

## CHAPTER XXV.

## OFFENCES AGAINST RELIGION.

CH. XXV. OFFENCES against religion can hardly be treated as an actually existing head of our criminal law. Prosecutions for such offences are still theoretically possible in a few cases, but they have in practice become all but entirely obsolete. The history of the subject is, however, of the highest interest, connecting itself, as it does, with several of the most important passages in our general history, besides which it throws light upon several matters to which their due importance has hardly been attracted by those who have written the history of political and social events.

The history of the Ecclesiastical Criminal Law has some points of resemblance, but many more of contrast, to the history of the ordinary criminal law. The ordinary criminal law always has been and still is recognised as an indispensable part of the institutions of the country, and the history both of its procedure and of its substantive provisions is a history of the improvement of definitions, and the adjustment of institutions to social changes. The improvements have (as the earlier part of this work clearly shows) been slow and imperfect, but in the aggregate they have been considerable, and if slow their progress has been uniformly in the same direction. The history of the Ecclesiastical Criminal Law, on the other hand, has for several centuries at all events been a history of decay. By a variety of provisions more or less distinctly and openly intended to diminish its importance, it has been rendered practically obsolete and ineffectual. I will try to give the history first of its development and then of its fall.

Probably the clergy were never more powerful in any time or country than they were in England before the Norman conquest. <sup>1</sup>Civil and ecclesiastical legislation went hand in hand. Nearly every set of secular laws enacted by any of the early English kings was coupled with an ecclesiastical code, or contained ecclesiastical provisions: the bishop and the earl sat side by side in every county court. Heresy and schism were alike unknown, and the ecclesiastical censures which the clergy had it in their power to inflict furnished a sanction to their discipline which the whole population, from the highest to the lowest, regarded with awe.

At the Norman conquest a great change was introduced into this state of things, as appears from what has been described as the “<sup>2</sup>one authentic monument of William’s jurisprudence.” This was the law by which he separated the spiritual from the temporal courts. This enactment recited that the ecclesiastical law had previously been ill administered, that for the future no bishop or archdeacon “*de legibus episcopalis amplius in hundred placita teneat, nec causam quæ ad regimen animarum pertinet ad iudicium secularium hominum adducant, sed quicumque secundum episcopales leges de quâcunque causâ vel culpâ interpellatus fuerit, ad locum quem ad hoc episcopus elegerit vel nominaverit veniat, ibique de causâ vel culpâ suâ respondeat, et non secundum hundred, sed secundum canones et episcopales leges rectum Deo et episcopo suo faciat. Si vero aliquis per superbiam elatus ad iustitiam episcopalem venire contempserit vel noluerit, vocetur semel, secundo et tertio; quod si nec sic ad emendationem venerit excommunicetur et si opus fuerit ad hoc vindicandum, fortitudo et iustitia regis vel vicecomitis adhibeatur.*” Such was the origin of the Bishops’ Courts which still exist, and which have played so prominent a part in some stages of our history.

<sup>1</sup> See, e.g., laws of Cnut, Thorpe, i. 358-376, especially IV. De reverentia sacerdotibus præbendâ; VII. De conjugis prohibitis; XIV. De Dei iuribus festis et jejuniis conservandis; XV. De Die Dominico; XVIII. Pia exportatio ad confessionem et penitentiam; XXI. Ad Deum ex intimo colendum et fidem; XXIII. Ut exitalia fugiant; XXIV. Et inter hæc stuprum. See, too, the laws of Alfred, Thorpe, i. 36-43. Many others might be mentioned. Nearly all the laws, in fact, contain more or less of a religious element.

<sup>2</sup> Stubbs, *Constitutional History*, i. 276. The “*Carta Willelmi*” is given in Thorpe’s *Ancient Laws*, i. 494-496; also in Stubbs’s *Charters*, p. 85.

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This memorable measure must have had two sets of effects. On the one hand, it is impossible to imagine a stronger assertion by the King of his unqualified sovereignty. The title of the document is "Carta Willelmi," and its style is as follows:—"W. gracia Dei Rex Anglorum R. Bainardo et G. de Magna Villa, et P. de Valoines ceterisque meis fidelibus de Essex et de Hertfordscire et de Middlesex salutem." After reciting former abuses, it adds: "Communi concilio et consilio archiepiscoporum et episcoporum et abbatum, et omnium principum regni mei [episcopales leges] emendandas iudicavi. Propterea mando et regia auctoritate præcipio quod," &c. There is not a word in it which suggests that any other authority was needed for the enactment than his own will, though he recites the advice of the ecclesiastical authorities.

On the other hand, although the King in this unquestionable way asserts his supreme authority over the clergy, he gives to them complete independence in their own sphere. Every one is to answer when the bishop requires him to do so, and if he refuses, the bishop's authority is to be supported by the sheriff. It is, however, most important to observe that no power to fine or imprison or otherwise to inflict temporal loss is conferred upon the bishop; the sheriff is to help him in case of need, but the bishop can inflict only spiritual censures. As necessarily incidental to this, the bishops must have obtained by this Charta full control over the procedure of their own courts, and a separation from the secular influences which the habit of sitting in the ordinary hundred courts would undoubtedly have exercised upon them. In early times the court is the substantive, the law the adjective, and the establishment of a separation between the ecclesiastical and temporal courts, involved, of necessity, the introduction of that peculiar version of the canon law which still, in a certain sense, and in certain cases, survives in this country. I do not propose to try to relate at length the history of the ecclesiastical courts, or that of the struggles between the clergy and the crown, in which Becket is the most conspicuous figure. I may, however, refer to two or three leading instances in which the legislature recognised the ecclesiastical courts, and so gave the character of coercive law to the canon law as

understood and administered by them. The first article of CH. XXV.  
<sup>1</sup> Magna Charta provides, "quod Anglicana ecclesia libera sit  
 "et habeat jura sua integra, et libertates suas illæsas." Another monument of the nature of the spiritual jurisdiction is the statute of Circumspecte agatis, passed in 1285, in the same year as the Statutes of Westminster Second, and of Winchester. The material part of it is in these words: "Circumspecte  
 "agatis de [negotio tangente] Dominum Episcopum Norwicensem et clerum, non puniendo eos si placita teneant de  
 "hiis quæ mere sunt spiritualia, videlicet de correctionibus  
 "quas Prælati faciunt pro mortali peccato, videlicet, fornicatione, adulterio et hujusmodi pro quibus aliquando infligitur pœna corporalis aliquando pecuniaria, maxime si convictus sit de hujusmodi liber homo." The following suits are also expressly mentioned, namely, suits referring to churches and churchyards, tithes and offerings, mortuaries, penances, laying violent hands on a clerk, defamation when the proceeding is for the correction of sin and not for damages, and likewise breach of faith (pro *fidei læsione* in some MSS., translated in the printed Statute Book, "and likewise for breaking  
 "an oath.") This statute was to a certain extent re-enacted and confirmed by the Articuli Cleri, 9 Edw. 2, stat. 1, A.D. 1315. It is said in <sup>2</sup> Caudrey's case that, notwithstanding the Statute of Circumspecte Agatis, "the clergy did not think  
 "themselves assured nor quiet from prohibition" till this act was passed, and 15 Edw. 3, c. 6, and 31 Edw. 3, c. 11, are also referred to as confirming the jurisdiction of the Ecclesiastical Courts. The importance of this description of the ordinary ecclesiastical jurisdiction will be illustrated hereafter.

As to the Ecclesiastical Courts themselves it is enough to say that <sup>3</sup> they may be divided into two classes, the provincial and the diocesan courts, the provincial courts of the dioceses of Canterbury and York being also diocesan courts. The diocesan courts are Consistory Courts and Archdeacon's Courts. An appeal lies from the Archdeacon's Court to the Consistory Court, from the Bishops' Court to the Provincial Court, and from thence to the Judicial Committee. Sir

<sup>1</sup> Stubbs's *Charters*, 296.

<sup>2</sup> 3 Coke's *Reports*, xxxvi.

<sup>3</sup> Phillimore's *Ecclesiastical Law*, chap. iv. 1189-1215.

CH. XXV. Robert Phillimore says that till lately there were also 300 peculiars, which however from the early part of the present reign have been practically abolished. They represented, in some cases, the local ecclesiastical jurisdictions of abbeys and other religious houses which were made over at the Reformation, or at other times, either to bishops or other ecclesiastical bodies, or in some cases to laymen. The owner of Rothley Temple, in Leicestershire, was, as such, the ecclesiastical head of a certain number of parishes which were exempt from all other spiritual authority.

Apart from these, which were and are the ordinary ecclesiastical courts, it was a question whether what we now know as Convocation, and what was before the Reformation known as a National or Provincial Council, was not also a court of justice having criminal jurisdiction. The question has long ceased to have the least practical importance. <sup>1</sup> It was debated in Whiston's case, when Convocation was desirous to call Whiston before them and try him for having "advanced" several damnable and blasphemous assertions against the "doctrine and worship of the ever blessed Trinity." The judges were consulted upon the subject, and eight were of opinion that the jurisdiction existed, and four that it did not. Their opinions, however, were extra judicial. The point was nearly though not absolutely decided in the case of <sup>2</sup> *Gorham v. Bishop of Exeter*, in which it was decided in substance that the Upper House of Convocation was not a Court of Appeal, though the question whether it possessed an original criminal jurisdiction was not touched upon. <sup>3</sup> Sir Robert Phillimore observes that "the power of Convocation to condemn an heretical work appears to be as well established as its incompetence to try a clerk for heresy." In 1864 Convocation condemned a work entitled *Essays and Reviews*. What difference there is between the condemnation of a book and an expression of dislike of it, say in an unfavourable review, is not and probably could not be explained.

The grounds of the supposition that Convocation was ever

<sup>1</sup> 15 *State Trials*, 703.

<sup>2</sup> 15 Q. B. 52; 10 C. B. 102; 5 Ex. 630.

<sup>3</sup> *Ecclesiastical Law*, 1861.

a court of justice will appear further on in this chapter. I should say that there is some evidence that on a few occasions it may possibly have acted as a court, but that the evidence falls far short of what would be necessary to prove that it ever has been recognised and established in that capacity. CH. XXV.

However this may have been, we can still give a clear account of the procedure of the ordinary ecclesiastical courts in criminal cases, as well as of the crimes to which it was applied. There is no reason to suppose that the procedure differed according to the nature of the case. The following is the account given of it in the learned preface to<sup>1</sup> Archdeacon Hale's *Precedents in Criminal Causes*.

"<sup>2</sup> There are three distinct methods of indictment" (he means accusation): "(1) Inquisition, (2) Accusation, (3) Denunciation. In the first form of proceeding, that by inquisition, the judge is in fact the accuser. He may proceed against the party from his own personal knowledge, or from common fame of crime committed, and no other step is required to bring the party before the court except citation. I am inclined to believe that before the Reformation the most usual mode of proceeding was that by inquisition, and that the apparitors of the different courts, who not only attended the ecclesiastical judges at the time of their visitations and during the sitting of the courts, but who also at other times employed themselves in discovering cases of delinquency, were the chief means of bringing crimes to the notice of the judge, who, without further information, cited the parties to appear." . . . "The second form of indictment, as it may be called, is that in which an accuser comes forward who voluntarily undertakes the cause, and in the legal phrase is said to promote the office of the judge. In this form criminal suits are now generally brought forward, the bishop or ordinary having ceased to proceed by inquisition, and substituting as a matter of form his secretary or other person, who in his own name promotes the office of the judge and becomes the accuser of the party."

<sup>1</sup> A series of precedents and proceedings in criminal causes, extending from the year 1475 to 1640, extracted from act books of ecclesiastical courts in the diocese of London, by William Hale Hale, Archdeacon of London, 1847.

<sup>2</sup> Hale's *Ecclesiastical Precedents*, preface, lvii.-lxi.

CH. XXV. "The third form of proceeding by which the ecclesiastical  
 " court took cognisance of offences was that of denunciation.  
 " It differed from accusation essentially in this point, that the  
 " person who gave the information to the judge was not bound  
 " to constitute himself the accuser, and become subject to  
 " the conditions and penalties to which the accuser was liable  
 " in order to carry forward the suit. Denunciation is now  
 " known to us under the name of presentment: the process  
 " of time and the enactment of the canons of 1603 has  
 " limited the power of making presentments to the minister  
 " and churchwardens; and thus the churchwardens have  
 " become not only the guardians of the goods of the church,  
 " but also in theory the supervisors of the clergy and people."  
 ". . . "These presentments, in the present state of the practice  
 " of the ecclesiastical courts, are but the shadow of a form."

It is no easy matter in our days to realise the fact that for many centuries, from the reign of William the Conqueror to that of Charles I., this system was in full activity amongst us. It was in name as well as in fact an Inquisition, differing from the Spanish Inquisition in the circumstances that it did not at any time as far as we are aware employ torture, and that the bulk of the business of the courts was of a comparatively unimportant kind, though from the days of Henry IV. to those of Queen Mary—a period of nearly 160 years—they conducted, by the aid of express statutory powers, persecutions, less severe indeed than those which took place on the continent, but still severe enough to have left deep traces on our national history and opinions.

To begin, however, with the ordinary business of the Ecclesiastical Courts. It was various, and it could hardly be better described than in the <sup>1</sup> words which Chaucer puts into the

<sup>1</sup> " Whilom there was dwelling in my countré  
 " An erchedeken, a man of gret degré,  
 " That boldly did executioun  
 " In punysching of fornicacioun,  
 " Of wicchecraft, and eek of bauderye,  
 " Of diffamacioun and avowterye,  
 " Of chirche reves and of testaments,  
 " Of contracts, and of lak of sacraments;  
 " And eek of many another meaner crime,  
 " Which needeth not to reherse at this tyme;  
 " Of usur, and of symony also,  
 " But certes lecchours did he grettest woo,

mouth of the Friar whose indignation is raised by the somp-  
nour's presence in the party of pilgrims. CH. XXV.

Abundant and indisputable evidence as to its nature is afforded by the *Criminal Precedents* already referred to, published in 1847 by the late Archdeacon Hale.

This work consists of a collection of extracts from the Act-books of six different ecclesiastical courts, four being archidiaconal courts in the diocese of London. The entries are dated from 1475 to 1640. The book contains 829 precedents, and may thus be taken as fully exemplifying the manner in which the ordinary ecclesiastical courts acted during the last two centuries of their full activity. There is no reason to doubt that in the four preceding centuries and even in earlier times they filled a similar position. As to the importance and frequency of the proceedings in these courts, Archdeacon<sup>1</sup> Hale observes, that from Christmas, 1496, to Christmas, 1500, 1,854 persons were cited before "the Court of the Commissary (whose jurisdiction was limited to the City of London and some small part of Essex and Hertfordshire)." This is more than a case a day during the whole period. He adds, "There is no reason to believe that the activity of the ecclesiastical courts, as instruments of moral correction, was at all abated as the year 1640 approached. In the Court of the Archdeacon of London, between the 27th November, 1638, and 28th November, 1640, the judge held thirty sittings, the number of entries of causes being more than 2,500. The number of persons prosecuted must have been considerably less, allowing that each person attended on two or three court days; the index, however, to the volume

"They shoulde synge, if that they were bent;  
"And small tythers, they were foullie schent,  
"If any person would upon him pleyne,  
"Ther might astert him no pecunial peyne.  
"For small tythes, and for small offerynge  
"He made the people pitously to synge.  
"For er the bisschop caught them in his hook,  
"They weren in the erchedeknes book:  
"And hadde through his jurisdiccoun  
"Power to have of them correccioun.  
"He had a sompnour redy to his hand,  
"A slyer boy was noon in Engllond,  
"Ful privily he had his espialle,  
"That taught him wher he might avail,"—*The Friar's Tale*.

<sup>1</sup> Hale, *Ecc. Prec.* p. liii.



CH. XXV. "would show that about 1,800 persons were before the court in that year, three-fourths of whom, it may be calculated, were prosecuted for tippling during divine service, breaking the Sabbath, and nonobservance of saints' days." The ecclesiastical courts must thus have resembled, in some respects, the courts of modern police magistrates, the difference being that the courts dealt with all sorts of irregularities as being sinful, which magistrates would punish, if at all, only on the ground of their being statutory offences.

The offences which appear from these precedents to have been made the subject of prosecution may be divided into two principal classes, namely, offences immediately connected with religion, and ordinary offences, and these last may be divided into offences which either did not, or did arise, out of the relation between the sexes. I will give a few illustrations of the procedure adopted in relation to each of these heads. I may observe, however, of all, that I know of nothing which in any degree resembled an ecclesiastical penal code. The courts seem to have had authority to punish anything which they regarded as openly immoral or sinful, without reference to any rule or definition whatever. A striking instance of this is afforded by the following curious <sup>1</sup>entry in 1543, "Symon Patryke notatur quod nunquam ibat ad lectum in charitate per spatium xx annorum."

Of offences connected with religion the most important, as appears from the precedents, were heresy and blasphemy, neglect of church services and ecclesiastical ceremonies, contempt of the clergy, and neglect by the clergy of clerical duty. With regard to heresy <sup>2</sup>Archdeacon Hale observes that he was "unable to trace in these Act-books the proceedings against any persons of eminence who were Lollards or heretics." He accounts for this by supposing that the articles of accusation and depositions of the witnesses were preserved together, as being too long for entry in the Act-book, though a few important cases were afterwards transcribed into the Bishop's register. He gives, however, a considerable number of cases which illustrate what may be called the summary jurisdiction exercised over

<sup>1</sup> Hale, *ecclxxi.* p. 120.

<sup>2</sup> Hale, *preface*, lxi.

language regarded as heretical or profane in the latter part of the fifteenth century. The first entry in the book illustrates this. In 1480,<sup>1</sup> Ambrosius de Borageos, "Contempsit Deum dicendo quod non est (? est)ustus parcialis, et quod unum diligit melius quam alium; et contempnit beatam Mariam "Katerinam et Margaretam vocando eas meretrices." For this the offender had to offer a wax candle weighing two pounds "apud Salvatorem," and to promise to pay ten pounds of wax to his parish church if he was convicted again. In the same year<sup>2</sup> Thomas Wassyngbourn, apparently a priest, was charged with heresy in saying, "quod sacramentum altaris est panis materialis." Also Mariona Sylwyng deposed that Thomas Wassyngbourn said, "Quod Christus erat falsus patri suo, dum vixit in terra; et beata Maria erat falsa qwene, Bartholomæus et Paulus erant falsi occisores hominum." Wassyngbourn "abjuravit et dimittitur."

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<sup>3</sup>In 1493 John Steward was "detectus officio de crimine heresim sonante sive tangente" for saying "I set nothing by curse" (excommunication) "yff I be ones on horssebake and my fete within the stiroppis," "et sic vilipendit claves ecclesiæ." He committed a further offence by refusing to answer without counsel. He was excommunicated and put to penance, but to what penance does not appear.

One<sup>4</sup> Bowkyn, a cobbler, "fovet opinionones hereticas tenendo candelam in manu suâ et dicendo coram testibus"—"as this candill doth vaad and gooeth out, lykwyse my soolle shall goo and assend to heaven." Probably Bowkyn meant to express doubts similar to those of one<sup>5</sup> Draper, of whom it is recorded, in 1587, "that the common report is that he doth not acknowledge the immortality of the sowle, and by his owne speeches he hath affirmed the same. Dominus ei injunxit, that he shall have conference with Mr. Bernnan, Mr. Negus, and Mr. Dent, sonderie times in metinge in Lee church, whereby he may be fullie perswaded of the immortality of the sowle, and to certifie under their hands of his full perswasion of the immortalitie of the sowle."

<sup>1</sup> Hale, p. 1, i.<sup>2</sup> P. 8, xxxiv., xxxv.<sup>3</sup> P. 41, cli.<sup>4</sup> P. 36, cxxxv.<sup>5</sup> P. 193, dxcvi.

CH. XXV. There are a variety of convictions for profane swearing, especially for such oaths as, "God's blood,"<sup>1</sup> "God's heart."

Not going to church, and neglecting other ecclesiastical ordinances, is a common head of offence. Thus, in 1476,<sup>2</sup> Nicholaus Haukyns "non audit divina, set jacet in lecto in tempore matutinarum et missæ die dominica in dominicam." In this case, however, there occurs the note, "non fiat processus." So in 1499<sup>3</sup> "Thomas Berno, in Chyklane, "auceps notatur quod violat Sabbatum et non audit divina, "sed vadit aucupando tempore divinorum, et est suspectus "de heresi." Here again, in 1630, is a scene like a Dutch picture.

"<sup>4</sup> John Strutt and one Joseph Bridge, Joan Goodman and "Amye Thorpe, single men and single women, departed out "of the church in the tyme of the sermon in the forenoone "of that Sunday; they went to the alehouse or taverne which "one William Chaundler keepeth, and there stayed eatinge, "drinkinge, and tiplinge, both wyne and beare, until evening "prayer. John Strutt came not at all to eveninge prayer, but "lay asleepe in the fields. The rest came to church. Joane "Goodman went out of churche about the beginning of the "sermon, and was observed by the parishe to goe out reelinge: "she lay down at the end at the chauncell, and there laye "asleepe till the latter end of the sermon, her hatt lyinge at "her feet, &c. The sideman, Robert Barnard by name, . . . "led her out of the churchyard, she being not able to go "of herself. . . . And so it is commonly noysed and reported, "both at home and abroade, in many places that she was "drunke." Upon this follows the note, "citentur."

Disrespectful language about the clergy was a common offence. Thus, "<sup>5</sup> Michel Moumford, notatur officio quod "vilipendit curatum ecclesie parochialis Sancti Botolphi "prædicti, necnon vilipendit verba Dei, dicendo præfato "curato in hiis verbis Anglicis sequentibus, viz. 'Leve thy "preaching it is nott worth a ——.'"

<sup>1</sup> *E.g.* Hale, dccxv. p. 231. Margaret Jones, "being used much swearing, so "she layde violent hands and smote the vicar of the said parish reproving " [her] for her swearinge, and followed him, swearing most develishly, from "the one ende of the toune to the other."

<sup>2</sup> lxiiv. p. 15.

<sup>3</sup> ccxxxvi. p. 69.

<sup>4</sup> dccxcii. p. 253.

<sup>5</sup> cclxxviii. p. 82. The —— is in the original.

<sup>1</sup> William Seville "vilipendit et adnichilavit ac diffamavit dominum Thoman Warde sic maliciose dicendo, 'Go forth, fool, and set a cockes combe on thi crowne,' sacerdotalem ordinem nequiter contempnendo." CH. XXV.

Neglects of clerical duty were very common, such, for instance, as <sup>2</sup>committing assaults or using bad language in church, or behaving there indecently.

<sup>3</sup>The following is a strange instance of the odd twists in conduct which occur, in times of great religious excitement. "Johannes Coyte" (curate of St. Martin's, Ironmonger Lane,) "confessus est quod die Veneris septimo, viz. die hujus mensis Martii (apparently, 1543) fuit absens a generali processione factâ ex mandato consilii domini nostri regis in civitate London contra monitionem alias ibi factum, &c., et quod tempore processionis hujusmodi presens fuit in publico spectaculo apud Tyburne dum quidam transgressores legis, &c., mortem inde subierunt, &c. Et ulterius fatebatur ut sequitur. That he did here noo confessions in his paryshe syns Lente sayeing that it greveth hym to here confessions, specially when any person uttereth and confessyth unto hym any partycular matter sounding to . . . fylthyness" (p. 136, ccccx.).

The above instances show that even as regards what might with propriety be called ecclesiastical offences, the old ecclesiastical courts had a jurisdiction wide enough to make them sufficiently formidable to the laity, but this is set in a much stronger and clearer light by referring to the manner in which they dealt with common offences which could be regarded as spiritual only because they are sins.

These offences may be divided under two principal heads, namely, those which do not and those which do arise out of the relation between the sexes. The following are amongst the most important of the former: Perjury, defamation, witchcraft, breach of faith, drunkenness.

<sup>1</sup> Hale, colix. p. 76.

<sup>2</sup> "Simon Greene, capellanus injectit violentas manus in dominum, Johannem Whyte, curatum ibidem, et eum ad summum altare predictæ ecclesiæ violenter percussit."—cxciij. p. 54. As to bad language, see l. 12, and indecent conduct, lii. 13, lxi. 15, cliij. p. 42.

<sup>3</sup> cccix. p. 136.

CR. XXV. Perjury was frequently punished, and this fact is one of some importance in reference to the history of that offence. The cases of perjury which are noticed in the precedents are, <sup>1</sup>perjury to arbitrators, <sup>2</sup>perjury as a compurgator, <sup>3</sup>perjury in the ecclesiastical court in denying incontinence upon the *ex officio* oath, <sup>4</sup>perjury in not keeping an oath "quod evitaret consortium ac colloquium Margarete Bird nisi fuerit in presentia plurium," <sup>5</sup>perjury in relation to a will, <sup>6</sup>perjury in not making a payment according to oath. There is no instance in which perjury as a witness in a lay court is treated as an offence, and it is probable that a prohibition would have been granted to restrain proceedings for such an offence. Indeed, <sup>7</sup>two cases occur in the Year-books in which a prohibition went to the spiritual court to restrain them from inquiring into breaches of promissory oaths relating to temporal matters, upon the ground that such an inquiry was an indirect way of determining temporal questions. In the record of the cases referred to the report says, "It happened in the King's Bench that a man had sworn to make a feoffment of land, and for not doing so he was prosecuted in the Court Christian as for perjury, and because by this means he might be forced to perform a thing touching land and inheritance, the same course was taken as if he had been sued for the land itself in the Court Christian," *i.e.* no doubt a prohibition went.

