocence: next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then witnesses were to be examined upon oath, but on behalf of the prisoner only: and, lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or put to penance *g*. A learned judge, in the beginning of the last century *h*, remarks with much indignation the vast complication of perjury and subordination of perjury, in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all

f Staundford, P. C. 138. *b*.
g 3 P. Wms. 447. Hob. 289.
h Hob. 291.

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convicted of a clergyable felony ought to be immediately discharged without being burnt in the hand, or without being liable to any imprisonment. 11 *H. St. Tr.* 264. If the duchess had been admitted, like a commoner, only to the benefit of clergy, burning in the hand at that time could not have been dispensed with.

The argument was, that the privilege of peerage was only an extension of the benefit of clergy, and therefore granted only to those who were or might be entitled to that benefit; but as no female, peeress or commoner, at that time was entitled to the benefit of clergy, so it was not the intention of the legislature to grant to any female the privilege of peerage.

And in my opinion the argument of the attorney-general is much more convincing and satisfactory, as a legal demonstration than the arguments of the counsel on the other side, or the reasons stated for the opinions of the judges.

of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to swear himself not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

This scandalous prostitution of oaths, and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that, upon very heinous and notorious circumstances of guilt, the temporal [369] courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione faciendâ*: in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As therefore these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law; it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

Accordingly the statute 18 Eliz. c. 7. enacts, that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly: but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered; except only that the statute 21 Jac. I. c. 6. allowed, that women convicted of simple larcenies under the value of ten shillings should (not properly have the benefit of clergy, for they were

not called upon to read; but) be burned in the hand, and whipped, stocked or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. & M. c. 9. and 4 & 5 W. and M. c. 24. was extended to women, guilty of any clergyable felony whatsoever; who were allowed once to claim the benefit of the *statute*, in like manner as men might claim the benefit of *clergy*, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the *hand* being found ineffectual, was also changed by statute 10 & 11 W. III. c. 23. into burning in the most visible part [370] of the left *cheek*, nearest the nose: but, such an indelible stigma being found by experience to render offenders desperate, this provision was repealed about seven years afterwards, by statute 5 Ann. c. 6. and, till that period, all women, all peers of parliament and peeresses, and all male commoners who could read, were discharged in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and female, upon branding, and peers and peeresses without branding, for the first offence: yet all liable (excepting peers and peeresses) if the judge saw occasion, to imprisonment not exceeding a year. And those men, who could not read, if under the degree of peerage, were hanged.

Afterwards indeed it was considered, that education and learning were no extenuations of guilt, but quite the reverse: and that, if the punishment of death for simple felony was too severe for those who had been liberally instructed, it was, *a fortiori*, too severe for the ignorant also. And thereupon by the same statute 5 Ann. c. 6. it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit (2). And experience having shewn, that

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(2) The statute enacts, that if a person convicted of a clergyable offence *shall pray the benefit of this act*, he shall not be required to read, but shall be taken to be, and punished as, a clerk convict. Hence persons convicted of manslaughters, bigamies, and simple

so very universal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital punishments were too rigorous for these inferior offences, yet no punishment at all (or next to none) was as much too gentle; it was farther enacted by the same statute, that when any person is convicted of any theft or larceny, and burnt in the hand for the same according to the ancient law, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour, for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted by the statutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any persons shall be convicted of any larceny, either grand or petit, or any felonious stealing or taking of money or goods and chat- [371] tels either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America, (or, by statute 19 Geo. III. c. 74. to any other parts beyond the seas) for seven years: and if they return or are seen at large in this kingdom within that time, it shall be felony without benefit of clergy. And by the subsequent statutes 16 Geo. II. c. 15. and 8 Geo. III. c. 15. many wise provisions are made for the more speedy and effectual execution of the laws relating to transportation, and the conviction of such as transgress them. But now, by the statute 19 Geo. III. c. 74. all offenders liable

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grand larcenies, &c. are still asked what they have to say why judgment of death should not be pronounced upon them? And they are then told to kneel down, and pray the benefit of the statute. It would perhaps have been more consistent with the dignity of a court of justice to have granted the benefit of clergy, without requiring an unnecessary form, the meaning of which very few comprehend.

to transportation may in lieu thereof, at the discretion of the judges, be employed, if males (except in the case of petty larceny) in hard labour for the benefit of some public navigation; or, whether males or females, may, in all cases be confined to hard labour in certain penitentiary houses, to be erected by virtue of the said act, for the several terms therein specified, but in no case exceeding seven years; with a power of subsequent mitigation, and even of reward, in case of their good behaviour. But if they escape and are retaken, for the first time an addition of three years is made to the term of their confinement; and a second escape is felony without benefit of clergy.

In forming the plan of these penitentiary houses, the principal objects have been, by sobriety, cleanliness, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection, and to teach them both the principles and practice of every christian and moral duty. And if the whole of this plan be properly executed, and its defects be timely
[372] supplied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes.

