CHAP. V.

OF HOMICIDE.

The ſeveral Kinds and reſpective Puniſhments thereof. - - - - § 1.

1. *Felonious.*
   1. Murder. § 2. Clergy. - § 3.
   2. Manſlaughter. - - § 4.
   3. Suicide. - - § 5.
2. *Juſtifiable* or *excuſable.* - - § 6.
   1. *Juſtifiable* ex neceſſitate. i. In Advancement of Juſtice. ii. In Execution of Juſtice. iii. In defence of Perſon or Property. iv. On a fatal Neceſſity. - - § 7.
   2. *Excuſable.* i. Upon Chancemedley. ii. By Miſadventure. - - § 7, 8.

   What Verdict may be found in theſe Caſes. § 6, 7 & 8.

The ſeveral Claſſes of Caſes referable to the abovementioned Heads. - § 9.

I. *Homicide from Malice aforethought expreſs, where the deliberate Purpoſe of the Perpetrator was to deprive another of Life, or do him ſome great bodily Harm.* - § 10.

1. *From a particular Malice to the Deceaſed.* § 11.

   Evidence of it.

   Malice by Implication of Law ariſes from the Act of killing: Circumſtances of Juſtification, Excuſe, or Extenuation, to be proved by Priſoner. § 12.

   Circum-

Circumſtances which might otherwiſe rebut ſuch Preſumption no Anſwer to Proof of expreſs Malice. Duelling. Poiſoning. § 12.

Actual Force will excuſe killing, but not moral Force, ſuch as Threats. *ib.*

Manner of Death, however various, not material; if by Malice, Murder in all: if only by culpable negligence, Manſlaughter. But Malice muſt be of corporal Damage to the Party to make Murder. Expoſing ſick Perſons, or Infants. Neglecting and ill-treating Infant Apprentices. - - § 13.

Againſt whom Malice may be directed. - § 14.

Againſt all in the King's Peace. Againſt alien Enemy, except in War: or attainted Felon. But not againſt Child in ventre ſa mere. *ib.*

Malice may be exerted againſt one in his Abſence, or by his own Command. *ib.*

Concealment of Death Evidence of Murder of *Baſtard* by ſtat. 21 Jac. 1. c. 27. § 15.

What is ſufficient Evidence of Diſcloſure to take the Caſe out of the Statute. *ib.*

Malice againſt a Man's own Life; *Felo de ſe.* § 16.

2. *Homicide from a particular Malice to one, which falls by Miſtake or Accident upon another.* - § 17.

The Act done follows the Nature of the Act intended. Miſtaking one Perſon for another. Offering Poiſon to one who innocently gives it to another. Killing a Woman by Practices intended to procure Abortion. Killing one's ſelf by an Act directed againſt another. If the intended Act would have been only Manſlaughter, the Act done will be no more. *ib.*

3. *Homicide from a general Malice or depraved Inclination to Miſchief, fall where it may.* - § 18.

The Act muſt be unlawful, attended with probable Danger, and done with miſchievous Intent to hurt, to make Murder. *ib.*

If done deliberately, Malice is preſumed. Riding unruly Horſe into a Crowd. Throwing Stones into

into a Street. If the Act only done incautiously, Manſlaughter. Reſolution to oppoſe all Oppoſition in committing Treſpaſs, Murder. §18.

II. *Homicide from Tranſport of Paſſion, or Heat of Blood.* - - §19.

Upon what Principle the Offence is extenuated. Not where expreſs Evidence of Malice. *ib.*

1. *What a ſufficient Provocation to extenuate the Homicide.* - - - §20.

Not Words, nor Geſtures, nor Threats, without an Act; but perſonal Aſſaults, eſpecially if with Circumſtances of Violence or Indignity, are ſufficient. So are injurious Reſtraints of Liberty. So the Detection of an Adulterer. *ib.*

But not even Aſſaults, if trivial, and cruelly revenged. - - - §21.

Still leſs, ſmaller Provocations, if dangerous Weapons uſed, or any Exceſs in the Manner; ſuch as Treſpaſſes on Property, petty Theſts, fighting between Children. - - §22.

Reſult of the Caſes on extenuating Provocations. §23.

No Provocation will avail if ſought; or if the Act be done on old Grudge. *ib.*

2. *How far Heat of Blood is an Extenuation of Homicide independent of reaſonable Provocation.* - §24.

On mutual Combat, on ſudden Occaſion, and equal Terms, without Malice; but not on deliberate Duelling; the Seconds equally guilty. *ib.*

Combat muſt be *equal* to extenuate Homicide. §25.

Aliter if Aſſault with deadly Weapon before Adverſary prepared, or if ſeveral attack one. *ib.*

But ſufficient if Combat equal at the *Onſet*, to reduce Offence to Manſlaughter. - §26.

Same Rules apply where Blow intended for one falls by Miſtake or Accident on another in the Conteſt. - - §27.

3. *What Caſes of this Sort are affected by the Statute of Stabbing.* 1 Jac. 1. c. 8. - §28.

The

The Statute only declaratory of the common Law. *ib.* Malice neceſſary to bring a Caſe within it. §28 & 29.

i. It extends not to Aiders and Abettors. §29.

ii. What a *Stab* or *Thruſt*. iii. Any Perſon armed in aid of the Party killed at the Time takes the Caſe out of the Statute. iv. So if the Party be armed at any Time of the Affray before the mortal Stroke. v. What *a Weapon drawn*. vi. A Blow given at any Time before the mortal Stroke takes the Caſe out of the Statute. *ib.*

4. *How long the Law will allow for the Blood continuing heated under the Circumſtances, and what is Evidence of its having cooled.* - - §30.