Breach of faith not involving perjury was, however, treated as an ecclesiastical offence, and might have turned the ecclesiastical courts into something like county courts or the old courts of requests, if the civil courts had not invented the action of *assumpsit* in addition to the old action of debt and covenant. The following are instances. <sup>8</sup>"Willielmus Weldon fregit fidem Magistro Ricardo Boseworthe pro non solucione *xxs.*" . . . "fatetur quod promisit solvere in festo

<sup>1</sup> Hale, *lxx.* 5, 18.

<sup>2</sup> *lxxvii.* 18, "perjurator et perjurarit se duodecim hominibus quod non vexaret Willielmum Petiti."

<sup>3</sup> *xciii.* p. 28; *cxxxii.* 35.

<sup>4</sup> *cxlvi.* p. 39.

<sup>5</sup> *cxlvii.* p. 40.

<sup>6</sup> *cc.* pp. 57, 58. <sup>7</sup> 2 Hen. 4, p. 10, No. 45; 11 Hen. 4, p. 88, No. 40.

<sup>8</sup> *xxxii.* p. 8.

“Michaelis proximo sub pænâ excommunicationis.” <sup>1</sup>Palmer CH. XXV.  
 claimed from Atkinson, 14s. 6d., “nomine mutui” “ad quod  
 “debitum probandum introduxerunt testes . . . qui depos-  
 “uerunt . . . eos audivisse predictum Atkinson predictum  
 “debitum et summam ante ejus accessum ad mare sponte  
 “recognovisse pro servicia pane (sic) et aliis.” <sup>2</sup>“Robertus  
 “Church notatur officio fama referente quod est communis  
 “perjurus, et presertim violavit fidem cuidam Johanni Tatam  
 “in non solvendo eidem vs. quos promisit sibi fide media ad  
 “terminum effluxum pro togâ de dicto Johanne emptâ.”

There are other cases in which the breach of faith complained of was not abiding by arbitration, not completing a contract of service, keeping a promise, or restoring a pledge.

Defamation was also a common subject for spiritual censures, and the fact that it was so explains the rule of the common law that no action lies for words spoken unless they impute a crime or relate to a man's profession or trade, or cause special damage. The remedy for common bad language was in the ecclesiastical courts. Thus in 1588 one <sup>3</sup>Pettigrew was “detected for railing against Mr. Evans of High Onger, and “reviling him, and called him raskill, jacke, and skurfe.” In 1619 one <sup>4</sup>Harwood was prosecuted for “railing and abusing “the constable and the whole parish in executing the king's “warrant upon him according to law, in calling them “murtherers and villains, with other base and slanderous “names.” The most remarkable language I have observed, however, is that which was used by one <sup>5</sup>Eleanor Dalok, who is described as “communis skandilizatrix.” She said many dreadful things, but amongst others these:—

“Item ipsa dicit quod si habeat celum in hoc seculo non  
 “curat de celo in seculo futuro.”

“Item ipsa utinizavit” (the perfect, I suppose, of *utinam*),  
 “se fuisse in inferno quam diu Deus erit in cælo, ut potuisset  
 “uncis infernalibus vindicare se de quodam Johanne Gybbys  
 “mortuo.”

Another item about her is “quia diabolice semper agit et

<sup>1</sup> Hale, xcv. p. 23.

<sup>2</sup> cclxxii. A note is added to this case, “Deus Rex celestis miserere anime  
 “sui quia mortuus est ideo dimittitur.”

<sup>3</sup> dci. p. 195.

<sup>4</sup> dclxv. p. 245.

<sup>5</sup> cxxxvii. pp. 36, 37.

CH. XXV. "nunquam Deifice," which seems not improbable if she was as angry with other people as with John Gibbs.

Drunkenness or disorderly life was also punished in these courts. Thus, in 1493, "<sup>1</sup> Dominus Thomas Stokes est pessimi regiminis sedendo in tabernis et potando horis inconsuetis, et violenter percussit dominum Robertum Goddard presbyterum in domo cujusdam Johannis Cooke, et projecit quandam ollam ad caput dicti domini Roberti et fregit ollam." So <sup>2</sup> Cole, a shoemaker, is prosecuted "for a most notorious and common drunkard, infamous and offensive to the whole parish and congregation, who in his drunken fits walketh about the streets with his naked sword breaking the windows," &c. So <sup>3</sup> Thomas Peryn is detected for a common drunkard and a "reylour and chyder to the griefe of the godlie and great danger of his soul." <sup>4</sup> Also William Watkins (and others), in 1633, "for disorderly carrying of himself on the Sabbath dayes, and sittinge up the greater part of the night disquietinge of his neighbours with their showtinge and outcryes." There are other instances of the same kind.

Witchcraft is also a frequent subject of punishment, though in almost every instance, particularly in the more modern ones, the offence charged is that of consulting cunning men and women for some harmless or praiseworthy purpose. No doubt the reason is that certain kinds of witchcraft were made felony in 1542 by 33 Hen. 8, c. 8, which would oust the jurisdiction of the ecclesiastical courts. The following are instances:—

In 1480, "<sup>5</sup> Stokys utitur incantationibus sortilegiæ pro febribus." <sup>6</sup> In 1482 Joan Beverley entreated witches "to secure for her the affection of her two lovers." In 1476 <sup>7</sup> Barley showed to Jarbrey a beryl stone in which Jarbrey saw a thief or thieves. <sup>8</sup> In 1490 Joan Benet a witch "vult accipere longitudinem hominis et facere in candelam ceri et offerri coram imagine et sicut candelam consumit sic debet homo consumere." This would have been felony within the express words of 33 Hen. 8, c. 1. In the same year <sup>9</sup> Laukiston

<sup>1</sup> Hale, civi. p. 43.

<sup>4</sup> decxciii. p. 252.

<sup>7</sup> xliii. p. 10.

<sup>2</sup> decxxxiii. p. 250.

<sup>5</sup> x. p. 8.

<sup>8</sup> lxxxii. p. 20.

<sup>3</sup> delxxxviii. p. 223.

<sup>6</sup> xxvii. p. 7.

<sup>9</sup> cxviii. p. 32.

and Margaret Jeffrey, a widow, were convened "super certis CH. XXV.  
 "articulis crimen heresie tangentibus et sorcerie." The man offered to find the woman "a man worth a thousand pounds" as a husband. The woman thereupon delivered to him two <sup>1</sup>"masers" worth five marcs ten shillings (£3 16s. 8d.) in hopes of getting such a husband. Each was sentenced to penance—the man to return the property, the woman to walk barefoot before the procession of the cross. <sup>2</sup>The other cases relate to curing animals or human beings by medicines and charms, or to the discovery of stolen goods by keys or sieve and shears.

The law relating to witchcraft has a curious history, to which I shall return, but this is enough to show the part taken in relation to it by the old ecclesiastical courts.

The second great class of offences over which the ecclesiastical courts had jurisdiction were offences arising out of the relation of the sexes. Every form of incontinence, whether committed by the clergy or the laity, and whether or not it involved adultery, was habitually censured, the parties being cited, put upon their oath to answer the questions proposed to them, and adjudged to penances of various kinds. I need not give instances of these cases, but I may observe that Archdeacon Hale <sup>3</sup>says that out of 1,854 cited before the Court of the Commissary for London and a small part of Essex and Hertfordshire "one half were charged with the "crimes of adultery and others of like nature."

The jurisdiction which the ecclesiastical courts exercised over marriage and incontinence seems to have been extended in practice to nearly all crimes which arise out of or are connected with the relation of the sexes, and which were not punishable as crimes by the common law. It will be sufficient to mention those which are dealt with in the cases reported by Archdeacon Hale. <sup>4</sup>They are as follows: incest, bigamy, acting as a procuress, procuring abortion, overlaying children, and in <sup>5</sup>one case an assault with intent to ravish.

<sup>1</sup> Translated "murras," which, I believe, means some sort of vessel.

<sup>2</sup> cccxxvii., ccxxxviii., ccccxxviii., ccccxxlii., ccccxciv., dlxxviii.

<sup>3</sup> Preface, liii.

<sup>4</sup> The cases are numerous.

<sup>5</sup> cxxiv. p. 33. The offender was the parish priest. He purged himself, "v manu," i.e. by his own oath and that of four compurgators, all priests. It is impossible that the four priests could know anything of such a matter. The charge says, "Pro eo quod noluit in eum consentire voluit eam suffocasse "cum suo flammiole, prout liquet per vestigia in collo suo, &c."



CH. XXV. The jurisdiction of the courts upon subjects of this kind was so extensive that they sometimes interfered in quarrels between married people. Thus <sup>1</sup>“Nicholaus Elyott notatur “officio quod non tractat Margaretam uxorem suam maritali “affecione.” Many neighbours on both sides were called, and at last the husband was required to show cause why he should not be excommunicated. Indeed, the court extended its protection even to a mistress. <sup>2</sup>John Bell not only lived in adultery with Margaret Sanfeld, but said to her at last, “If “I see the speke eny more with him, I shall kutt of thi nose,” “pretextu quorum verborum predicta Margareta est extra se “jam posita et totaliter demens effecta.”

The sanction by which the ecclesiastical courts enforced their decrees was excommunication. Of this there were two kinds, the less and the greater. The less excommunication deprived a man of all the offices of the Church. The greater cut him off from the society of all Christians, and both involved a variety of civil incapacities. An excommunicated person could not sue, nor give evidence, nor receive a legacy. Moreover, if he refused to submit to penance, the ecclesiastical court signified his contumacy to the king in his chancery, whereupon a writ was issued *de excommunicato capiendo*, and upon this the party might be imprisoned till he submitted. Penance consisted in carrying a fagot or a taper, or standing in a street, or undergoing some other public humiliation. One of the most elaborate penances I have observed was enjoined upon a man and woman who had entered into a contract of marriage whereby a subsequent marriage of the woman was said to be invalidated, <sup>3</sup>“Dominus injunxit dicto Johanni “Grey, quod tempore matutinarum in ecclesia sua parochiali “dicat psalterum beate Marie et quod procedat processione “nudis tibiis et pedibus indutus lynthiamine cum cera in “manu sua dextera posita, et ita ad manus celebrantis missam “illum offerat penitenter; et istis factis et missa celebrata, “quod accipiat disciplinam a dicto celebrante missam, &c.; ac “eciam injunxit mulieri consimiliter.”

Such were the old ecclesiastical courts. I have tried to illustrate, as clearly as I could, the character of their juris-

<sup>1</sup> Hale, clxi. p. 44.

<sup>2</sup> cvii. p. 26.

<sup>3</sup> cxcv. p. 89.

diction, because I think it has a more important place in legal and general history than has usually been assigned to it. The only difficulty which is suggested in the present day by the account given of it is to understand how people submitted to it so long as they did. It is difficult even to imagine a state of society in which on the bare suggestion of some miserable domestic spy any man or woman whatever might be convened before an archdeacon or his surrogate and put upon his or her oath as to all the most private affairs of life, as to relations between husband and wife, as to relations between either and any woman or man with whom the name of either might be associated by scandal, as to contracts to marry, as to idle words, as to personal habits, and in fact as to anything whatever which happened to strike the ecclesiastical lawyer as immoral or irreligious.

The hatred with which the *ex officio* oath was regarded, and which was excited by the policy of such a man as Laud, who wished to make the discipline of the Church seen and felt as well as talked of, becomes intelligible when we read such a book as Archdeacon Hale's.

In order, however, to understand the matter fully, it is necessary to refer to the history of the Court of High Commission which extends over the interval between the Reformation and the year 1640. It was the great instrument by which the royal supremacy was put in force under Elizabeth, James, and Charles. Henry VIII. had exercised his ecclesiastical supremacy first through Cromwell, and afterwards to some extent at least personally. The short reign of Edward VI. was a time of almost revolutionary confusion. Mary had done her best to replace the bishops and the Pope in their ancient position. Elizabeth's whole reign was occupied by efforts which upon the whole were for the time successful, to force upon extreme parties a compromise, which practically satisfied the majority of the nation, and which rested on her authority. Hence, the very first important step taken by her and her advisers was to procure the act under which the Court of High Commission was established. This was 1 Eliz. c. 1, A.D. 1558, entitled, "An Act to restore to the Crown the ancient jurisdiction over the estate ecclesiastical and spiritual,

CH. XXV. "and abolishing all foreign powers repugnant to the same."

Section 17 established and enacted that all ecclesiastical jurisdiction, and in particular all <sup>1</sup> ecclesiastical criminal jurisdiction, shall for ever be united and annexed to the Crown. Section 18 empowered the queen and her successors to authorise such persons, being natural born subjects, as she thought fit to exercise under her all ecclesiastical jurisdiction, and especially all ecclesiastical criminal jurisdiction, according to letters patent to be issued by her.

It was under the authority given by this act that Elizabeth and her two successors exercised their ecclesiastical supremacy. The first commissions issued under the act appear to have been local and temporary. One was issued June 24, 1559, for "the cities and dioceses of York, Chester, Durham, and "Carlisle," the text of which is printed in <sup>2</sup> Burnet. It authorises the commissioners amongst other things to proceed against "contumaces et rebelles cujusque conditionis sive " status fuerint, si quos inveneritis tam per censuras ecclesiasticas quam personarum apprehensionem et incarcerationem " ac recognitionem, acceptionem ac quæcunque alia juris regni " nostri compescendum."

The commissioners so constituted stood to the ordinary ecclesiastical courts in a relation not unlike that in which the king's courts soon after the Conquest came to stand to the local jurisdictions of earlier times. The two jurisdictions were concurrent, but the Court of High Commission had, or at all events used, powers which the inferior courts had never claimed, and they proceeded against offenders who would probably have been able in a variety of ways to evade and perhaps in some cases to defy the ordinary ecclesiastical courts.

<sup>3</sup> Five High Commissions were issued in the first twenty-five years of Elizabeth's reign, but in December, 1583, a Commission was issued which created a permanent court having authority in every part of the kingdom. The text of the commission is published by <sup>4</sup> Neal. It empowers the

<sup>1</sup> "And for reformation, order, and correction of the same, and of all manner " of errors, heresies, schisms, abuses, offences, contempts, and enormities."

<sup>2</sup> *History of the Reformation*, vol. ii. part ii. p. 481.

<sup>3</sup> Neal's *Puritans*, i. 330.

<sup>4</sup> *Ib.* 330-332, note; Gardiner's *History of England*, i. 152-154.

commissioners, of whom there were forty-four, twelve being CH. XXV.  
 bishops, and three a quorum, "to inquire from time to time  
 " during our pleasure as well by the oaths of twelve good  
 " and lawful men, as also by witnesses and all other ways  
 " and means you can devise, of all offences, contempts, mis-  
 " demeanours, &c., done and committed contrary to the tenor"  
 of the principal acts passed in the queen's reign, "and also  
 " to inquire of all heretical opinions, seditious books, con-  
 " tempts, conspiracies, false rumours or talks, slanderous words  
 " and sayings, &c." The commissioners were also authorised  
 to punish offenders "by fine, imprisonment, censures of the  
 " Church, or by all or any of the said ways" as they might  
 think proper. They were also empowered to call any persons  
 suspected before them, to examine them "on their corporal  
 " oath for the better trial and opening of the truth; and if  
 " any persons are obstinate and disobedient, either in not ap-  
 " pearing at your command or not obeying your orders and  
 " decrees, then to punish them by excommunication or fine, or  
 " to commit the said offenders to ward." Several parts of this  
 commission were clearly unauthorised both by the statutes on  
 which it was professedly founded and by the common law.

The prerogative was probably never carried higher than by  
 the creation of this formidable court, and the proceedings  
 which took place under the authority conferred upon it by its  
 commission. The commissioners not only stretched to the  
 utmost the illegal powers which the commission gave them,  
 but they imposed tests of their own devising, and enforced as  
 law instructions called advertisements and informations which  
 the bishops issued at the instigation of the queen, though  
 she characteristically refused to give them the sanction of  
 her authority when they were issued.

<sup>1</sup> The interrogatories which they administered were so close  
 and searching that Burleigh <sup>2</sup> remonstrated upon the subject  
 with Whitgift, describing them as "too much savouring of the  
 " Romish inquisition." Whitgift replied that "they ought  
 " not to be compared with the inquisition, because the  
 " inquisition punished with death," and he observed that if

<sup>1</sup> See an instance given in Neal, i. pp. 337, 338, *note*.

<sup>2</sup> See his letter, Neal, i. p. 339; Gardiner, i. p. 154.

CH. XXV. they proceeded by witnesses and presentment it would be hard to get evidence to convict them, and they could not make quick despatch enough with the sectaries. Neither Burleigh, however, nor the Privy Council, who agreed with him, could succeed in bridling the bishops. <sup>1</sup> Neal publishes a curious letter in which eleven of the Council formally wrote to Aylmer, Bishop of London, calling on him to make compensation to one Benson, a minister, whom he "had suspended and kept in prison several years on pretence "of some irregularity in his marriage." The Council based their advice on the consideration that if Benson "should "bring his action of false imprisonment he should recover "damages which would touch your lordship's credit." The bishop prayed the council to "consider my poor estate and "great charges otherwise, together with the great vaunt the "man will make of his conquest over a bishop. I hope, "therefore, your lordships will be favourable to me, and refer "it to myself either to bestow upon him some small benefice "or otherwise to help him as opportunity offers. Or, if this "shall not satisfy the man or content your lordships, leave "him to the trial of the law, which I hope will not be so "plain for him as he taketh it."

The proceedings of the High Commission were so violent that even in that age they were called in question. Cawdrey, minister of Luffingham in Suffolk, was suspended by the Bishop of London for refusing the oath *ex officio*, and as he did not submit to the bishop he was cited before the High Commission, which deprived him. <sup>2</sup> He sued the person put into possession of his living for trespass, and the jury found a special verdict to the effect that the defendant was not guilty if the High Commission had power to deprive Cawdrey of his benefice. The report and the decision in Cawdrey's case form a kind of treatise, headed in Coke's *Reports*, "De jure regis "ecclesiastico." It is the leading authority on the subject of the true nature of the ecclesiastical law. It deals with many matters, but amongst other things it carried the power of the High Commission to the highest possible pitch, for <sup>3</sup> "it was

<sup>1</sup> P. 350.

<sup>2</sup> Cawdrey's case, 5 *Rep.* 1, vol. iii. p. xv. of edition of 1826.

<sup>3</sup> *Ib.* 5 *Rep.* 7, vol. iii. p. xxvi. of edition of 1826.

“ resolved that the said act” (1 Eliz. c. 1) “ was not a statute CH. XXV.  
 “ introductory of a new law, but declaratory of the old . . . .  
 “ so if that act . . . . had never been made it was resolved  
 “ by all the judges, that the king or queen of England for the  
 “ time being may make such an ecclesiastical commission as  
 “ is before mentioned by the ancient prerogative and law of  
 “ England.” This doctrine would practically make the king’s  
 power in ecclesiastical matters absolute, for where the statute  
 failed the king’s ecclesiastical law would come in, and where  
 there was in fact no ecclesiastical law the king and his  
 commissioners could make it under the fiction of declaring it.

This was set in a striking light by the answers given by  
 the judges to questions put to them in 1605, soon after the  
 publication of King James I.’s canons in 1603. The first of  
 these questions was whether the deprivation of Puritan  
 ministers by the High Commissioners for refusing to conform  
 to the ceremonies appointed by the last canons was lawful?  
 The judges replied that it was lawful, because the king had  
 the supreme ecclesiastical power which he has delegated to  
 the commissioners, whereby they have the power of depriva-  
 tion by the canon law of the realm, and the statute 1 Eliz.  
 which appoints commissioners to be made by the queen  
 does not confer any new power, but explains and declares the  
 ancient power; and therefore they held it clear that the king  
 without parliament might make orders and constitutions for  
 the government of the clergy, and might deprive them if they  
 obeyed not; and so the commissioners might deprive them.

Although the courts of common law were disposed to  
 carry the king’s power in ecclesiastical matters to very great  
 lengths, they were by no means disposed to acquiesce in the  
 powers which the commissioners assumed of inflicting fine  
 and imprisonment and forcing accused persons to criminate  
 themselves by the *ex officio* oath. This appears from many  
 cases in Coke’s Reports. For instance, in the Michaelmas  
 term, the 4th of January (1606 or 1607),<sup>2</sup> “ there was moved  
 “ a question amongst the judges and serjeants at Serjeant’s  
 “ Inn if the High Commissioners in ecclesiastical causes may

<sup>1</sup> Neal, ii. 36.

<sup>2</sup> 12 Rep. 19; edition of 1826, iii. 217.

CH. XXV. "by force of their commission imprison any man or no," and the opinion seems to have been that as the power was not given by the act of Elizabeth they could not. The act was regarded no doubt as declaring the common law, but the common law did not authorise imprisonment by the ecclesiastical courts, and the act did not give the power.

<sup>1</sup> In Easter term of the same year "the Lords of the Council demanded of Popham, C.J., and myself, upon motion made by the Commons in Parliament, in what cases the ordinary may examine any person *ex officio* upon oath." They replied in substance that the Ordinary cannot constrain any man to swear generally to answer such interrogatories as shall be administered to him, but must deliver to him the articles upon which he is to be examined that he may judge whether he is bound to answer them. Moreover, such interrogatories ought to be administered only in testamentary and matrimonial causes, and not in accusation of "adultery, incontinency, usury, simony, hearing of mass, heresy, &c." They admitted "that for a very long time divers had been examined upon oath in ecclesiastical courts," but it was answered that if this was by their consent it would not be illegal—a very lame answer. The rest of the opinion seems to state that whatever the practice may have been the *ex officio* oath was contrary to the principles of English law.

Besides these expressions of opinion the courts in <sup>2</sup>several cases set at liberty by *habeas corpus* persons whom the High

<sup>1</sup> 12 *Rep.* 26, vol. vi. p. 227, ed. of 1826.

<sup>2</sup> Sir Anthony Roper's case, 12 *Rep.* 47, vi. 258. Sir W. Chanley's case, 12 *Rep.* 82, vi. p. 309. See also the case of Nicholas Fuller, *ib.* p. 750. Fuller was a barrister who, as counsel, moved for the discharge of various Puritan divines imprisoned by the High Commission on the ground that they had no right to imprison. Neal says that he himself "was shut up in close prison, from whence neither the intercession of his friends nor his own humble petitions could obtain his release till the day of his death."—*Puritans*, ii. 39-40. The report in Coke consists entirely of a statement of the resolutions come to by the court. It gives no date, states no fact, and does not even say what the judgment of the court was, or even before what court the question (whatever it was) came. It says simply, "In the great case of Nicholas Fuller, of Gray's Inn, these points were resolved upon conference had with all the justices and barons of the Exchequer." It ends by saying "that the commissioners convicted Fuller of schism and erroneous opinions, and imprisoned him, and fined him £200, and afterwards Fuller moved the King's Bench for a *habeas corpus et ei conceditur*, upon which writ the gaoler did return the cause of his detention," but what became of the matter finally is not said. See as to Fuller's case, Gardiner's *History of England*, i. 444-446. Mr. Gardiner says Fuller paid his fine and was released.

Commissioners had imprisoned, and issued prohibitions to them on various occasions. This led in 9 Jas. 1 (1611 or 1612) to a debate upon the subject. <sup>1</sup>“All the justices of England were by the command of the king assembled in the Council Chamber, where was also Abbot, Archbishop of Canterbury, and with him two bishops, and divers civilians, where the archbishop did complain of prohibitions to the High Commissioners out of the Common Pleas, and the delivery of persons committed by them by *habeas corpus*, and principally of Sir William Chanley, where I” (Coke) “defended our proceedings.” There was “great disputation between the Archbishop and me” (Coke). Coke strenuously maintaining the rights of the courts of common law to interpret the statutes and keep the High Commission within limits, and the archbishop asserting their independence. The matter was afterwards greatly debated with the other judges, the judges of the Common Pleas being excluded, and the judges of the other two courts being examined as to their opinions *seriatim* and without previous warning or preparation. Coke says that “they were not unanimously agreed,” and that the king said after hearing them he would “reform the commission in divers points, and reduce it to certain spiritual causes, the which after he will have to be obeyed in all points, and the Lord Treasurer said that the principal feather was plucked from the High Commission, and nothing but stumps remaining, and that they should not intermeddle with matter of importance, but of *petit crimes*.” Upon this Coke told the king that it was “grievous to us his justices of the Bench to be so severed from our brethren the justices and barons, but more grievous that they differed from us in opinion without hearing one another;” especially because they had proceeded judicially in the case of Cawdrey and other cases concerning the power of fine and imprisonment claimed by the High Commission. Their judicial determination that these powers were not possessed by the commission ought not, in Coke’s opinion, to be set aside otherwise than judicially.

The conduct of Coke and his court in the whole of this

<sup>1</sup> 12 *Rep.* 34, vol. vi. p. 311, ed. of 1826.



CH. XXV. matter appears to have been extremely spirited, and in principle as wise as it was bold, though certainly his theory as to the king's ecclesiastical authority over the clergy and the formularies of the Church was carried to as great a length in one direction as his theory as to the liberty of the subject was carried in the other.

No alteration appears to have been made in the constitution of the Court of High Commission in consequence of these proceedings. Parliament <sup>1</sup>petitioned against it in 1610, but without effect. It reached the height of its power during the twelve years which intervened between the dissolution of Charles I.'s third parliament in 1628, and the meeting of the Long Parliament in 1640.

The best evidence as to the nature of its proceedings during the last seven years of its existence still remains, as a large part, though not quite the whole, of its Act Books for this period are printed <sup>2</sup>in calendars of the Domestic State Papers lately published under the authority of the Master of the Rolls. These documents enable us to see distinctly what sort of body the Court of High Commission was. It seems to have had three principal functions: the punishment of clerical improprieties; the punishment of lay immorality, and the enforcement of ecclesiastical conformity upon all persons whatever, whether lay or clerical.

I will illustrate each of these classes of cases.

