

A  
S Y S T E M  
OF THE  
L A W S  
OF THE  
STATE of CONNECTICUT.

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IN SIX BOOKS.

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By ZEPHANIAH SWIFT.

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VOLUME II.

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A SYSTEM



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# A SYSTEM of the LAWS OF THE STATE of CONNECTICUT.

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## BOOK FIFTH.

### Of Crimes and Punishments.

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#### CHAPTER FIRST.

##### GENERAL OBSERVATIONS RESPECTING CRIMES.

IN the preceeding Book we have treated at large of legal remedies for civil injuries. We now come to handle the important, and interesting subject of crimes, and punishments.

A crime may be defined to be an act, committed or omitted, in violation of a public law, that either forbids, or commands it. A punishment is some pain or penalty inflicted on a criminal, by the judgment, and command of some lawful court, for the purpose of correcting and amending him, and preventing him from the commission of like crimes in future : and likewise for the purpose of operating as a public example to mankind in general, in order to deter them from the practice of similar crimes, by the dread of similar punishments. A misdemeanor is synonymous with crime ; but when crimes and misdemeanors are mentioned together, it is commonly understood that the first relate to higher, and the last to lower offences.

The object of the institution of society, is to preserve to individuals certain private social rights, and to restrain those acts, which disturb the peace, interrupt the happiness, and tend to the dissolution of government. As mankind united in society for that purpose,

pose, this must be the leading principle of all laws, which restrain their conduct. Those acts which violate the rights of individuals, are private wrongs : and those which affect the general welfare, are public crimes. The same acts will generally constitute a private injury, as well as a public crime. A public punishment is inflicted on the part of the state, to restrain such conduct, and the party injured is entitled to a compensation for the injury he has sustained. If one man assaults and beats another, he is punished by a fine for disturbing the peace, and compelled to compensate in money the person he has abused and wounded. All public crimes therefore are considered and estimated as relative to the community at large, and private wrongs, as they affect individuals. If every man was allowed to kill, wound, or evilly treat his neighbour, and to take away and destroy his property at pleasure, it is apparent that it would not only destroy all private right, but dissolve the bands of society. It is therefore not only necessary that a compensation should be awarded to the person who has suffered the loss ; but that the collected strength of the community should be exerted, to prevent those acts which endanger its existence.

As human laws are founded upon political considerations, legislators have not deemed themselves to be bound solely by the moral law in enacting their codes. It has never, however, been adopted as a maxim, that they may require acts to be done, which are forbidden by the law of nature : but the great rule is, that they are not bound to punish all the infractions of natural law ; that they may never infringe that law ; that they may prohibit under civil pains and penalties, not only those acts, which are repugnant to natural law ; but that they may also restrain the conduct of the members of the community, in those points, which are indifferent as it regards natural law, for the purpose of promoting the political welfare of the state. Hence we find a division of public crimes, into those which are *mala in se*, wrong in their own nature, that is, morally wrong : and those which are *mala prohibita*, wrong because they are prohibited, that is, politically wrong. Under the first division is comprehended those acts, which are prohibited by the law of nature, as well as the law of society,—such as murder, robbery, theft, adultery, and the like : and the latter are such as are  
not



not prohibited by the law of nature, but are only prohibited by the law of society on political considerations,—such are the laws respecting taverns, and the like.

In this point of view, crimes are contemplated by a human tribunal. The subject of punishment merits a particular investigation. My limits confine me to a few general observations. It is a fundamental principle, *that the sole end of punishment is the prevention of crimes, and that every punishment ought to be proportioned to the offence.* It has been ascertained by experience, that mildness of punishment is better calculated to prevent crimes, than severity. Where the laws are sanguinary, and disproportionate, informing officers will be unwilling to prosecute, and jurors will be unwilling to convict : and if an offender should be so unfortunate as to be convicted, he will stand a chance to be deemed a proper object of pardon. The prospect of escaping the punishment, will diminish its terrors, in the eyes of a criminal. But when the punishment is mild, and proportionate to the offence, every person will combine in the punishment of the offender, and a mild punishment when it is certain that it will be inflicted, will operate with far greater force to deter from the commission of crimes, than severe punishments, where it is uncertain whether they will be inflicted, and the offender has a variety of chances to escape.

In countries where the laws are sanguinary, if they are rigorously executed, the frequency of the punishment, often renders the object so familiar and common, as to disarm it of its terror. In England there are one hundred and seventy-six crimes punishable with death, without benefit of clergy, and sixty-five where the benefit of clergy is allowed : yet in no country are crimes more frequent, and more persons suffer there by the hands of the executioner, than in all the civilized world besides. <sup>a</sup> So frequent and common are executions in England, and especially in London, that the people behold them without any emotions of horror, or compassion ; and there are many instances where the same crime is perpetrated under the gallows, for which the criminal is hanging. But in all countries where the punishment of death is rarely inflicted, no language can describe the horror which it impresses on the minds of the surrounding spectators.

<sup>a</sup> 1 Windeborn's View of England, 56,

In all countries where punishments have been mild and proportioned to offences, it has been demonstrated by experience that fewer crimes are committed. Instead then of inflicting death upon the greater part of crimes, *confinement to hard labour and coarse fare* has been substituted. The certainty and long continuance of such a punishment, will more effectually prevent crimes, than all the pains and terrors of death, under the usual prospect and hope of escape.

The example of the State of Pennsylvania, ought to be mentioned to their honour. It is worthy the attention of every philosopher, and ought to be imitated by every government. They have substituted for all crimes excepting treason and murder in certain degrees, the punishment of *confinement to hard labour, and coarse fare*, instead of death. But it is in the mode of inflicting the punishment, in the government and discipline of the prison, that our greatest admiration is excited, and the cause of humanity most effectually served. In a building accommodated to that purpose, we behold the convicts performing the labour assigned them, with as much regularity and good order, as the same number of mechanics in a work shop. To stimulate them to be industrious, they are entitled to receive on their release, such sum as the value of their labour exceeds their cost and expense. In case of refractory behaviour during the period assigned for their punishment, they may be confined in the solitary mansions of a cell, till they will submit and conform to the regulations of the goal. They are secured and kept to labour without irons or shackles. Subject to no hardship, but confinement to labour and coarse fare, they in every other respect live in a comfortable manner, in convenient and healthy apartments. In the dreary walls of a prison, where criminals are constantly suffering punishment for the most atrocious offences, we see not the tears of anguish, nor hear the groans of despair; there are no marks of severity and cruelty. And yet, by this mild punishment, it is found, that crimes are more effectually restrained than by the awful punishment of death. But what is still more interesting to the feelings of humanity, the criminals are corrected, amended, and in some instances restored to society as reformed citizens. The world has never before witnessed such an example of benevolence,



benevolence, in the mode of punishing criminals, nor has punishment ever before produced such salutary effects. Compare the state of this prison, with the prisons of every kingdom in Europe, and it will reflect the highest honor, on the compassion and generosity of the authors of this goodly work, and confirm the hope, that in America, not only the form of government, but the administration of justice, will receive its last and greatest improvement. We read with admiration, the heroic achievements of an Alexander, a Cæsar, and a Frederic : but how much dearer to the heart of sensibility, is the character of the benevolent philosopher, who makes it the great object of his ambition, to introduce humanity within the walls of a prison ; who attempts to correct and amend offenders, by softening the pains of punishment : who instead of exterminating, aims to render them useful members of the community. The satisfaction of doing good, furnishes the richest reward to a generous mind ; but from the universal tribute of praise, rendered to the memory of the celebrated Howard, it is probable that the period is not remote, when great exertions in the cause of philanthropy and humanity, will acquire a more distinguished and lasting fame, than the most splendid enterprises of heroes and warriors.

In this state, before Montesquieu, and Beccaria, had immortalized their names in pleading the cause of humanity, the legislature had begun to practice upon the sublime principles, which these philosophers have recommended by all the charms of eloquence and power of reason. Our ancestors when they enacted their criminal code, were far from being disposed to adopt the sanguinary system of their native country. They exploded the idea of inflicting death, upon crimes of a very different nature. For a few of the most enormous crimes, the punishment was death, and for the rest, corporal pains, and pecuniary penalties were inflicted, according to the nature of the offence. But it was discovered that there were certain crimes to which the wicked and the indolent were tempted by so strong a desire to obtain property without labor or industry, that they could not be restrained by ordinary corporal and pecuniary punishments. Unwilling to introduce sanguinary punishments, the legislature adopted the principle of punishing a certain class of crimes, by confinement to hard labour and coarse fare. For  
this

this purpose, New-Gate prison was erected. The convicts are immured during the night in the dreary mansions of a profound cavern, to heighten the horror of the punishment, and to guard against the possibility of an escape. By day in an upper apartment, chained for their safe-keeping, they are compelled to perform such hard labour, as is most suitable for them.

The legislature have aimed to proportion the punishment, to the nature of the offence, and for that purpose have introduced three distinct grades of punishment,—*Death : Confinement to hard labor, and coarse fare : Corporal and pecuniary pains and penalties.* The crimes for which death is the punishment, are treason, murder, rape, the crime against nature, mayhem, and arson, where some life is endangered. Imprisonment in New-Gate is inflicted on robbery, burglary, forgery, counterfeiting, horse-stealing, arson, attempting to commit a rape, perjury, and aiding to escape from New-Gate prison. On all other crimes corporal and pecuniary punishments are inflicted.