Length of Time between Provocation and mortal Stroke. Manner of Death. Other intervening Diſcourſe, Amuſement, or other Circumſtances. Deliberation. Leſs Allowance to be made for Exceſs of Retaliation in Proportion to the Length of Time intervening. Former Provocation no Excuſe againſt expreſs Malice at the Time. *ib.*

III. *Homicide in the Proſecution of an Act or Purpoſe unlawful in itſelf, wherein Death enſues collaterally to or beſide the principal Intent.* - - - §31.

1. *Where the Act on which Death enſues is malum in ſe.* ib.

If Felony, Murder: if Treſpaſs, Manſlaughter. Stat. de Malefactoribus in Parcis, 21 Ed. 1. juſtifies killing Deer-Stealers, extended by Stat. 3 & 4 W. & M. c. 10. and 4 & 5 W. & M. c. 23. *ib.*

Unlawful Intent of bodily Harm, but not of Death; Murder, or Manſlaughter, according to Circumſtances. - - §32.

If without ſuch Intent, Manſlaughter. *ib.*

Confederacy to do unlawful Acts implicates all concerned. Murder, if Death enſue in forcible Proſecution of them: aliter, if the killing were accidental,

accidental, without relation to the principal Deſign. In ſmuggling: in reſiſting a Diſtreſs. § 33.
To affect all the Confederates, the killing muſt be during actual Strife or abetting of all. § 34.
Entry upon Claim of Title by Force. *ib.*

2. *Where Death enſues on an Act malum prohibitum.* § 35.
Shooting at Game and accidentally killing a Perſon, Miſadventure. *ib.*

IV. *Homicide from Impropriety, Negligence, or Accident, in the Proſecution of an Act lawful in itſelf, or intended as a Sport or Recreation.* - - § 36.

Diſtinction between Acts of Impropriety, Negligence, and Accident. *ib.*

1. *To make Miſadventure, the Act intended muſt be lawful, and done without Intention of bodily Harm, and with proper Caution.* ib.
Correction in foro domeſtico. - § 37.
Accidents in the Purſuit of common Occupations. - - § 38.
Workmen throwing Rubbiſh. Driving Carriages. Overloading Boats, or Stage Coaches. *ib.*
Adminiſtering Medicine ignorantly. *ib.*
Wilful Neglect to provide againſt probable Miſchief, as in keeping miſchievous Animals. § 39.
Want of due Caution in uſing dangerous Inſtruments, &c. Manſlaughter. But the utmoſt poſſible Precaution not required. § 40.

2. *Diſtinct Conſideration of Homicide at Sports, &c.* § 41.
If Sport innocent and allowable, and Death accidentally happen, Miſadventure. If unlawful or dangerous, Manſlaughter. Manly Sports, though with ſome Riſk, allowable, if uſual Caution taken. Playing with Foils, Cudgels, &c. Shooting at Game or Butts. *ib.*
But Death at Prize-fightings, Cock-fightings, &c. Manſlaughter, though unintentional. § 42.
Concluſion. - - § 43.

V. *Homicide*

V. *Homicide from Neceſſity in Defence of a Man's own Perſon or Property, or of the Perſons or Property of others.* § 44.

1. *What Attacks it is juſtifiable to reſiſt by Death of Aſſailant.*
Attacks of Felons endeavouring by Violence or Surprize to commit a known Felony. Party may purſue the Felon till out of Danger. But a bare Fear of ſuch Offence not ſufficient to juſtify killing in Prevention: nor Commiſſion of a Treſpaſs. Stat. 24 H. 8. c. 5. juſtifying the killing of Robbers, Murderers, and Burglars, made in Affirmance of common Law. *ib.*
Diſtinction as to Felonies without Force or Atrocity, ſuch as picking Pockets: there killing in Prevention not juſtified. - § 45.
Killing by Miſtake, on reaſonable Ground for imputing felonious Intent; Manſlaughter or Miſadventure according to Circumſtances. § 46.
Miſtaking Bailiff for Thief; one Perſon in a Mob for another dreſſed like him; a Servant concealed in the Night for a Houſebreaker; a Man for a Deer treſpaſſing; a Commander trying the Vigilance of a Sentinel for an Enemy. *ib.*
Queſtions concerning Apparency of Intent to commit ſuch Felony as juſtifies killing in Prevention. - - § 47.
Throwing a Bottle at the Head of another with great Violence. Diſtinction between ſuch Caſes and Caſes of Combat on equal Terms. Where firſt Attack was with plain Intent only to chaſtiſe for Miſbehaviour, killing thereon Manſlaughter. *ib.*
Party juſtifying killing another on Neceſſity muſt be wholly without Fault. - § 48.
Not like killing on Entry under Claim of Title; nor on meeting one, though accidentally, againſt whom he had ill Blood. Nor if he had firſt made a felonious Attack on the other without lawful Provocation, though afterwards willing to retreat. *ib.*
Caſe of Officers of Juſtice. - § 49. & Poſt.

2. *Where killing another in Self-defence is only excuſable.* § 50.

Where Neceſſity in Part created by the Perſon's own Fault. *ib.*

Homicide, "*upon Chancemedley in* Self-Defence," is properly when Death enſues from Combat on ſudden Quarrel. Induces Forfeiture of Goods, but Pardon and Reſtitution of courſe. *ib.*

To reduce the Crime to Self-defence upon Chance-medley, the Party muſt decline the Combat before a mortal Stroke, and afterwards kill his Adverſary through Neceſſity to avoid Death. § 51.

Difference between that and Manſlaughter. *ib.*

Diſtinction between Self-defence and Miſadventure, where Death happens by Accident in a Combat. - - - § 52.

No Diſtinction as to firſt Aſſault in Caſes of Combat by Conſent. - - § 53.

To make Chancemedley, the firſt Aſſault muſt not be upon Malice. - § 54.