As to clerical improprieties, a considerable number of cases of drunkenness and immorality occur, such as would now be dealt with under the Church Discipline Act. Of these I need say nothing, but apart from them the court appears to have been continually occupied with the cases of clergymen who either preached in what was regarded as an objectionable manner, or neglected ceremonies to which Laud and his partisans attached special importance. A singular instance of this kind is afforded by the case of <sup>3</sup>Dr. Stephen Dennison, the curate of Katharine Cree Church, in London, whose per-

<sup>1</sup> See the petition in Neal, ii. pp. 72-73; and see Gardiner, i. 472-473.

<sup>2</sup> *Calendar of State Papers, Domestic Series, 1633-1640*. There are nine volumes of them. There are several ways of quoting these volumes. I quote them by the year and the page.

<sup>3</sup> 1635-1636, p. 105.

formances seem to have attracted great attention. A painted window, representing Abraham sacrificing Isaac, having been put up in the church, Dr. Dennison said it was "a whirligig, a crow's nest, and more like the swaggering hangman cutting off St. John Baptist's head. He also in divers sermons reviled some of his parishioners, comparing them to frogs, hogs, dogs, and devils, and called them by the name of knaves, villians, rascals, queans, she devils, and pillory whores." He preached a sermon depreciating baptism in comparison with preaching, and was accused of immorality. "For his personal taxations and his invective manner of preaching the court held it so odious" that they removed him from his curateship. This cannot be considered very severe, as he had <sup>1</sup> previously been ordered not to preach on account of his personalities, and had afterwards continued his "personal taxations" "under pretence of catechizing." <sup>2</sup> Ward of Ipswich was convicted upon somewhat similar charges. He spoke ill of set forms of prayer, especially against the service for the visitation of the sick, he "uses not to kneel or show any sign of devotion when he comes into his seat or pew in the church, and has preached disgracefully against bowing and other reverend gestures in the church. He preached doubtfully concerning Christ's descent into hell. He uttered speeches derogatory to the discipline and government of the Church of England. He preached by way of opposition to his Majesty's declaration concerning recreations to be permitted on Sundays." He was suspended, condemned in costs, and required to recant, but was not punished with any special severity.

One <sup>3</sup> Dr. Holmes was "charged with almost all variety of clerical misdoings then alleged against inconformable clergymen. Amongst other things, with speaking irreverently in the pulpit; using these words 'the drunken knave 'priest'; with never reading the book of Liberty; with speaking very unreverently and rudely against the reverend bishops; with preaching for divers Sundays together 'in the

<sup>1</sup> 1634-1635, pp. 329, 335.

<sup>2</sup> 1635-1636, p. 129.

<sup>3</sup> 1637-1638, p. 63. The words are copied from the abridgment of the editor.

CH. XXV. " 'pew and in the pulpit, four sermons in a day;' with baptizing his own child without the sign of the cross; with being passionate and speaking angerly in the church, and in the church calling the writer of the present paper " <sup>1</sup> ' Mutch-a-vile ' ; with allowing strangers, after evening sermon on Sunday, to resort to his house so as we can see he does but ' hover with all the ceremonies, ' and with many " other similar offences."

The frequent occurrence of such prosecutions as these must have been a great grievance to the Puritanical party, but I do not think they would explain the detestation excited by the court. It is hardly possible to believe that violent zealots who used unseemly language, and attached a passionate degree of importance to ceremonies not calculated to excite any strong feeling in the minds of the great majority of lay people would have raised any special storm. In this part of its work the Court of High Commission did little more than other ecclesiastical courts always did and still do.

The second class of cases to which I have referred were of a very different kind. They consist of instances in which the court punished immorality as a crime, either in the laity or in the clergy. The smaller ecclesiastical courts, as I have already shown, continued till the year 1640 to exercise a jurisdiction resembling that of modern police magistrates, over all sorts of immoral practices. The Court of High Commission proceeded apparently <sup>2</sup> in a more formal way against persons of superior rank to those who were cited in the smaller courts, and inflicted upon them infinitely more serious punishments. Numerous prosecutions are mentioned for adultery and incest amongst the laity. Some idea of their frequency is given by the following entry as to the case of <sup>3</sup> a man charged with adultery committed nineteen years before. " It not " being the law of this court to examine misdemeanours of " that kind committed above ten years past referred to " Sir John Lambe and Dr. Eden to consider the articles."

<sup>1</sup> Can this mean Machiavel?

<sup>2</sup> One, Santley, being charged with simple incontinence, " being a bachelor, " with a single woman, it was ordered that that article should be put out as " being more fit for an ordinary court."—1635-1636, p. 501.

<sup>3</sup> 1634-1636, page 124, case of George Curtia.

Adultery was punished with extreme severity. A fine of CH. XXV. £500 seems to have been a common punishment, but in some cases it was heavier. One <sup>1</sup> Thomas Hesketh, for instance, was fined £1,000, ordered to do penance in York and Chester cathedrals, and a parish church, and to be imprisoned till he gave securities in 2,000 marks (£1,332) for the performance of the order and the payment of costs. In <sup>2</sup> another case, not on the face of it nearly so bad, a woman was fined "for notorious adultery," £2,000. Such a fine would obviously have been idle if the person on whom it was imposed had not been rich. The extreme severity of proceedings of this nature is perhaps best illustrated by the case of Thomas Cotton and Dorothy Thornton of Lichfield. <sup>3</sup> In April, 1634, they were both sentenced to do penance, and Cotton was fined £500. It seems from other entries that Cotton did not pay his fine, <sup>4</sup> and in November, 1639, the following entry occurs: "Thomas Cotton and Dorothy Thornton—their petition read, praying " that they might be released from confinement in Stafford " gaol, where they had remained these four years in great " misery, upon entering their own bonds to perform the " sentence of this court." There are many other entries of this nature. There are also a few for immorality of another kind. Thus <sup>5</sup> " Augustine Moreland, of Stroud, was much " given to excessive drinking, and at the same time swore " most desperate oaths, and blasphemed the name of God; " but the highest point of blasphemy objected against him " having, according to the depositions, been spoken beyond " the time mentioned in the articles, the court forbore to " proceed against him for that, but for his notorious drunken- " ness and habitual swearing ordered him to make acknow- " ledgment at his parish church in certain words to be set " down by the commissioners, fined him £500 to the king, " and condemned him in costs."

In several of these cases, and especially in cases of incontinence charged against clergymen, the defendants were permitted to make purgation. Thus in the case of <sup>6</sup> Stephen

<sup>1</sup> 1635-1636, p. 475.

<sup>2</sup> 1633-1634, p. 580.

<sup>3</sup> 1634-1635, p. 330.

<sup>4</sup> 1638-1639, p. 481.

<sup>5</sup> 1639-1640, p. 282.

<sup>6</sup> 1635-1636, p. 115.

CH. XXV. Dennison already mentioned, part of the charge was that he attempted the chastity of certain women. He swore that he never did so, and five compurgators, each being the parson of a parish in London, took their oaths that they believed him to have taken a true oath, "whereupon the court pronounced him to have purged himself."

A jurisdiction of this sort must have been invidious to the last degree, and would excite almost any amount of sullen hatred.

The third class of the decisions to which I have referred are those by which the court tried to enforce ecclesiastical conformity upon all persons whether lay or clerical. Its proceedings in this matter were similar to, and indeed can hardly be distinguished from, those of the Court of Star Chamber; for all the great political questions of the day were ecclesiastical, and it was hardly possible for any one to write or speak in what could be regarded as an objectionable manner in relation to either politics or religion without being regarded both as a seditious person and as an offender against the doctrines and discipline of the Church. The publication of seditious and fanatical pamphlets, the preaching of seditious and fanatical sermons, and speaking of seditious and fanatical words, form the gist of a large proportion of the offences dealt with by the court. I will give a few of the most characteristic instances. <sup>1</sup> The following instances all occur on the 18th February, 1633, being the day of the mitigation of fines:—John Vicars, holding heretical opinions; George Preston, speaking scandalous words against the king and queen; Nathaniel Barnard, seditious preaching at St. Mary's, Cambridge, fined £1,000; Barker and Lucas, the king's printers, fined for errors in printing the Bible—Barker, £200, Lucas, £100; Frederick Waggoner, profane speeches of the Lord's Supper and contumely towards the clergy, fined £100; <sup>2</sup> Lady Eleanor Davis,

<sup>1</sup> 1633-1634, p. 480.

<sup>2</sup> It is said in the preface to the volume, p. xviii., that she was "unquestionably mad," and that she was the sister of Lord Castlehaven, whose disgusting case is mentioned in the *State Trials*. She is the subject of a story told, I think, in Disraeli's *Curiosities of Literature*. She attached great importance to anagrams, from which she proved various unwelcome doctrines. Some officer of the court replied that "Dame Eleanor Davies" made "never so mad a ladie."

publishing fanatical pamphlets, fined £3,000; Pamplin, for dispersing Popish books, fined 100 marks; George Burdett, for schism, blasphemy, and raising new doctrines in his sermons. CH. XXV.

The particulars of some of the cases are very strange. Thus <sup>1</sup> Richard Parry, of Llanvalty, was fined £2,000 for the following offences:—He made a disturbance in church by causing the sexton to apprehend a person during divine service. “Rising after receipt of the bread in the Sacrament, he said, ‘Some devil is in my knee.’ He said to his rector, ‘I am a better preacher than thou, and I care not a straw for thee.’ He said of the Archdeacon of Carmarthen, or his official, that he hoped he would be hanged, also that if he were king there should be no bishops.”

<sup>2</sup> John Bastwick was convicted of a great variety of offences. He said that a double-beneficed man could not be an honest man. He “termed the bishops of the Church of England ‘grolls,’ and that this word ‘groll’ he commonly used to slight men withal.” He objected to kneeling at the Communion and bowing at the name of Jesus. He “affirmed that the reverend bishops lived like beasts and ‘drones,’ and wrote various books against episcopacy. He was sentenced to acknowledge his errors, his books were to be burnt, he was excommunicated, suspended from the practice of physic, fined £1,000, and condemned in costs. <sup>3</sup> Lastly, in respect that, neglecting his calling, he used to employ much of his time in speaking and writing scandalous matter against Church and State, he was committed close prisoner to the Gatehouse until he gave bond for the due performance of his sentence.

Bastwick was no doubt a prominent person, but the court took notice of small as well as great. This appears from <sup>4</sup> the case of Richard Waddington, aged eighteen, and William Ellyott, aged about twenty, “Two poor foolish boys, taken amongst others at Francis Donwell’s house, the ‘Ale

<sup>1</sup> 1634-1635, p. 52.

<sup>2</sup> The same person who was punished by the Star Chamber with Burton and Prynne, 1634-1635, p. 547. “Groll,” I believe, is Dutch for “silly.”

<sup>3</sup> This entry, it is said, has been scored out.

<sup>4</sup> 1635-1636, p. 98.

CH. XXV. " 'howlder,' at Stepney. They came newly in, and were found "sitting at the table with Bibles before them. They were "discharged." One <sup>1</sup>Blundell, a bailiff, who executed a warrant on Belts, in Bletchingly churchyard, and "upon some "struggling rent a skirt in the said Belts' doublet," and in "a saucy and scornful manner" desired the rector to make him (Blundell) churchwarden, was fined, his fine being assessed at £30 by three commissioners and £50 by three others, because it was considered that by the facts stated "he had violated the liberties of Holy Church and con- "secrated ground, and had scoffed at the office of church- "warden."

Pages might be filled with further illustrations, but these are enough. I may observe in general that all opinions except those which were regarded as strictly correct, were pretty impartially punished. It was as dangerous to believe too much as not to believe enough—to be a Roman Catholic priest as to be a publisher of fanatical pamphlets.

The lengths to which the court went, not merely in hearing and determining cases otherwise brought before them, but in seeking out offenders, appear from several entries. <sup>2</sup>On the 1st April, 1634, the commissioners addressed a circular "to "all justices of the peace, mayors, and all other officers of "the peace, as follows: 'There remain in divers parts of the "kingdom sundry sorts of separatists, novalists, and sectaries "as follows: Brownists, Anabaptists, Arians, Traskites, "Familists, and some other sorts, who upon Sundays and "other festival days, under pretence of repetition of sermons, "ordinarily are to meet together in great numbers, in "private houses and other obscure places, and there keep "private conventicles and exercise of religion by law pro- "hibited.' "The circular then directs the persons addressed "to enter any house where they shall have intelligence that "such conventicles are held, and every room thereof search "for persons assembled and all unlicensed books," and bring them before the Ecclesiastical Commissioners.

<sup>3</sup>On the 20th February, 1635-6, a general warrant was

<sup>1</sup> 1638-1639, pp. 152-153.

<sup>2</sup> 1633-1634, p. 538.

<sup>3</sup> 1635-1636, pp. 242-243.

issued to John Wragg, the messenger of the chamber. It CH. XXV.  
 recited that the commissioners had credible information that  
 conventicles were held in London and elsewhere of "Brownists,  
 "Anabaptists, Arians, Thraskists, Familists, Sensualists, Anti-  
 "nomians, and others." The warrant directs Wragg, with a  
 constable and such other assistance as he thinks meet, to enter  
 all houses and search for such sectaries and for unlicensed  
 books, and to bring them before the commission, or to commit  
 them to the next prison and acquaint the commissioners  
 therewith, unless they [the sectaries] give bonds for their  
 appearance before the commission.

These warrants were, so far as I can judge, wholly illegal.  
 Their effect was to enable the persons to whom they were  
 addressed to arrest and imprison, merely on suspicion, persons  
 who by law were not liable to be imprisoned at all, even upon  
 conviction, except upon a *significavit* to the Court of King's  
 Bench and a writ *de excommunicato capiendo*. Some light is  
 thrown on the nature of the oppressions which they must  
 have caused by a <sup>1</sup> petition from Robert Belim, keeper of the  
 White Lion prison at Southwark. The petition showed "That  
 "the White Lion, the common gaol for heresy, is the next  
 "prison to Lambeth, the place where the High Commission  
 "Court is kept, and therefore he prayeth (and the rather for  
 "that he hath lately done some good service to the Church  
 "and State in discovering a number of Separatists and  
 "Schismatics, whereof divers were now in prison, and hoped to  
 "do better service in that kind hereafter) that he might be  
 "admitted to attend the Commission Court." The abstract  
 goes on "which the court well liked of, and that as occasion  
 "should serve he might have now and then prisoners com-  
 "mitted thither, to which he was assigned to attend the court  
 "accordingly."

No doubt the gaoler regarded the prisoners as a source of  
 profit, used all possible means to get them arrested, and was  
 rewarded by having them "now and then" committed to his  
 custody.

These illustrations, which might be indefinitely increased,  
 are enough to enable us to understand the recitals of the act

<sup>1</sup> 1635-1636, p. 92.



CH. XXV. by which the Court of High Commission was dissolved, 16  
 Chas. 1, c. 11, A.D. 1640. The act recites the provisions of the  
 act 1 Eliz. c. 1, and then proceeds as follows: "And whereas  
 "by colour of some words in the aforesaid branch of the said  
 "act, whereby commissioners are authorised to execute their  
 "commission according to the terms of the king's letters  
 "patent, and by letters patent founded thereupon, the said  
 "commissioners have to the great and insufferable wrong and  
 "oppression of the king's subjects used to fine and <sup>1</sup>imprison  
 "them, and to exercise other authority not belonging to  
 "ecclesiastical jurisdiction." The act goes on to take away  
 all coercive jurisdiction whatever from all the ecclesiastical  
 courts. It repeals the provision in the statute of Elizabeth,  
 and forbids the erection of any new court like the Court of  
 High Commission for the future in England and Wales.

The minor ecclesiastical courts fell by the same blow, for  
 s. 4 enacts that no ecclesiastical judge should "award, impose,  
 "or inflict any pain, penalty, fine, amerciamment, imprisonment,  
 "or other corporal punishment upon any of the king's subjects,"  
 for anything belonging to spiritual cognizance. The act also  
 took away the *ex officio* oath. During the interval between  
 1640 and 1661 there were accordingly no ecclesiastical courts,  
 but in 1661, by 13 Chas. 2, c. 12, s. 1, it was "declared and  
 "enacted" that neither this act nor anything contained in  
 it doth or shall take away any ordinary power or authority  
 from any of the said ecclesiastical judges, and the statute was  
 repealed except as to the Court of High Commission. Its  
 provision as to the *ex officio* oath, was, however, re-enacted by  
 s. 4. It is probable that the declaratory form was given to  
 this statute by way of suggesting that the parliament had  
 no power to deprive the ecclesiastical courts of their jurisdic-  
 tion, but however this may have been, the result of the  
 abolition of the *ex officio* oath was to put an end practically to  
 the powers of the ecclesiastical courts, although they still  
 retain them in theory. To this day there is no legal reason

<sup>1</sup> The imprisonments which I have noticed in the Act Books seem to  
 be principally, if not always, by way of arrest, to compel the giving  
 of security for the payment of fines, performance of penance, &c. I have  
 not noticed a case of a sentence of imprisonment for a fixed time by way of  
 punishment.

why any ecclesiastical court in England should not try any person for adultery or fornication and enjoin penance upon them, to which <sup>1</sup> they must submit under pain of six months' imprisonment. No doubt, however, the first proceeding of the kind would be the last—the public would not endure it.

The whole of the ecclesiastical ordinary jurisdiction did not fall at once, nor did all of it remain untouched till the year 1640. It was always a recognised principle of law that the ecclesiastical courts should not try men for temporal offences, and that if they did so they might be restrained by a writ of prohibition. As some of the crimes with which they concerned themselves came to be regarded as temporal offences of importance they were made felonies by statute, and thus the ecclesiastical courts lost jurisdiction over them. This was the case with several offences.

The earliest enactment of this kind I believe to have been <sup>2</sup> 25 Hen. 8, c. 6 (1533), which makes unnatural offences felony, reciting in the preamble that "there is not yet sufficient and condign punishment appointed by the due course of the laws of this land" for such offences. It is true that <sup>3</sup> Fleta, Britton, and the Mirror mention the offence, the first mentioning burying alive, the other two burning, as the punishment. This is one of many reasons which points to the conclusion that the early writers frequently stated as actual law either what they thought ought to be the law, or what they found laid down as law by canonists or civilians. A well-known <sup>4</sup> passage in the *Germania* of Tacitus presents a parallel which may be merely accidental to Fleta's notion about burying alive. <sup>5</sup> Burning was the punishment inflicted by the Theodosian Code. The statute of Henry VIII. is wholly inconsistent with the opinion that the authors cited stated the law correctly, whereas it is not only consistent with

<sup>1</sup> 53 Geo. 3, c. 127, ss. 1-3.

<sup>2</sup> Repealed by 1 Edw. 6, c. 12, which repealed (s. 4) all statutes making new felonies in Henry VIII.'s reign, but revived by 5 Eliz. c. 17, A.D. 1562.

<sup>3</sup> Quoted in Coke, *Third Institute*, 58.

<sup>4</sup> "Ignaros et imbelles et corpore infames coeno ac palude injecta insuper crate mergunt."—*Germania*, c. xii.

<sup>5</sup> "Hujusmodi scelus expectante populo flammis vindicibus expiabunt."—Gotofred's *Codex Theodosianus*, iii. 68.

CH. XXV. but suggests the notion that the offence was till then <sup>1</sup> merely ecclesiastical.

In connection with this matter I may observe that the only reason which I can assign why incest in its very worst forms is not a crime by the laws of England is that it is an ecclesiastical offence, and is even now occasionally punished as such. It is, I believe, the only form of immorality which in the case of the laity is still punished by ecclesiastical courts on the general ground of its sinfulness.

Bigamy continued to be an ecclesiastical offence exclusively till the year 1603, when it was made felony with benefit of clergy by 1 Jas. 1, c. 11. This act remained in force till modern times, when it was repealed and re-enacted by 9 Geo. 4, c. 31, s. 22, which enactment was treated in the same way by 24 & 25 Vic. c. 100, s. 57. In the proposed alteration of law under the Commonwealth it was proposed that bigamy should be punished with death.

Speaking defamatory words continued to be an offence cognizable in the ecclesiastical courts till our own days. The courts <sup>2</sup> lost their jurisdiction over it by an act passed in 1855, 18 & 19 Vic. c. 41.

The last of the ecclesiastical offences which I need notice, which became an offence by statute, was one which had a strange and terrible history, namely, witchcraft. The few cases of this offence which are noticed in Archdeacon Hale's work are, as I have already shown, rather instances of trifling superstitions than what was afterwards hated and dreaded as witchcraft, namely, the infliction of bodily harm by supernatural

<sup>1</sup> The Penitentiaries published in Thorpe abound in provisions as to penance for this offence. In Foxe's *Acts and Monuments*, vol. ii. p. 169, it is said that Anselm made an "act synodal" on this subject, that he was persuaded not to publish it, or to recall its publication, on the ground that it would attract attention to the subject, and do more harm than good; that he acted upon this advice, and that the enforced celibacy of the clergy aggravated the evil. In 2 *Rot. Par.* 832a, No. 58 (A.D. 1376), a complaint occurs that the Lombards had introduced the practice into England, "Par quoi le Roialme ne poet failer d'estre en brief destruyte si redde corrigeant ne soit sur icell hastivement ordeignez."

<sup>2</sup> I remember one of the last cases under the old law. It occurred when I was at Cambridge, about the year 1850. Some one had talked scandal of a clergyman near Cambridge, who was unwise enough to prosecute the offender in the ecclesiastical court, which enjoined upon him penance in the church in a white sheet. The offender blacked his face, got drunk with a number of friends, and made a disgraceful scene in the church, which ended in a riot. Whether this was the immediate occasion of the act I do not know.

means. This offence came in process of time to be regarded with special horror, and to be believed in with an ardour and eagerness which it is now hard to understand. It is regarded by Mr. Lecky as a natural result of religious excitement, by which the minds of men were directed to the unseen world. However this may be, the first act passed upon the subject was 33 Hen. 8, c. 8 (A.D. 1541). This act makes it felony to practise or cause to be practised conjuration, witchcraft, enchantment or sorcery, to get money; or to consume any person in his body, members, or goods; or to provoke any person to unlawful love; or for any other unlawful purpose; or for the despite of Christ or lucre of money dig up or pull down any cross, or to declare where goods stolen be. In his <sup>1</sup> *Essay on Witchcraft* Hutchinson suggests that this act, which was passed two years after the act of the Six Articles, was intended as "a hank upon the reformers," that the part of it to which importance was attached was the pulling down of crosses, which, it seems, was supposed to be practised in connection with magic. Hutchinson adds that the act was never put into execution either against witches or reformers. The act was certainly passed during that period of Henry's reign when he was inclining in the Roman Catholic direction. Upon Edward VI.'s accession this act, together with all the others of Henry VIII.'s reign which created new felonies, was repealed, and no further legislation on the subject took place till 1562, when was passed 5 Eliz. c. 16. This was one of <sup>2</sup> several acts which revived acts of Henry VIII., repealed either by Edward or by Mary. <sup>3</sup> It recites the act of Henry VIII., its repeal, and the subsequent increase of witchcraft, and it makes it felony without benefit of clergy (1) to use, practise, or exercise any invocations or conjurations of evil or wicked spirits to any intent whatever. (2) To use, practise, or exercise any witchcraft, enchantment, charm, or sorcery whereby any person happens to be killed or destroyed. It also provides that every one shall be liable to a year's imprisonment and six hours' pillory, and on a second offence

<sup>1</sup> Hutchinson's *Essay on Witchcraft*, 216.

<sup>2</sup> c. 10 revives 21 Hen. 8, c. 7, which first made embezzlement by a servant felony. c. 10 revives 25 Hen. 8, c. 6, against unnatural crimes.

<sup>3</sup> Hutchinson misstates the effect of this act.

CH. XXV. to be a felon without clergy, who uses any witchcraft, enchantment, &c., whereby any person happens to be wasted, consumed, or lamed in his body or member, or whereby any goods or chattels of any person are destroyed, wasted, or impaired. This act increases the severity of Henry VIII.'s act as to invocations of spirits, but diminishes it as to witchcraft by other means. Thus to invoke an evil spirit merely in order to satisfy curiosity would not have been a crime under the act of Henry VIII., but would have been felony without benefit of clergy under the law of Elizabeth. On the other hand, to use witchcraft to provoke unlawful love would be felony without benefit of clergy under the act of Henry, and on the first offence a misdemeanour under the act of Elizabeth. These variations are curious, and in the present day unintelligible. In his list of trials for witchcraft, Hutchinson mentions five cases of convictions under this statute. <sup>1</sup> One case occurred at Cambridge in 1560, <sup>2</sup> another at Abingdon in 1575, <sup>3</sup> another in 1576 in Essex, <sup>4</sup> another in 1593 also in Essex, and another in <sup>5</sup> Lancaster in 1597. These are the only cases which Hutchinson, writing early in the eighteenth century, seems to have been able to discover as having occurred in the last part of the sixteenth.

The law relating to witchcraft was most severe, and trials for the offence most common in the seventeenth century. In Scotland the prosecution of witches was undertaken at an earlier period than in England, and their punishment was more severe. <sup>6</sup> The articles of Justice-Aire for Jedworth in 1510 include the inquiry "gif thair be ony wichecraft or "sossary wysyt in the realme," and instances occur in which witches were burnt in <sup>7</sup> 1572 and 1576. James I. before his accession to the throne of England greatly busied himself with witchcraft. <sup>8</sup> Hutchinson says, "In the twenty-third year

<sup>1</sup> P. 39.

<sup>2</sup> P. 35. Some person connected with this case seems to have said that "with his sword and buckler he killed the devil, or at least wounded him so sore that he made him stink of brimstone."

<sup>3</sup> P. 38. "Seventeen or eighteen were condemned on this occasion. An account of this was written by Brian Darcy, with the name and colours of their spirits."

<sup>4</sup> P. 42. This was the case of the witches of Warbois. See Hutchinson, pp. 180-189, a horrible story.