The legislature have unquestionably adopted the three essential grades of punishment, but it is a serious question, whether in every instance, the punishment is proportioned to the crime. The dreadful punishment of death, ought only to be inflicted on those crimes which directly and immediately tend to the destruction of society and the human race, as treason, and murder. Those ought to be prevented by the most effectual measures ; and if death be inflicted on no other crimes, there is no probability that it will be so common as to be disarmed of its terrors. It will impress a certain awe and dread on the mind, that will in the most effectual manner possible, guard against the commission of those crimes ; but if they are punished only in the same manner, as crimes of an inferior degree, it will lead mankind to confound them together, and efface those peculiar sentiments of horror from the mind, which ought to be enforced.

But the other crimes punishable with death, by our law are certainly inferior to treason and murder, and of course may be prevented by a punishment less severe. Confinement to hard labor may be so varied in degree, as well as length of time, that it may be  
proportioned



proportioned to a vast variety of different crimes in such manner as to prevent their commission. Here is room for important improvement. This is the mode by which crimes are most effectually to be restrained.

This subject deserves the most attentive consideration of the jurist and the philosopher. I shall only remark, that the dreadful punishment of death ought only to be inflicted on treason and murder : that confinement to hard labour ought to be inflicted on those crimes, to which there is a strong temptation, which indicate great moral depravity, which are infamous, and are highly injurious to society ; that this ought to be varied according to the aggravations of the offence : and that for all inferior crimes, corporal pains and pecuniary penalties may be proportioned in such a manner as to subserve the interest of society : that corporal punishment is proper for those crimes which are infamous and bad in their own nature ; and pecuniary penalties are adapted to actions which are deemed crimes in a political point of view, and bad because they are prohibited.

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## CHAPTER SECOND.

### OF TREASON.

**I**N pursuing this branch of our enquiries, I shall begin with the highest, and descend to the lowest crimes, defining each in the concise manner, and ascertaining the punishment.

In almost all codes of criminal law, treason is a crime that comprehends a great variety of actions, and requires a long dissertation to explain it. But in this country, as we have no royal families, whose dignity is to be defended, and whose affronts are to be avenged, a short statute fully defines the crime and declares the punishment. It is only the majesty of the people, and the existence of the government, that are capable of being affected by this crime. The lives of the rulers are sufficiently guarded and protected by the same laws which protect every member of the community.



<sup>a</sup> The statute enacts, that all persons belonging to, or residing within this state, and under protection of its laws, who shall levy war against the state or government, or aid any enemies at open war against this State or the United States, by joining their armies, or enlisting, or procuring others to enlist for that purpose, or by furnishing arms, ammunition, provision, or any other articles for their aid or comfort, or by carrying on a correspondence with them, or shall form or be concerned in any combination, plot, or conspiracy, for the betraying this State or the United States, into the hands or power of the enemy, or shall give or attempt to give any intelligence to any enemy for that purpose, shall on conviction, suffer death. That all persons who shall endeavour to join the enemies of this or the United States, or use their influence to persuade any person to join, aid, or comfort them in any manner, or shall have knowledge of any person's endeavouring to do the same, and shall conceal it, shall be punished by fine, according to the nature of the offence, and be imprisoned at the discretion of the superior court, not exceeding ten years. That no person accused of this crime, and on examination before proper authority, shall be adjudged to be held to trial, shall have bail, unless before the court having final jurisdiction.

Since the passing this statute, the government of the United States has been established and a statute enacted, defining and punishing treason, which will supersede the necessity of the law of this state.

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### CHAPTER THIRD.

### OF HOMICIDE.

**U**NDER this head, I shall treat of the crimes of murder and manslaughter. Their connexion is such as requires them to be considered together.

The Statute respecting murder enacts, <sup>b</sup> “ that if any person  
 “ shall commit any wilful murder, upon malice, hatred or cruel-  
 “ ty, not in a man's just and necessary defence, nor by casualty  
 “ against his will, or shall slay or kill another through guile, or  
 “ by

<sup>a</sup> Statutes, 251

<sup>b</sup> Statutes, 162.

“ by poisoning, or other such atrocious practices, he shall be put  
 “ to death.” <sup>c</sup> The common law definition of murder is “ when  
 “ a person of sound memory and discretion, unlawfully killeth any  
 “ reasonable creature in being, and in the public peace, with ma-  
 “ lice aforethought, either express or implied.” It is evident that  
 the statute is made in affirmance of the common law. It is strange  
 that the revisers of our statutes did not adopt the perspicuous and  
 accurate language of the common law, in describing this offence.

The age and capacity of persons to commit this as well as other  
 crimes will be considered hereafter. The person killed, to consti-  
 tute murder must be actually in existence. <sup>d</sup> To kill a child  
 in its mother's womb, is not murder, but a great misdemeanor,  
 but if the child be born alive, and then die by reason of the injury  
 it suffered in the womb, it will be murder in him who caused it.  
 Every person who is in the state, is in the public peace, and of  
 course protected in his life, excepting alien enemies at open war,  
 and who enter the state with an armed force. In the repulsion  
 of such invaders it is justifiable to kill them. But if an alien en-  
 emy comes into this state in a peaceable manner, without force,  
 tho in the character of a spy, no person has a right to kill him,  
 but may apprehend him for trial.

<sup>e</sup> There must be an actual killing: an assault with an intent to  
 kill is a misdemeanour, but not murder. The modes of murder may  
 be as various, as the possible means of taking away life, as by  
 poisoning, striking, starving, drowning, or by an indirect act, of  
 which the probable consequence may be, and actually is death.  
<sup>f</sup> If a man set a dog upon another, and the dog kills him, it is  
 murder. If a man turns loose a beast, which he knows is used to  
 do mischief, purposely, and he kills any person, it is murder. So  
 where a son carried his sick father against his will, in a cold frosty  
 season from town to town, by reason whereof he died, it was held  
 to be murder. If a man lay poison to kill one, and another is kil-  
 led by it, this is murder. <sup>g</sup> According to the common law, a  
 person must die within a year and a day after the stroke was given,  
 or cause of death was administered, to constitute the crime of mur-  
 der, and that in the computation the whole day in which the fact

was

<sup>c</sup> 3 Inst. 47. <sup>d</sup> Black. Com. 195. <sup>e</sup> 3 Inst. 50. <sup>f</sup> 1 Hawk. P. C. 80.  
<sup>g</sup> 4 Black. Com. 198. <sup>h</sup> Ibid. 196. <sup>i</sup> 4 Black. Com. 196, 197. <sup>j</sup> 1 Hawk.  
 P. C. 73, 79. <sup>k</sup> Hawk. P. C. 79. <sup>l</sup> H. P. C. 55.



was done shall be reckoned the first. *b* Malice prepense is the grand characteristic of this crime. This malice is not confined to the particular object, but where the conduct shews that depravity of mind, and wicked malignant heart, which evidences that the offender is capable of any mischief however dangerous to the community, it will be sufficient proof of malice prepense. This may be either express or implied. *i* Express malice is where the design is formed, and the act perpetrated in a deliberate manner. This may be determined by the attendant circumstances, as by lying in wait, former menaces and enmity; and concerted schemes to do some bodily injury, which clearly discover the intention to kill. *k* A duel will come within the description of deliberate murder. There are instances where there is no intent to kill, yet the act is accompanied by such express hatred, revenge, and cruelty, as to evidence a total depravity of heart, and constitute malice prepense. *l* Where a park-keeper tied a boy that was stealing wood, to a horse's tail, and dragged him along the park: a master corrected a servant with an iron bar; and a school-master stamped on a scholar's belly, so that the sufferers died, these acts were held to be murder. So where a person deliberately goes with a horse used to strike, or discharges a gun among a multitude of people, by which any are killed. Such act demonstrate that wanton cruelty, and unfeeling barbarity, which render the perpetrators unfit and dangerous members of society.

*m* Where two, or more assemble for the purpose of doing an unlawful act against the peace, and of which the probable consequence may be bloodshed, as to beat a man, or commit a riot, and one of them kills a man, it is murder in all, because of the illegality of the act, and the premeditated wickedness of the design.

Implied malice must be deduced from the circumstances attending the fact. *n* Where a person upon little or no provocation, strikes another with a dangerous weapon, and kills him, the law implies malice prepense. There is considerable nicety in distinguishing between murder, and manslaughter, where the death ensues upon a sudden quarrel. Where on a sudden quarrel, and high provocation, a man is transported beyond himself, and in the paroxysm of anger

intentionally

*b* 4 Black. Com. 198. *i* Ibid. 197. *l* Hal. P. C. 451. *k* 1 Hawk. P. C. 81.  
*l* 4 Black. Com. 197. *m* 1 Hawk. P. C. 74. *n* 4 Black. Com. 200.



intentionally kills a person, it is manslaughter. <sup>6</sup> So where a person upon slight provocation beats another, with an intent to chastise him, and not kill him, and unfortunately kills him, it is manslaughter. These seem to be very reasonable allowances for the passions and failings of mankind. But if a man will rise into anger upon trifling provocations, as mere words and gestures, and intentionally kill his fellow-creature, or treat him with that cruelty, and barbarity, which produce his death, the law implies malice, and pronounces him a murderer : or if a person in a sudden affray, however abused, has the command of his temper, and deliberately and intentionally kills another, it is murder. If two have had a quarrel, and they separate, and have time to cool their passions, and then one kills the other, it is murder. <sup>8</sup> If a man kills a sheriff or other public officer, or any of his assistants in the execution of their duty, endeavouring to preserve the peace, or any private person endeavouring to suppress an affray, or apprehend a felon, knowing the authority or intention with which he interposes, the law implies malice, and the killer is guilty of murder. <sup>7</sup> It is a principle of the common law, that where a man, intending to commit a felony, undesignedly kills a man, he is guilty of murder. If a man shoots at a one person, and missing him kills another, he is guilty of murder. If one lays poison to kill a man, and another by accident takes it, and dies, it is murder ; but if the poison be laid to kill rats, and a man takes it, and dies, it is not murder.