How far Retreat will avail in premeditated Duelling, or on a ſudden Combat, or after a felonious Aſſault without Provocation. *ib.*

There muſt be a Neceſſity in Fact to excuſe the killing purpoſely in any Caſe. What is Evidence of it. - - § 55.

Killing another who was holding him down and beating him, not ſo; but Manſlaughter. But where the Blow or Inſtrument was not probably calculated to kill, and was lawfully exerted in Self-defence, though no Danger of Death at the Time, Qu. the Caſe may amount only to Miſadventure? *ib.*

Homicide in defence of Property, diſtinguiſhable on what Grounds. - § 56.

More Latitude allowed in defence of a Man's own Houſe. *ib.*

3. *By whom ſuch Juſtification or Excuſe may be urged.* § 57.

All preſent may juſtify killing to prevent Felony intended, and not otherwiſe to be prevented. *ib.*

Interfering

Interfering in mutual Combats or ſudden Affrays between others. - - § 58.

Precautions to be adopted. Qu. The Difference between the Caſe of a Friend, Relation, or Servant, and a mere Stranger interfering. If the Intent be to preſerve the Peace, and due Notice given, the killing may be juſtifiable; aliter, if to take Part with either Side; for then the Degree of Guilt depends on the Circumſtances. But the Guilt of the Aider may ſtill be leſs than that of the Principal, if the former acted on a ſudden without Malice. *ib.*

Where the Party interfering is killed. § 59.

4. *How far the Neceſſity extends.* - § 60.

In no Caſe will the killing of another be juſtified or excuſed beyond the actual Continuance of the Neceſſity which gave Riſe to it: but in ſome Caſes Allowance will be made for the Blood being heated on the Occaſion. *ib.*

5. *Neceſſity induced by mutual Misfortune.* § 61.

Killing an innocent Perſon for Self-preſervation will *excuſe* rather than *juſtify*. But in no Caſe if the Act be done under the Influence of a Threat of future Miſchief. *ib.*

VI. *Homicide in the Advancement or Execution of the Laws.* - - § 62.

Introduction. *ib.* Trial by Battle. *ib.*

General Principles. - - § 63.

Perſons authorized to arreſt, or otherwiſe to advance Juſtice, and uſing proper Means, are juſtified in killing ſuch as reſiſt, if neceſſary. And if killed by others in ſo doing, Murder in all concerned. There muſt be a legal Authority to do the Act, otherwiſe Manſlaughter. *ib.*

Caſe of Soldier ſtabbing a Serjeant who arreſted him. *ib.*

Party arreſted not implicated in Reſiſtance by a third Perſon, without his Privity. *ib.*

Officers protected in diſcharge of their Duty eundo, morando, et redeundo. *ib.*

But though Officers need not retreat, yet not juſtified in killing Reſiſters without Neceſſity. § 63.
Protection of Officers extends to their Aſſiſtants, § 64.
And to private Perſons under certain Circumſtances acting of their own accord in Aid of Juſtice. *ib.*
Application of the general Principles to (§ 65.)

1. *Homicide on the Arreſt of Perſons.* § 66.

1. *Death happening on the Arreſt of Perſons upon a Felony done or ſuppoſed.* - - § 67.
Duties of Officers and private Perſons on Felony committed. *ib.*
On Felony committed, but not by the Party ſuſpected and purſued. - § 68.
Private Perſons acting under their own Authority againſt ſuch not entitled to the ſame Protection as Officers or others acting in Execution of a Duty impoſed on them by Law. *ib.* Quære, in caſe of an Indictment found againſt the ſuppoſed Felon. *ib.*
Conſtable acting on Information of private Perſon; Precautions to be taken. - § 69.
Where Doors may be broken open. *Poſt.*

2. *Homicide on Arreſt of Perſons in Caſes of Miſdemeanor and Breach of the Peace.* - § 70.
Killing on Flight, Murder in general: Manſlaughter under ſpecial Circumſtances. Killing by Officer, if neceſſary on Reſiſtance, lawful. Murder if he be killed. Killing malefactores in parcis on Flight, juſtifiable by the Statute. Aliter of Night Walkers. *ib.*
Breaches of the Peace in view of the Conſtable or others interfering to prevent it. § 71.
There muſt be Notification expreſs or implied of the public Character in the one Caſe, or the friendly Intention on the other, to juſtify Homicide; otherwiſe Manſlaughter. *ib.*
Peace Officers taking oppoſite Parts in Affray. *ib.*
Arreſt by Conſtable on Information of a Breach of the Peace out of his View. - § 72.

There

There ought regularly to be a Warrant of a Magiſtrate for this Purpoſe, unleſs in urgent Caſes for the Purpoſe of carrying the Offender before a Magiſtrate, or to prevent a probable Felony. - - § 72.
Arreſt on *Proceſs* in caſe of Miſdemeanor. § 73.

3. *Homicide on Arreſt in civil Suits.* - § 74.
Murder, if deadly Weapon uſed on bare Flight; Manſlaughter if Weapon not likely to kill. But if Reſiſtance be made, Officer need not give back, and Death of Party juſtifiable if Reſiſtance not otherwiſe to be overcome. *ib.*
Private Perſon cannot arreſt in civil Suits. *ib.*

4. *Homicide on Occaſion of Preſſing.* - § 75.
The Right of impreſſing confined to Mariners. There muſt be a legal Warrant. It muſt be executed by a proper Officer. On Reſiſtance, the Officer may freely repel Force by Force ſufficient to overcome the Reſiſtance: but killing Party on Flight, Murder, if intentional; Manſlaughter, if not. *ib.*

5 *How far the Legality of the Proceſs, or Informality in the Manner of making the Arreſt, material in caſe of Homicide on Arreſt.* - - § 76.

i. *The Court from whence the Proceſs iſſues muſt have Juriſdiction*, otherwiſe killing thereon Manſlaughter. - - - - § 77.
Except where Officer indemnified by Statute 24 G. 2. c. 44. *ib.*

ii. *The Proceſs muſt be legal in its Frame.* Then Officer juſtified, though erroneouſly iſſued, or Charge falſe. - - § 78.
But if Warrant altered after the Iſſue of it, or it be defective in its Frame, Manſlaughter. *ib.*
Preſs-Warrants. - - - § 79.

iii. *The Proceſs muſt be executed by a legal Officer or his Aſſiſtant, and due Notice given*, in order to juſtify him; otherwiſe killing him in the Struggle by the Party arreſted, only Manſlaughter; but Murder in the Officer killing the Party, if done wilfully and without Provocation. § 80.