<sup>5</sup> P. 44.

<sup>6</sup> Pitcairn's *Criminal Trials*, i. 66æ.

<sup>7</sup> Pitcairn, i. 38 (Borgman's case), 49 (Bessie Dunlop's case). <sup>8</sup> P. 223.

“ of his age he had the examination of Agnes Simpson, CH. XXV.  
 “ commonly called the wise wife of Keith, and of several  
 “ others who confessed themselves guilty of witchcraft.”

Some years afterwards he published his *Dæmonologia*, and Hutchinson conjectures, not improbably, that the act passed immediately after his accession (1 Jas. 1, c. 12, A.D. 1603), was more or less by way of a compliment to his special tastes and acquirements. The offences which it punishes are as follows:—

(1) To use, practise, or exercise any invocation or conjuration of any wicked or evil spirit.

(2) To consult, covenant with, entertain, employ, feed, or reward any evil or wicked spirit to or for any intent or purpose.

(3) To take up any dead man, woman, or child out of the grave or other place where the “ body rests, or the skin, bone, “ or <sup>1</sup> any part of a dead person to be employed or used in any “ manner of witchcraft, sorcery, charm, or enchantment.”

(4) To use, practise, or exercise any witchcraft, enchantment, charm, or sorcery, <sup>2</sup> whereby any person shall be killed, destroyed, wasted, consumed, pained, or lamed in his body.

All these offences were under the act of James felonies without benefit of clergy. A considerable number of prosecutions took place at intervals under this act, to some

<sup>1</sup> These words, says Hutchinson, were probably suggested by part of the confession of Agnes Simpson, “ Then they opened their graves, and took the “ fingers and toes and noses of the dead people,” &c.

<sup>2</sup> This provision fell far short in point of severity of the Scotch law, according to which any kind of witchcraft was a capital crime. In Pitcairn (vol. iii. part ii. pp. 555-558) there is an account of a certain Thomas Greave, who was “ dilaitit for cureing of the persons following by sorcery and witch- “ craft,”—to wit, fifteen specified persons. One or two instances may be given. “ Item, for cureing of one woman, duelland besyde Margaret Douglas, of one “ grit and panefull seiknes by drawing her nine times backward and ford- “ ward by the leg.” Another offence was “ that whereas one Elspeth Thom- “ son was visseit with one grievous seiknes,” Greave promised to cure her if two of her brothers would walk with him twelve miles at night, and not speak, and whatever they saw “ nawayes to be effrayed.” Greave took the woman’s shift and her two brothers to a place twelve miles off, “ and at the “ ffurde” (ford) “ be-ist Burley in one south-rynnig watter he thaur wusche “ the sack; during the time of the quhilk wasching of the sack there was one “ grit noise maid be foullis on the lytte beistis” (water-fowl, or little beasts— snipe, *e.g.*) “ that arraise and flichtered in the water.” The woman, on putting on the shift was cured. For this Greave was sentenced to be “ taen “ to the Castell-hill of Edinburgh and thair to be wirrait” (worried—strangled) “ at ane stake quhill he be deid, and his body thaireafter to be burnt to ashes.” This was in 1623.

CH. XXV. of which I have already referred for other purposes. The most notable instances are <sup>1</sup> the case of the Lancashire witches in 1634, and the case of the witch trials in Norfolk and the other eastern counties in 1644 and 1645, in which about fifty persons in all were executed.

The case of the Lancashire witches was a good instance of the horrible cruelty involved in the very nature of laws against witchcraft. Seventeen persons were condemned to death on the evidence of a single witness, who afterwards admitted his imposture and perjury. Their lives were saved only by the good sense of the judge. The prosecutions in the eastern counties involved the death of a large number of innocent persons. Probably the ease with which a belief in their criminality was produced was due to a great extent to the passionate religious excitement of the period, and to the support which a belief in witchcraft was supposed to, and no doubt did really, give to many of the religious theories of the time.

The evidence on which they were convicted seems to have consisted principally of confessions obtained by torture. A wretch of the name of Hopkins made himself specially conspicuous in the work of extorting such confessions. That they were ever received in evidence is infinitely disgraceful to all who were responsible for it. Torture had been solemnly declared to be illegal in Felton's case, and even if it ever had any colour of law at all it was only when it was inflicted by a special warrant from the king in council. The brutalities of Hopkins and others like him were devoid of the faintest shadow of legal authority, and constituted crimes for which those who were guilty of them might and ought to have been punished.

The readiness with which religious people in the seventeenth century gave way to cruel superstitions and the fierce fanaticism with which they insisted on the reality of witchcraft are a stain upon them and on their religion. Those who laughed at the ridiculous nonsense which the witchfinders believed in were wiser, and, as far as that matter went, better than those who prayed and groaned over it.

<sup>1</sup> Hutchinson, 264. See also Ewald's *Stories from the State Papers*.

A considerable number of isolated cases of convictions for witchcraft took place in the seventeenth century. The following are the cases mentioned by Hutchinson. <sup>1</sup> Two at Salisbury in 1653, and one about the same time at Ipswich; two at Bury in 1655, and one in Somersetshire, another in Norfolk, and others in Cornwall in 1658; <sup>2</sup> two at Lancaster in 1659, <sup>3</sup> one at Taunton in 1663, two at Bury (this was the case tried by Sir Matthew Hale) in 1664, <sup>4</sup> one condemned at Ely but reprieved in 1679, three hanged at Exeter in 1682 (this was the last execution known to Hutchinson in England. It was not, however, by any means the last trial.) <sup>5</sup> Three women were tried before Holt, L.C.J., in Somersetshire in 1691, and <sup>6</sup> another at Bury, and another at Ipswich, both before the same judge, in 1694. <sup>7</sup> He also tried a case at Launceston in 1695, and at Exeter in 1696. <sup>8</sup> He also tried a woman at Guildford in 1701. In all these cases there were acquittals. The last case in which a conviction for witchcraft took place in England seems to have been that of <sup>9</sup> Jane Wenham, who was sentenced to death for witchcraft at Hertford in 1712.

<sup>1</sup> P. 51.<sup>2</sup> P. 52.<sup>3</sup> P. 54.<sup>4</sup> P. 56.<sup>5</sup> P. 58.<sup>6</sup> P. 59.<sup>7</sup> Pp. 60-62.<sup>8</sup> P. 63.

<sup>9</sup> P. 163. Hutchinson thus mentions in all fifteen cases, in which twenty-three persons at least were accused between 1653 and 1712. Probably the list is incomplete. Hutchinson says that Chief Justice Holt lent him the notes of four of the trials (p. 62). There may have been other cases of which he had not heard, as it seems improbable that one judge should try all the cases of a particular kind which happened in a series of years. Hutchinson sums up the result of his inquiries thus:—"In this collection that I have made it "is observable that in 108 years from the statute against witchcraft in the "33 Hen. 8, till 1644, when we were in the midst of our civil wars, I find "but about fifteen executed. But in the sixteen years following" (1644-1660) "when the government was in other hands, there were 109, if not more, "condemned and hanged. In the five years following" (1660-1665) "before "the late notions were well considered, I find five witches condemned, and "three of them, if not all five, executed; and three after, at Easter, 1682. "Since then, that is, in thirty-six years last past" (so that this was written in 1718) "I have not met with one witch hanged in England." This, according to Dr. Parr, is an error. He says (*Works*, iv. 181), "I know not that "Judge Powel was a weak or hardhearted man, but I do know that . . . this "judge in 1712 condemned Jane Wenham at Hertford, who, in consequence "perhaps of a controversy that arose upon her case than of any interposition "of Powel, was not executed; and that four years afterwards he at Hunting- "don condemned for the same crime Mary Hicke and her daughter Elizabeth, "an infant of 11 years old, who were executed on Saturday, 17th July, 1716. ". . . Two unhappy wretches were hung at Northampton the 17th of March, "1705, and upon July 22, 1712, five other witches suffered the same fate at the "same place." Parr's authority for these statements is Gough's *British Topography*, ii. 255, but it does not warrant his assertion. If these cases had really happened, Hutchinson writing in 1718 must have known of them. By my calculation, the 17th July, 1716, was not a Saturday but a Thursday.



CH. XXV. The judge, however, respited her, and procured a pardon. The act of James continued in force till 1736, when it was repealed by 9 Geo. 2, c. 5, which also enacted (s. 2) that no prosecution, trial, or proceeding shall be commenced or carried on against any person for witchcraft, enchantment, or conjuration. The effect of this section was to prevent the prosecution of witchcraft even as an ecclesiastical offence. The act contains a section still in force for the punishment of persons "pretending to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration" or to discover stolen or lost property by "any occult or crafty science."

The result of this long history may be thus shortly summed up. The function of the ordinary ecclesiastical courts was to punish offences against religion and morals, in a word to punish sin as such. This function they discharged with little interruption till the year 1640, and during the latter part of the period they united with it the function, half political, half theological, of enforcing ecclesiastical conformity and suppressing writings and words opposed to the system established by law. The resistance provoked by these efforts and the intense unpopularity of their method of procedure brought the whole system to the ground. It was revived to a very limited extent in 1660, and still retains a shadowy existence as against the laity, though it has fallen into complete desuetude in regard to them, except in the single case of incest.

As regards the other offences with which the ecclesiastical courts used to deal, two, namely, unnatural offences and bigamy, were withdrawn from the ecclesiastical courts, the first in the reign of Henry VIII. and the second in that of James I., by statutes the equivalents of which are still in force. Witchcraft in its more aggravated forms became a statutory offence under Henry VIII., and ceased to be even an ecclesiastical offence by virtue of the act of 1736. The speaking of defamatory words continued to be an ecclesiastical offence till 1855, when the jurisdiction of the ecclesiastical courts in that matter was abolished.

As instruments of Church discipline the ecclesiastical courts are still in full force. The law under which a beneficed clergyman is admonished, suspended, or deprived, for im-

morality or intemperance, is precisely the same as the law CH. XXV.  
under which the laity were liable to be enjoined to do penance before the year 1640, though the procedure against clergymen who are guilty of any impropriety is now regulated chiefly by the Church Discipline Act of 1840 (3 & 4 Vic. c. 106). Practically the Church courts have thus in the course of their long history changed from being courts of law, having authority over the sins of all the subjects of the realm, to special courts for enforcing propriety of conduct upon the members of a particular profession.

There is, however, one ecclesiastical offence with which I have still to deal, as it has a history of its own of the highest interest and importance, and as it is connected with all the most stirring epochs of our history.

In order to show the connection between the ancient ecclesiastical courts, the court of high commission, the ecclesiastical courts of our own days, and that branch of the criminal law which has been substituted by statute for part of the old ecclesiastical criminal law, I have passed over what in one point of view may be regarded as the most important and curious part of the subject. I refer to the laws by which, through a great part of our history, religious opinions regarded from time to time as heretical, were made the subject of legal punishment.

The general outline of the history of prosecutions for this offence is of course well known, but I am not aware that it has as yet been considered from the legal point of view. The unexpressed assumption on which all legislation and government from the conversion of the English from heathenism to our own days has proceeded, has been the truth of Christianity. What specifically Christianity is? and by whom and how questions relating to it are to be determined? has been the subject of passionate controversy. Indeed for upwards of three hundred years the controversy has been so eager that since 1688 government has been carried on as far as possible without prejudice to differences of opinion which, in earlier times, were regarded as altogether fundamental. Even in our own days it is an offence for any person brought up as a Christian to deny the truth of Christianity, however

CH. XXV. respectfully ; and the present generation is the first in which an avowed open denial of the fundamental doctrines of the Christian religion has been made by any considerable number of serious and respectable people. For many centuries the maintenance, or even the expression of opinions, suspected or supposed to involve a denial of the truth of religion in general, was regarded in the same kind of light as high treason in the temporal order of things. A man who did not begin by admitting the king's right to obedience and loyalty, put himself out of the pale of the law. A man who did not believe in Christ or God put himself out of the pale of human society ; and a man who on important subjects thought differently from the Church, was on the high road to disbelief in Christ and in God, for belief in each depended ultimately upon belief in the testimony of the Church. In our own days the physical sanctions of the law are so much more frequently appealed to, and are so much more effective than its moral sanctions, that it is only by an effort that we can understand the horror with which our ancestors regarded a man who held opinions which, in their view, were inconsistent with a real hearty assent to the principles on which they believed all human society, whether spiritual or temporal, to repose. For many centuries there was hardly any distinct law against heresy in England, because there were hardly any heretics. There was a general understanding as to what constituted Christianity, and it was unnecessary to define it, just as from the Reformation till our own time there was in the formularies of the Church of England no definite doctrine about the Bible and its authority. By degrees questions arose and definitions were attempted, with what results I shall now attempt to show.

The laws of the early English kings contained a few provisions against heathenism. Thus the laws of <sup>1</sup>Edward and Guthrum provide "if any one violate Christianity or reverence heathenism by word or by work, let him pay as well wer as wite or lah-slit according as the case may be." <sup>2</sup>Ethelred enacted : "This, then, is first, that we all love and worship one God, and zealously hold one Christianity, and

<sup>1</sup> Edward and Guthrum, Thorpe ii. 72.    <sup>2</sup> Ethelred v. Thorpe i. p. 129.

“every heathenship totally cast out.” <sup>1</sup> Cnut, in a law CH. XXV.  
 already quoted, says: “And we earnestly forbid every  
 “heathenism; heathenism is that men worship idols; that  
 “is, that they worship heathen gods, and the sun or the  
 “moon, fire or rivers, water-wells or stones, or forest-trees of  
 “any kind; or love witchcraft, or promote morth-work in  
 “anywise, or by <sup>2</sup> ‘blot’ or by <sup>2</sup> ‘fyrht,’ or perform anything  
 “pertaining to such illusions.”

Heresy is occasionally referred to in the Penitentiaries; for instance, the *Liber Penitentialis* of Theodorus, Archbishop of Canterbury, said to have been written between 668 and 690, contains an article <sup>3</sup> “De Communionem Hereticorum,” in which various penances are appointed for communicating with heretics, but they are not pointed at any particular heretics, and may have been copied from some foreign authority. Heresy is also referred to in the <sup>4</sup> *Canons of Alfric*, and also in his <sup>5</sup> *Pastoral Epistle*, but in each case in a historical way, and as a man speaks of something past. “Many synods have been held since, but these four are the principal, because they extinguished the heretical doctrines which the heretics heretically invented against God.”

These scattered notices of heathenism and heresy are the only traces that I know of any law upon the subject of heresy in England before the Conquest. For several centuries after that event the references to heresy are even slighter. The following are the only ones referred to either by Foxe, by Coke, or by Hale, each of whom has gone into this matter minutely.

The following passage occurs in <sup>6</sup> *Bracton de Corona*. After describing the privilege of the clergy in a passage already quoted, Bracton proceeds to say that when a clerk is degraded for any offence, he is not, in common cases, to be subjected to any further punishment, as degradation is punishment enough. He then adds, “Nisi forte convictus fuerit de apostasia quia tunc primo degradetur, et postea per manum laicalem com- buretur secundum quod accidit in concilio Oxon̄ celebrato

<sup>1</sup> Cnut, 5; Thorpe, i. 379.

<sup>2</sup> Mr. Thorpe considers these words unintelligible.

<sup>3</sup> Thorpe, ii. 38.

<sup>4</sup> *Ib.* ii. 343-344.

<sup>5</sup> *Ib.* ii. 373-375.

<sup>6</sup> Bracton, vol. ii. p. 300.

CH. XXV "a bonæ memoriæ S. Cantuarenſi archiepiſcopo, de quodam  
 "diacono qui ſe apſtatauit pro quadam Judæa, quicum eſſet  
 "per epiſcopum degradatus ſtatim fuit igni traditus per  
 "manum laicalem."

<sup>1</sup> Nothing else whatever is known of this transaction or of the council at which it is ſaid to have taken place. The caſe is important becauſe it will be found that ſeveral centuries afterwards great weight was attached to it as a precedent. It is poſſible that the apoſtaſy may have conſiſted only in an improper connection with the Jeweſs, for there is at leaſt <sup>2</sup> one authority for ſaying that ſuch a relation was about that time looked upon in a light which would make it likely to be ſtigmatised as "apoſtaſy."

With this ſolitary exception there is no evidence to ſhow that till the end of the fourteenth century any other provision was made for the puniſhment of heresy than ſuch as was afforded by the ordinary eccleſiaſtical courts, and their power of enjoining penance in the manner already deſcribed. <sup>3</sup> Hale, indeed, refers to two caſes mentioned in the *Close Rolls* in which perſons are ſaid to have forfeited their goods to the king's uſe upon a conviction for heresy, but theſe he regards as of queſtionable authority. He alſo refers to two paſſages in the chronicles of the reign of Henry II. where it is ſtated that heretics were baniſhed; but theſe references are vague and unſatisfactory in the extreme.

Though the power of the Church Courts was thus narrowly limited, they made efforts to enlarge it. During the thirteenth and fourteenth centuries the <sup>4</sup> Canon law was brought

<sup>1</sup> Foxe, ii. 374, ſays, "In the town of Oxford, where the king" (Henry III.), "then kept his court, Simon" (a miſtake for Stephen) "Langton held "a council, where was condemned and burned a certain deacon, as Nicholas Trivet ſays, for apoſtaſy. Alſo another rude countryman, who had crucified "himſelf, and ſuperſtitioſly bare about the wounds in his feet and hands, "was condemned to be cloſed up perpetually within walls." Langton was Archbiſhop of Canterbury from 1206 to 1228.

<sup>2</sup> Fleta, i. c. 35. "Contrahentes cum Judæis et Judæiſis, pecorantes et Sodomite in terra vivi confodiantur." The author of the *Mirror* deſcribes unnatural crimes as a kind of "majesty . . . againſt the King of heaven."

<sup>3</sup> 1 Hale, P. C. 394.

<sup>4</sup> The *Corpus Juris Canonici* includes Gratian, 1151; Gregory IX.'s decretals, 1230; Sixtus decretalium, 1298; the Clementine Conſtitutions, and extravagantes Joannis, 1317. The Engliſh canon law conſiſted partly of the ordinary canon law, ſo far as it was received here, and partly of conſtitutions enacted at national ſynods by Cardinals Otho and Othobon, about the years 1220 and

into shape, and in a certain modified sense introduced into England. The Canonists, of whom Lyndwood was the highest authority, took their views of heresy from this body of law. The continental canon law assumed the existence of the continental civil law. The provisions of this system as to heresy went back to the <sup>1</sup>Theodosian Code, which punished with death, under certain circumstances, the Manichæans, the Donatists, and other heretics, and contained a multitude of provisions as to lighter punishments in particular cases. The Emperor Frederic Barbarossa (1154-77) was understood by <sup>2</sup>Lyndwood to have made a law that "indistincte illi qui "per Judicem ecclesiasticum sunt damnati de hæresi, quales "sunt pertinaces et relapsi, qui non petunt misericordiam "ante sententiam sunt damnandi ad mortem per sæculares "potestates, et per eos debent comburi et in igne cremari." In short, the view of the Canonists in England, as elsewhere, was, that it was the right of the ecclesiastical courts to try and convict heretics and the duty of the civil power to act as their executioners. This, for a considerable time, was not admitted by the law of England. <sup>3</sup>Hale observes, "As to the "penalties by the Canon law (*i.e.* the English Canon law), "they go no further than ecclesiastical censures, imposition "of penance, excommunication, and a deprivation of eccle- "siastical benefices, but yet they" (the Canonists) "made "bold by some of their constitutions to proceed further, and "indeed further than they had authority; such were, among "others, imprisonment by the Ordinary, and confiscation of "goods, but whether they adventured hereupon only in sub- "servience to civil constitutions, or whether by their own "pretended power, may be doubtful; but howsoever it is so "decreed by their canons and constitutions."

Such were the views of the Canonists on the one hand, and

1268, and partly of provincial constitutions, or decrees of convocation, made at different times, from Stephen Langton's days down to the days of Archbishop Chichele, in the reign of Henry V. These, however, had no force except as far as they were recognised and adopted by the king and parliament. Thus limited they were so vague that it is almost hopeless to say how far the canon law upon any given point was and is in force or not. (Blackstone, i. pp. 82-83).

<sup>1</sup> Book xvi. tit. v. Gothofred, v. pp. 116-122, in his paratitlon or abridgment, gives an abstract of the mass of legislation on this subject.

<sup>2</sup> Quoted by Hale, i. p. 388.

<sup>3</sup> *Ib.* p. 488.

CH. XXV. of the common lawyers on the other, between the reign of Edward III. and that of Richard II. During all this period there was an extreme jealousy on the one side against the introduction of either the Roman civil law or the Roman canon law into this country; and on the other side a corresponding desire to introduce them.

<sup>1</sup>The destruction of the Albigenses appears to have produced almost no effect upon the state of the laws of this country, but it was very different with the Lollards. Wickliff's great contest with the clergy of his day began about <sup>2</sup>1377, when he was deprived of his benefice, and continued till his death in 1384. Various articles taken from his works were condemned as heretical by Pope Gregory XI., who by a <sup>3</sup>bull in 1378, denounced him as a heretic, and ordered him to be apprehended and detained in the custody of the Archbishop of Canterbury. He also addressed a letter to Richard II. calling upon him to assist the archbishop. The bishops cited Wickliff but were ordered not to proceed. Gregory XI. died, and the proceedings came to nothing. Archbishop Courtney procured the condemnation, as heretical, of <sup>4</sup>various opinions ascribed to Wickliff, and called upon the Bishop of London to "extirpate" these heretical opinions, and to order every one to shun all who taught them "as he would avoid a serpent putting forth most pestiferous poison." This was to be "under pain of the greater curse which we command to be thundered against all and every one who shall be disobedient in this behalf." Two of Wickliff's disciples, Herford and Reppington, were excommunicated in

<sup>1</sup> End of Albigensian crusade, 1229.

<sup>2</sup> Foxe, ii. 797.

<sup>3</sup> Foxe, iii. pp. 5-7. "John Wiclif" . . . "vomiting out of the filthy dungeons of his breast" . . . "most wicked and damnable heresies."

<sup>4</sup> Foxe, iii. pp. 21-23. One opinion was "that God ought to obey the devil." On which Foxe's editor gravely observes, "this article is either slanderously reported, or else can hardly be defended." The "hardly" seems unnecessarily cautious. At p. 30 a sort of explanation occurs. Certain Wickliffites, "being asked whether God owed any manner of obedience to the devil or not, they answered, 'Yea, as the obedience of love, because he loveth and punished him as he ought.' And to prove that God ought so to obey the devil they offered themselves to the fire." It is hard to say which is most obscure, the doctrine, the explanation of the doctrine, or the connection between the doctrine and the argument proposed in proof of it. It possibly may have been intended as the strongest imaginable illustration of the proposition that the obligations of morality are universal, extending even to the relations between God and the devil.

1382, but no temporal consequences appear to have followed. CH. XXV.  
 Upon this <sup>1</sup>Foxe makes the following observation: "The  
 "archbishop, not yet contented with this, doth moreover,  
 "by all means possible, solicit the king to join withal the  
 "power of his temporal sword, for that he well perceived that  
 "hitherto the popish clergy had not authority sufficient by  
 "any public law or statute of this land, to proceed unto  
 "death against any person whatsoever in case of religion, but  
 "only by the usurped tyranny and example of the Court of  
 "Rome." Foxe's hatred of popery has somewhat lowered his  
 authority in a generation which likes to sympathise with and  
 understand everything, but I think that in this instance he  
 was right, and that Hale, who long afterwards affirmed the  
 existence at common law of a power to burn heretics by a  
 writ called the writ *de hæretico comburendo*, was wrong. It is  
 to me incredible that Wickliff and his followers should have  
 been allowed to go unpunished after the pope and the Arch-  
 bishop of Canterbury had solemnly declared their doctrines  
 to be heretical, and after some of them had been solemnly  
 excommunicated, if any means of punishing them had been  
 known to the law. The utmost, therefore, that could be  
 done was to excommunicate them, for which, in itself, they  
 did not care. It would no doubt have been possible to enjoin  
 upon them the performance of penance, as, for instance, by  
 publicly renouncing their heretical opinions, and to have im-  
 prisoned them till their penance was performed under the writ  
*de excommunicato capiendo*. This might have been thought  
 sufficiently severe, but I suppose that the clergy thought it  
 was not enough, and that in any case the lay courts would be  
 slow to afford their assistance, and might altogether refuse it.

At all events the clergy proceeded, in 1382, to a measure  
 which can probably not be paralleled in the history of  
 England. They forged an Act of Parliament, which appears  
 in the Statute Book as 2 Rich. 2, c. 5. It recites that  
 "divers evil persons" go about preaching heresy, who, when  
 cited before the ordinaries, refuse to obey their summons,  
 and "expressly despise" the censures of the Church. It  
 then proceeded to enact that the king's commissions are to

<sup>1</sup> Foxe, iii. p. 35.



CH. XXV. be directed to sheriffs and others, "according to the certifications of the prelates thereof to be made in the chancery from time to time, to arrest all such preachers, and all their factors, maintainers, and abettors, and to hold them in arrest and strong prison till they will justify them according to the law and reason of holy Church." Though published as an act of parliament, this measure was not entitled to the name, for, as <sup>1</sup>Coke says, it was never assented to by the Commons. He adds that in the next Parliament "the Commons preferred a bill reciting the said proposed act, and constantly affirmed that they never assented thereunto, and therefore desired that the said supposed statute might be annulled and declared to be void, for they protested that it was never their intent to be justified by, and to bind themselves and successors to, the prelates more than their ancestors had done in times past; and hereunto the king gave his royal assent in these words, 'Pleist au Roi.'" This appears to have been taken by Coke from <sup>2</sup>Foxe, who gives what purports to be a translation of "an extract from the petition of the Commons." He adds that "such means were used by the prelates that this act of repeal was never published, nor ever since printed with the rest of the acts of that parliament." It is now printed in *3 Rot. Par.* p. 141, No. 53. It recites the statute and then proceeds: "Laquel ne fuist unques assentu ne grante par les *coēs*, mes ce q fuist ple de ce fuit sanz assent de lour. Qe celui estatut soit annienti, qar il n'estoit mie lour entent d'estre justifiez ne obliger lour ne lour successours as prelats plus q lour auncestres n'ont este en temps passez. Y plest au Roi."