The statute has declared, that in the cases of just and necessary defence, and casualty, the killing of a man is not murder. Let us attend to these circumstances, and this will aid us in giving an accurate description of murder.

<sup>\*</sup> Justifiable homicide is where the act results from unavoidable necessity, without any will, intention, desire, inadvertence, or negligence, on the part of the killer. <sup>f</sup> As where an officer in the execution of a judgment of court, puts a malefactor to death ; or where an officer in the execution of his office, kills a person that assaults, or resists him. So where an officer, or a private person, endeavor to take a person, charged with some high crime, and are resisted, and in the attempt to take kill him, this is justifiable.

Where

<sup>6</sup> Fort. 291. <sup>8</sup> 1 Hl. P. C. 457. <sup>7</sup> 4 Black. Com. 201. <sup>f</sup> Hl. 178.

<sup>1</sup> Hawk. P. C. 71.

Where there is a riot, or rebellious assembly, and the peace officers endeavour to disperse them, and they refuse, it will be justifiable to kill them, if it be necessary for the purpose of executing the law.

\* Homicide is justifiable for the preventing of any forcible and atrocious crime; as an attempt to rob, to murder, to break open a house, or to burn it. But to prevent crimes not accompanied by force, to kill a person, could not be justifiable. It is justifiable for a woman to kill a man, who attempts to ravish her: and a husband or father may justify killing a man, who attempts to commit a rape upon his wife or daughter. And in all instances where the crime is capital, it is justifiable to prevent the commission of it, by killing the person attempting it.

“ Excusable homicide is by misadventure, or casualty, or in self-defence, upon the principle of self-preservation. Homicide by misadventure, or casualty, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is cutting with an ax, and the head flies off, and kills a bystander: or where sundry persons are hunting, and one discharging his gun, undesignedly kills another: \* Where a parent moderately corrects his child, or master his scholar, and happen to occasion their death, it is only misadventure: but if they exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least; and may according to the circumstances of the case be murder.

y Homicide in self-defence, or self-preservation, is one of the first laws of nature, which no man ever resigned upon entering into society. Whenever a person is assaulted by another, and he has no other mode to defend his life, he may kill the assailant. Here the law goes upon this principle, that a man may take away the life of another only when his own is in danger, and he has no other possible mode of defending himself. One may not kill another to defend himself from an assault. The law therefore requires that where a man is assaulted by another, he shall do every thing in his power to defend himself, and save his own life, without killing the assailant. He shall retreat as far as he can, till he be stopped by some fence, wall, or ditch, if the fierceness of the assailant will permit.

\* 4 Black Com. 180.    u 4 Black. Com. 182.    i Hawk. P. C. 73; 74.  
Hail P. C. 473.    y 4 Black. Com. 184.



mit it : but when he can retreat no farther, or the fury of the assailant will not permit it, without manifest danger of life, or enormous bodily harm, then in his defence he may justify killing the assailant.

2 Where persons stand in the relation of husband and wife, parent and child, and master and servant, they may justify the killing of an assailant, when necessary to the defence of each other.

3 Excusable homicide is by the law of England deemed a crime, and is punishable by the forfeiture of goods, and the unfortunate person must now pray out a writ of pardon and restitution of goods : which however, is a matter of course. In this country it has not been deemed a crime, and the unfortunate person is subjected to no kind of punishment.

4 There is one species of murder, respecting which the statute has varied the mode of proof. If a woman be delivered of a bastard child, and she endeavour privately, either by drowning, or secret burying, or in any other way, by herself or others, so to conceal the death thereof, that it may not be known whether it was born alive, or not, she shall be accounted guilty of murder, unless she can prove by one witness at least, that the child was born dead. This law is intended to prevent the secret murdering of bastard children by their mothers, to conceal their disgrace : and for that purpose has introduced a presumptive mode of proof, which the nature of the case seems to require. This law however, has by many been considered as bearing hard upon female frailty, and a rigid construction of it, might expose an innocent woman to suffer death, who only attempted to conceal her disgrace, by concealing the death of a bastard child, which was born dead, and to which she is impelled by the strong inducement of preserving her character.

5 In England they require some presumptive proof, that the child was born alive, before from the circumstance of the concealment, they will convict the parent of murdering it. In this state it has not been considered necessary that the woman should produce a witness present at the birth of the child, to prove that it was born dead :

2 4 Black. Com. 186.      3 2 Hawk. P. C. 381.      4 Statutes 162.  
5 4 Black. Com. 193.



dead : but if by any circumstances, as the appearance of the child when found, the mind of the triers can be satisfied, that the child was still born, the mother, tho from a wish to hide her disgrace, she concealed the birth of her child, shall not be convicted of murder.

Before I finish my observations on murder, it may be proper to say something respecting suicide, or self-murder, which by the English law is deemed a crime. The person murdering himself, is called *felo de se*, and the punishment is a forfeiture of his personal estate, and the burial of his body in a public highway, with a stake driven thro it. The Roman law considered suicide as not within its animadversion ; and it is evident that the English law originated in the barbarous period of superstition, and cruelty. There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender. This odious practice has been attempted to be justified upon the principle, that such forfeiture will tend to deter mankind from the commission of such crimes, from a regard to their families. But it is evident that when a person is so destitute of affection for his family, and regardless of the pleasures of life, as to wish to put an end to his existence, that he will not be deterred by a consideration of their future subsistence. Indeed this crime is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment. This principle has been adopted in this state, and no instances have happened of a forfeiture of estate, and none lately of an ignominious burial.

The English nation have been distinguished for the frequent commission of acts of suicide. Such acts are rare in this country ; but no instance has happened more remarkable in any country, than that of Beadle, who coolly and deliberately in the exercise of his reason, murdered his wife, four children, and himself, from a dread of their being exposed to want.

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We shal lose this chapter by a discussion of the crime of Man-  
slaughter.

*d* The statute law has declared the punishment for this crime, and describes it to be a killing without malice aforethought : but we must have recourse to the common law for a compleat definition of it. *e* “Manlaughter is the unlawful killing of another, without  
“malice exprels or implied, either intentionally upon a sudden  
“quarrel, or unintentionally in the commission of some unlawful  
“act.” If upon a sudden quarrel, two persons fight, and one kills the other, if one be greatly provoked, as by pulling his nose, or other great indignity, and he kills the aggressor, it will be manslaughter, because there was no previous malice, and the act was done hastily without deliberation. But if there be sufficient time for passion to subside, and reason to interpose, and then the person provoked kills the other, it will be murder, because it was a deliberate act of revenge. *f* If a man detects another in the act of adultery with his wife, and kills him on the spot, by the English law it is manslaughter : for no man ought to be the judge and avenger of his own wrongs ; but such is the nature of this injury, that if any thing will justify the taking away life, as an instantaneous punishment by the party injured, it must be this. *g* And in England on the conviction of a person of manslaughter under these circumstances, the judges directed the punishment to be lightly inflicted.

Intentional manslaughter differs from homicide in self-defence, in this respect ; one is a sudden act of revenge, and the other a necessary act of self-preservation. Unintentional manslaughter differs from homicide, by misadventure in this respect ; the first results from an unlawful, and the last from a lawful act. *b* If two men fight, and one kills the other, it is manslaughter, because the act of fighting was unlawful. *i* If a man does an act lawful in itself, in an unlawful manner, without due caution, it is manslaughter. Where a workman flings down a stone or piece of timber, into a street, and kills a man, it may be either homicide by misadventure, manslaughter, or murder. If in a country village where few pass, and due warning is given, it is misadventure. If in a large town, where people are constantly passing, it will be manslaughter, tho

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warning

*d* Statutes, 135. *e* 4 Black, Com. 191, *f* Ibid. *g* St. T. Raym. 212.  
*b* 4 Black. Com. 191. *i* 3 Inst. 57.



warning be given : but if no warning be given, it will be murder, for such conduct evidences a general malice against all mankind. If one riding a horse, another whips him, by which he runs over a child and kills him, it is accidental in the rider, but manslaughter in the person striking the horse, for the act was a trespass.—Wherever death ensues in consequence of any dangerous and unlawful sport, as shooting, or casting stones in a town, the slayer is guilty of manslaughter, on account of the illegality of the acts.