There

There must be due Notice of Officer's Authority to justify him: but this to be implied from public Ensigns of Authority, &c. - § 81.

Constable de facto acting within his District sufficient. *ib.*

Notice to some in an Affray, and not to others. § 82.

How far Notice necessary to one who ignorantly opposes an Officer doing his Duty, but with Intent to preserve the Peace. - § 83.

Such Notice of the Business necessary also in Cases of Arrest on Process. - § 84.

How far Warrant to be shewn. *ib.*

If Party knew the Officer or his Business before, no Occasion to repeat Notice. - § 85.

In general Murder to kill the Officer, if due Notice given; Manslaughter if not. *Per tot.*

iv. *The Process must be executed and Arrest made duly and according to Law* to justify the Officer killing another in the Execution thereof. § 86.

If he kill him unnecessarily, or with Cruelty and in Revenge for a slight Resistance, it may amount to Murder. *ib.*

Where Doors may be broken open to make an Arrest. - - § 87.

The Owner's Privilege confined to civil Suits; to outward Doors; to the Occupier and his Family; and to Arrests in the first Instance. *ib.*

Time for making Arrests. - - § 88.

In all Cases however there must be previous Notification of Business, and Demand to enter, and Refusal. *ib.*

v. *How far a Defect in any of the above Particulars may be urged by a third Person interfering and killing an Officer making the Arrest.* § 89.

How far illegal Arrest of another is a sufficient Provocation to another to reduce the killing the Officer to Manslaughter. Semble it must be governed by same Considerations as regulate the Case of killing another in a common Affray.

2. *Homicide*

2. *Homicide in endeavouring to keep in safe Custody Persons arrested, and in Confinement.* - - - § 90.

1. *By the Officer arresting.* Officer killing Party escaping or rescued justifiable in case of Felony, if not otherwise to be re-taken. *ib.* Aliter, in cases of Misdemeanor or civil Process, unless actual Resistance, in which case Officer need not retreat. *ib.*

2. *By Gaolers, &c.* Killing Prisoners, or others in aid of them, on Resistance made, justifiable. § 91. Killing of Gaoler by such Persons, Murder. *ib.* But in order to justify Homicide it must be upon Necessity to prevent Escape. *ib.*

Killing Prisoner by Duress, without such Necessity, Murder. - - § 92.

Death from want of necessary Sustenance, Clothing, &c. or reasonable care in Sickness, Murder. *ib.*

3. *Touching the Execution of Criminals.* § 93.

1. How far the Witnesses on whose Testimony the Verdict and Judgment are founded, are implicated in the rectitude of the consequent Execution - - § 94.

2. How far the Judge is responsible for the competency of his Jurisdiction. - § 95.

How far the Officer who executes the Sentence. *ib.*

The Officer at all events excused if the Court had Jurisdiction over the offence, however erroneous the proceeding. *ib.*

3. To what extent the Execution must conform to the Judgment. - - § 96.

If the Officer, without warrant or colour of authority, vary from the Judgment, it is Murder. *ib.*

4. The Execution must be by the proper Officer or his appointed Deputy, otherwise Murder. § 97.

VII. *Petit Treason.*

Wherein is to be considered how far all or any of the circumstances treated of under the foregoing

going Heads vary the Degree and Puniſhment of Homicide committed againſt Maſters, Huſbands, or Eccleſiaſtical Superiors, by their Servants, Wives, or Eccleſiaſtical Inferiors. § 98.

1. *Of the Offence itſelf. ib.*

Petty Treaſon is Murder aggravated by the relation of the Party killing to the Deceaſed. *ib.*

The Fact muſt amount to Murder. Pardon of Murder includes Petty Treaſon. *ib.*

It may be committed

i. By a Servant killing his Maſter, or one who ſtands in the relation of Maſter. § 99.

ii. By a Wife killing her Huſband; but not e converſo. § 100.

By a Wife divorced a menſâ et thoro, but not a vinculo matrimonii. *ib.* What ſhall be deemed ſufficient evidence of Marriage in ſuch caſes. *ib.*

iii. By a Clergyman killing his Superior, to whom he owes canonical obedience. § 101.

Who are ſuch. *ib.*

2. *Concerning Principal and Acceſſaries in Petit Treaſon.* § 102.

One may be guilty of Petit Treaſon, the other of Murder, where both are Principals; but the Acceſſary cannot be guilty of a greater offence than the Principal. *ib.*

3. *As to the Indictment and Verdict in Petit Treaſon.* § 103.

Whether one guilty of Petit Treaſon may be indicted of Murder. *ib.* One indicted of Petit Treaſon may be found guilty of Murder only, if the relation be not proved. Two may be indicted together, one for Petit Treaſon, the other for Murder. *ib.*

4. *As to the Witneſſes.* - - § 104.

Two neceſſary in Petit Treaſon. *ib.*

5. *Trial.* - - - - § 104.

To be according to common Law. *ib.*

Of the Indictment, Appeal, and Evidence.

General Rules. - - § 105.