The pretended statute gave no other power than that of arrest and imprisonment by the sheriffs on the order of the bishops, and this proves that before that time no such power existed.

It does not appear that during Richard II.'s reign anything beyond the ordinary process of the ecclesiastical courts was used for the punishment of heretics. An instance of what

<sup>1</sup> 12 Coke's *Rep.* pp. 56-58 (the case of heresy).

<sup>2</sup> iii. p. 87.

this amounted to is afforded by the case of<sup>1</sup> William Swinderly. He was convicted of heresy by the Bishop of Lincoln, "the friars" . . . . "bringing also dry wood with them to the town to burn him." He was put to penance, and forced to read a recantation in different churches in the diocese. He was afterwards tried again by the Bishop of Hereford for<sup>2</sup> heresy, and was excommunicated, from which sentence he appealed to the king and his council, and addressed "a fruitful letter" to the House of Commons. Foxe knew not what ultimately became of him, except that "this remaineth out of doubt, that during the life of King Richard II. no great harm was done unto him."

CH. XXV.

This confirms the opinion, that till the very end of the fourteenth century the only punishment for heresy in England was by process of the ordinary ecclesiastical courts.

Henry IV., according to one of our<sup>3</sup> latest historians, owed his crown to a tacit engagement with the nobles to renew the war with France, and to the clergy to persecute the Lollards. "The last pledge," says Mr. Green, "was speedily redeemed" by the passing of the act 2 Hen. 4, c. 15. This is true, but it is not the whole truth.

<sup>4</sup>In April, 1399, one William Chatris, or Sawtre, was convicted of heresy before the Bishop of Norwich, and put to penance by recanting his heresies in certain churches specified. On the 12th February, 1400, Arundel, then Archbishop of Canterbury, "in the presence of his council provincial," cited Sawtre before him, and questioned him as to his belief on eight Articles as to which he was said to hold heretical opinions. Sawtre had time allowed him to answer the Articles from Saturday till Thursday. On the Thursday he

<sup>1</sup> Foxe, iii. pp. 107-131.

<sup>2</sup> The proceedings are set out in Foxe, pp. 101-126. They run into a controversial form. There is also in Foxe a brief account of the proceedings before the same bishop against a layman, named Brute, who believed the pope to be Antichrist, and held many other views about the controversies of the day. He submitted (p. 137), but what ultimately became of him does not appear.

<sup>3</sup> Green's *History of the English People*, p. 258. Mr. Green is not technically accurate in speaking of Sawtre as "its" (the statute's) "first victim." See also Stubbs, *Const. Hist.* iii. 31, 32. The facts as to Sawtre are here stated correctly, but I do not think Mr. Stubbs appreciates the legal importance or bearing of the case.

<sup>4</sup> Foxe, iii. p. 225.

CH. XXV. was examined as to his opinions, and <sup>1</sup> affirmed the truth of the doctrines which were alleged against him as heretical. He was then convicted of heresy, and on the production and admission by Sawtre of the record of the previous conviction before the Bishop of Norwich, he was declared to be a relapsed heretic, and was degraded. <sup>2</sup> The sentence of degradation ends by saying, *inter alia*, "and for thy pertinency "incorrigible we do degrade thee before the secular court of "the High Constable and Marshal of England, being personally present . . . beseeching the court aforesaid that they "will receive favourably the said William unto them so "recommitted."

What the constable and marshal had to do with the matter I am unable to say. Possibly it may have been thought that as such proceedings as they took were regulated by the civil law, they were the proper persons to be concerned in a proceeding under the canon law; but, however this may have been, the king upon this conviction issued a writ, which is entered on the <sup>3</sup> Parliament Roll, for burning Sawtre. It is dated Wednesday, March 2, 1400, and is headed thus:—  
"Item. Mesme cette Mesquerdy, un brief feut fait as Meir

<sup>1</sup> His principal heresy was as to transubstantiation, on which he was closely cross-examined. Some of the questions and answers are given by Foxe, p. 224.  
"The [arch]bishop demanded of the same William if the same material bread being upon the altar, after the sacramental words being by the priest rightly pronounced, is transubstantiated into the very body of Christ or not? And the said Sir William said he understood not what he meant.  
"Then the said archbishop demanded whether that material bread, being round and white, prepared and disposed for the sacrament of the body of Christ upon the altar, wanting nothing that is meet and requisite thereunto, by virtue of the sacramental words being by the priest rightly pronounced, be altered and changed into the very body of Christ, and ceaseth any more to be material and very bread or not? Then the said Sir William, deridingly answering, said he could not tell.  
"Then consequently the archbishop demanded whether he would stand to the determination of the holy Church or not, which affirmeth that in the sacrament of the altar, after the words of consecration being rightly pronounced by the priest, the same bread, which before in nature was bread, ceaseth any more to be bread? To this interrogation the said Sir William said that he would stand to the determination of the Church, where such determination was not contrary to the will of God.  
"This done, he demanded of him again what his judgment was concerning the sacrament of the altar, who said and affirmeth that after the words of consecration by the priest, duly pronounced, remained very bread and the same bread which was before the words spoken.  
"And this examination about the sacrament lasted from 8 o'clock until 11 o'clock or thereabouts of the same day."

<sup>2</sup> It is very long, see Foxe, pp. 227-228.

<sup>3</sup> 3 *Rot. Par.* p. 459a.

“ et Viscontz de Londres, par advis des Seigneurs Temporelx CH. XXV.  
 “ en Parlement, de faire execution de William Sawtre, jadys  
 “ chapelein heretic, dont le tenour s'en suyte.” The writ  
 recites the conviction of the archbishop and bishops “ in  
 “ concilio suo provinciali conjugat’,” and commands the mayor  
 and sheriffs “ quod prefatum Willielmum in custodia vestra  
 “ existen’ ” (nothing is said of the constable and marshal)  
 “ in aliquo loco publico et aperto infra libertatem civitatis  
 “ prædictæ, causâ premissâ, coram populo publice igni com-  
 “ mitti ac ipsum in eodem igne realiter comburi fac’.” The  
 writ is tested February 26, being the day on which the sen-  
 tence of degradation was passed. The act 2 Hen. 4, c. 15,  
 was not passed till March 10.

These facts are of greater legal importance and of more constitutional interest than has been supposed. In the first place, they clearly prove that Sawtre was not executed under the statute, inasmuch as he was burnt a week before it passed. In the next place, in later times this was used as an argument to show that there was a writ *de hæretico comburendo* at common law, and that therefore the king had a right to burn heretics apart from the statutes of Henry IV. and Henry V. Sawtre's case, and the case of the deacon mentioned in Bracton, were the only authorities for this proposition.

I think, for the reasons already given, that no such power existed, and that no such writ was ever known or issued before Sawtre's case. I also think that the course taken in that case was taken in order to establish a precedent for the punishment of heresy as an offence known to the common law apart from any statute. My reasons are: *First*, that there is no record whatever of any such writ having been issued before, and, with the exception of the few words in Bracton already referred to, no evidence of the existence of any power to burn heretics. If such a writ had been capable of being issued it would probably have been issued, or at least demanded in express terms, in the reigns of either Edward III. or Richard II. *Secondly*. The same thing appears from the title of the writ entered on the Parliament Rolls. Why should the temporal lords have assented to it if it had been a well-known writ? In such a case their consent would

CH. XXV. not have been asked. *Thirdly*. There is a great similarity between the granting of this writ by the advice of the temporal lords, and the passing of the statute of 1382 by the House of Lords without the consent of the Commons. The Commons were always jealous of the introduction of new bodies of law into England, and in particular of the introduction of the canon law. I think that the Lords, by sanctioning this writ, contrived by a side wind to introduce into England the most oppressive part of what was then known on the continent of Europe as the canon law, and that the practice of burning heretics was thus introduced into the law of England by forgery and usurpation countenanced and procured by the clergy.

The Canon Law is well summed up in <sup>1</sup>Lyndwood:—  
 “Hodie indistincte illi qui per judicem ecclesiasticum  
 “sunt damnati de hæresi, quales sunt pertinaces et relapsi  
 “qui non petunt misericordiam ante sententiam, sunt  
 “damnandi ad mortem per seculares potestates et per eos  
 “debent comburi seu igne cremari ut patet in quâdam  
 “constitutione Fræderici, quæ incipit, &c.” Lyndwood, like many other writers of his time, seems to have been under the impression that the civil law had a force of its own apart from that which it might derive from its acceptance by the sovereign power of this country, and that if according to the civil law the secular power might and ought to burn people convicted of heresy by an ecclesiastical court, the king of England had authority to do so apart from any act of parliament or ancient usage whatever. A similar view is often taken in our own days as to the authority of speculative writers upon international law. It should be observed, however, that in the time of Lyndwood (he died in 1446) the writ *de hæretico comburendo* was regarded as a writ which in his discretion the king might or might not issue. It did not issue as of course. Under this system accordingly no one could be burnt as a heretic unless both the king and the clergy thought he ought to be burnt, and this no doubt weakens to some extent the force of the argument against the existence of the writ, drawn from the

<sup>1</sup> P. 293, note *d*.

fact that no such writ was issued under Edward III. or Richard II. CH. XXV.

On the 10th March, 1400, a few days after Sawtre's execution, was passed the statute 2 Hen. 4, c. 15. It recites at considerable length that "divers false and perverse people of a certain new sect" preach new doctrines, make unlawful conventicles, hold and exercise schools, and write books, and stir up sedition; that the diocesans of the realm "cannot by their jurisdiction spiritual without aid of the said royal majesty sufficiently correct" these persons, "because" they "go from diocese to diocese and will not appear before the said diocesans, but the said diocesans and their jurisdiction spiritual and the keys of the Church, with the censures of the same, do utterly contemn and despise." The statute then enacts that no one is to preach without licence, or to teach anything contrary to the Catholic faith, or favour any such person; that every one who has heretical books shall deliver them up, that any one "defamed or evidently suspected" of any offence against the statute may be arrested by the diocesan and detained in the diocesan's prison till he purges himself and abjures his heresies. The offender may be fined by the diocesan, and if any person "is before the diocesan sententially convict" "upon the said wicked preachings, doctrines, opinions, schools, and heretical and erroneous informations, or any of them, and the same wicked sect, &c., do refuse duly to abjure," or if he relapses after conviction, "so that according to the holy canons he ought to be left to the secular court, whereupon credence is to be given to the diocesan of the same place, or to his commissaries in his behalf"; then the sheriff or other civil authority, who is to be personally present to hear the sentence of the ecclesiastical court, "the same persons after such sentence promulgate shall receive, and them before the people in an high place do to be burnt."

This statute was much increased in severity in 1414 by 2 Hen. 5, c. 7, which was supplementary to it, and in particular dealt with the question of procedure. It enacts that "the chancellor, treasurer, justices of the one bench and the other, justices of peace, sheriffs, mayors, and bailiffs of

CH. XXV. " cities and towns, and all other officers having governance of  
 " people, shall make an oath in taking of their charges and  
 " occupations, to put their whole power and diligence to put  
 " out and do to be put out, cease, and destroy all manner of  
 " heresies and errors, commonly called Lollardries." They  
 are to assist the ordinaries and their commissaries as often as  
 they are required. All persons convict of heresy and left to  
 the secular power are to forfeit their lands, goods, and chattels.  
 Moreover the King's Bench, the justices of assize, and the  
 courts of quarter sessions are to receive indictments for here-  
 tical offences, and are to deliver persons indicted to the  
 ordinaries to be tried. A curious proviso upon this subject  
 throws light on what has already been said as to the value  
 attached in early times to indictments as proof of the matters  
 alleged in them. " Provided always, that the said indictments  
 " be not taken in evidence, but for information before the  
 " spiritual judges against such persons so indicted, in the  
 " same manner as if no indictment were, having no regard to  
 " such indictment." Persons indicted were to be admitted  
 to mainprise, and the jurors were to be qualified by a landed  
 estate of £5 a year.

These acts gave to the bishops what Hale calls a " wild  
 " and unbounded jurisdiction " in three different ways.

First. They contain no definition of heresy. The ordinary  
 might describe any opinion he pleased as heretical.

Secondly. The words of the statute " whereupon credence  
 " shall be given to the diocesan or his commissary," made  
 the sentence conclusive upon the civil power, so that when a  
 man was convicted of anything which was found by the ordi-  
 nary to be heresy he might be at once delivered over to the  
 sheriff to be burnt without waiting for any writ *de hæretico  
 comburendo*.

Thirdly. The ecclesiastical authorities obtained, for the first  
 time under these acts, power to arrest and imprison by their  
 own authority, and to require the assistance of the civil  
 power in doing so.

Some slight modification of the law was effected by  
 decisions of the Court of King's Bench to the effect that if  
 a person was imprisoned as being suspected of heresy they

would inquire in what the alleged heresy consisted and deliver the party if they were of opinion that the matter of which he was suspected was not heretical. <sup>1</sup> Thomas Keyser was imprisoned as a heretic for saying that notwithstanding his having been excommunicated by the Archbishop of Canterbury "he was not excommunicated before God, for " his corn yielded as well as any of his neighbours." Warner was imprisoned as a heretic for saying " he was not bound " to pay tithes to the curate of the parish where he dwelt." Each of these persons was set at liberty on a writ of Habeas Corpus.

Besides this, it should be observed that there is no provision whatever in such cases as to procedure before the Bishop's Court, except that it is to be " according to the laws " of the Church." In fact the procedure actually adopted, as appears from many cases reported in Foxe, was that of the ordinary ecclesiastical courts. The accused persons had certain articles objected to them. They were cross-examined as to their belief by the bishop, who usually had the assistance of civilians and canonists, and if their answers satisfied the bishop or other judge of their heresy, and they refused to abjure, they were convicted as obstinate heretics or otherwise, and were handed over to the sheriff to be burnt, or were put by the ecclesiastical authority to a variety of other painful and humiliating penances.

This system continued in full force till 1533. During the interval between 1400 and 1533 many persons were punished and not a few burnt for heresy. The details are given in Foxe's *Acts and Memorials*. Amongst the most conspicuous cases were the proceedings against Lord Cobham, who was prosecuted first in 1413, and afterwards in 1417. <sup>2</sup> He was half hanged and half burnt at the beginning of 1418. Several persons suffered in the reign of Henry VI., large numbers being in several cases punished in various ways. <sup>3</sup> Between 1428 and 1431 a hundred and twenty persons were " examined " and sustained great vexation," for their religious opinions in Beccles and other small places in Norfolk and Suffolk,

<sup>1</sup> 1 Hale, *P. C.* p. 400.

<sup>2</sup> Foxe, iii. pp. 370-405, 541.

<sup>3</sup> *Ib.* p. 537.



CH. XXV. several of them were burnt. <sup>1</sup>In 1491 Joan Boughton was burnt at Smithfield, and several other persons in 1498 and 1499. <sup>2</sup>About the year 1506 two persons were burnt and many others put to penance at Amersham.

These are not quite but nearly all the cases mentioned by Foxe, in which the statute of Henry IV. was put in force from 1400 when it was passed to the end of the reign of Henry VII. Foxe obviously took great pains to collect every instance he could, and he complains that the events having in many cases been forgotten or the evidence of them lost, he had omitted many things. Still the instances to which he refers show that the statutes of Henry IV. and Henry V. were enforced, and on particular occasions with rigour, though almost everything must have depended on the character of individual bishops.

Under Henry VIII. the cases of punishment for heresy became much more common. Between 1509 and 1518, Fitzjames and afterwards Tunstall being bishops of London, there were numerous prosecutions for heresy. <sup>3</sup>Foxe gives the names of forty persons who were charged with various heresies. Most of them were excommunicated, imprisoned, put to penance, and compelled to recant. Some few were burnt, as for instance, <sup>4</sup>William Sweeting and John Brewster on the 18th October, 1511.

One <sup>5</sup>Richard Hun was confined in the bishop's prison called the Lollard's Tower at St. Paul's and was found hanged to a beam there. The <sup>6</sup>coroner's jury found that he had

<sup>1</sup> Foxe, iv. p. 7.

<sup>2</sup> *Ib.* pp. 4, 123.

<sup>3</sup> *Ib.* p. 174.

<sup>4</sup> *Ib.* p. 180.

<sup>5</sup> *Ib.* p. 183.

<sup>6</sup> Foxe gives the whole story at great length, pp. 183-205. One highly curious document printed by him purports to be "the whole inquiry and verdict of the inquest, exhibited by them unto the coroner of London, and so given up and signed with his own hand." It begins by a most minute and detailed account of the position in which the body was found, carefully pointing out minute circumstances tending to show that the case was one of murder, and not suicide, *e.g.*, "We find that within the said prison there was no means whereby a man might hang himself, but only a stool; which stool stood upon a bolster of a bed so tickle that any man or beast might not touch it so little but it was ready to fall," &c. The depositions of nine witnesses are given at length, and the finding of the jury upon the oath of twenty-four jurors, is that Horsley (the chancellor), Joseph, and Spalding, "of their set malice feloniously killed and murdered Hun." The case clearly proves that witnesses were at this time examined before coroner's inquests, though it is not said that they were examined upon oath. The circumstances as to the position, &c., of the body, are stated by the jury

been murdered by the chancellor of the diocese, the almoner, CH. XXV. and the bellringer.

<sup>1</sup> Man was burnt for heresy in London. He had preached in various places, and especially at Newbury, to "a glorious and secret society of faithful favourers, who continued by the space of fifteen years together, till at last by a certain lewd person whom they trusted and made of their council they were bewrayed; and then many of them, to the number of six or seven score, were abjured, and three or four of them burnt." Similar events took place much about the same time in <sup>2</sup> the diocese of Canterbury, and <sup>3</sup> the diocese of Lincoln. Probably conventicles of a more or less secret kind were formed in various parts of England, and when discovered the preachers and leading persons were burnt and the ordinary members of the congregation put to penance by carrying fagots and wearing badges on their dress.

Such was the condition and administration of the law relating to heresy before the Reformation. The next question to consider is the change which that event produced in it.

Legally, the Reformation may be said to have consisted of four great measures, namely: 1, The statute for the restraint of appeals, 24 Hen. 8, c. 12, passed in 1532; 2, The statute called the submission of the clergy and restraint of appeals, 25 Hen. 8, c. 19, passed in 1533; 3, The statute of supremacy, 26 Hen. 8, c. 1, passed in 1534; 4, The statutes for the demolition of the monasteries, the last of which was 31 Hen. 8, c. 13, passed in 1539.

Legally, the result of these acts was to deprive the pope of all authority whatever in England, to make the king the supreme head of the Church in the same sense in which he was supreme head of the State, that is to say, to vest or

as of their own knowledge and observation, and the evidence of the witnesses seems to have been recorded rather as justifying their verdict than as a record of evidence to be used afterwards. The case thus marks the stage at which the transition of juries from witnesses to judges was in process, and was not quite complete. Fitzjames wrote a letter to Wolsey in favour of Horsley (p. 196), begging that a *nolle prosequi* might be entered by the Attorney-General, which was done. The bishop's reason is singular. "Assured am I if my chancellor be tried by any twelve men in London, they be so maliciously set 'in favorem hæreticæ pravitatis' that they will cast and condemn my clerk, though he were as innocent as Abel."

<sup>1</sup> Foxe, pp. 14, 213.

<sup>2</sup> *Ib.* v. p. 644, *seq.*

<sup>3</sup> *Ib.* iv. p. 219.

CH. XXV. declare to be vested in him ultimate judicial and legislative authority in the one case as well as in the other, to destroy as corporations the bodies which had been the strongest supporters of the Roman Catholic religion, and to distribute their property amongst public institutions and private persons. The great points in this legislation were all completed in the course of seven years, and resulted in the complete remodeling of the old system of Church government.

The effect of these changes undoubtedly was to produce a change in the doctrines of the Church, at least as deep and as important as the change which they made in its discipline, and no doubt it was the wish of the bulk of the more active reformers to produce that effect. This however was far from being the intention of Henry VIII. himself and some of his principal advisers. They piqued themselves on their orthodoxy, and maintained that the changes made by them involved only the removal of corruptions and a return to primitive purity. Hence it was a necessary part of their scheme that heresy should be treated as a crime under the new no less than under the old order of things, though it was natural to reform this as well as other branches of the law. This reform was effected by two acts passed respectively in 1533 and 1539, the first in the session in which was passed the act of the submission of the clergy, the second in the session in which was passed the act for the dissolution of the greater monasteries. The first act has attracted far less attention than it deserves; the second act was the famous act of the Six Articles. The two, as it seems to me, complete, and can hardly be understood unless they are considered in connection with, each other and with the events which happened in the interval between their enactment.

<sup>1</sup>The statute of 1533 (25 Hen. 8, c. 14), like many of Henry VIII.'s statutes, is exceedingly wordy, but in substance it is as follows. It recites the act of 2 Hen. 4, c. 15, and says that this act is extremely defective because it does not "decline any certain cases of heresy," and because it gives the bishops an unlimited power of putting men on their trial for

<sup>1</sup> For these statutes reference should be made to the Statutes of the Realm. The common editions of the Statute Book either abridge them most inaccurately or omit them altogether.

heresy on bare suspicion, whereas even in cases of high treason a subject cannot be tried unless he is accused by a grand jury or otherwise, according to the known course of law. It expresses, however, the utmost detestation of heresy, and accordingly confirms and so re-enacts the statutes of 5 Rich. 2, c. 5, and 2 Hen. 5, c. 7. Moreover it gives a kind of negative definition of heresy, for it provides that speaking against the authority of the pope, or against spiritual laws made by the authority of the See of Rome repugnant to the laws of this realm and the king's authority shall not be heresy. This last provision was extremely vague, and in an age of furious controversy must have opened the way for discussions which all parties had reason to dread. For instance, the questions whether a denial of the doctrine of the celibacy of the clergy, or the refusal of the cup to the laity were protected by the clause in question, were left unsettled. The effect of this must have been to make it far more difficult than it was before to convict a man of heresy, as the act whilst declaring that certain things were not heresy left it uncertain what was heresy.

The changes which the act introduced into procedure were still greater. By repealing the act of 2 Hen. 4, c. 15, it deprived the bishops of the power of arrest and imprisonment on suspicion, and by leaving in force the acts of Rich. II. and Henry V. it made it necessary for the proceedings in cases of heresy to begin by indictment. The superior courts and courts of quarter sessions had, by the act of Henry V., power to receive indictments for heresy. This power was extended by the act of Henry VIII. to sheriffs in their tourns and stewards in their leets. The result of the act must thus have been greatly to blunt the law against heresy. It appears from Foxe (who does not mention the act under consideration) that two persons, <sup>1</sup> Frith and Hewet, were burnt on the 4th July, 1533, under a sentence by the Bishop of London, and <sup>2</sup> he mentions some obscure cases as occurring in 1538, but there seems generally to have been a considerable pause in prosecutions for heresy between 1533 and 1539. There was, however, one great and memorable instance to the

<sup>1</sup> Foxe, pp. 11-18.

<sup>2</sup> *Ib.* pp. 251-254.

CH. XXV. — contrary. This was the case of John Lambert, who was tried before Henry VIII. in person in Westminster Hall in November, 1538, and burnt the day after his trial. His heresy consisted in a denial of transubstantiation. It is difficult to understand the procedure against him. Neither <sup>1</sup> Foxe nor Burnet precisely explain it, especially they do not say whether he was indicted or not. He seems, however, in some way to have been tried before Cranmer and to have appealed to the king. Lambert's trial was, however, only one symptom of the state of feeling which had gradually grown up during the years immediately succeeding the establishment of the royal supremacy. They had been marked by insurrection, especially the pilgrimage of grace, and conspiracy, especially the conspiracy of the Marquis of Exeter. It is probable that the bulk of the population, the quiet people who disliked foreigners but were averse to changes of a revolutionary kind, were willing enough to support Henry in his measures against the pope and the monks, but by no means disposed to tolerate what they regarded as the wild and revolutionary views of the sacramentaries, whose special doctrine was that the sacrament was a simple metaphor—a doctrine which summed up for the moment the crude imperfect rationalism of the day. Upon this point there was not apparently much difference of opinion. Whatever might or might not be heresy, it was clearly heresy to deny the miraculous change in the elements at the celebration of the mass. Other points, such as communion in both kinds, the marriage of the clergy, and auricular confession, were subjects of furious controversy, and as the law stood, after the act of 1533, it was not easy to say whether the minority, the Lutheran party, were heretics or not.

It was in this state of things that the famous act of the Six Articles was passed, 31 Hen. 8, c. 14, A.D. 1539.

By this act it was provided that every one who denied the doctrine of transubstantiation, or depraved the sacrament,

<sup>1</sup> Foxe, v. pp. 227-250; Burnet, *Reformation*, i. pp. 390-391. Mr. Fronde throws no light on the legal points in the case, iii. 153. Foxe says that at Gardiner's instigation Henry "sent out a general commission, commanding all "the nobles and bishops of this realm to come with all speed to London to "assist the king against heretics and heresies, which commission the king "himself would sit in judgment upon."

should be burnt as a heretic; that every one who should preach in any sermon or teach in any school or other congregation, or obstinately affirm, uphold, or defend the communion in both kinds, the marriage of priests, the lawfulness of marriage after vows of chastity or widowhood, the unlawfulness of private masses, or that auricular confession is not expedient or necessary, should be guilty of felony without benefit of clergy. Any one who declared any such opinion by writing or printing was to forfeit his goods and the profits of his lands for life, and to be imprisoned at pleasure for the first offence, and for the second offence to be guilty of felony without benefit of clergy. Priests keeping company with women to whom they had been married were to be guilty of felony. To contemn or contemptuously refuse, deny, or abstain to be confessed or to receive the sacrament at the usual times was punishable on the first offence with imprisonment and ransom, and the second offence was a clergyable felony. Ca. XXV.