§ The general rule is, that when an unintentional homicide happens in consequence of an unlawful act, it will be murder or manslaughter, according to the nature of the act which occasioned it. If it be in the commission, or in the attempt of committing a capital crime, it will be murder : as if a man should kill a woman in attempting to commit a rape, it would be murder : if the crime be not capital, or the act a trespass, it will be manslaughter.—There can be no doubt of the justice and propriety of making the unintentional killing of a person, murder, where the real intent was to commit a crime of as high a nature. But the law is too severe, to say that it shall be manslaughter in all cases, where the killing results from an attempt to commit a crime not capital, or to commit a trespass, and then to punish the crime under all the various circumstances with the same severity. It seems repugnant to reason and justice, to punish the offender under circumstances of the slightest criminality, with the same severity as offenders whose crime is attended with the deepest guilt. If a man hunting on another's ground, which is clearly a trespass, should happen in shooting game, to kill a person, this would be manslaughter according to the common law. Under these circumstances, it is hard and unjust to punish the unfortunate offender, with the same severity as the law punishes a man, who when stealing a horse unintentionally kills another. There certainly is a great difference in the criminality of these acts, and the punishment ought to be varied and proportioned accordingly. Perhaps this distinction might be adopted with propriety, that where a man unintentionally kills another, in committing or attempting to commit some crime of equal malignity with and deserving as severe a punishment as manslaughter, that he should be deemed guilty of that crime, and there would be no difficulty

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in specifying these crimes. But that where the unlawful act intended to be done, could not be considered as deserving such severe punishment, it should either not be accounted manslaughter, or be called manslaughter in an inferior degree, and punishable with less severity. It is evident that where a man in committing a trespass, undeliberately kills another, he does not deserve to be punished with that severity, which is denounced against the crime of manslaughter: for he may thus by an accidental and involuntary act, be involved in the punishment for a crime, which he reprobates with all his heart, and would not commit on any consideration with design. The intent of the mind, constitutes the nature and degree of the crime. In a civil view, a man is responsible for all the consequences of the act, which he does to the party injured, whether he contemplated them, or not; but in a moral view, the crime is not merely to be considered according to the consequences, which happen to ensue, but according to what the criminal had it in his power actually to contemplate or expect at the time of doing the act, and according to the intent of his mind. If it should be thought proper, that a man who kills another in attempting to commit some of the lowest crimes, or a trespass, should be punished for the purpose of making mankind more cautious and circumspect in their conduct, then let homicide under these circumstances constitute a new species of crimes, or an inferior grade of manslaughter, and let the punishment be proportioned to the nature of the offence. Then we shall follow the excellent rule of separating crimes in our definitions, that are really different and of not inflicting the same punishment, upon crimes of a different nature.

The statute punishes this crime by a forfeiture of all the goods and chattels of the offender, at the time of committing it, by whipping, burning in the hand with the letter M, and by a perpetual disability to be a juror or witness. The dreadful punishment annexed to this crime, must have been dictated by that horror which is universally entertained respecting homicide, without due attention to the circumstances under which it may be committed. But at this enlightened period, when reason and science have dispelled

led the gloom of prejudice and superstition, it is to be hoped that the legislature will soon enact more rational and consistent laws on this subject.

This is the only crime punishable by a forfeiture of all the goods of the offender. In general, where a person is to be deprived of his property for a crime, it is in the nature of a fine, which is assessed by the court. This was borrowed from the English jurisprudence, where almost every crime works a forfeiture of the estate of the criminal. Laws most evidently adopted in those barbarous ages, when the rapacity of the rulers delighted to take advantage of the failings of their subjects, for the purpose of plundering them of their property.

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#### CHAPTER FOURTH.

#### OF RAPE, AND OTHER HIGH CRIMES.

**R**APE is where a man obtains carnal knowledge of a woman, with force and against her consent. To constitute this crime, there must be an actual penetration, and any attempt, however abusive and violent, will not be a rape, if this be not effected. Such attempt at common law, would be considered as a high-handed assault, but in this state, it is punishable by statute. Carnal knowledge of a female, under ten years, whether against her consent or not, is considered to be a rape at common law. This crime may be committed upon a woman let her character be ever so abandoned in point of chastity ; for the law more charitably than rationally supposes, that there was a possibility of repentance and reformation. A male under the age of fourteen years, is considered to be incapable to commit this crime.

*m* At common law, the party ravished is a competent witness to convict a man of a rape; but her credibility must be judged of, according to the circumstances of her testimony, and the facts which may be testified by other witnesses. If the witness be a woman of fair character, immediately make known the offence, and

searched



searched for the offender : if the party accused fled, and such circumstances happened as usually do, and probably will attend such transactions, then her testimony may be credited. But if her character be bad in point of truth as well as chastity, if she did not forthwith make complaint, but concealed the injury, if the place where she charges the fact to have been done, was where she might have been heard, and she made no outcry, if she be unsupported by others, and her story be not confirmed by those attendant circumstances, which are the most infallible clue to truth, she ought not to be credited. As the law gives a woman so much power, to subject a man to a capital punishment, it ought particularly to be observed, whether the witness has not had a previous controversy with the person accused, so that it is probable that the charge is made from motives of malice and revenge : especially if the witness be a woman of bad fame : for the vindictive spirit of lewd women, has furnished frequent instances of such conduct. If the female on whom the rape is charged to be committed, be under twelve years, if she has sufficient understanding to be a witness, she is admissible. When it is considered that this accusation is easy to be made, and that it is hard for an innocent man to defend against it, jurors should be cautious that their detestation of the offence should not influence them to convict a person upon slight evidence.

All nations have entertained such a detestation of this crime, that they have punished it with great severity, generally with death. When it is considered that it is so dangerous to society, so destructive to the peace of families, so distressing to the unhappy victim of it, and indicative of such a depravity of mind, the humane and benevolent heart, the strongest advocate for lenity of punishment, cannot find much fault with a law that subjects the criminal to the pains of death. Such is the punishment by our law, but as it is probable, that perpetual confinement to hard labour, would more effectually prevent the commission of the crime, it would be better to adopt that punishment.

In this state, not many years since, a man convicted of a rape, and sentenced to suffer death, petitioned the legislature for a commutation

mutation of his punishment, even to castration. The legislature granted his request, and the criminal underwent an operation, which effectually guards against a repetition of the offence, and would be a very proper punishment in all cases, were it not for the ridicule attending it.

I shall here treat of the crime against nature, or the crime not to be named, as some writers modestly express themselves. In considering a crime, which reflects such disgrace upon human nature, every person will be filled with horror and disgust. But to complete our view of criminal law, it is necessary to attend to the subject, however disagreeable, and we shall treat of it with the utmost decency.

*n* Sodomy, or buggery is the unnatural connection between the human being and a brute. The statute inflicts the punishment of death on the offender, and to inspire the deepest detestation of the deed, directs that the very beast shall be slain and buried. I should have hardly thought it possible, that a human being could be so vile and depraved, as to commit this crime, had I not been present at the trial of a man indicted for it, and against whom there was explicit and convincing proof was adduced : but who was acquitted from the circumstance, that no two witnesses saw him at the same time, tho' sundry saw him at different times separately. The jury supposed that there must be two witnesses at the same time, to the same act, to comport with the statute, requiring the testimony of two or three witnesses, or that which is equivalent, to take away the life of man : but it is evident that this atrocious offender escaped that punishment which he richly merited, from a misapprehension of the jury respecting the law ; for it is clear that the testimony of five or six witnesses, to different facts of the same nature, tho' they saw them separately, must be equivalent to the testimony of two witnesses who saw the same fact together.

Of the same name, is the crime of carnal connection between human beings against nature. The statute enacts, that if any man lie with mankind, as with woman kind, both shall be put to death, unless one of the parties was forced, or under the age of fifteen years. This crime, tho' repugnant to every sentiment of decency and



and delicacy, is very prevalent in corrupt and debauched countries, where the low pleasures of sensuality, and luxury, have depraved the mind, and degraded the appetite below the brutal creation. Our modest ancestors, it seems by the diction of the law, had no idea that a man would commit this crime with a woman, and therefore have not comprehended it in the statute. But in countries, where men have acquired a brutal relish for animal pleasure, this crime is frequently committed—and might here by force of common law be punished with death. The indictment must alledge that he had the venereal act, and carnally knew—

Notwithstanding the disgust, and horror, with which we treat of this abominable crime, we find that the elegant and modest Virgil, entertained very different ideas on the subject. He made the passion of a shepherd for a beautiful boy, the foundation of an eclogue, and Corydon sighs for Alexis, with all the fondness of a lover, and in all the harmony of pastoral numbers.

Tho the example of other Roman poets and the manners of the age, may in some measure excuse the choice of the subject, yet it is striking evidence, of the depravity, corruption, and debauchery of the Romans at that period, that they could relish a poem, which celebrated an unnatural passion.

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#### CHAPTER FIFTH.

#### OF MAYHEM AND ARSON.

**M**AYHEM according to the principles of the common law, is the violently depriving a person of the use of such of his members as may render him the less able in fighting, either to defend himself or annoy his adversary. This law was probably adopted in the heroic ages when war was considered as the noblest employment: but when our ancestors formed their criminal code, the ardor of heroism seems to have abated, and it is enacted, if any person on purpose, and of malice aforethought, and by lying in wait, shall cut, or disable the tongue, or put out an eye, or cut off any of the privy members, or shall be aiding or assisting therein, shall suffer

• Virg. Eclogue, ii.      • Statutes, 67.

suffer death. Any wounding of an inferior degree, is considered as a battery, and may be punished as a breach of the peace, and the party injured, recompenced in damages, according to the nature and aggravation of the injury.

9 The crime of arson is constituted and defined by statute. That if any person of the age of sixteen years or more, shall wilfully, and of purpose burn any dwelling house, barn, or out house, he shall be put to death, if any prejudice or hazard happen to the life of any person thereby. If part of a building be burned, and then extinguished, it is arson.

\* If any person shall wilfully and maliciously burn or destroy, or attempt to burn and destroy any public magazine or stores, or if any master or seaman, in a vessel belonging to the United States or this state, shall burn and destroy it, or in time of war, betray, or deliver it to the enemy, he shall suffer death : but in time of peace, the superior court have discretionary power to punish by whipping, not exceeding forty stripes, banishment, imprisonment not exceeding ten years, and forfeiture of estate. The establishment of the government of the United States and the laws enacted by Congress, will render this last law unnecessary.

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## CHAPTER SIXTH.

### OF CRIMES PUNISHABLE BY IMPRISONMENT IN NEW-GATE.

**T**HESE are, I. Robbery. II. Burglary. III. Forgery. IV. Counterfeiting. V. Horse-stealing. VI. Arson. VII. Attempting to commit a rape. VIII. Perjury. IX. Aiding to escape from New-Gate prison.