In

In caſe of Homicide, uſual to prefer Indictment for Murder, if any doubt. Acquittal thereon, a bar to any other Indictment for the ſame death. - - § 105.

Preſumption of Malice ariſes from the Fact of killing; and circumſtances of Alleviation to be proved by Defendant. - § 106.

Particular Form.

1. *As to Principals.*

Manner of death to be ſet forth. § 107.

But if proof agree in ſubſtance, it is ſufficient. *ib.*

Inſtrument of death to be ſtated, and how holden, and the Value of it. § 108.

It muſt allege *a Stroke*, where death happened by ſuch means. - - § 109.

It muſt deſcribe the Wound. - § 110.

Death by means ſtated muſt be poſitively alleged, and not left to implication. - § 111.

Alſo Time, and Place, and reſpective Times of Wound and Death. - - § 112.

But proof of other Times within year and day from the Stroke, ſufficient. *ib.*

What Evidence ſufficient of death happening mediately or immediately from the act of the Party. - - § 113.

If the Death were haſtened by ſuch means, Party is accountable. *ib.*

Naming the Deceaſed. - - § 114.

Not neceſſary to ſtate other ſpecial circumſtances of the caſe. - - § 115.

Terms of Art neceſſary to be uſed. § 116.

How Bill altered where Grand Jury find Bill for Manſlaughter only. *ib.*

Apt Concluſion. - - § 117.

Indictment on *Statute of Stabbing.* 1 *Jac.* 1. c. 8. § 118.

None but the Party actually ſtabbing is within the Statute. *ib.*

All may be found guilty of Manſlaughter at common Law. - - § 118.

Indictment on ſtat. 21 *Jac.* 1. *c.* 27. for *Murder of Baſtard Child.* - - § 119.
Not neceſſary to conclude contra formam Statuti; for the Statute only makes the Concealment *Evidence* of Murder. *ib.*

Appeal of Death, wherein diſtinguiſhable from Indictment for ſame offence. - § 120.
As to Time. As to Party by whom preferred. By Wife, or by Heir. Where the King may pray execution. *ib.*

2. *As to Accomplices.* - - § 121.
Several preſent may be charged with different degrees of guilt in ſame indictment. If all contributed or aided, all may be charged as Principals; and evidence that one gave the Stroke proves indictment charging it to have been given by another of them. Aliter, on Statute of Stabbing. Qu. Where Principal acquitted, and Aider and Abettor convicted? *ib.*
The Abetment ſhould be laid to the Stroke, and not to the Death. *ib.*
Wife not excuſed by Huſband's preſence. *ib.*

3. *Acceſſaries*; how their offence to be laid. § 122.
How far one who incited to the Death, and was afterwards preſent, can be charged as Acceſſary before. *ib.*
One acquitted as Acceſſary before may be charged as Principal. *ib.*
Incitement, how to be charged. *ib.*
Of charging Acceſſaries in one county to Murder in another. *ib.*
No Acceſſaries to Manſlaughter. - § 123.

Particular Evidence.

Declarations of the Deceaſed. - § 124.
Deceaſed muſt be conſcious of danger at the time. *ib.* Declarations of the Deceaſed, though particeps criminis. *ib.* Declarations of Deceaſed before a Magiſtrate on oath, evidence within Stat. of Ph. & Mar., though no belief of danger.

ger. *ib.* Declarations of Wife againſt her Huſband. *ib.*
The Judge, and not the Jury, to decide whether Deceaſed thought himſelf in danger, previous to admiſſion of the evidence. - § 124.
Articles of War, how given in evidence. § 125.

Of the Trial, Arraignment, Verdict, and Judgment, &c. - - § 126.

1. *Trial.*

In what County? ib.
i. Where Stroke and Death in ſame County. § 127.
Within the Verge. *ib.*
ii. Where Stroke and Death in different Counties. § 128.
iii. Where Acceſſary in one County to Murder in another. - - § 129.
iv. Where Stroke and Death in Wales: § 130.
Or one in Engliſh County, and the other in Wales. *ib.*
v. Where Stroke at Sea or out of England, and Death in a County, or vice verſâ. - § 131.
vi. Where Stroke and Death at Sea. - § 132.
What ſhall be conſidered within the Admiralty Juriſdiction. *ib.*
vii Where Stroke and Death in parts beyond Sea. § 133.
In Newfoundland, and the Iſles thereto belonging. *ib.*

2. *Arraignment.* - - § 134.

On Indictment and Coroner's Inquiſition at the ſame time. *ib.*

3. *Verdict.* - - § 135.

May negative the higher and find leſſer offence charged. May find different Degrees of guilt in different Defendants. Special finding. *ib.*

4. *Judgment.* - - § 136.

In *Petit Treaſon.* In *Murder. ib.*
How regulated by Stat. 25 Geo. 2. c. 37. ſ. 3. *ib.*

Extends to Peers. *ib.* Regulations of Convicts. *ib.*
Offence of Refcuers before and after execution. - - §136.
In *Manflaughter*, &c. *ib.*

The feveral Kinds of Homicide, and the refpective Punifhments thereof.

§ 1. *The feveral kinds. Vid.* 3 inft. 54. & Foft. 255.

HOMICIDE, which is here ufed to denote the killing of a perfon by whatever means, is ufually treated of under the heads of murder, (of which petit treafon is a more aggravated fpecies,) felo de fe, manflaughter, per infortunium or chance-medley, and homicide ex neceffitate; which latter relates either to the execution or advancement of juftice, or to felf-defence. But as the fhades between fome of thefe are in many inftances very faint, and as the difficulty in this branch of law lies chiefly in difcriminating between the one and the other, a different arrangement feems neceffary in order to facilitate inquiry and avoid repetition as much as poffible. It is therefore propofed to treat of thefe feveral forts of homicide as they arife out of fubjects and fituations moft familiar to common underftanding, and agreeable to the ufual courfe of human affairs. Previous however to the confideration of thefe heads it will be proper to take a review of the feveral terms made ufe of in our law to expref the different degrees of the offence now treating of; together with the punifhments annexed to each: after which it will only be neceffary to refer particular cafes to this or that head; by which means the proportionable enormity or alleviation of the offence will be diftinctly underftood.