It is also enacted by the same statute, 19 Geo. III. c. 74. that instead of burning in the hand (which was sometimes too slight and sometimes too disgraceful a punishment) the court in all clergyable felonies may impose a pecuniary fine; or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inflicted in the presence of two witnesses, and in case of female offenders in the presence of females only. Which fine or whipping shall have the same consequences as burning in the hand; and the offender, so

fined or whipped, shall be equally liable to a subsequent detainer or imprisonment.

In this state does the benefit of clergy at present stand; very considerably different from its original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

From the whole of this detail we may collect, that however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws; yet, when learning, and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross, as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force [373] is exerted in their due, and universal, execution.

II. I AM next to inquire to what *persons* the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping, (for those are only substituted in lieu of the other,) to be admitted to this privilege, and immediately discharged; and this as often as they offend[i] (3). Again, all lords of parliament and peers of the

[i] 2 Hal. P. C. 375.

(3) But clergymen have no privilege in petty larcenies, but they are liable to be whipped or transported, like other persons, for a petty larceny, though they are subject to no corporal punishment whatever, upon being convicted of a grand larceny or any clergyable felony.

realm having place and voice in parliament, by the statute 1 Edw. VI. c. 12. (which is likewise held to extend to peeresses[k],) shall be discharged in all clergyable and other felonies, provided for by the act, without any burning in the hand or imprisonment, or other punishment substituted in its stead, in the same manner as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour for the benefit of some navigation; or, in case of larceny, upon being transported for seven years, if the court shall think proper (4). It hath been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6. as being under a legal incapacity for orders[l]. But I much question whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case,
[374] the Jews are still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. The third point to be considered is, for what *crimes* the

[k] Dutchess of Kingston's case, in parliament, 22 Apr. 1776.

[l] 2 Hal. P. C. 373. 2. Hawk. P. C. 338. Fost. 336.

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(4) A layman, who has once had the benefit of clergy, may be precluded from obtaining it a second time, by a counter-plea on the part of the prosecution, averring the identity of the prisoner's person, and that he had before been allowed the benefit of his clergy, though the second crime be quite different from the first. As a person convicted of bigamy is liable to suffer death for a manslaughter, or any other clergyable felony. *Scott's case, Leach*, 312.

privilegium clericale, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larceny, nor in any mere misdemesnors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treason and capital felonies: which for the most part became legally entitled to this indulgence by the statute *de clero*, 25 Edw. [illegible]st. 3. c. 4. which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz. *insidiatio viarum*, or lying in wait for one on the highw[illegible] *opulatio agrorum*, or destroying and ravaging a count[illegible]d *combustio domorum*, or arson, that is the burning of houses[n]: all which are a kind of hostile acts, and in some degree border upon treason. And farther, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigour of capital punishment in the first offence, that is exerted before the *privilegium clericale* was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. But so tender is the law of inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law, as declared in statute 28 Hen. VIII. c. 15. the benefit of clergy is not allowed in any case whatsoever; yet, when offences are committed within the admiralty-jurisdiction, which would be clergyable [373*] if committed by land, the constant course is to acquit and discharge the prisoner[o]. And, to conclude this head of

m 2 Hal. P. C. 333.
n 1 Hol. P. C. 346.
o Moor. 756. Fost. 288.

inquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law clergy is now allowable, unless taken away by express words of an act of parliament[p]. 2 That where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute[q]. 3. That when the benefit of clergy is taken away from the *offence*, (as in case of murder, buggery, robbery, rape, and burglary,) a principal in the second degree, being present, aiding, and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the *person committing* the offence, (as in the case of stabbing, or committing larceny in a dwelling house (5), or privately from the person,) his aiders and abettors are not excluded; through the tenderness of the law, which hath determined that such statutes shall be taken literally[r].

IV. Lastly, we are to inquire what the consequences are to the party, of allowing him this benefit of clergy. I speak not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy: which operates as a kind of statute pardon.

And, we may observe, 1. That by this conviction he forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender[s]. 2. That, after conviction, and till he receives the judg-
[374*] ment of the law, by branding or some of its substitutes, or else is pardoned by the king, he is to all intents

[p] 2 Hal. P. C. 330. [r] 1 Hal. P. C. 529. Foster 356, 357.
[q] 2 Hawk. P. C. 341. [s] 2 Hal. P. C. 388.

(5) In the case of all capital larcenies in a dwelling house, the benefit of clergy has been taken away, as well from those who aid, assist, and abet, as from those who actually commit the crime, by 3 *W. & M. c.* 9. and 12 *Ann. st. 1. c.* 7. See p. 249. *ante.*

and purposes a felon, and subject to all the disabilities and other incidents of a felon [t]. 3. That, after burning or its substitute, or pardon, he is discharged for ever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted [u]. 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it [x].

t 3 P. Wms. 487.
u 2 Hal. P. C. 369. 5 Rep. 110.
x 2 Hal. P. C. 389, 390.