I. / Robbery is the forcible taking of goods or money, to any value from the person of another, by putting him in fear. The punishment for this crime has been pointed out by statute ; but we must have recourse to the common law for its definition. The requisites to constitute this crime are, 1. There must be an actual taking. A mere attempt to rob, is punishable only as a high-handed breach of the peace. If the offender once take the thing,

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9 Statutes 66. ; Ibid. / Ibid 4 Black. Com. 242. 1 Hawk. P. C. 95.



tho he return it again, it is robbery. It is not strictly necessary that the thing be taken from the person ; if it be done in his presence, it is sufficient. Thus when a robber by threats and violence puts a man in fear, and drives away his sheep or cattle before his face. So where several in a gang commit a robbery, and one only takes the money, all are guilty in judgment of law. So if they fail of an intended prize, and one ride from the rest, and commit a robbery out of their view, and without their knowledge, all are guilty on account of the general intent. 2. Property of the least value when thus taken, is sufficient to constitute the crime of robbery. 3. The taking must be by force, or by a previous putting in fear, which constitutes the aggravated nature of the offence. If the property be taken forcibly and against consent, without exciting fear ; as knocking a man down and taking his money while he is senseless, this is robbery tho there is no fear. The putting in fear need not arise from any great circumstances of terror : it is sufficient that so much force and threatening were made use of as to create an apprehension of danger, and compel a person to part with his property. If a person with a drawn sword begs alms, and a person apprehensive of danger gives, this is robbery.

II. Burglary is defined to be the breaking and entering into a dwelling house, or shop in the night time, with an intent to steal, or commit some high crime. To illustrate this subject, we must consider the time, the place, the manner and the intent.

1. " The time must be in the night, when there is not sufficient day light to discern a man's face. If there be moon light, so that a person can be known, it will make no difference ; for the malignity of the offence arises from the circumstance of committing it in the night, when sleep has disarmed the owner of the powers of vigilance and defence.

2. \* The place according to the common law, must be a mansion house ; if it be a private house, a distant barn, or the like, it is not under the same privilege ; for the breaking open where no man resides, is not accompanied with the same circumstances of midnight terror. A house in which a man sometimes resides, and has

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1 Statutes, 17. 3 Inst. 63, " 4 Black. Com. 224. 1 H.L. P. C. 50.  
1 Black. P. C. 101 2 4 Black. Com. 224, 225. 1 H.L. P. C. 566. Holt. 77.

only left it for a season, with an intent to return again, is a place where burglary may be committed, tho no person was in it, at the time the fact was done. If a barn, stable, ware-house or any out house be adjoining to, and parcel of the mansion house, tho not under the same roof, a burglary may be committed in them, for the capital house protects all the appurtenances, if within the home-stall.— A chamber in a college, or a room hired in a private house, are the mansion houses of the possessors, if they actually lodge there. Burglary cannot be committed in a booth, or tent, erected in a fair or market, tho the owner lodge there, because the law respects only permanent edifices. Burglary may also be committed in a church. The statute not only regards dwelling houses, but has gone beyond the common law, and makes it burglary to break into a shop, where goods, wares, and merchandize are deposited.

3. y The Manner must be both by entering and breaking, tho this need not be done at the same time : for a person may cut a hole one night and enter the next. There must be an actual breaking, a substantial and forcible irruption. If a man enters a house by a door, which he finds open, or thro a hole which was made there before, and steals goods, or draws any thing out at a door or window, which was open before, or enters a house by the door in the day time, and lies there till night, and then steals and goes away without breaking any part of the house, he is not guilty of burglary. But he would have been guilty, if he had opened a window, picked a lock, or opened it with a key, lifted a latch, or any way unloosed the fastening, which the owner had provided and then entered, or having entered by a door or window, which he found open, or having lain in the house by the owner's consent, and then unlatches a door, or opens a door or window to go out of the house, or comes down the chimney, he is guilty of burglary. To knock at a door and on its being opened to rush in, or under pretence of taking lodgings, to fall upon the landlord, and rob him, or to procure a constable to gain admittance to search for any thing, and then to bind the constable and rob the house, have been considered burglaries, tho there was no actual breaking. If a servant opens and enters his master's chamber with a criminal design,

or



or if any person lodging in a public house, opens and enters another's door with a criminal design, or if a servant conspire with a robber, and let him into a house by night, this is burglary in all.

The least entry with the whole or any part of the body, or with an instrument held in the hand is sufficient. Thus to step over the threshold—to put a hand or hook into a window to draw out goods, or a pistol to demand one's money, or to turn the key of a door, which is locked on the inside, or to discharge a loaded gun into a house, are burglarious entries. Where several persons combine together to commit a burglary and some stand in adjacent places to watch, and the other break and enter, all are guilty, for the act of one in judgment of law is the act of all. The breaking may as well be after the entry as before, for if a person gets into a house or shop without breaking, and then breaks to get out, he is guilty of burglary.

4. The intent must be criminal. The common law definition is with an intent to commit a felony. Of course, if the intent be to commit murder, robbery, rape, mayhem, and the like, it will constitute burglary, as well as an intent to steal : tho in common speech we annex to burglary, the idea of an intent to steal only, and I never heard of any prosecutions for breaking a house with any other intent. If the intent be to commit a trespass, as beating the party, or disturbing the peace of his family, it is not burglary, but a trespass, or breach of the peace. Where a person breaks into a house with an intent to commit a crime, tho he does not perpetrate the crime intended, yet it is burglary.

III. Forgery, by the statute, consists in the following acts : to forge, counterfeit, or alter any of the bills of credit, or securities of this state, or any other of the United States of America, or any note, or obligation, or other writing of any person or persons whatsoever, to prevent equity and justice ; or to utter and put off any such forged, altered, or counterfeit bill or bills, security or securities, note or obligation, or other writing, knowing them to be such, or to counsel, advise, procure, or in any way assist in the forging, altering, counterfeiting, or signing any bill, security, note, obligation, or other writing, knowing them to be false ; or

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to engrave any plate, or to make any instrument to be used for any of the purposes aforesaid.

IV. Counterfeiting is thus defined by statute : to stamp, or otherwise counterfeit any of the coins of gold and silver currently passing in this state, or to utter and put off any such counterfeit coins, knowing them to be base, and counterfeit, or to make any instrument or instruments, for the counterfeiting of any of the coins aforesaid, or to be aiding or assisting therein. The words forgery and counterfeiting, are clearly of the same signification. In a legal sense, one is applicable to writings, and the other to money. The statute has defined these crimes with such precision and accuracy, that any explanation is wholly unnecessary. I shall however mention a few cases that have been decided. A person was indicted for aiding and assisting in counterfeiting money. On a motion in arrest, it was contended that the aiding and assisting, related only to the making the instruments and did not extend to the counterfeiting ; but the court determined, that the aiding and assisting extended to the counterfeiting, as well as making the instruments. A person offered to a tavern-keeper, a counterfeit guinea to pay his bill, and to receive his change. The tavern-keeper discovering the guinea to be counterfeit, refused to change it, but retained it, and procured the person to be prosecuted. This was held to be an uttering and passing within the statute.

V. Horse-stealing is where one man feloniously takes and carries away another's horse or horses, with an intent to steal them. This crime is distinguished from theft in general, for the purpose of preventing it, by inflicting a severer punishment ; because the opportunities of committing it are greater, on account of the exposed situation of such property, and the facility with which the thieves make their escape, by means of the fleetness of the stolen horses.

The punishment of criminals convicted of the foregoing offences, is, that for the first offence, the offender shall suffer imprisonment in New-Gate prison, being a public goal or work house, and there be kept to hard labour, for a term not exceeding three years,



at the discretion of the court before whom the conviction is had. If a person has been convicted of either of these crimes, previously to the time of erecting New-Gate prison, or afterwards, if any person shall be convicted a second time, of any of said crimes, he shall suffer imprisonment in said prison, and there be kept to hard labour, for a term not exceeding six years, and on conviction a third time, the offender shall suffer imprisonment during life.

If any person committing burglary, or robbery, shall in the perpetration of the crimes, be guilty of personal abuse or violence, or shall be so armed with any dangerous armour or weapon, as shall clearly indicate violent intentions, he shall on conviction for the first offence, be imprisoned and kept to hard labour during life. For these crimes, no punishment can be inflicted but that provided by statute, which supercedes the common law.

VI. If any male person of the age of sixteen years, or more shall wilfully, and feloniously burn, or attempt to burn by setting on fire, any dwelling house, barn, outhouse, shop, store, ship, or other vessel, and no prejudice, or hazard happen to the life of any person thereby, he may at the discretion of the superior court, on conviction thereof, be imprisoned in New-Gate prison, and there be kept to hard labor, not exceeding seven years, and on a second conviction for this offence, the offender may be there imprisoned, and kept to hard labor, for any limited period, or during life, as the circumstances of the case may require.

VII. If any person shall with force, and arms, and actual violence, an assault make on the body of any female, with an intent to commit a rape, he shall on conviction be imprisoned, and kept to labor in New-Gate prison, during life, or such other period, as the superior court shall determine : By the common law, this offence can only be punished as a high handed breach of the peace : but as it actually evidences all the baseness, and wickedness of heart, that the committing of a rape does, and as the abuse to the woman, and injury to her feelings must be nearly the same, it seemed necessary in proportioning punishment to crimes, that this act should be placed in a different grade, from breaches of the peace.

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The legislature has therefore with great propriety defined the crime, and inflicted upon it a punishment, that may be proportioned to its enormity.