§ 2. *Felonious homicide.*

Felonious homicide may be either againft the life of another, or againft a man's own life. The former is of two forts, *murder*, and *manflaughter*.

Murder. 3 Inft. 47. 51. 2 Ld. Raymond, 1487. 1 Hale, 425. 1 Hawk ch. 31. f. 3. 18. Kel. 127. Foft. 256. 4 Blac. Com. 198. Pult de Pace, 123. b.

1. *Murder*, in the fenfe in which it is now underftood, is the voluntarily killing any perfon (which extends not to infants in ventre fa mere) under the king's peace, of malice prepenfe or aforethought either expref or implied by law: the fenfe of which word *malice* is not only confined to a particular

ticular ill-will to the deceafed, but is intended to denote, as Mr. Juftice Fofter expreffes it, an action flowing from a wicked and corrupt motive, a thing done malo animo, where the fact has been attended with fuch circumftances as carry in them the plain indications of an heart regardlefs of focial duty and fatally bent upon mifchief. And therefore malice is implied from any deliberate cruel act againft another, however fudden.

Ch V. § 2. *Murder.*

See the hiftory and definition of the term *Murder* per Holt, C. J. in Mawgridge's cafe, Kel. 121. 124. 126, 7. 3 Inft. 52.

When this malice is exerted to the death of a mafter by his fervant, or of a hufband by his wife, or of an eccleffaftic fuperior by one owing obedience to him as fuch, it takes the name of *petit treafon*.

The groffer inftances of murder, where the depravity of the heart or malice above-mentioned is apparent, form the 1ft claffs of cafes under this head. 2. Where an officer, or one who affifts in the advancement of juftice where he lawfully may, is killed in the regular difcharge of his duty. 3. Where a private man, lawfully interfering to prevent a breach of the peace, is oppofed in fuch his endeavour, and flain. 4. Where death happens incidentally in the profecution of fome other felony. 5. Where it happens from other unlawful acts, of which death was the probable confequence, done deliberately, and with intention of mifchief or great bodily harm to particulars, or of mifchief indifcriminately fall where it may; though the death enfue againft or befide the original intent of the party. 6. From deliberate duelling.

§ 3. *Clergy. Vide* Foft. 304, &c. 1 Hale, 426.

Clergy is taken away in all cafes of murder and petit treafon from acceffaries before as well as principals; and lands and goods are forfeited; the forfeiture in fuch cafe relating back to the ftroke or other caufe of the death.

The queftion of clergy in cafes of murder and petit treafon ftands on feveral ftatutes, of which I fhall take a fhort review. Thefe are the ftatutes 12 H. 7. c. 7., 1 Ed. 6. c. 12., 4 & 5 Ph. & M. c. 4., and 3 & 4 W. & M. c. 9. f. 2. I forbear to rely on the ftat. 28 H. 8. c. 1. or the 25 H. 8. c. 3. which as to the point of ouffing clergy ftand repealed in all refpects not re-enacted by the 1 Ed. 1. c. 12. f. 10. For although Hawkins thinks that the whole of the

2 Hawk ch. 33. f. 30. and *vide* 1 Hale, 450.

Ch. V. § 3. *Murder, Clergy.*

ſtat. 25 H. 8. c. 3. and ſo much of the ſtat. 23 H. 8. c. 1. as is therein recited and affirmed, were revived by the ſtat. 5 & 6 Ed. 6. c. 10., yet both Lord Hale and Foſter J. are expreſsly of a different opinion: and it does indeed ſeem a violent conſtruction of that act ſo to conſider them. The ſtat. 12 H. 7. c. 7. is included in the terms of the ſtat. 1 Edw. 6. c. 12. ſ. 10. (and ſ. 13.) which enacts, that no perſon "attainted or convicted of murder of malice prepenſed, or of poiſoning of malice prepenſed, or being indicted or appealed thereof, and thereupon found guilty by verdict, or ſhall confeſs the ſame upon arraignment, or will not anſwer directly according to law, or ſhall ſtand wilfully or of malice mute," ſhall have the benefit of clergy; and "that in all other caſes of felony other than ſuch as before mentioned, all perſons arraigned, or found guilty upon their arraignment, or who ſhall confeſs the ſame, or ſtand mute, in form aforeſaid, ſhall have the benefit of clergy in like manner as before the 1 H. 8." with a proviſo ſ. 11. that all clauſes, articles, and ſentences in any acts of H. 8., touching any manner of challenge for the county, hundred, or peremptory challenge, or touching any trial of foreign pleas pleaded by murderers, felons, or other offenders, ſhall as concerning the ſaid challenges and trial remain unrepealed. The above recited 10th ſection of the ſtatute does not indeed mention petit treaſon in terms, as the ſtat. 12 H. 7. c. 7. does with reſpect to lay perſons after conviction or attainder, and as the abovementioned ſtatutes of H. 8. had done in the caſes therein mentioned: but it is agreed by all that petit treaſon is included under the term *murder*: and ſo attainder includes outlawry.

