

may be proceeded against either for a *pro munire* or for *trahere*
inwards *id.* cap. 19. Stat. 18.

So much shall suffice to have said concerning ordinary
punishments; I proceed to those called *Arbitrary*.

2.

Of Arbitrary or Extraordinary punishments

Arbitrary Punishments are those to which Crimes are
not subjected by Law without Expressing the punishment
For albeit incidently the punishments of all Crimes were
determined by the Law, so that the Justice and Condemnation
Should only be upon the Crime when the Punishment was
known to be such as it is. But it is found that the
When a just Cause comes to be multiplied and diversified
as the words of the Law are intended then could be foreseen by the
Legislators; it was found necessary to lodge a power in
the Arbitrament of Judges to punish more severely or mildly
in these Emergencies, by the Rules of Equity and Justice, as
the Circumstances Required, observing always the Golden
Rule of Moderation or as Mr John Selden (locality of Crime
and Judges in Criminal Cases, Tit. 1 Cap. 2) Phraseth it,
to punish by the King's Will and Mercy, Imprisoning, that
the King and his Judges should in Arbitrary Crimes Justice
rather to Mercy than to Rigour, when the fact will allow
it: so that our Judges have power to Exalt and abate the
punishment of Ordinary Crimes: so they are authorized to
determine the punishment of Extraordinary Crimes.

However Judges cannot act in arbitrary Crimes
Arbitrarily according to their pleasure, nor can do any
thing that is Unjust or contrary to Reason and Equity
to qualify any person, but should keep an Equality
towards the Circumstances of the Crime and the punish-
ment. A Judge having an Arbitrary power must Regard
the Crime, whose Law hath not positively determined the
punishment of a Crime, is to inflict an Extraordinary
or Arbitrary punishment; and to proportion the same
to the offence according to his Discretion, without affor-
ding either too great severity or Pardon. *l. 11. pr. ff. de pen.*
And where a Statute imposes a Fine at the Will and
pleasure of the King, that is intended of his Will and
pleasure. But the Judge must observe the Fine. *Code A. Just. 7. ff. de iudic.*
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According to the quality of the Crime, any ordinary punishment
doth extend, but cannot punish with death, unless it is
from the Authority of a superior Monarch. *l. 1. ff. de Leg. 2.*
l. 1. ff. de Quast. 66. n. 18. leg. 2. ff. de Quast. 66. n. 18. leg. 2. ff. de Quast. 66. n. 18. leg. 2. ff. de Quast. 66. n. 18. leg. 2.
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of our Statutes Act 24 Charles II. 1704. Tit. 14. § 6. 2. ¶ From the Statute
where death is appointed to arbitrary punishment. 30. In
ary punishment is often appointed for small offences, that
deprive not to be punished with death. ¶ Persons who
would be very precarious and Unsecure, could find out the
London Arbitrary punishment to death. And as in the
tion of Law, so Men's life can be taken away upon
an Express Law. Whether can such a thing be done upon
pretext of a General Power to punish as it is. ¶ Es
pecially of our Kings, that in personal words are to be
taken in the midst and most favourable sense they
can bear. *l. 15. ff. de leg. Jur. c. In p. n. ff. de leg. Jur. c. In p. n. ff. de leg. Jur. c. In p. n. ff. de leg. Jur. c. In p. n. ff. de leg. Jur. c. In p. n.*
Some of the Doctors think, that an arbitrary Punish-
ment may be extended to the Imputation of a Crime, but
Matth. de Crim. in Gl. ff. de pen. n. 12. But if an owner
prevalent of that in our Custom.

A Statute prohibiting an offence upon pain that
the offenders person and goods shall be in the Kings Will
amounts to no more than a high Middlemanor punishment
able by Imprisonment &c. and not by loss of life or Mem-
ber, *Code Litt. 301. 3. Just. 146. Stat. in p. n. ff. de leg. Jur. c. In p. n. ff. de leg. Jur. c. In p. n. ff. de leg. Jur. c. In p. n.*
40. 52. When the punishment of a Crime is by Law or
Custom arbitrary and the guilty person comes in the
foreigner's Will, he most justly find caution to satisfy
by the Law betwixt and a certain Day, otherwise Crim-
part 2 Gl. 30. 54. And where one guilty of a Crime whose
of the punishment is determined and certain, offers
to come in with his submission and certain offer
to some in will, his submission will not be accepted.

In the imposing an arbitrary Mult or Fine
at the Discretion of the Court, Regard ought to be
had to the poverty or wealth of the Criminal: so as
not to lessen or over to admit it all together as the Judge
thinks fit, if the offender is not able to pay. *l. 6. ff. de
ff. de off. judic. l. 6. ff. de off. judic. l. 6. ff. de off. judic. l. 6. ff. de off. judic.*
ff. de off. judic. l. 6. ff. de off. judic. l. 6. ff. de off. judic. l. 6. ff. de off. judic. l. 6. ff. de off. judic. l. 6. ff. de off. judic. l. 6.