VIII. — Perjury by the common law is defined to be, where a lawful oath is administered in some judicial proceeding, to a person, who swears wilfully, absolutely, and falsely in a matter material to the issue, or point in question : the oath must be administered in a court of justice, or by some person having power to do it, and upon a lawful occasion.

*a* Swearing falsely in a deposition is included in this description, but if the oath was unlawfully administered, there can be no perjury committed. It must be wilfully, and knowingly done, with deliberation, and not on surprize. It must be absolute, and positive : therefore if a person swears as he thinks, remembers or believes, it will not be perjury. It is generally said that it must be false ; but if a man should happen to swear to the truth when he did not know it, but intended to swear to a falsehood, it will be perjury : it must be to some point material to the question in dispute, or material to induce the triers to believe the story of the witness. It is immaterial whether the testimony be credited, or any person injured by it.

Subornation of perjury, is the procuring another to take such false oath, as constitutes perjury in the principal. The punishment for these offences at common law, is fine, imprisonment, and perpetual disability to be a witness.

*b* The punishment for these offences by statute, is a forfeiture of twenty pound, one half to the public treasury, and the other half to the party injured, who shall sue for and prosecute the same to effect, and six months imprisonment in New-Gate, and perpetual disability to testify. If the offender is unable to pay the forfeiture of twenty pounds, he shall be set in the pillory for one hour, in the county town where the offence was committed or next adjoining to the place, and have both his ears nailed. The party injured may proceed by a *qui tam* prosecution against the offender, on this statute ; *c* and likewise a prosecution in the name of the state by

*a* 1 Hawk. P. C. 171. *b* Statutes, 190. *c* Ibid 442.



by an informing officer may be pursued, in which case, the whole of the forfeiture goes to the treasury of the state. *d* By statute a Quaker who is guilty of false affirmation or declaration, when administered to him, in lieu of the common oath, shall suffer the pains and penalties of perjury.

IX. *e* If any person shall effect the escape of any prisoner confined in New-Gate prison, or attempt the same, or shall give any help, or assistance therein, he shall upon conviction before the County, or Superior Court, be sentenced to imprisonment in said prison, for a term not exceeding six years, and pay the cost of prosecution.

*f* As it would have been improper to have confined females in New-Gate, where they must have been in the same apartment with males; it is provided that when a female is convicted of a crime, for which the punishment is imprisonment in New-Gate, she shall be confined with none but females in the common work-house, in the county where tried, and kept to such hard labor as may be suitable under the direction of the overseer, or may be imprisoned in the common goal in the county, and be kept to labor according to the direction of the court, before whom she is convicted, for the same period as male offenders are liable to be confined in New-Gate for the same crimes.

*g* When the time of imprisonment has expired, and it appears by the warrant of commitment, that the prisoner was to stand committed till the cost should be paid, the overseers of the prison may assign such person in service to any citizen of the United-States, if he cannot pay, or secure the cost to their acceptance, for such time as they shall judge necessary to pay the cost, taking reasonable security for payment of the person to whom they shall make the assignment. If no suitable person appear to take in service such prisoner, they may direct the master of the prison, to hold him in service in the prison, such time as they shall limit to pay the cost, allowing him customary wages for like service. If such prisoner be unable to labour, the overseers may take the best security they can for the cost, and order the master to discharge him

*d* Statutes, 197. *e* Ibid. 324. *f* Ibid 474. *g* Ibid. 417.

him. If a prisoner escapes, and is re-taken, and re-committed he shall pay all the expence, in the manner provided for the payment of cost, and the time between the escape, and re-commitment, shall not be considered as part of the time for which he was sentenced to imprisonment.

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## CHAPTER SEVENTH

### OF CRIMES AGAINST RELIGION.

**C**RIMES of this description are not punishable by the civil arm, merely because they are against religion. Bold, and presumptuous must he be, who would attempt to wrest the thunder of heaven from the hand of God, and direct the bolts of vengeance where to fall. The Supreme Deity is capable of maintaining the dignity of his moral government, and avenging the violations of his holy laws. His omniscient mind estimates every act by the standard of perfect truth, and his impartial justice inflicts punishments, that are accurately proportioned to the crimes. But short sighted mortals cannot search the heart, and punish according to the intent. They can only judge by overt acts, and punish them as they respect the peace, and happiness of civil society. This is the rule to estimate all crimes against civil law, and is the standard of all human punishments. It is on this ground only, that civil tribunals are authorised to punish offences against religion.

The crimes against religion are, I. Blasphemy, II. Atheism, III. Polytheism, IV. Unitarianism, V. Apostacy, VI. Breach of Sabbath, VII. Profane Swearing.

I. *b* Blasphemy by the Statute is where a person wilfully blasphemes the name of God, the Father, Son, or Holy Ghost, either by denying, cursing, or reproaching the true God, or his government of the world. The punishment is whipping not exceeding forty stripes, and setting in the pillory one hour; and the superior court which has cognizance of the offence, may at discretion bind the offender to his good behaviour.

Blasphemy



i Blasphemy at common law, is the denial of the Being and Providence of God, contumelious reproaches against Jesus Christ, profane scoffing at the holy scriptures, and exposing them to contempt and ridicule. The crime is punishable by fine and imprisonment, and other infamous corporal punishment.

II. *h* Atheism is defined by statute, to be where a person educated in, or having made profession of the christian religion, by writing, printing, teaching, or advised speaking, denies the being of a God.

III. Polytheism, is where a person educated in, and having professed the christian religion, asserts and maintains by writing, printing, teaching, or advised speaking, that there are more Gods than one.

IV. Unitarianism, or denial of the Trinity, is where a christian by education, and profession, denies either by writing, printing, teaching or advised speaking, that any of the persons in the Trinity are God.

V. Apostacy is where a person educated under the wings of christianity, and having professed to believe it true, either by writing, printing, teaching, or advised speaking, denies the christian religion to be true, or the holy scriptures of the old and new testament, to be of divine authority.

As a punishment for the four last crimes, the statute enacts, that on conviction for the first offence, the offender shall be incapable to have or enjoy any offices or employments, ecclesiastical, civil or military, or any part in them, or profit by them; and the offices, places and employments, enjoyed by such offenders at the time of their conviction, shall be void. On a second conviction, such person is disabled to sue, prosecute, plead or maintain any action or information in law or equity, or to be guardian, executor, or administrator. The prosecution must be within six months after the commission of these last offences, and the law has that tenderness and indulgence for the errors of human reason and the infirmities of human nature, that it opens the door for repentance and restoration, and provides that upon renouncing the erroneous opi-

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nions within twelve months after conviction in the court where convicted, the person shall from that time be discharged from all the disabilities incurred by the conviction.

These are all the crimes respecting religious opinions known to our law. Blasphemy is so indicative of an abandoned heart, and injurious to the morals, that no one can question the propriety of punishing it.

The being of a God is so universally impressed on the human mind, that it seems unnecessary to guard against a denial of it by human laws. Atheism is too cold and comfortless, to be a subject of popular belief.

Polytheism tho it has been believed by the most polished, as well as the most savage nations, has no chance of a revival where the unity of a god has been promulgated. The elegant fictions of the Grecian and Roman mythology, vanished like the baseless fabric of a vision, before the light of rational philosophy, and true religion. We must acknowledge that the multitude and subordination of the pagan gods furnish a system of poetical machinery, much more beautiful and magnificent than the christian theology. They seem to be a kind of poetical divinities, created by the bards of ancient times, to ornament and embellish poetical description, and one can hardly think they were ever the object of popular belief and serious adoration. The rapes of Jupiter and the amours of Venus, seem to render them very improper deities, for religious devotion. The character of God in the christian system, is too sublime and glorious to be exhibited in verse, and his conduct in the government of human affairs does not admit him to be introduced into the machinery of a poem, in such manner as will give scope to the fictions of fancy, and the embellishments of the imagination. The bold and vigorous genius of Milton, flags in such an attempt. In his description of the battle of the angels in heaven, the wild fiction of their inventing cannon, and throwing mountains at each other, while the Supreme Deity from his immortal throne beholds the wild affray, is so inconsistent with the nature and character of spiritual essences, that we are highly disgusted with the scene, tho painted in the most glowing colours, and can only consider it as a sublime burlesque upon the king of heaven. No event which the human race  
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have witnessed, is more solemn and awful, than the passion of our Saviour. Vida, an eminent Italian poet, has painted it in the most brilliant colouring, and decorated it with the richest poetical fictions, yet the scene is far less interesting and magnificent, in this poem, than in the plain and unadorned narrations of the evangelical historians. But when Homer exhibits the Grecian mythology in action, when the gods assemble in council, when Jupiter thunders from Olympus, and Apollo, Neptune, Mars, and Venus, mingle in the combat round the walls of Troy : we are charmed with the elegance of the fictions, the richness of the descriptions, the splendor of the scenery, the variety of the action, and the consistency of the conduct of these imaginary beings, with the character ascribed to them. But tho polytheism, furnishes the best machinery for poetry, there is no danger that it will root out the belief of the unity of God, and revive and flourish on the ruins of christianity.