2 Hale, 346, 7. Foſt. 330, &c.

2 Hale, 342. 2 Hawk. ch. 33. ſ. ca. 55. Foſt. 329, 330.

But the caſe of the principal in murder or petit treaſon challenging more than the proper number, (which had been ouſted of clergy in the caſe of indictments by the ſtat. 25 H. 8. c. 3.,) ſtill remained unprovided for either by the ſtat. 1 Edw. 6. or the ſtat. 12 H. 7., and the ſtat. 3 & 4 W. & M. c. 9. ſ. 2. which ſupplies the place of the ſt. 25 H. 8. in this reſpect is ſtill confined to the caſe of *indictments*. So that the caſe of the principal in murder or petit treaſon, challenging more than the proper number upon an appeal, was not ouſted of clergy by any of the abovementioned ſtatutes.

Ch. V. § 3. *Murder, Clergy.*

ſtatutes. But the ſtat. 4 & 5 Ph. & M. c. 4. ouſts clergy with reſpect to acceſſaries before in murder and petit treaſon from all perſons "outlawed, or arraigned and found guilty, or otherwiſe lawfully attainted, or convicted, or ſtanding mute, or peremptorily challenging above 20, or not anſwering directly to the offence." This extends to appeals as well as indictments; and Hawkins puts it as a queſtion to be conſidered, whether the ouſting of clergy from the acceſſaries before in theſe caſes does not neceſſarily ouſt it from the principals in the like inſtances. Lord Hale and Foſter J. are decidedly of opinion that it does. Admitting this concluſion to be juſt in all caſes where the contrary is not expreſſed by or to be implied from the terms uſed by the legiſlature, another difficulty ariſes. It is generally agreed, and the practice is conformable thereto, that in petit treaſon the defendant is entitled to a peremptory challenge of 35; upon this ground, that though the ſtat. 22 H. 8. c. 14. reduced the number to 20, (which ſtood unrepealed by virtue of the beforementioned proviſo in the ſtat. 1 Edw. 6. c. 12.) yet that the ſtat. 1 & 2 Ph. & M. c. 10., in providing that "all trials of any treaſon ſhall be had and uſed only according to the due order and courſe of the common law," has reſtored the number to 35 in caſe of petit treaſon. Now if the reaſoning be true, which is generally admitted, that the ſtat. 4 & 5 of Ph. & M. c. 4. by ouſting clergy from the acceſſary before, by neceſſary implication ouſts it from the principal in the like caſes, it ſhould follow that the acceſſary before having been ouſted by that ſtatute in the caſe of challenging peremptorily above 20, as well in caſes of petit treaſon as of murder, the principal in petit treaſon is precluded from any greater number of challenges than that under the like penalty. Yet I think the diſtinction I before hinted at is a ſolution of the difficulty; for the inference is only to be made when, and ſo far only as the contrary is not expreſſed by, or to be implied from, the terms of the legiſlature: and here are two exiſting ſtatutes in pari materiâ, which are to be made to ſtand together as far as may be, from both which taken together it appears, that the legiſlature intended to allow to the principal a peremptory challenge of 35, and to the acceſſary before only 20. At this day however the conſequence

2 Hawk. ch. 33. ſ. 56.

2 Hale, 347. Foſt. 333, 4, 6.

2 Hale, 269. 339. 2 Hawk ch. 43. ſ. 8. Foſt. 337. 4 Blac. Com. 354.

1 & 2 Ph. & M. c. 10. ſ. 7.

2 Hale, 270. 339. 345. 4 Blac. Com. 354.

Ch. V. § 3. *Murder, Clergy.*

consequence of challenging more than the proper number is, by a beneficent conſtruction of the ſtat. 22 H. 8. c. 14., only this, that the challenge ſhall be over-ruled.

2 Hale, 342, 4.

Acceſſaries after the fact either in petit treaſon or murder are in no inſtance ouſted of clergy.

§ 4. *Manſlaughter.*
1 Hale, 449, 450. 466.
3 Inſt. 55.
1 Hawk. ch. 30. ſ. 2.
Vide R. v. Mawgridge, Kel. 124. Foſt. 290.

2. *Manſlaughter*, which is principally diſtinguiſhable from murder in this, that though the act which occaſions the death be unlawful, or likely to be attended with bodily miſchief, yet the malice either expreſs or implied, which is the very eſſence of murder, is preſumed to be wanting in manſlaughter; and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionably lenient. It follows that though there may be ſeveral principals, there cannot be any acceſſaries before to manſlaughter, becauſe it muſt be done without premeditation; but there may be acceſſaries after.

Vide Lord Cornwallis's caſe, Dom. Proc. 1678.
2 St. Tr. 730.

Puniſhment.
1 Hale, 466.
4 Blac. Com. 193.
19 Geo. 3. c. 74. ſ. 3, 4.

The offence amounts to felony, but within the benefit of clergy; and the offender ſhall be burned in the hand, and forfeit all his goods and chattels. By ſtat. 19 Geo. 3. c. 74. ſ. 3 & 4. the burning in the hand may in the diſcretion of the court be changed to a moderate fine; but not to whipping: but this does not prevent the court from alſo adjudging the offender to be impriſoned for any term not exceeding a year.

1 Jac. 1. c. 8. *Vide* poſt. ſ. 28.

The benefit of clergy is however taken away by the ſtat. 1 Jac. i. c. 8. (commonly called the ſtatute of ſtabbing) in one ſpecies of killing, though done upon a ſudden provocation; namely, the offence of mortally ſtabbing another under certain circumſtances.

Homicide on the high ſeas. Foſt. 288. 2 Hale, 369.

With reſpect to indictments for homicide on the high ſeas, before the admiralty ſeſſions, under the ſtat. 28 H. 8. c. 15.; inaſmuch as the marine law does not allow of clergy in any caſe, if the fact appeared upon the evidence to be no more than manſlaughter at common law, the priſoner was

39 Geo. 3. c. 37. ſ. 2.

prior to the ſtat. 39 Geo. 3. c. 37. conſtantly directed to be acquitted. But now by ſ. 2. of that act, "perſons tried for murder or manſlaughter committed upon the ſea, by virtue of any commiſſion directed under the former act, and found guilty of manſlaughter only, ſhall be entitled to receive the

Ch. V. § 4. *Manſlaughter.*

the benefit of clergy in like manner, and ſhall be ſubject to the ſame puniſhment, as if they had committed ſuch manſlaughter on the land."