A special and very curious procedure was provided for the prosecution of these offences. Commissions were to be issued to the bishop of each diocese, his chancellor, or commissary, and other persons, who were to inquire into all the offences mentioned, four times a year, and also in the case of the bishops at their visitations. The inquiry might be either by a grand jury or "by the oaths and depositions of two able and lawful persons at least." If the two accusers came forward they were "to be examined what other witnesses were by or present at the time of doing and committing the offence," and such witnesses were to be bound to appear. The commissioners had power to issue process, as in cases of felony, into all shires to compel the appearance of the accused persons, and upon their appearance they were to hear and determine, *i.e.* try them by jury. An account of sittings held under one of these commissions by Bonner in the Guildhall is given by <sup>1</sup> Foxe.

In a legal point of view the act of the Six Articles may be regarded as supplementary to the act of 1533. As the earlier act declared what was not to be heresy, the later act

<sup>1</sup> v. p. 444, *seq.*

CH. XXV. declared what was to be heresy. The system of procedure established or recognised by the two acts taken together, as well as by the earlier acts of Henry V. and Richard II., had the effect of making heresy, as <sup>1</sup>Hale observes, "in great measure a secular offence." Hale also observes that the jurisdiction which the Ordinary had by the act of Henry V. was exercised under this act by commissioners under the great seal. This, no doubt, was important, as involving an emphatic assertion of the royal supremacy, but as the statute provides that the bishops should be on the commission, its practical importance was not great. Some slight mitigations were introduced into the severity of the act of the Six Articles by permitting convicted persons to recant, &c., but no alteration in the law relating to heresy which need be noticed here took place till the death of Henry VIII., though I may observe that by 34 & 35 Hen. 8, c. 1 (1542-3), it was made heresy, punishable upon a third offence with burning, for any spiritual person to preach, teach, or maintain anything contrary to the king's instructions or determinations. It ought to be observed of these celebrated acts, that whatever might be their merits or demerits, they were infinitely less severe than the system established by the statutes of Henry IV. and Henry V. Nothing was made heresy by the act of the Six Articles, which might not have been held to be heresy by the Ordinary under the act of Henry IV., and many offences which, under the earlier act, might have been punished by burning, were punishable under the later act only by hanging, and that after a previous conviction. Moreover the procedure under the act of the Six Articles was infinitely less oppressive than under the earlier acts. If the act of the Six Articles had been passed in 1533 the fact that it really greatly mitigated the law of heresy as it then stood would have been obvious. Being delayed till 1539, after a somewhat milder system—which however was upon the face of it wholly incomplete—had been in force for six years, it looked to the thorough-going Protestants then even more severe and cruel than it looks to most people now.

Upon the accession of Edward VI. a complete change of

<sup>1</sup> 1 Hale, *P. C.* 403.

policy took place. By 1 Edw. 6, c. 12 (A.D. 1547), not only the act of the Six Articles but "all acts of parliament and statutes touching, mentioning, or in anywise concerning religion and opinions," were repealed, the following being specifically named: 5 Rich. 2, st. 2, c. 5; 2 Hen. 5, c. 7; 25 Hen. 8, c. 14; 31 Hen. 8, c. 14, and 34 & 35 Hen. 8, c. 1. The effect of this was to restore the common law as to heresy, but the law so restored was understood to be the law as settled by Sawtre's case at the beginning of the reign of Henry IV., which authorised the burning of a heretic by the writ *de hæretico comburendo* after a conviction by a provincial council. <sup>1</sup> Accordingly on the 2nd May, 1550, Joan Bocher, a Kentish woman, was burnt as a heretic after a conviction before a commission issued by the Protector Somerset to the Archbishop of Canterbury, six bishops and other persons to examine and search after all anabaptists, heretics, or contemners of the Common Prayer. Joan Bocher "denied that Christ was truly incarnate of the Virgin, whose flesh being sinful he could take none of it, but the Word by the consent of the inward man in the Virgin took flesh of her." In the following year George Van Paar, a Dutchman, was burnt on the same authority for denying that Christ was very God.

It seems to me that these executions were clearly illegal. There was no authority for the issue of the commission, nor was there any authority for the infliction of the punishment of burning. The only case which was in any way a precedent for Joan Bocher's was that of Sawtre, and to say nothing of the objections to the authority of that case, which were probably unknown in Edward VI.'s time, it authorises the issue of the writ *de hæretico comburendo* only after a conviction in a provincial council. Some other offences against religion were created by Edward VI.'s legislation. These were "depraving, despising, or contemning" the sacrament, which was *punishable by the justices in quarter sessions, with fine and imprisonment* (1 Edw. 6, c. 1). <sup>2</sup> By some strange accident this act has never been repealed, and is still theoretically in force though it has long been forgotten.

<sup>1</sup> Burnet, *Reformation*, vol. ii. part i. p. 179, and see Froude, iv. p. 526.

<sup>2</sup> It is printed in the Revised Statutes.



CH. XXV. The same is true of the penal clauses of the Act of Uniformity of Edward VI. (2 & 3 Edw. 6, c. 1), which requires ministers to perform service in the prescribed form under the penalty of imprisonment for life upon a third conviction. The same act punishes every person who speaks "in the derogation, depraving, or despising of the Book of Common Prayer," or who interrupts the minister in reading the service, upon a third conviction with forfeiture of all his goods and chattels, and imprisonment for life. <sup>1</sup> These acts are still in force and have, by 14 Chas. 2, c. 4, s. 20, and the Act of Uniformity of 1661, been applied to the Book of Common Prayer now in use.

As soon as Queen Mary succeeded her brother she repealed a great part of his and of her father's legislation, and in particular she <sup>2</sup> revived the statutes of Richard II., Henry IV. and Henry V. against Lollards. It was under the authority of these statutes that the great persecutions took place which earned for her the title of "Bloody Mary." In a legal point of view they have little interest, as they show only how the statutes of Henry IV. and Henry V. were capable of being used when they were zealously put in force.

When Elizabeth succeeded her sister she began her reign by repealing many of her sister's laws and reviving many of the laws of her father and brother. This was effected by 1 Eliz. c. 1 (1558), which amongst other things repealed (s. 13) formally the statutes of Richard II., Henry IV., and Henry V.

This act provided however a completely new jurisdiction for the trial of ecclesiastical offences by provisions contained in ss. 17, 18, which, as already mentioned, authorised the establishment of the Court of High Commission.

This statute did not define heresy, but it enacted (s. 36) negatively that the commissioners "shall not in anywise have authority or power to order, determine, or adjudge any matter or cause to be heresy, but only such as heretofore have been determined, ordered, or adjudged to be heresy by the authority of the canonical scriptures; or by the first four general councils, or any of them, or by any other general council wherein the same was declared heresy

<sup>1</sup> See them in my *Digest*, pp. 99-100.

<sup>2</sup> 1 & 2 Phil. & Mary, c. 6.

“ by the express and plain words of the said canonical  
 “ scriptures, or such as hereafter shall be ordered, judged, or  
 “ determined to be heresy by parliament, with the assent of  
 “ the clergy in their convocation.”

The effect of this in reference to heresy was to limit the High Commission narrowly as to what was to be declared to be heresy. Practically it might be said to have enacted that no one should be treated as a heretic on account of his views as to the Roman Catholic and Protestant controversy, unless he was an Anabaptist, or as we should say in these days, a Unitarian. The Anabaptists, and indeed every one who was not orthodox about the Trinity, were in those days regarded with a horror which we have ceased to feel with regard to those who reject all religion whatever. The act is silent as to the punishment of heresy. <sup>1</sup>No doubt the tacit assumption was that the writ *de hæretico comburendo* really was a common law writ, and might issue upon a conviction for heresy before the High Commissioners. This view seems to have been acted on in 1575. There was at that time a question of an alliance with Spain. “<sup>2</sup>Elizabeth was ready to do what she could to gratify Philip, and she took the opportunity of showing him that the English for whom she demanded toleration were not the heretics with whom they were confounded. Amongst the fugitives from the provinces who had taken refuge in England was a congregation of Anabaptists, wretches abhorred in the eyes of all orthodox Anglicans. Twenty-seven of them were arrested in Aldgate and brought to trial for blasphemous opinions on the nature of Christ’s body.” Two of them, Terwort and Wielmacher, were burnt (July 22, 1575) “in great horror, crying and roaring.” Mr. Froude says that some having recanted “eleven who were obstinate were condemned in the Bishop of London’s court and handed over to the secular arm.” <sup>3</sup>Hale says that the prisoners (whom he calls Peters and Dirwert) were “convict of heresy before the commissioners.” There seems to be no positive evidence on the subject.

Whether any other executions of this nature took place

<sup>1</sup> 1 Hale, *P. C.* p. 405.    <sup>2</sup> Froude, x. pp. 345-346.    <sup>3</sup> 1 Hale, *P. C.* 405.

CH. XXV. under Elizabeth it would, perhaps, be difficult to affirm positively. Hale knew of no others, and none are mentioned by Mr. Froude.

One other transaction of this sort took place in the year 1612 (10 Jas. 1). <sup>1</sup> Bartholomew Legate, an Arian, was burnt in Smithfield upon a writ *de hæretico comburendo*, issued after a conviction as an obstinate heretic, before the Bishop of London, and one Edward Wightman was at about the same time burnt in the city of Lichfield upon a similar writ issued after a similar conviction, before the Bishop of Lichfield and Coventry.

These appear to me to have been both on moral and legal grounds the least defensible executions for heresy, except indeed that of Sawtre, which ever took place in England. The executions from 1400 to the death of Henry VIII. were warranted by law, and the same may be said of those which took place in Queen Mary's time. The executions of Joan Bocher and Van Paar were, I think, illegal, but I do not think that Somerset and Cranmer were aware of the reasons for thinking them illegal. Besides, they took place at a time of revolutionary excitement, when the persons in authority had the strongest conceivable inducements to vindicate as far as possible their orthodoxy, and to separate the cause of which they were the representatives from the charge of sympathy with doctrines at that time universally regarded with horror.

The same remarks apply, though, as regards the political reasons for what was done, with less force, to the executions in the reign of Queen Elizabeth. If the Anabaptists were, as Hale says, convicted before the High Commissioners, the legality of their executions would depend upon the correctness of my view of the illegality of Sawtre's execution, for by the act under which the High Commission was issued all ecclesiastical jurisdiction was annexed to the crown, and therefore that of a provincial council if it possessed any.

<sup>1</sup> "Bartholomew Legate, native county, Essex; complexion, black; age, "about forty years; of a bold spirit, confident carriage, fluent tongue, excellent skilled in the Scriptures. . . . His conversation (for aught I can learn "to the contrary) very unblameable, and the poison of heretical doctrine is "never more dangerous than when served in clean cups and washed dishes." —Fuller's *Church History*, quoted in 2 *State Trials*, p. 727.

None of these reasons applies to the conduct of James I. in the cases of Legate and Wightman. It is difficult to find any other motive for the course taken than genuine theological enmity. James seems to have burnt Legate really because he thought that Legate was a heretic, and that he himself both as a king and as a divine was authorised and even required to put heretics to death; and it is probable that he liked it. <sup>1</sup>He disputed with him personally, if Fuller is to be believed, and showed indignation at Legate's avoiding a dilemma which he had prepared for him. As to the illegality of the punishment inflicted upon Legate it is to be observed that the precedent in Bracton, and even the writ in Sawtre's case, implies that in order to the issue of a writ *de hæretico comburendo* the conviction of the heretic must have taken place before a provincial council. No precedent has been produced of the issue of such a writ on a conviction before the ordinary, except whilst the statutes of Henry IV. and Henry V. were in force. In Legate's case the conviction was before the ordinary, not before a provincial council, nor was the illegality of the course taken unquestioned. Coke, then chief justice, was consulted on the issuing of the writ. He says, "<sup>2</sup>In this very term the attorney and solicitor-general consulted with me if at this day, upon conviction of an heretic before the ordinary, this writ *de hæretico comburendo* lieth, and it seems to me clearly that it doth not." Four other judges certified the contrary, adding, however, "that the most convenient and sure way was to convict the heretic before the High Commissioners." James, therefore, issued his writ though he knew that Coke thought it clearly illegal,

<sup>1</sup> "King James caused this Legate often to be brought before him, and seriously dealt with him to endeavour his conversion. One time the king had a design to surprise him into a confession of Christ's deity, as his Majesty afterwards declared to a right reverend prelate, by asking him whether or no he hid not daily pray to Jesus Christ? Which, had he acknowledged, the king would infallibly have inferred that Legate tacitly consented to Christ's divinity as a searcher of hearts. But herein his Majesty failed of his execution, Legate returning that indeed he had prayed to Christ in the days of his ignorance, but not for these last seven years. Hereupon the king in choler spurned at him with his foot. 'Away, base fellow,' said he, 'it shall never be said that one stayeth in my presence that hath never prayed to our Saviour for seven years together.'"—Fuller, quoted in *2 State Trials*, 727.

<sup>2</sup> *Reports*, p. xii. 93 (vol. vi. p. 323, edition of 1827).

CH. XXV. and that the other four judges who were consulted thought it to some extent doubtful.

These were the last executions for heresy that ever took place in England, but the law upon the subject had a curious subsequent history. Under James I. and Charles I. heresy, blasphemy, and similar offences were, as I have already shown, dealt with by the Court of High Commission, in important cases, and by the minor ecclesiastical courts in cases of less importance. In 1640 all the ecclesiastical courts fell together, and their existence was suspended till after the Restoration, in 1661. Theological controversy however was never so prominent in the whole course of the history of England as it was during this period; nor has there ever been a time in our history in which so many new and fervent religious sects came into existence, or at least into notice. The circumstance that their numbers and their powers were not very unevenly balanced was probably the principal reason why laws of extreme severity against heresy were not enacted. As it was, several attempts to enact such laws were made.

In 1643 the Westminster Assembly of Divines began its sittings, and in 1645, shortly before the battle of Naseby, <sup>1</sup> it accused one Paul Best before the House of Commons of asserting that Christ was a mere man. Best was imprisoned, and his case having been reported upon and compared to Legate's, "a bill was ordered in for the punishment of Best, "and two months afterwards it was voted that he should be "hanged for his offence." Best was examined, and avowed and maintained his opinions, <sup>2</sup> but he seems to have been discharged. The case, however, suggested legislation, and a bill was introduced into parliament, which finally passed into law in May, 1648, for the punishment of blasphemy and heresy. <sup>3</sup> This law provided that it should be felony, without benefit of clergy, to maintain, publish, or defend, by preaching or writing, certain heresies with obstinacy. If the party refused to abjure, on his trial, he was to be hanged. If he

<sup>1</sup> Goodwin's *Commonwealth*, ii. 252-255; Neal's *Puritans*, iii. 266.

<sup>2</sup> Neal says that "he confessed his belief of that doctrine" (the Trinity) in general terms before he was brought to his trial, and that he hoped to be "saved thereby, but persisted in denying the personality as a Jesuitical tenet.

<sup>3</sup> Upon this confession his trial was put off, and he was at length discharged.

<sup>4</sup> Goodwin's *Commonwealth*, ii. p. 254; Neal's *Puritans*, iii. p. 419.

abjured, he was to be imprisoned till he found sureties that he would not maintain the same heresies any more. If he relapsed and was convicted a second time, he was to suffer death. The heresies in question were (1) That there is no God. (2) That God is not omnipresent, omniscient, almighty, eternal, and perfectly holy. (3) That the Father is not God, that the Son is not God, that the Holy Ghost is not God, or that these three are not one eternal God, or that Christ is not God equal with the Father. (4) (5) and (6) Certain opinions as to Christ. (7) The denying that the Holy Scriptures of the Old and New Testament are the word of God. (8) The denying of the resurrection of the dead and a future judgment. Sixteen other errors are specified as to which it was enacted, that whoever maintained them should, upon conviction on the oath of two witnesses, or on his own confession before two justices of the peace, be ordered to renounce his errors, and if he refused, be committed to prison till he found sureties that he should not publish them any more. The following are specimens:—"That all men shall be saved." "That man, by nature, hath free will to turn to God." "That man is bound to believe no more than by his reason he can comprehend." "That the Sacraments . . . are not ordinances commanded by the word of God." "That magistracy is unlawful." "That all use of arms, though for the public defence (and be the cause never so great) is unlawful." It seems doubtful whether this act was ever put in force, at all events to its full extent.

In 1649, when the Independents had obtained the upper hand over the Presbyterians, a much milder ordinance was passed for punishing "blasphemous and execrable opinions." It punished with six months' imprisonment for a first offence, and with banishment (return from which without license was to be felony) for the second, the maintenance of a variety of strange opinions, some of which were, "for any person not distempered in the brains to affirm of him or herself, or of any mere creature, that he is God, or that the crimes of uncleanness and the like are not forbidden by God; or that lying, stealing, and fraud, or murder, adultery, &c., are in

<sup>1</sup> Goodwin's *Commonwealth*, iii. p. 507; Neal's *Puritans*, iv. p. 27.

CH. XXV. "their own nature as holy and righteous as the duties of prayer, preaching, or thanksgiving; or that there is no such thing as unrighteousness or sin but as a man or woman judges thereof." <sup>1</sup>This act appears to have been regarded as superseding the other.

Whatever the law may have been, it was considered to be wholly insufficient to meet some of the cases which arose. <sup>2</sup>Naylor the Quaker, who seems to have been nearly if not quite mad, and who affirmed that he was God, and made an entry into Bristol in a style which was an obvious parody upon Christ's entry into Jerusalem, was brought up in 1656, before the House of Commons, and was in imminent danger of being put to death. <sup>3</sup>A vote that he should be executed was rejected only by 96 to 82. He was sentenced to be whipped from Westminster to the Old Exchange, to be there pilloried, to have his tongue bored with a hot iron, and to be branded on the forehead, and afterwards to be imprisoned and kept to hard labour indefinitely. This was one of several instances in which the Parliaments of the Commonwealth assumed judicial power—a practice for which the history of the House of Commons affords one or two precedents; but the state of things at the time was so peculiar that no inference can be drawn from it. Several persons, of a very different order from Naylor, underwent, under the Commonwealth, more or less persecution for their religious opinions. <sup>4</sup>Fox, the founder of Quakerism, and Biddle, the founder of English Unitarianism, are perhaps the most remarkable of the number.

At the Restoration the laws of the Commonwealth, good and bad, were treated as void, and the law relating to heresy fell back into the position in which the Act of 1640 left it, that is to say, the offence practically ceased to exist, as the ecclesiastical courts had been abolished, and there was no law for the punishment of heresy which the ordinary courts would

<sup>1</sup> This seems to have been Whitelocke's opinion. In his speech on Naylor's case, 5 *State Trials*, 825, he says, "It is held that the ordinance of the Long Parliament concerning blasphemy is not now" (1655) "in force."

<sup>2</sup> The proceedings against him are reported in 5 *State Trials*, p. 802, &c.

<sup>3</sup> Goodwin, iv. p. 320.

<sup>4</sup> As to Fox, see Goodwin, iv. pp. 307-313, and Neal, iv. pp. 29-32; also v. pp. 206, 222-223, 228, &c. As to Biddle, see Goodwin, iii. pp. 510-513, and Neal, iv. pp. 122-123.

administer. In 1661 the jurisdiction of the ordinary ecclesiastical courts was revived, but without the *ex officio* oath, and without any kind of definition of heresy except the one implied by that part of Queen Elizabeth's Act of Uniformity, which authorised the erection of the Court of High Commission. As this enactment applied only to the extinct court, and as all the legislation which had declared what amounted to heresy was repealed, it was difficult to say that the offence existed any longer. It never was supposed that to deny the thirty-nine articles was heresy, though a clergyman who did so was liable to <sup>1</sup>special ecclesiastical penalties by statute and otherwise. The law as to heresy accordingly fell into a state of obscurity, which has no doubt prevented its absolute extinction. Its history, however, has one step more.

In 1666, <sup>2</sup>“the great fire of London following in ominous succession on the great plague of the year before, roused the superstitious and intolerant passions of the people, and the House of Commons embodied the general feeling in a bill against atheism and profaneness. On the 17th October it was ordered that the commission to which the bill was referred ‘shall be empowered to receive information touching such books as tend to atheism, blasphemy, and profaneness, or against the essence and attributes of God, and in particular the book published in the name of one White, and the book of Mr. Hobbes called the *Leviathan*, and to report the matter with their opinion to the House.” Hobbes seems to have written upon this occasion an <sup>3</sup>historical tract upon heresy, which was published after his death. Attention must no doubt have been attracted by these proceedings to the laws relating to heresy, and to the absence of any legal provision for its suppression, except the supposed writ *de hæretico comburendo*. The bill which was intended to supplement the writ having failed, the writ itself did not long survive. Hobbes was the last person of eminence who went in fear of it. It was abolished in 1677 by 29 Chas. 2, c. 9, which also abolishes “all punishment of death in pursuance of

<sup>1</sup> See 13 Eliz. c. 12 (1570). This statute is still in force.

<sup>2</sup> Article “Hobbes” by Mr. Croom Robertson in the *Cyclopædia Britannica*, xii. 88.

<sup>3</sup> See his works, iv. p. 385, &c.



CH. XXV. "any ecclesiastical censures." Parliament, however, was careful to give the ecclesiastical courts the honours of war. The act accordingly contained a proviso that nothing in it shall "take away or abridge the jurisdiction of Protestant archbishops or bishops, or any other judges of any ecclesiastical courts, in cases of atheism, blasphemy, heresy, or schism, and other damnable doctrines and opinions, but that they may proceed to punish the same according to his Majesty's ecclesiastical laws by excommunication, deprivation, degradation, and other ecclesiastical censures not extending to death." This enactment contains the present law as to heresy, a law so obscure as to be practically inoperative. As a mere matter of legal theory, however, I know of no legal reason why to this day any <sup>1</sup>layman who is guilty of "atheism, blasphemy, heresy, schism, or other damnable doctrine or opinion," should not be prosecuted in any ecclesiastical court and have penance enjoined upon him—for instance, the public recantation of his heretical opinions. If he refused to recant, he might be excommunicated, the effect of which would be <sup>2</sup>that the court pronouncing him excommunicate, might direct him to be imprisoned for any term not exceeding six months. I do not believe, however, that any prosecution for heresy has taken place since the year 1640. The only addition to the statute law upon this subject consists of a single Act of Parliament, namely, 9 Will. 3, c. 35, more commonly cited as 9 & 10 Will. 3, c. 32. <sup>3</sup>This bill originated in an address by the House of Commons to William III. calling upon him to suppress profaneness and immorality, and "pernicious books and pamphlets, which contain in them impious doctrines against the Holy Trinity and other fundamental articles of our faith, leading to the subversion of the Christian

<sup>1</sup> Ministers of religion (Unitarians, e.g.) are protected in a curious indirect way.

<sup>2</sup> 53 Geo. 3, c. 127, ss. 1, 2, 3. This is an act "for the better regulation of ecclesiastical courts." It was introduced by Lord Stowell, then Sir W. Scott, for the purpose of reforming the procedure of the ecclesiastical courts. The consequence pointed out in the text can hardly have been intended by its authors.

<sup>3</sup> Cobbett's *Parliamentary History*, vol. v. p. 1171. Its progress through the two Houses is traceable in the journals, but they disclose nothing of much interest, except that it was sent down by the Lords to the Commons, and afterwards amended by the Lords in such a way that but for the refusal of the Commons to accept the amendments it would have applied to Jews. See *Commons' Journals*, May 14, 18, 21, 25, 1698.

“religion.” The king expressed his satisfaction at the address, and “in immediate compliance to the request of the Commons, published a proclamation for preventing and punishing immorality and profaneness.” The successor to this proclamation is still read at the opening of every Commission of Assize and Quarter Sessions in England, and echoes to a great extent the terms of the address to William III. It is not only a mere form, but is open to the objection that it affects to forbid many things (*e.g.*, the playing at cards on Sunday) which the Queen has no power to forbid. In practice, the act has been as much a dead letter as the proclamation. It makes it an offence in any person, educated in or having professed the Christian religion, to “*deny any one of the three Persons in the Holy Trinity to be God,*” or to “assert or maintain that there are more Gods than one, or deny the Christian religion to be true, or the holy scriptures of the Old and New Testament to be of divine authority.” The punishment is incapacity to hold any office, expulsion from any office held at the time of conviction; and on the second conviction, a variety of disabilities and imprisonment for three years. <sup>1</sup>The words in italics were repealed by 53 Geo. 3, c. 160, but the remainder of the act is still nominally in force, though I never heard of any prosecution under it having taken place at any time.

I now proceed to notice a set of offences which stood to the offences punished by the old ecclesiastical courts and the Court of High Commission in a relation not altogether unlike that in which those offences stood to heresy, as punished by the acts of Henry IV. and Henry V. I refer to the offences of blasphemy at common law and blasphemous libel.

One case only has been referred to <sup>2</sup> in which blasphemous or irreligious language was punished at common law before the Restoration of Charles II. This is the case of *R. v. Atwood*. It is, however, so imperfectly reported that no

<sup>1</sup> See *Ann. Reg.* for 1813. The bill for the repeal was brought in by the well-known Mr. W. Smith, of Norwich. Several bishops remarked in the House of Lords that they wished to say that the bill had not been made necessary by any desire on the part of the clergy of the Church of England to interfere with the Unitarians.

<sup>2</sup> *Cro. Car.* 421.