To prohibit the open, public, and explicit denial of the popular religion of a country, is a necessary measure to preserve the tranquility of a government. Of this no person in a christian country can complain, for admitting him to be an infidel, he must acknowledge, that no benefit can be derived from the subversion of a religion which enforces the best system of morality, and inculcates the divine doctrine of doing justly, loving mercy, and walking humbly with God. In this view of the subject, we cannot sufficiently reprobate the baseness of Thomas Paine, in his attack on christianity, by publishing his Age of Reason. While experiencing in a prison, the fruits of his visionary theories of government, he undertakes to disturb the world by his religious opinions. He has the impudence and effrontery, to address to the citizens of the United States of America, a paltry performance, which is intended to shake their faith in the religion of their fathers ; a religion, which, while it inculcates the practice of moral virtue, contributes to smooth the thorny road of this life, by opening the prospect of a future and better : and all this he does not to make them happier, or to introduce a better religion, but to embitter their days by the cheerless and dreary visions of unbelief. No language can describe the wickedness of the man, who will attempt to subvert a religion,  
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which is a source of comfort and consolation to its votaries, merely for the purpose of eradicating all sentiments of religion.†

While the public denial of christianity is prohibited, particular articles of creeds, and mere doctrines of speculation, excepting the doctrine of the Trinity, are left open for free and candid discussion. The crime of heresy is unknown. Direct and explicit denial, can only be comprehended by the statute. Consequences can never be drawn, and twisted by implication from the conversation, or writings of a person, into a breach of the law. It extends only to those who have been educated in or made profession of christianity. God's ancient covenant people, the Jews, who have been so long abused and insulted by christians, the Mahometan, who prays five times a day, the Bramin who believes in transmigration, and the Tartar who prostrates himself before the Grand Lama, may all teach the doctrines and practice the ceremonies of their religion, without being exposed to any penalty.

It is with the highest pleasure, that we compare our laws with other nations in this respect. Tho our ancestors on flying from the hand of persecution, into this asylum of liberty, were anxious to preserve a uniformity of religious opinion, and public worship, yet they never attempted to effect their design by severe laws and sanguinary punishment. Prosecution never feasted her eyes upon wretched victims, tied to the stake or stretched on the rack. The severest laws against heretics, extended no further, than to send away such as came into the country, and to inflict a penalty on those who harboured or brought them into the government. At an early period our laws began to exempt sect after sect, from any penalty, and then by degrees, extended to all the full blessings of toleration

† In the title page the work is said to be written by Thomas Paine, secretary for foreign affairs to Congress in the American war. The truth is, that during some period of the American war, Congress appointed a committee for foreign affairs, to which Paine was secretary, but had no power, and performed no duty, but that of a clerk to the committee; without any portion of the authority, afterwards annexed to the office of secretary for foreign affairs. From the post of secretary to the committee for foreign affairs, he was dismissed for a scandalous breach of trust. What must we think of a man, who is capable of such a pitiful artifice to gratify his vanity, and render himself important.



toleration. While the civil arm was cautious in punishing the religious opinions of the people, no power of a secular nature was delegated to the church for that purpose. They could only inflict the sentence of excommunication, which secluded a person for misconduct, from the communion of a religious congregation, but subjected him to no civil inconvenience whatever.

VI. / Breach of Sabbath consists in a variety of acts, which are punishable by statute. Non attendance on divine worship in some lawful congregation, subjects a person to a fine of three shillings : but this law has grown obsolete.

No person may keep open his shop, store, ware-house, or work-house, or do any manner of secular business, (works of necessity and mercy excepted,) nor be present at any concert of music, dancing, or any public diversion, or show, or entertainment, nor use any game, sport, play, or recreation, on any part of the Lord's day, upon a penalty not exceeding twenty, nor less than ten shillings. No traveller, drover, waggoner, or teamster, or their servants, may travel on that day, (except for necessity or charity,) under the same penalty. Companies may not meet in the streets, or elsewhere, nor any persons go from home, unless to attend public worship or some work of necessity and mercy, upon the penalty of five shillings.

No tavern-keeper may entertain, or suffer any of the inhabitants of the town, or others, not strangers or lodgers, to be in their houses or dependencies, drinking or idly spending their time, on Saturday night after sun-set, on Sunday, or the evening following, on penalty of five shillings, and every person so spending his time to forfeit the same sum. Informations must be made within a month. No warning or notification of any secular business may be fixed on a door of any meeting-house to remain there on any day of public worship, upon penalty of five shillings, to be paid by the person putting it up, and grandjurors, constables and tything-men are directed to pull them down. No vessel may unnecessarily depart from any harbour, port, creek or river, nor pass by any town, where public worship is maintained, nor weigh anchor

anchor within two miles, unless to get nearer thereto, on the Lord's day, at any time between the morning light, and the setting sun, upon penalty of thirty shillings to be paid by the master. Any person behaving rudely or indecently within the house, where any congregation are met for public worship, may be fined not more than forty, nor less than five shillings. The service of a civil process on the Lord's day is void, and the officer incurs a penalty of ten shillings.

All fines imposed for a breach of this act, on minors, shall be paid by their parents, guardians, or masters, if any be, otherwise such minors are to be disposed of in service to answer the same, and upon refusal and neglect to pay such fine and cost, the offender may be committed, unless he be a minor, in which case execution for the fine and cost, shall issue against his parent, guardian, or master, at the end of a month, after conviction. No appeal is allowed upon a conviction of any offence in this statute.

The statute law to prevent the disturbances of public worship, has provided, that if any person or persons, either on the Lord's day, or any other day, shall wilfully interrupt, or disturb any assembly of people, met for the public worship of God, within the place of their assembling, or out of it, each person so offending, shall pay a fine not exceeding ten pounds, nor less than twenty shillings: and that in case the offender is a minor, the fine is to be collected as aforesaid, and if not, then on neglect or refusal, he may be committed.

There seems to be an inaccuracy in this statute. After the above direction respecting the payment of fines, there is a clause, that where there is a conviction for any profanation of the Lord's day, or any disturbance of public worship, if the offender neglect or refuse to pay the fine, or present estate, that he may be whipped, not exceeding twenty stripes, by order of the court before whom he was convicted. The first paragraph, directs on neglect to pay, that the offender be committed, in case of all fines imposed for a breach of this law, and the last directs, that in such cases

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he be whipped. These paragraphs being contradictory, the courts must determine which is void.

It is directed by statute, that where children or servants are under the age of fourteen, on conviction of profanation, or disturbance, they shall be corrected by their guardians, parents, or masters, in presence of some officer, if the authority so appoint, and in no other way, and if they neglect, or refuse to correct, they shall incur a penalty of three shillings.

VII. *m* The swearing rashly, vainly, or profanely, by the holy name of God, or any other oath, or the sinful and wicked cursing any person, subjects the offender for every offence, to a fine of six shillings, and if he be unable or refuse to pay, he shall be set in the stocks, not exceeding three hours, nor less than one, for one offence, and pay cost of prosecution.

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## CHAPTER EIGHTH.

### OF CRIMES AGAINST CHASTITY AND PUBLIC DECENCY.

**T**HESE crimes are, I. Adultery. II. Incest. III. Polygamy. IV. Fornication. V. Lacivious Carriage and Behaviour. VI. A Man being found in a bed with another's Wife. And, VII. Public Indecency.

I. Adultery is the carnal connexion of a man with another's wife. The man may be either married or single; but the woman must be married: for the essence of the crime, is the adulteration of the offspring, the spuriousness of the issue. If a married man has carnal knowledge of a single woman, it is not adultery, but fornication. This distinction is founded in nature. The common opinion of mankind declares, that it is a very different and much more heinous crime for a woman that is married, to have criminal conversation with a single man, than for a married man with a single woman. A married woman that submits to the embraces of any man but her husband, does by that act, alienate her affections, deprave her sentiments, and expose him to the greatest of

of all misfortunes, an uncertainty with respect to his offspring, or to support the children of another. But it is possible, tho hardly probable, that a married man may be concerned in an intrigue with a girl, without impairing his conjugal affection, and at any rate he does not subject his wife, to maintain the children of another, nor does that act produce such total depravity of moral character in a man, as in a woman: for when a female once breaks over the bounds of decency and virtue, and becomes abandoned, she is capable of going all lengths in iniquity: but there are frequent instances of men, who disregard the principles of chastity, but in other respects conduct with propriety.

It must however be granted, that it is a crime of a much blacker nature for a married than a single man, to commit fornication. For he not only does an injury to his wife, but brings disgrace upon his family. It would therefore be proper, that a married man should be punished with greater severity for committing fornication, than a single man: but with less severity than in the case of adultery; for this would be proportioning the punishment to the crime, according to its influence on society, which is the only standard of human punishments.

” The punishment for adultery is discretionary whipping, branding in the forehead with the letter A, and wearing a halter about the neck, on the out side of the garments so as to be visible. On being found without the halter, on information and proof made before an assistant or justice of the peace, he may order them to be whipped not exceeding thirty stripes.

• If a man and woman, who have been divorced shall again cohabit together as man and wife, they shall be punished as adulterers.

ρ It has been determined, that the fact of a man and woman being found in bed together, naked, is such presumptive proof of the commission of the crime of adultery, as will justify a conviction, tho the same evidence would have convicted the man of the offence of being found in bed with another's wife, if he had been prosecuted for that offence.

II. Incest

” Statutes 8 • Ibid. 137. ρ Kirb. 87.



II. Incest is the marriage or carnal copulation between relations within certain degrees of consanguinity and affinity, prohibited by statute. This prohibition is extended to all degrees in the ascending and descending line, and to the third degree in the collateral line. Formerly the law prohibited a man to marry his wife's sister, but that law has lately been repealed. The punishment is, that the offenders shall be set on the gallows for the space of one hour, with a rope round their necks, and the other end over the gallows. On the way from thence to the common goal, they shall be severely whipped, not exceeding forty stripes; they shall forever wear the capital letter I, two inches long, and of proportionable bigness, cut out of cloth, of a contrary colour to their clothes, and sewed upon the upper garments, on the out side of the arm, or on the back in open view. If they are found without such letter worn as aforesaid, they may by warrant from an assistant or justice of the peace, be apprehended and ordered to be publicly whipped, not exceeding fifteen stripes, and so as often as they are guilty. The issue of such marriage or carnal copulation, is disabled from inheriting or taking any estate, being generally named in a deed or will, by the father or mother, and the marriage is declared to be void. If the parties shall afterwards converse together as man and wife, or dwell together in the same house, they shall be punished as adulterers. The superior court may assign to the woman so separated, such reasonable part of her late husband's estate, as in their discretion the circumstances of it will admit, not exceeding one third.