CH. XXV. inference can be drawn from it. The words constituting the offence may even have been regarded rather as being seditious than as being blasphemous.

After the Restoration, the Court of King's Bench treated as misdemeanours at common law many of the acts which the ancient common law left unpunished, and which the Star Chamber had converted into offences by treating them as such. Perjury, forgery, conspiracy, and, to a certain extent, political libels, were amongst the number. The same was the case with gross public acts of indecency, like those of which <sup>1</sup> Sir C. Sedley was convicted in 1663. He, amongst other things, "stripped himself naked, and with eloquence "preached blasphemy to the people." Thereupon the court told him, "Notwithstanding there was not then any Star "Chamber, yet they would have him know that the Court of "King's Bench was the *custos morum* of the king's subjects, "and that it was then high time to punish such profane "actions committed against all modesty, which were as frequent as if not only Christianity but morality also had "been neglected."

The next reported case of the kind is <sup>2</sup> *R. v. Taylor*, in which the defendant used vile language of Christ. Hale upon this observed that "such kind of wicked and blasphemous words "were not only an offence against God and religion, but a "crime against the law, State, and government; and, therefore, punishable in this court; that to say 'religion is a "cheat' is to dissolve all those obligations whereby civil "societies are preserved, and Christianity being parcel of the "laws of England, therefore, to reproach the Christian "religion is to speak in subversion of the law." This was in 1676. <sup>3</sup> Some other cases of minor importance having been decided in the interval, Woolston was prosecuted in 1728 for "publishing five libels wherein the miracles of Jesus Christ "were turned into ridicule, and his life and conversation vilified "and exposed." The court declared "they would not suffer

<sup>1</sup> 17 *State Trials*, p. 155.

<sup>2</sup> 3 Keble, 607; and see Folkard's *Starkie*, 595.

<sup>3</sup> See *Strange*, 789.

<sup>4</sup> Quoted in Folkard, 595; from Fitzgibbon, 64. There is a short note of the case in *Strange*, 834.

“ it to be debated whether to write against Christianity in  
 “ general was not an offence of temporal cognisance.” Wool-  
 ston had tried to represent the miracles as being to be taken  
 in an allegorical sense, and it was said that therefore the book  
 could not be considered as aimed at Christianity in general,  
 but merely as attacking one proof of the divine mission, but  
 the court was of opinion that “ the attacking Christianity in  
 “ that way was attempting to destroy the very foundation of  
 “ it, and though there were professions in the book to the  
 “ effect that the design of it was to establish Christianity  
 “ upon a true foundation by considering those narratives as  
 “ emblematical and prophetical, yet those professions could  
 “ not be credited.” This case is remarkable on account of  
 the emphatic way in which it makes the matter and not the  
 manner of the publication the gist of the offence. The same  
 view seems to have been taken in <sup>1</sup> R. v. Ilive in 1756, and  
 in <sup>1</sup> R. v. Annett in 1763 and on some other occasions.

The most celebrated reported case on this subject is that  
 of <sup>2</sup> R. v. Williams, tried before Lord Kenyon in 1797 for  
 publishing Paine's *Age of Reason*. The prosecution was in-  
 stituted by what was called the <sup>3</sup>Proclamation Society, of  
 which the then Bishop of London (Porteus), Mr. Wilberforce,  
 and many other eminent persons were members. Erskine  
 was counsel for the prosecution and Mr. Stewart Kyd for the  
 defence. The indictment set forth seven passages taken from  
 the *Age of Reason*, each of which was unquestionably expressed  
 in the coarsest and roughest terms which Paine could find.  
 On the other hand, each of his assertions was unquestionably  
 put forward as a serious argument based on specific grounds.

Kyd had no difficulty in referring to a number of passages  
 in the Old Testament which Paine might in good faith regard  
 as immoral, and it is, I think, impossible to read his argu-  
 ment without admitting that he established the proposition  
 that the *Age of Reason* is a genuine argument against the  
 Christian religion which, however violent and indecent in  
 some of its language, does convey the sentiments which its

<sup>1</sup> Folkard, 596.

<sup>2</sup> 26 St. Tr. 653.

<sup>3</sup> *i.e.* A society for enforcing the King's proclamation against vice, profane-  
 ness, and immorality.

CH. XXV. author honestly held, and must therefore be presumed to have been published in order to benefit mankind by the propagation of views which the author regarded as true and important.

Kyd, who obviously thought of nothing but the opportunity of making himself notorious, and who, if he had done his duty to his client, would have defended him on the ground that he knew nothing whatever of the contents of the pamphlet which he sold, handled this topic in a needlessly offensive, clumsy way, but he might, if he had had more sense and knowledge, have used in his client's defence the whole of Erskine's argument in defence of Paine himself, upon his prosecution for the work called *Common Sense*. Erskine argued, on that occasion, in substance, that the decent expression of any political views, in which a man really believes, is not a seditious libel as it is not malicious. Kyd had only to substitute "religious" for "political" and every one of Erskine's arguments would have applied to the case of Williams. The whole trial however (notwithstanding a few passing expressions which look in the opposite direction) proceeded on the assumption that the matter and not the style of the *Age of Reason* was criminal. Erskine, indeed, argued that certain passages could not have been written in good faith, but he also contended that even if the whole book was so written it would still be illegal, because <sup>1</sup> "in a country whose government and constitution rest for their very foundations upon the truths of the Christian religion a bold, impious, blasphemous, and public renunciation of them must be a high crime and misdemeanour."

Lord Kenyon told the jury (<sup>2</sup> amongst other things) that

<sup>1</sup> 26 *St. Tr.* 703.

<sup>2</sup> *e.g.* "Christianity from its earliest institution met with its opposers. Its professors were very soon called upon to publish their apologies for the doctrines they had embraced. In what manner they did that, and whether they had the advantage of their adversaries or sunk under the superiority of their arguments, mankind for near two thousand years have had an opportunity of judging. They have seen what Julian, Justin Martyr, and other apologists have written, and have been of opinion that the argument was in favour of those very publications." Whether the judge or the shorthand writer was to blame for turning Julian into an apologist I do not pretend to guess. Lord Kenyon may possibly have meant that Julian had been heard on one side and Justin Martyr on the other, but in that case one would have expected Cyril rather than Justin Martyr to be opposed to Julian. If he really used these words, I should think Lord Kenyon attached little or no definite sense to them.

“ the Christian religion is part of the law of the land,” and his summing-up implies, though it does not positively and directly state, that every attack on Christianity must, as such, be illegal. In delivering the judgment of the court, Ashurst, J., expressly based their sentence on the principle that attacks on Christianity are crimes “ inasmuch as they tend to destroy those obligations whereby civil society is bound together,” to destroy the solemnity of oaths, and to strip the law “ of one of its principal sanctions, the dread of future punishment.”

Many subsequent cases proceeded on precisely the same principle. For instance, in <sup>1</sup> *R. v. Eaton*, which was also a trial for the publication of the *Age of Reason*, Lord Ellenborough treated the case exactly as Lord Kenyon had treated it.<sup>2</sup> The case of <sup>2</sup> *R. v. Carlisle*, decided in 1819, recognised the principle that a blasphemous libel is an offence at common law. It throws no light on the definition of a blasphemous libel, but establishes the proposition that the statute 9 & 10 Will. 3, c. 32, does not affect the common law upon the subject. It is difficult to me to understand how it could ever have been supposed to do so. The statute creates certain special offences; for instance, it applies to the case of a person who alleges that there are more Gods than one, but not to the case of a person who denies the existence of any God. In <sup>3</sup> *R. v. Waddington* the defendant had “ denied the authenticity of the Scriptures, and one part of the libel stated “ that Jesus Christ was an impostor and a murderer in principle and a fanatic.” All the judges held that the Lord Chief Justice (Abbott) was right in holding that this language was a libel. No question seems to have been raised as to the defendant’s good faith. Best, J., said, “ It is not necessary for me to say “ whether it be libellous to argue from the Scriptures against “ the divinity of Christ, that is not what the defendant professes to do. He argues against the divinity of Christ by “ denying the truth of the Scriptures. A work containing “ such arguments published maliciously (which the jury have “ found) is by the common law a libel, and the legislature “ has never altered this law, nor can it ever do so whilst the

<sup>1</sup> 81 *St. Tr.* 927.

<sup>2</sup> 3 B. and Ald. 161.

<sup>3</sup> 1 B. and C. 26.

CH. XXV. "Christian religion is considered to be the basis of that law." In <sup>1</sup>R. v. Hetherington Lord Denman directed the jury "that if they thought the publication tended to question or cast disgrace upon the Old Testament, it was a libel." Lastly, it was decided in <sup>2</sup>Cowan v. Milbourne that a person was justified in refusing to carry out a contract to let certain rooms because the plaintiff proposed to deliver in them lectures, the titles of two of which were advertised as follows: "The Character and Teachings of Christ; the former defective, the latter misleading," "The Bible shown to be no more inspired than any other book." This case was decided in 1867. Kelly, L. C. B., said that Christianity was part of the law of the land, and that the first proposition above-mentioned could not be maintained without blasphemy. Lord (then Baron) Bramwell was of the same opinion. This last decision is strong to show that the true legal doctrine upon the subject is that blasphemy consists in the character of the matter published and not in the manner in which it is stated. The propositions intended to be expressed in the placards which were thus held to be blasphemous could hardly have been expressed in less offensive language.

There is, no doubt, some authority in favour of a different view of the law. <sup>3</sup>In *Starkie on Libel* there is a passage the point of which is as follows: "A wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or, what is equivalent to such an intention in law as well as morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong." <sup>4</sup>At the trial of

<sup>1</sup> Folkard, 598, quoting 5 Jur. 529.

<sup>2</sup> L.R. 2 Ex. 230.

<sup>3</sup> Folkard's *Starkie*, p. 600.

<sup>4</sup> See my *Digest*, art. 161, for a note of this case, with which I was favoured by Lord Coleridge, who was counsel for the Crown on the occasion. Apart from this note, I may observe that in the course of the discussion to which the case gave rise Mr. Justice Coleridge told me that he pointed out to the jury that one of the offensive remarks made by Pooley upon the character of Jesus Christ might possibly have been intended as an argument, and not as mere railing, and that if they took this view of it they might acquit him on the count founded upon it. In the article referred to, I have

a man named Pooley at Bodmin, in 1857, Coleridge, J., laid down the law to the jury in terms apparently founded upon this passage of Starkie. No judge who ever sat on the bench was less likely to understate the law relating to blasphemous libel than Mr. Justice Coleridge, and indeed the sentence which he passed upon Pooley was regarded as over severe, and was afterwards mitigated, and this circumstance gives special weight to his decision. I must however say that the weight of authority appears to me to be opposed to it. The cases cited all proceed upon the plain principle that the public importance of the Christian religion is so great that no one is to be allowed to deny its truth. The history of the offence confirms this view. In very early times heresy did not exist, and open attacks upon the Christian religion were unknown. As soon as doctrines regarded as being heretical became at all common they were treated as capital crimes, and heretics continued to be burnt from the reign of Henry V. to the reign of James I., though from the beginning of the reign of Elizabeth orthodoxy was more usually protected by the Court of High Commission. After the Restoration the Court of King's Bench punished as offences against the common law many offences which had formerly been dealt with by the Court of High Commission and the Star Chamber; and the grounds on which they put the punishment of blasphemous libel was that the law of the land derived its principal moral support from religion, and that therefore attacks on the truth of religion must be treated as temporal crimes. To say that the crime lies in the manner and not in the matter appears to me to be an attempt to evade and explain away a law which has no doubt ceased to be in harmony with the temper of the times. It is unquestionably true that in the course of the last thirty, but especially in the course of the last twenty, years, open avowals of disbelief of the truth of both natural and revealed religion have become so common that they have ceased to attract attention. To mention only the writings of foreigners, Strauss's *Leben Jesu*, set side by side the two views of the law for which there is authority. On the fullest consideration of the subject, I am disposed to think that, in the case in question, Mr. Justice Coleridge laid down the law too favourably to Pooley.



CH. XXV. Renan's *Vie de Jésus*, and the works of Auguste Comte, are read everywhere, and the opinions which they maintain are avowedly held and publicly maintained by large numbers of persons whose good faith and decency of language it would be absurd to dispute. If the cases to which I have referred are good law, every one of these works is a blasphemous libel, and every bookseller who sells a copy of any one of them, every master of a lending library who lets one out to hire, nay, every owner of any such book who lends it to a friend, is guilty of publishing a blasphemous libel, and is liable to fine and imprisonment. These are certainly strong reasons why the law should be altered. They might, if any one should try to put the law in force, be strong grounds for mitigation of punishment, but they are no reasons at all for saying that the law is not that which a long and uniform course of decisions has declared it to be.

In order to complete the subject of offences against religion, it is necessary to refer shortly to two classes of enactments which have ceased to have any other than a historical interest, and which may seem to belong more properly to the general history of the country than to a history of the criminal law. These are (1) the laws intended to secure uniformity of public worship, and (2) the laws against Roman Catholics. It would, for many reasons, be out of place to attempt to give here any account even of the leading details of these bodies of law, and it would obviously be impossible to discuss in this place the questions of policy which they suggest; but I will attempt to give some account of their general scope.

The relations between Church and State in this country may not at all times have been distinctly conceived or expressed by those who have at different times possessed public authority in England, but there can be no doubt that the theory of the identity of Church and State embodied in the

<sup>1</sup> "Whereas by divers sundry old authentic histories and chronicles it is manifestly declared and expressed that this realm of England is an empire, and so has been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same, unto whom a body politic, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality, be bounden and owe, next to God, a natural and humble obedience." It then goes on

preamble of the Statute of Appeals, expressed, when it was adopted and acted upon, the view of the subject on which all subsequent legislation to our own times has proceeded. However this may be, the bodies of law to which I have referred illustrate the stages in a process which has lasted now for three hundred years, and which may be shortly stated as follows:—

The reigns of Henry VIII., Edward VI., and Mary, may be regarded as so many steps in a revolution, the final result of which, at the accession of Elizabeth, was a strenuous effort on her part to establish by law a form of religion which should satisfy that important part of the population who objected almost equally strongly to the Roman Catholic clergy, especially when they sided with the pope against the law of the land, and burnt people for theological opinions, and to Protestants, whose views appeared revolutionary, extravagant, or needlessly severe. This feat she was enabled by circumstances to accomplish to a great extent. Notwithstanding the Civil War and the Revolution of 1688, the system of which she was the author retained its leading features till about the year 1830. Even now there is a sense in which it may still be said to exist. The fundamental principle of it was that the regulation of public religious worship was a matter of public concern for which the legislature ought to make provision, and that it was the duty of all good subjects to accept and make use of the opportunities for public worship provided for them. A second equally fundamental principle was that to acknowledge the alleged right of a foreigner like the Pope to interfere with the laws of England on this subject was a step towards treason, and that to act in obedience to his authority in opposition to the law of the land was actual treason.

The principal laws founded on these principles were as follows:—The first was the Act of Uniformity of 1558 (1 Eliz. c. 2). This act revived the Prayer-book of Edward VI., and enforced its use in church by penalties extending, upon a third conviction, to imprisonment for life. It also punished all ridicule or “depraving” of the book with great amplitude of expression to say that the king is head, both of the body spiritual and the body temporal, and that each is capable of governing itself without any help or interference from the Pope.

CH. XXV. similar penalties, and <sup>1</sup> provided that every one should attend public worship in the prescribed form regularly, under a penalty of twelve pence for every omission, and the censures of the Church. In 1581 the penalty for not going to church was increased to £20 a month, by 23 Eliz. c. 1, s. 5. In 1593 a statute of much greater severity was passed. This was 35 Eliz. c. 1. "An Act to retain the Queen's Majesty's subjects in their due obedience." It provided that any person who obstinately refused to come to church, and persuaded others to withstand her Majesty's ecclesiastical authority, or persuaded any other person not to go to church and to go to any unlawful conventicle, should be imprisoned till he conformed. If he did not conform within three months, he was to abjure the realm, and if, after abjuration, he did not leave the realm, or returned to it without license, he became guilty of felony without benefit of clergy.

The law relating to Protestant dissenters stood thus till the Civil War, being enforced with various degrees of rigour according to the circumstances of the time; but in estimating its severity it must be remembered that the Court of High Commission and the ecclesiastical courts exercised their powers down to the year 1640 in the manner already sufficiently illustrated.

During the Civil War, and under the Commonwealth and Cromwell's protectorship, the law on this subject underwent a succession of remarkable changes. The first took place immediately after the battle of Naseby, when the Presbyterians were at the height of their power. It was effected by an <sup>2</sup> ordinance dated August 23, 1645, which ordered all ministers to make use of a new service-book called the Directory, then lately framed by the Westminster divines, and forbade the use of the Book of Common Prayer, not only in all places of public worship, but in any private place or family, under the penalty of £5, and £10 fine, and a year's imprisonment, for the first, second, and third offences respectively.

This ordinance was by no means satisfactory to the Inde-

<sup>1</sup> S. 14 in Pickering's *Statutes*. The *Revised Statutes* omit the repealed parts of the act, and renumber the parts which are unrepealed.

<sup>2</sup> Neal's *Puritans*, iii. p. 131.

pendents, and <sup>1</sup> efforts were made to frame some scheme by which they could be comprehended under the Presbyterian government without oppression. These attempts, however, failed, as there was no room for a compromise between men who claimed the spiritual government of others by divine right, and those who peremptorily refused to admit their claim. By degrees, however, the Independents obtained the upper hand, and they established, especially under the Protectorate, a form of Church government much less stringent than Presbyterianism. The principal points in its history were as follows:—

On the point of his departure for Ireland in 1649, <sup>2</sup> Cromwell wrote to Parliament recommending the removal of all penal laws on religion, and in this he was seconded by Fairfax and his army. The Parliament thereupon <sup>3</sup> repealed all the acts of Elizabeth already referred to, but provided that, in order to prevent profane or licentious persons from neglecting the performance of religious duties, all persons should resort to some place of religious worship every Sunday. It also legislated against adultery and incest, which were made felony, and fornication, which on a first offence subjected the offender to three months' imprisonment, and on the second was felony without benefit of clergy. The law, already noticed, as to "blasphemous and execrable opinions," formed part of the same legislation.

The Irish campaign, the invasion of Scotland, the defeat of the Presbyterians at the battle of Dunbar, and the termination of the second civil war by the battle of Worcester, the expulsion of the last remnant of the Long Parliament, and the failure of the Barebone Parliament, led to the establishment of Cromwell as Protector, first under the Instrument of Government (December 16, 1653), and afterwards under the Humble Petition and Advice (March 29, 1657). Each of these memorable documents contained a statement of principles as to religious belief which represented fairly the practice of Cromwell during his tenure of power. "They were thus stated in the Instrument of Government:—

Art. 35. "That the Christian religion contained in the

<sup>1</sup> Neal's *Puritans*, iii. pp. 133-142. <sup>2</sup> *Ib.* iv. p. 8. <sup>3</sup> *Ib.* p. 26. <sup>4</sup> *Ib.* p. 69.

CH. XXV. "Scriptures be held forth and recommended as the public  
 "profession of these nations; and that as soon as may be  
 "a provision less subject to contention and more certain than  
 "the present be made for the maintenance of ministers; and  
 "that till such provision be made the present maintenance  
 "continue."

36. "That none be compelled to conform to the public  
 "religion by penalties or otherwise; but that endeavours be  
 "made to win them by sound doctrine and the example of a  
 "good conversation."

37. "That such as profess faith in God by Jesus Christ,  
 "though differing in judgment from the doctrine, worship, or  
 "discipline publicly held forth, shall not be restrained from,  
 "but shall be protected in, the profession of their faith and  
 "exercise of their religion, so as they abuse not this liberty  
 "to the civil injury of others and to the actual disturbance of  
 "the public peace on their parts: provided this liberty be not  
 "extended to popery or prelacy, or to such as, under a pro-  
 "fession of Christ, hold forth and practise licentiousness."

In its debates on this subject, <sup>1</sup>Parliament tried to abridge the generality of the 37th Article by drawing up a list of fundamental points on which agreement should be required, and they elaborated sixteen propositions "intended to exclude not only Deists, Socinians, and Papists, but Arians, Antinomians, Quakers, and others," but this seems to have come to nothing.

<sup>2</sup>The corresponding part of the Humble Petition and Advice goes into considerably greater detail than the Instrument of Government, but is to much the same effect. In substance, it provides that all forms of Christian worship are to be permitted and protected, except Deism or Socinianism, popery, and prelacy. Matters stood thus till the restoration of Charles II. Upon that event, the Commonwealth legislation being treated as void; except in some particular points on which it was confirmed by express enactments, the law as to conformity stood as Elizabeth had left it, the High Commission Court however being taken away and the ecclesiastical courts being greatly restrained in

<sup>1</sup> Neal, iv. pp. 89-91.

<sup>2</sup> *Ib.* p. 153.

their operations by the abolition of the *ex officio*-oath. Under CH. XXV.  
 this state of the law those who dissented from the Church of England, as constituted by Edward VI.'s Prayer-book and Articles, were subject to severe penalties. They might be fined £20 a month if they did not go to church; they might be banished if they persuaded others to go to illegal religious meetings, and all such meetings were illegal except those of the Church by law established. This state of things, however, by no means satisfied the party which had regained power. They insisted upon and carried the Act of Uniformity of 1662 (13 & 14 Chas. 2, c. 4), which was in various ways far more stringent than the older act. It required <sup>1</sup> far more explicit declarations of assent and consent to the articles and other contents of the new Book of Common Prayer than had been required to the old one. <sup>2</sup> It made episcopal ordination an absolutely essential condition to holding preferment in the Church of England. The new Prayer-book also contained matter which was not in the old one, and which was vehemently objected to by what we should call the Low Church party. The legal effect of the substitution of the new for the old Prayer-book and Act of Uniformity was largely to increase the class to whom all the severe penalties enacted by the statutes of Elizabeth applied, and to make it more difficult for them than it had been before to bring themselves to obey the law.

The legislation of Charles II. against Dissenters did not, as is well known, stop here. In 1665 was passed 17 Chas. 2, c. 2, known as the Five-mile Act. It provided in substance that no Nonconformist minister should "come or be within" five miles of any town represented in Parliament, or any place where he had acted as such minister, "unless only in "passing upon the road," without swearing to the doctrine that it is not lawful upon any pretence whatever to take up arms against the king, and that the person swearing "will not at any time endeavour any alteration of government "either in Church or State." The persons in question were also prohibited from keeping schools (s. 4).

<sup>1</sup> See ss. 4 and 17, and compare 13 Eliz. c. 12, ss. 1 and 3 (Pickering).

<sup>2</sup> Sa. 13, 14.

CH. XXV. In 1670 was passed the act to suppress seditious conventicles (22 Chas. 2, c. 1). This act authorised, and in <sup>1</sup>stringent terms required, all peace officers to disperse all conventicles, breaking open doors if necessary (s. 9) for that purpose. Persons attending such conventicles were liable to 5s. penalty for a first, and to 10s. for a second offence, and preachers to penalties of £20 and £40, and the owners of houses who permitted their houses to be so used to a penalty of £20. "Lieutenants, or deputy-lieutenants, or any "commissionated officer of the militia or other his Majesty's "forces," were required on a certificate by one justice to disperse such conventicles by military force.

The law relating to Protestant Dissenters stood thus till the Revolution of 1688. Of the manner in which it was administered, and of the degree in which it contributed to the overthrow of the government of James II., I need say nothing; nor does it fall within my province to discuss the manner in which the Protestant Dissenters refused to be bribed by James II. into an approval of the obviously illegal measures by which he tried to gain their support in favouring the members of his own Church. Their reward was the Toleration Act (1 Will. & Mary, c. 18). It is a narrow and jealously-worded concession. It does not repeal one of the acts to which reference has been made, but after reciting that "some ease to scrupulous consciences in the exercise of "religion may be an effectual means to unite their Majesties' "Protestant subjects in interest and affection," it proceeds to enact that no one shall be liable to the penalties contained in the various acts which I have noticed who makes certain declarations or takes certain oaths set out in the act. It also provides (s. 5) that "if any assembly of persons dissenting "from the Church of England shall be found in any place "of religious worship with the doors locked, bolted, or "barred," the persons present are to receive no benefit from the act. It is also provided "that neither this act, nor any "clause, article, or thing therein contained, shall extend, "or be construed to extend, to give any ease, benefit, or

<sup>1</sup> "Any justice wilfully and willingly omitting to perform his duty was liable "to a penalty of £100 by s. 11, and every constable to a penalty of £5."

“advantage to any papist or popish recusant whatever, or  
 “any person who shall deny in his preaching or writing the  
 “doctrine of the blessed Trinity as it is declared in the  
 “Thirty-nine Articles.”

CH. XXV.

Practically the Toleration Act put an end to the attempt to treat Protestant dissent as a crime, though theoretically it interfered in no degree with the general principle that the State ought to regulate religion, and that it is a duty to obey the law upon that as upon other subjects. The old statutes became obsolete, but they continued to exist upon paper for a great length of time.

The Five-mile Act and the Conventicle Act were repealed by 52 Geo. 3, c. 155, A.D. 1812, which also contains a section (s. 4) the effect of which is to extend to Unitarians the advantages of the Toleration Act; for it applies to every person officiating in or resorting to any congregation of Protestants whose place of meeting is duly certified under the act, and it makes no condition as to belief in the Trinity.

Two of the acts of Elizabeth—namely, the acts of 1581 and 1593—continued to be nominally in force, subject to the provisions of the Toleration Act, till 1844, when they were repealed by 7 & 8 Vic. c. 102. The section of Elizabeth's Act of Uniformity (1 Eliz. c. 2, s. 14) which made attendance at church obligatory under a penalty of a shilling, was repealed in 1846 by 9 & 10 Vic. c. 59. The result of the whole is that it may now be stated broadly that uniformity in public worship is no longer one of the objects sanctioned by the criminal law.

I now come to the legislation against Roman Catholics. It was extremely intricate and severe, and may be referred to three distinct periods, namely, the reign of Elizabeth, the reign of James I., and the reign of William III.

It is to be observed, in the first place, that the offence of nonconformity to the Established Church was one which was committed as much by a Roman Catholic as by a Protestant Dissenter. Each was equally bound by law to attend the services of the Established Church, and each was liable to the same penal consequences for refusing to do so. It is unnecessary, therefore, to repeat what has already been said on



CH. XXV. this subject; though I may observe that the expression "popish recusant," which continually occurs in the acts on the subject, means <sup>1</sup> a Roman Catholic who, because he is one, refuses to come to church.

It must also be observed that practically several of the statutes by which it was made high treason or an offence punishable by *præmunire* to deny the royal supremacy may be regarded either as creating offences against the State or offences against religion. Having already referred to many of them in giving the history of the law relating to political offences, I need not return to the subject. I may, however, observe that several of the treasons created in Elizabeth's reign seem to fall rather under the head of offences against religion than under that of offences against the State, though no doubt they were passed principally, if not altogether, for political reasons.

The most important of the acts in question were as follows:—

In 1570, Pius V. issued a bull releasing Elizabeth's subjects from their allegiance.

By way of reply to this there was passed in the same year the act 13 Eliz. c. 2, which made it treason to "use or "put in ure" any bull of absolution or reconciliation, or to absolve or reconcile any person by virtue of any such bull. It was also made a *præmunire* to bring any *agnus dei* "or "any crosses, pictures, beads, or any such like vain and "superstitious things from the Bishop or See of Rome, or "from any person authorised or claiming authority by or from "the said Bishop of Rome, to consecrate or hallow the same."

In 1580, the contest between Catholic and Protestant was at its height. The massacre of St. Bartholomew had happened just eight years before. The Spanish Armada sailed eight years afterwards. The parliamentary association for the protection of Elizabeth against assassination was formed in 1584, and Mary Stuart was executed in 1587.

Under these circumstances the following Acts of Parliament

<sup>1</sup> "And first as to the said offence of not coming to church, so far as it "practically concerns those of the popish religion who, in respect thereof, are "commonly called popish recusants."—1 Hawkins, *P. C.* 386.

were passed:—By 23 Eliz. c. 1, s. 2, it was made high treason CH. XXV.  
 “to pretend to have power, or by any ways and means put  
 “in practice, to absolve, persuade, or withdraw any of the  
 “queen’s subjects from their natural obedience to her  
 “Majesty, or to withdraw them for that intent from the  
 “religion now by her Highness’s authority established within  
 “her Highness’s dominions to the Romish religion, or to  
 “move them to promise any obedience to any pretended  
 “authority of the See of Rome,” or do any overt act for that  
 purpose. By s. 4 of the same act the saying or singing of  
 mass was made an offence punishable by two hundred marks  
 fine, and imprisonment for a year and till payment. To  
 hear mass willingly was made an offence punishable by one  
 hundred marks fine and a year’s imprisonment.

In 1585 was passed 27 Eliz. c. 7, “An Act against Jesuits,  
 “seminary priests, and other such like disobedient persons.”  
 It provided that all Jesuits, seminary priests, and other priests,  
 ordained out of England or ordained in England since the  
 beginning of the reign under the authority of the Pope,  
 should within forty days leave the realm; that every such  
 priest coming into the realm, or remaining in it after the  
 forty days, should be guilty of high treason; and that it  
 should be felony without benefit of clergy “wittingly and  
 “willingly” to “receive, relieve, comfort, aid, or maintain any  
 “such Jesuit, seminary priest, or other priest, being at liberty  
 “and out of hold.” Every subject being a student at a sem-  
 inary was to return within six months after a proclamation  
 made for that purpose under pain of high treason.

By the same act it was made a *præmunire* to send money  
 to any Jesuit, or seminary or other priest abroad, and a  
 misdemeanour to send any child or other person under the  
 government of the offender abroad without special license.

In 1593, the effects of the defeat of the Spanish Armada  
 had made themselves felt in various directions. The large  
 body of persons who up to that time had been moderate  
 Roman Catholics, or at least had favoured the Roman Catholic  
 side, became members of the Church of England, and formed  
 the High Church section of it. The Church of England was  
 thus strongly reinforced, both as against the extreme Catholics

CH. XXV. and as against the Puritans, and the effect of this was shown in the legislation of 1593. In that year were passed two most severe acts—35 Eliz. c. 1, "The Act to retain the Queen's Majesty's subjects in their due obedience," and 35 Eliz. c. 2, "An Act for restraining popish recusants to some certain places of abode." Of the first act I have already spoken. The second provided that all popish recusants should within a certain time "repair to their place of dwelling where they usually heretofore made their common abode, and shall not at any time after pass or remove above five miles from thence." A recusant having no place of abode was to "repair to the place where such person was born, or where the father or mother of such person shall then be dwelling, and not remove or pass above five miles from thence." The penalty was forfeiture of goods and chattels, and of the profits of land for life. They were also to notify their names to the minister or constable of the parish. If an offender had nothing to forfeit, he was to abjure the realm.

The result of this legislation was that at the end of the reign of Elizabeth every Roman Catholic priest in England, except the few who might have been ordained in the reign of Queen Mary, was by the very fact of his presence in England guilty of high treason; that to celebrate the mass was an offence in itself punishable with fine and imprisonment, and that popish recusants were not only liable to ruinous penalties, but were forbidden to travel above five miles from their registered places of abode.

In 1605 the Gunpowder Plot was discovered, and two statutes were passed in consequence, namely 3 Jas. 1, c. 4, and 3 Jas. 1, c. 5. They greatly increased the severity of the law upon this subject. By c. 4<sup>1</sup> the king was enabled to refuse £20 a month penalty, and to take instead of it two-thirds of the recusant's whole estate,<sup>2</sup> his mansion house excepted. Moreover an<sup>3</sup> oath abjuring the Pope's authority to depose the king was drawn up, and any<sup>4</sup> two justices were empowered to

<sup>1</sup> S. 11.

<sup>2</sup> S. 12.

<sup>3</sup> S. 15. By 7 Jas. 1, c. 6, this oath was to be administered to every person over eighteen in the whole country.

<sup>4</sup> S. 13.

administer it to any person, not being a nobleman, who had not received the sacrament twice in the year before, and to all travellers who would not upon oath say that they had done so. <sup>1</sup> Six privy councillors might tender the oath to a nobleman. <sup>2</sup> Every one who refused the oath was to be committed to prison till the next quarter sessions or assizes, when the oath was to be tendered a second time, and if it was still refused the person refusing was guilty of a *præmunire*. <sup>3</sup> Lastly, the provisions of the act of 23 Eliz. c. 1, which made it treason to reconcile any person to Rome, or to be willingly reconciled, were reenacted in a somewhat severer form.

The statute 3 Jas. 1, c. 5, contained further provisions. It <sup>4</sup> offered rewards for the discovery of any person entertaining or relieving a Jesuit or priest. It <sup>5</sup> prohibited recusants from coming to Court, and <sup>6</sup> required all popish recusants (<sup>7</sup> except mechanics and persons having no other place of abode) to leave London and go to at least ten miles from it.

Other provisions <sup>8</sup> disabled recusant convicts from practising as barristers, attorneys, solicitors, advocates, or proctors: from practising physic and from being apothecaries, from being judges in any court, and from holding any military office. Popish recusants convict, and every one married to a wife being a popish recusant convict, were forbidden to "exercise any public office or charge in the commonwealth by himself or by his deputy," unless the husband and all his children above nine went to church once a month. <sup>9</sup> All popish recusants were excommunicated *ipso facto*, <sup>10</sup> but not so as to be prevented from suing. There were also provisions imposing a penalty of £100 on all persons <sup>11</sup> married or causing any dead body to be <sup>12</sup> buried otherwise than according to the rites of the Established Church, or not having their children so <sup>13</sup> baptized within a month after birth.

<sup>14</sup> Popish books were prohibited, and <sup>15</sup> justices were authorised to search for them as well as for "relics of popery,"

<sup>1</sup> S. 41. <sup>2</sup> S. 14. <sup>3</sup> Sa. 22 and 23. <sup>4</sup> S. 1. <sup>5</sup> S. 2. <sup>6</sup> S. 3. <sup>7</sup> S. 5.  
<sup>8</sup> S. 8. I suppose "recusant" in this section meant "popish recusant," which is the expression used in other parts of the act, but this is not the natural meaning of the word.

<sup>9</sup> S. 11. <sup>10</sup> S. 12. <sup>11</sup> S. 13. <sup>12</sup> S. 15. <sup>13</sup> S. 14. <sup>14</sup> S. 25. <sup>15</sup> S. 26.

CH. XXV. and if any "altar, pix, beads, pictures, or such like popish "relics or books" were found, the justice, if he "thought them "unmeet for such recusant," might cause them to be presently defaced and burnt.

<sup>1</sup> Finally all arms, gunpowder, and munition, except only such weapons as four justices might consider necessary for the defence of the person or house of the recusant, were to be taken from him, and be kept and maintained at the recusant's cost in any place which the justices might appoint.

It is well known that the execution of these laws under James I. and Charles I. was very uncertain. It was constantly suspended by both of these sovereigns, but instances occurred even in the reign of Charles II. in which the most severe of them, those by which the mere fact of being a priest in England amounted to high treason, were executed in their full rigour. They not only remained in force all through the seventeenth century, but they were increased in severity on two occasions.

In 1678, in consequence of the excitement caused by Oates's story about the Popish Plot, was passed <sup>2</sup> 30 Chas. 2, st. 2, c. 1, by which Roman Catholics were excluded from Parliament by a test oath denying transubstantiation, and describing "the invocation or adoration of the Virgin Mary, "or any other saint, and the sacrifice of the mass, as they "are now used in the Church of Rome, as superstitious and "idolatrous."

All these acts were passed under the influence of passionate excitement and great fear caused by real danger. There could be no mistake about the dangers to which Elizabeth was exposed by the Roman Catholics at home and abroad, nor as to the Gunpowder Plot; and though Oates was one of the worst and most false of mankind, the relations between Louis XIV. and Charles II. which existed in 1678, were in fact even more alarming than public opinion excited by Oates's lies supposed them to be. It is thus easy to understand the legislation of which I have just given the effect.

<sup>1</sup> Ss. 28, 29.

<sup>2</sup> In Pickering's *Statutes* this act is dated 1677, which is clearly wrong.

The last, and in some respects the most severe, of the penal laws was passed under very different circumstances. It was 11 & 12 Will. 3, c. 4. It provided <sup>1</sup> that every one who should take any popish bishop, priest, or Jesuit, and prosecute him to conviction for saying mass, or executing any other part of his functions, should receive £100 reward. <sup>2</sup> Every popish bishop, priest, or Jesuit, saying mass or exercising any other part of the function of a popish bishop or priest, and every papist keeping school or taking upon himself the education or government, or boarding of youth, was to suffer perpetual imprisonment. <sup>3</sup> Every person educated in the popish religion, or professing the same, was to take the oaths of allegiance and supremacy within six months after attaining the age of eighteen, and to make the declaration in the act excluding Roman Catholics from Parliament. In default, every such person, but not his heirs, was to be disabled and made incapable to inherit land, and during his life or till he should take the oaths, “<sup>4</sup> the next of his kindred, which shall be a Protestant, shall have and enjoy the said lands, tenements, and hereditaments,” being accountable only for wilful waste. Moreover, every papist was disabled and made incapable to purchase land after a certain date, and uses and trusts for the benefit of any such person, subsequent to that date, were declared to be void.

The object of this clause, no doubt, was gradually to deprive the Roman Catholic gentry of their landed property, in particular by forcing them to sell it. They were to be prevented absolutely from buying land, and put under such a restriction as to inheriting land that many persons would wish not to run the risk of it. This is pointed out by <sup>5</sup> Burnet as follows:—“This act hurt no man that was in the present possession of an estate, it only incapacitated his next heir to succeed to that estate if he continued a papist; so the danger of this, in case the act should be well looked to, would put those of that religion, who are men of conscience, on the selling their estates; and in the course of a few years might deliver us from having any papists left among us. But this act wanted several neces-

<sup>1</sup> S. 2.    <sup>2</sup> S. 3.    <sup>3</sup> S. 4.    <sup>4</sup> S. 4.    <sup>5</sup> *Own Times*, iii. 253.

CH. XXV. "sary clauses to enforce the due execution of it: the word  
 " 'next of kin' was very indefinite, and the 'next of kin'  
 " was not obliged to claim the benefit of this act; nor did  
 " the right descend to the remoter heirs if the more imme-  
 " diate ones should not take the benefit of it." The language  
 of this part of the act no doubt is vague—perhaps intention-  
 ally so. This, however, cannot be said of other clauses,<sup>1</sup> one  
 of which enacted that "if any popish parent, in order to the  
 " compelling his Protestant child to change his religion, shall  
 " refuse to allow such child a fitting maintenance suitable to  
 " the degree and ability of such parent, and to the age and  
 " education of such child," the Lord Chancellor might make  
 such order therein as should be agreeable to this act.

The following is Burnet's account of the objects of the  
 act:—"Upon the peace of Ryswick a great swarm of priests  
 " came over to England, not only those whom the Revolution  
 " had frightened away, but many more new men who appeared  
 " in many places with great insolence; and it was said that  
 " they boasted of the favour and protection of which they  
 " were assured. Some enemies of the government began to  
 " give it out that the favouring that religion was a secret  
 " article of the peace; and so absurd is malice and calumny  
 " that the Jacobites began to say that the king was either of  
 " that religion, or at least a favourer of it. Complaints of  
 " the avowed practices and insolence of the priests were  
 " brought from several places during the last session of  
 " Parliament, and those were maliciously aggravated by some  
 " who cast the blame of all on the king." He then states the  
 effect of part of the bill, and proceeds, "Those who brought  
 " this into the House of Commons hoped that the court  
 " would have opposed it; but the court promoted the bill, so  
 " when the party saw their mistake they seemed willing to  
 " let the bill fall; and when that could not be done they  
 " clogged the bill with many severe and some unreasonable  
 " clauses, hoping that the Lords would not pass the act; and  
 " it was said that if the Lords should make the least alter-  
 " ation in it, they in the House of Commons who had set it  
 " on were resolved to let it lie on their table when it should

<sup>1</sup> S. 7.

“ be sent back to them. Many lords, who secretly favoured CH. XXV.  
 “ papists on the Jacobite account, did for this very reason  
 “ move for several alterations; some of them importing a  
 “ greater severity; but the zeal against popery was such in  
 “ that House that the bill passed without any amendment,  
 “ and it had the royal assent.”

This was the last of the penal laws against the Roman Catholics. I may shortly sum up their effect as follows:—

The presence of a Roman Catholic bishop or priest in England was high treason. To reconcile any person to Rome or to be willingly reconciled was also treason. If any bishop or priest performed any of the functions of his office he was liable in the alternative to perpetual imprisonment under the act of William, or to fine and imprisonment under the act of Elizabeth. To harbour a priest was felony without benefit of clergy. The other disabilities of Roman Catholics are summed up with admirable terseness by Serjeant Hawkins (1 *P. C.* 387).

First, They are under the following disabilities:—1. That of bringing an action. 2. That of presenting to a church. 3. That of bearing any public office or charge. 4. That of claiming any part of a husband's personal estate. 5. That of claiming an estate by courtesy or by way of dower after a marriage against law.

Secondly, They are put under the following restraints  
 1. From going five miles from home. 2. From coming to Court. 3. From keeping arms. 4. From coming within ten miles of London.

Thirdly, They are liable to the following forfeitures:—  
 1. That of two parts of a jointure or dower. 2. That of £20 for not receiving the sacrament yearly after conformity. 3. That of £100 for an unlawful marriage. 4. That of £100 for an omission of lawful baptism. 5. That of £20 for an unlawful burial.

Lastly, They are subject to the following inconveniences:—1. That their houses may be searched for relics, whether they be men or women. 2. That if they be women, and married, they may be committed, &c.

I have omitted some of the forfeitures and inconveniences,



CH. XXV. as a full account of them would render the statement of the law tediously minute.

The subsequent history of these laws is curious, and is as follows:—The Roman Catholics, as I have already said, got no benefit from the Toleration Act; and though the laws against them fell into disuse, and were seldom, if ever, put in execution during the eighteenth century, their legal validity long remained unaffected. In his speech in opening the case against Lord George Gordon, Wallace, then Attorney-General, gave some account of the manner in which these laws, and especially the act of William III., acted. <sup>1</sup>He said, “The penalties and punishments appeared to everybody so extremely harsh and severe, that very few prosecutions were carried on upon this act: in my own time I only remember one, which was against a person for saying mass in a house somewhere about Wapping; he was committed, and of course doomed by the provisions of this act to perpetual imprisonment. But the Roman Catholics were still liable to private extortionary demands, which they yielded to to avoid either prosecution or that they might have the liberty of enjoying what had long been in their families and had descended to them as their birthright.” In 1778, there was passed an act, 18 Geo. 3, c. 60, known as Sir George Saville's Act. This act repealed practically all the penal clauses of the act of William III. as against all persons who would take an oath of allegiance to George III., disclaiming the Stuarts, and also disclaiming the deposing power of the Pope, and some other doctrines ascribed to the Roman Catholic Church. This act, for the first time for nearly two hundred years, allowed mass to be said in England without the risk of perpetual imprisonment, but from a merely legal point of view this was of no importance, as the bare presence of a Roman Catholic priest in England was still treason under the act of Elizabeth, and the saying of mass was still an offence which involved a fine of 200 marks and a year's imprisonment.

Some similar legislation was afterwards proposed for

<sup>1</sup> 21 *State Trials*, p. 501.

Scotland, but was opposed with violence and rioting, which CH. XXV. led ultimately to the Gordon riots of 1780.

In the course, however, of the next few years a great change of sentiment took place, and in 1791 an act was passed (31 Geo. 3, c. 32) which, following the precedent of the Toleration Act, exempted from all the penalties of the acts of Elizabeth and James I. all Roman Catholics who were willing to make a declaration renouncing certain doctrines imputed to the Roman Catholic Church, and promising fidelity to the Hanoverian family. This act still, however, left Roman Catholics subject to many disabilities as to holding office, and especially as to sitting in Parliament. All of these were removed by the act known as the Catholic Emancipation Act, 10 Geo. 4, c. 7, passed in 1829. This act, however, contains (ss. 28-36) severe enactments against Jesuits and members of other male religious communities. Jesuits and monks residing in the kingdom at the time when the act passed were to be registered. Natural-born subjects being Jesuits or monks were empowered to return, and required to register themselves within six months of their return, under a penalty of £50 a month. Jesuits and monks coming into the realm from foreign parts were made guilty of a misdemeanour, upon conviction of which they must be banished for life, though under a Secretary of State's license a Jesuit may remain in England for six months. To admit any person in England to become a member of any religious order is by s. 33 a high misdemeanour, punishable by banishment for life. Any person banished who does not leave England within three months, or is afterwards at large in England, is liable to transportation for life.

These provisions have never been modified, and I believe have been treated ever since they were passed as an absolutely dead letter.

The numerous acts which I have enumerated remained on the statute book long after the acts of 1791 and 1829 had made them practically inoperative. Most of these were repealed in 1844 by 7 & 8 Vic. c. 102, which is entitled "An Act to repeal certain penal enactments made against her Majesty's Roman Catholic subjects." Some were repealed in

CH. XXV. 1846 by 9 & 10 Vic. c. 59, "An Act to relieve her Majesty's  
— "subjects from certain penalties and disabilities in regard to  
"religious opinions."

Such is the history of the laws relating to offences against religion. The following is a short summary of it.

When this island was converted to Christianity, and for many centuries afterwards, the temporal and spiritual authorities were in the closest possible alliance and union. The temporal authorities dealt with crimes, the spiritual authorities with sins. The judges of both sat in the same courts and seem to have followed the same or similar procedure. At the Norman Conquest the jurisdictions were separated, the bishops sat in their own courts and proceeded according to their own laws, and the lay courts, in case of need, enforced their decisions. For several centuries, however, their criminal jurisdiction was confined to sins, and had little to do with heretical opinions, for the simple reason that there were no heretics. Though this jurisdiction was, according to our modern notions, intolerable, on account of the interference which it involved with private life, and also on account of the inquisitorial method in which it was carried on, it cannot be said to have been cruel. It affected neither life nor limb, nor even property or personal liberty, except in a roundabout way through the agency of the lay courts.

Towards the end of the fourteenth century the great controversies began which have ever since been growing wider and deeper. Heresy was now viewed as a capital crime for which people were to be burnt alive, and measures were taken for the purpose of so burning them, first fraudulently and afterwards straightforwardly, by passing the acts of Henry IV. and Henry V., which gave the clergy the power of defining heresy just as they pleased. This state of things lasted, and persons adjudged to be heretics continued to be burnt as such at intervals, for about 135 years, namely from 1400 to 1535. In 1535 a great check was put upon the punishment of heretics by the act of Henry VIII. which declared negatively what should not be heresy, and though the Act of the Six Articles declaring affirmatively what should be heresy made the law more severe than it had been in the preceding years,

it did not make it nearly as severe as it had been throughout the whole of the fifteenth and the first half of the sixteenth century. Under Edward VI. there were two executions for heresy. Mary restored the old system for a short period, during which about 300 persons were burnt. Under Elizabeth two were burnt, under James I. two, and after some slight attempts at persecution at later dates the writ *de heretico comburendo* was abolished in 1678.

Though theological persecution proper hardly outlived the reign of Henry VIII. it was followed by ecclesiastical and political prosecutions of Dissenters and Roman Catholics, which were the main causes of the great events of the seventeenth century. The old ecclesiastical courts reinforced, constituted, and regulated by the Court of High Commission, sought to enforce uniformity of worship and decency of conduct by means so repulsive to all the strongest feelings of the country that the courts themselves were abolished, their fall, and that of the hierarchy which they specially represented, being perhaps the main cause of the Civil War, and the king's execution. After the Restoration the old ecclesiastical courts, though in a sense restored, were paralysed, but the old differences in slightly different shapes became the causes of troubles hardly less violent than those of earlier times. Sins ceased practically to be punishable as such, but the questions, Whether, on the one hand, conformity to the Established Church should be enforced on Protestants? and Whether, on the other, Roman Catholics should be allowed free scope in their endeavours to regain what they had lost? were the great questions of the reigns of Charles II. and James II. The Established Church retained, and even greatly increased, the severity of the old laws against nonconformity, though the destruction of the High Commission and the mitigation of the procedure of the ordinary ecclesiastical courts caused the new laws to be less oppressively executed than the old ones. On the other hand the laws against the Catholics were upheld by popular and patriotic sentiment against the personal wishes and sympathies of Charles II. and against the illegal efforts of James II. to dispense with them.

The purely theological view of heresy was represented in

CH. XXV. this period by the assumption on the part of the Court of King's Bench of the power to punish blasphemous words and libels as temporal offences at common law—a power which in theory still exists, though the base of the theory may have been to some extent shifted.

The Revolution of 1688 produced a narrowly limited toleration, in the strict sense of the word, for Protestant Dissenters. "You are a set of narrow-minded bigots, but we will not punish you for it," was the language of the legislature towards them. The Roman Catholics, on the other hand, were treated as men who would be rebels if they dared, and were placed under laws nominally harsher than any which had been in force before. The laws, however, were not executed, and, after being practically repealed in 1791 and 1829, were formally repealed in 1844 and 1846.

This is hardly the place to speculate on the vast questions which this remarkable history suggests. I will, however, venture to make one observation upon it. The remark usually suggested by it is that our ancestors walked in darkness, and that we have solved the problem which was too hard for them by recognising liberty of conscience as a principle of universal application which avoids all difficulty. There is a good deal of truth in this, as there is in most commonplaces. To legislate on the principle that no religion is to be regarded by the legislature as truer than any other does no doubt avoid many difficulties, though it is a long step towards legislating on the principle that all existing religions are false—an opinion which in these days prevails extensively, but which could not, without a revolution of the most violent kind, be avowedly made the principle of legislation.

Much violence is no doubt avoided by accepting scepticism on all the great controversies relating to human life as the basis of legislation, but such a course has its disadvantages. It tends to reduce politics, government, and legislation to a low level, and to make them vulgar, uninteresting, and effective only for small purposes of trade and the administration of a petty kind of justice. If such a basis had been accepted for legislation, say at and after the barbarian conquests, it is difficult to see how Western Europe could ever have ceased

to be barbarous. Or if the same view had prevailed in the fifteenth, sixteenth, and seventeenth centuries it is difficult to see how the oppressions of the clergy could ever have been removed. If no religion is particularly true, and one happens to be established, people in general will support it. But where any religion is really and generally believed people will, in legislation as in other matters, act upon the supposition of its truth, and if two or more religions are believed to be true and false respectively by large numbers of people, the result must be conflict more or less serious according to circumstances. The transition from general belief to general disbelief is a comparatively peaceable condition so long as the belief and the disbelief are not unequally matched, but I do not think it would continue to be peaceable if active disbelief got the upper hand. If convinced unbelievers ever became a practical majority, I think they would legislate against believers in a way hardly distinguishable from persecution. They would, for instance, confiscate all existing endowments for religious purposes—especially all places of worship, all places of religious education, all places intended for the education of the clergy of any religious body. They would suppress all convents, monasteries, and similar institutions. They would substitute for them other institutions for teaching the public whatever they thought important to be known, especially in the way of morality.

Of course such a policy could not be pursued without a revolution in our existing habits of thought which as yet is far distant, if it ever happens at all; but, in the face of such a possibility, the glorification of our existing compromises as if they were the final result of human wisdom appears to me weak and foolish.

END OF VOL. II.