III. *q* Polygamy is where a married person marries another, the former or other husband or wife being living: or where such persons continue to live together when thus married. The punishment is the same as in cases of adultery, and the marriage void. If either party at time of marriage, be ignorant that the other is married, and separate immediately on discovering it, that party will not be guilty of any crime: but a continuance to live together after knowing the fact, will be criminal. The offenders are to be tried in the county where apprehended.

This statute does not extend to those persons, whose husband or  
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wife shall be continually beyond the seas, by the space of seven years together, or whose husband or wife shall absent him, or herself, the one from the other, for that time, the one of them not knowing the other to be living within that time. Nor shall it extend to persons whose husband or wife have gone to sea in any ship or vessel, bound from one port to another, where the passage is usually made in three months time, and such ship or vessel shall not be heard of in three years, or be heard of under such circumstances, as may rather confirm the opinion, that the whole company are lost. In such cases the matter being laid before the superior court, the parties may be esteemed and declared single and unmarried, and upon such declaration thereof, and liberty obtained from the superior court, such parties may marry again. This statute does not extend to persons legally divorced, or whose first marriage was within the age of consent, which is fourteen for a man and twelve for a woman.

IV. *r* Fornication is the carnal copulation of a man and single woman. The punishment is a fine of thirty-three shillings to the county treasury, or corporal punishment not exceeding ten stripes, but corporal punishment is never inflicted.

V. *f* Lascivious carriage and behaviour is a crime of very uncertain description. The statute enacts, that for the preventing of lascivious carriage and behaviour against, and for the punishment of which, (in regard of the variety of the circumstances, particular and express laws cannot be easily made and suited) the county courts shall be empowered, and directed to proceed against and punish such persons, as shall be guilty of lascivious carriage, and behaviour, either by imposing a fine on them, or by committing them to the house of correction, or by inflicting corporal punishment on them, according to the nature and aggravation of the offence, and the discretion of the court: that such seasonable and exemplary punishment may be inflicted upon offenders of that kind, that others may hear and fear.

The general terms, and the uncertain signification of the words of this statute are such, that it is no wonder that judges and lawyers have always been puzzled about the meaning of it. Indeed no consistent



sistent construction has ever been put upon it. Persons have been punished as violators of this act, for passing thro a town with their nudities exposed. This manifestly was public indecency, an offence at common law. Persons have been punished on this statute for attempting to commit rapes, and exposing their nudities. This was clearly a high-handed breach of the peace at common law. As the statute gives courts power to inflict very severe punishments on this crime, it is necessary to know the acts which come within the description of it. For the purpose of establishing a rational construction, we must consider the state of society, and manners, and the sentiments of the people at the time the law was past, the probable object they had in contemplation, the true import of the word lascivious, and whether the legislature did not intend to punish a crime, not punishable by any laws then in being.

This act was passed in the earliest period of the government. The first settlers of this country, most unquestionably brought with them much of the spirit of puritanism. The gloominess of their manners was heightened by the singular opinions they entertained respecting social pleasure. They considered the joys of love, to be in a great measure inconsistent with the grace of God ; they reprobated the carnal appetites of men, and many entertained the whimsical idea, that the husband should not indulge in the conjugal act in the arms of his wife, with any other view than that of procreation. The singularity of these sentiments, were first displayed at New-Haven, in the punishment of young persons of both sexes, for the crime of filthy dalliance in some of their innocent frolics and amusements, which gave birth to the fiction of the blue laws, respecting which, so many laughable stories have been told, and which is unquestionably the proto-type of the act respecting lascivious carriage and behaviour. When people entertained such whimsical ideas, respecting the impurity of the sexual passion, it is not strange that they should attempt to restrain the intercourse of the sexes, by severe laws, and to establish the greatest purity of manners. They could not have it for their object to punish crimes already punishable by law. It was evident that the crimes of adultery and fornication did not comprehend every act in the intercourse of the sexes, which was repugnant to virtue and innocence : that between these,  
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and that connexion of the sexes which is consistent with chastity, decency, and delicacy, there are many acts which are improper and vicious. It was pursuant to the spirit of the times, to attempt to restrain them; but as they are so various that they could not be described in detail, they were all comprehended under the description of lascivious carriage and behaviour: and tho the legislature intended to introduce an austerity of manners and reserve, in social intercourse, which would have thrown a gloom over life and excluded the most innocent amusements, yet by a liberal construction of their law, it may now be directed to restrain that licentious familiarity between the sexes, which is repugnant to decency and virtue. Lascivious, has an appropriate meaning, and signifies the exercise of lustful passions, or unchaste and wanton desires, between the sexes; and when applied to carriage and behaviour, these words signify the acts which evidence the exercise of those feelings.

Having premised these general observations, I shall hazard a definition of this crime, which I think is a fair, rational and consistent construction of the statute. Lascivious carriage and behaviour, may be defined to be those wanton acts between persons of different sexes, which do not amount to carnal copulation, which are inconsistent with that decent intercourse of the sexes, that is warranted by virtue and innocence, and which are repugnant to the sentiments of delicacy and chastity. These acts are unaccompanied with force and violence; for if they are committed with force, they would be breaches of the peace, punishable at common law. Lascivious carriage cannot be the same as public indecency, for that does not necessarily import lasciviousness, but may be committed without exciting lascivious ideas, and is punishable as an offence at common law. It is a crime created by statute, is unknown to the common law, has relation only to the intercourse of the sexes, and is intended to restrain a wanton indulgence of the passion of sex. It would be hardly consistent with delicacy, to illustrate these observations by detailing those actions, which come within the description of this crime. The imagination of every person will suggest a thousand indecent familiarities, which are the objects of  
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this statute, which ought to be restrained, and deserve to be punished.

The court have a discretionary power to punish by fine, committing to the house of correction, and whipping—This statute needs correction. It is improper and dangerous to give to courts such latitude of construction, with respect to the acts which are criminal, and then to vest them with such boundless discretion in inflicting the punishment. It breaks that gradation of crimes, which ought to be regarded, and admits a disproportion of punishments, to crimes, which is incompatible with the principles of justice. I have known a man on a prosecution by virtue of this law, fined thirty pounds, for a connection with a woman, less criminal than fornication, who if he had committed fornication, and had been convicted, would not have been fined but thirty three shillings.

VI. † The offence of a man's being found in bed with another's wife, subjects them both to be whipped, not exceeding thirty stripes ; but if one party was surpris'd, and did not consent, that shall excuse the punishment. It seems unnecessary to have pass'd this law ; for the proof of the fact, that a man was in bed with another's wife, must be sufficient to convict them of adultery, or it ought not to convict them of any crime.

VII. † Public Indecency is a crime at common law ; as where sundry persons from a balcony displayed their nudities, to a large concourse of people : and where a man went through a town with his nudities expos'd to view. So is any gross lewdness, a crime at common law, as the keeping or frequenting a bawdy-house. They are punishable by fine and imprisonment.

Such are the laws which have been framed to preserve the inestimable virtue of chastity ; but such is the strong and perpetual temptation to the commission of crimes, against chastity, and so deep is the veil of secrecy, which the modesty of the most profligate, throws round these transactions, that it is impossible to restrain them by the terror of penal laws. Purity of manners must depend upon principles instilled into the minds of youth by education, and all parents are under the strongest obligations, to impress on  
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the minds of their female children, these all-important truths ; that chastity is the peculiar ornament of the sex, that innocence gives the brightest lustre to their charms ; that their connection with the other sex, ought to be marked with the utmost delicacy in their conversation, and decency in their deportment : and that they should forever be on their guard against that indecorous familiarity, which leads by slow but sure steps, to irretrievable disgrace and ruin.

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CHAPTER NINTH.

OF THEFT, RECEIVING STOLEN GOODS, AND THEFT-BOTE.

<sup>70</sup> **T**HEFT is the taking and carrying away the personal goods of another, with an intent to steal.

1. <sup>71</sup> \* There must be a taking without the knowledge, and consent of the owner. If there be an actual delivery of the goods, and the possession is acquired lawfully, no subsequent act can render it stealing. <sup>72</sup> *y* If a carrier should open a pack of goods, and take away part of it, or if he carry it to the place appointed, and then afterwards take it away, he is guilty of theft ; but the mere not delivering, would only make him guilty of a breach of trust. If goods are delivered to a man to keep, and he run away with them, it is not theft ; for the original possession was lawful. <sup>73</sup> *z* If a man deposit property in the hands of a pawn-broker, or entrust it with any other person, and then take it away with an intent to charge the bailee, with the value of it, it is theft.

2. There must be a carrying away. A bare removal of the goods is sufficient. <sup>74</sup> *a* If a man be leading a horse out of another's pasture, and be apprehended in the fact ; if a guest stealing goods out of an inn, has removed them from his chamber down stairs ; or if a thief intending to steal plate, take it out of a chest and lay it on the floor, and is surprised before he can go away with it, in these cases it is theft.

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<sup>70</sup> 4 Black. Com. 229. <sup>71</sup> 1 Hal. P. C. 504. <sup>72</sup> 3 Inst. 107. <sup>73</sup> Fost. 113.  
<sup>74</sup> 3 Inst. 108.