The caſes falling under the head of manſlaughter are either, 1ſt, where death enſues from actions in themſelves unlawful, but not proceeding from a malicious or felonious intention; 2dly, from actions in themſelves lawful, but done without due care and circumſpection for preventing miſchief; 3dly, where death enſues upon a ſudden combat or affray; or, 4thly, from heat of blood upon a reaſonable provocation given.

§ 5. *Felo de ſe.*
1 Hale, 411.
4 Blac. Com. 189, 190.
Poſt. ſ. 16. and *vide* the next chapter *as to the form of the inquiſition.*

3. The laſt kind of felonious homicide is that againſt a man's own life, which denominates the party ſlaying himſelf *felo de ſe.* This is where any one wilfully or by any malicious act cauſes his own death. The law regards this as an heinous offence, though the party himſelf may at firſt view appear to have been the only ſufferer: for as the public have a right to every man's aſſiſtance, he who voluntarily kills himſelf is with reſpect to the public as criminal as one who kills another. It is equally an offence againſt the fundamental law of ſociety, which is protection. The law has therefore ordained as ſevere a puniſhment for it as the nature of the caſe will admit of, namely, an ignominious burial in the highway with a ſtake driven through the body; and a forfeiture of all the offender's goods and chattels to the king. The uſual inſtances of this ſort of offence are either, 1ſt, where felo de ſe intended his own death; or, 2dly, where he intended ſome other felony, in attempting which he accidentally ſlew himſelf.

3 Inſt. 54, 5.
1 Hawk. ch. 27. ſ. 7, 8.
1 Hale, 413.
4 Blac. Com. 190.

§ 6. *Juſtifiable or excuſable homicide.*
1 Hawk. ch. 28. ſ. 1. 22.

There are other degrees of homicide which do not amount to felony, but are either *juſtifiable*, or *excuſable*.

Foſt. 279. 288.
1 MS. Sum. 38, 9.
1 Hale, 471. 477. 492, 3.
2 Hale, 704.
3 Inſt. 214.
4 Blac. Com. 182. 188.

1. To make homicide *juſtifiable*, it muſt ariſe from an imperious duty preſcribed by the law, or be owing to ſome unavoidable neceſſity induced by the act of the party killed, without any manner of fault in the party killing. In theſe caſes it is now clearly underſtood that the jury may acquit the party generally, without obliging him by a ſpecial finding of the matter to purchaſe his pardon under the ſtatute of Glouceſter, c. 9.; and no forfeiture is incurred.

2. Homicide

Ch. V. § 6
Juſtifiable or excuſable homicide.

Excuſable.
Foſt. 279. 289.
1 MS. Sum. 39. 157.
1 Hale, 478. 492.
3 Inſt. 55, 6.
Pult. de Pace, 12a. b.
1 Hawk. ch. 29. ſ. 25.
2 Hawk. ch. 37. ſ 2.
4 Blac. Com. 188.
MS. Burnet, 41.
Foſt. ſ. 8.

2. Homicide is only *excuſable* where the party killing is not altogether free from blame; but the neceſſity, which renders it excuſable, may be ſaid to be partly induced by his own act. And here the party ſeemed formerly not entitled to a verdict of acquittal, but the jury would find the facts ſpecially; on which the court would bail the party, whoſe goods were forfeited at common law, to the next ſeſſions or term; and upon certifying the record into Chancery, a pardon iſſued of courſe under the ſtatute of Glouceſter, c. 9. to have them reſtored, without any application to the king, only paying for ſuing out the ſame. Of late years however it has been more frequent, in caſes even of excuſable homicide, for the court to direct a verdict of acquittal.

The ſeveral deſcriptions of homicide referable to either of the two laſt heads come next to be conſidered.

§ 7.
Ex neceſſitate, in advancement of juſtice.
Foſt. 270, 1, 2.

1. Homicide *ex neceſſitate*, which is of three ſorts:

1. *In advancement of juſtice*, which is juſtifiable by *permiſſion* of the law. This is where perſons having authority to arreſt or impriſon others, or to ſeize goods, or interfering to preſerve the peace, and uſing proper means for that purpoſe, are reſiſted in ſo doing, and the party reſiſting is killed in the ſtruggle; or where a felony has been committed, or a dangerous wound given, and the offender flies from juſtice; if in the purſuit the party flying be killed, the perſon killing is juſtified, provided the other could not be otherwiſe overtaken. Here is conſiderable, 1ſt, What cauſes or warrant ſhall juſtify the killing of a perſon reſiſting or flying from an arreſt. 2dly, To whom ſuch juſtification ſhall extend.

In execution of juſtice.

2. Homicide *in execution of juſtice;* which is *juſtifiable by the command* of the law. This is the carrying into execution the ſentence of the law on malefactors condemned to death. Herein has been generally conſidered, 1ſt, How far the execution may vary from the ſentence; 2dly, How far a want of juriſdiction in thoſe who paſs the judgment ſhall affect themſelves or thoſe who carry ſuch judgment into execution; 3dly, How far they are affected by the execution of an erroneous judgment; 4thly, To what extent a falſe witneſs is implicated.

In defence of perſon or property.

3. Homicide *in defence of perſon or property* under certain circumſtances of neceſſity. This is either *juſtifiable* by *permiſſion*

miſſion of the law, or only *excuſable*. Firſt, That neceſſity, which *juſtifies* a man in killing another who comes to commit a known felony with force againſt his perſon, his habitation, or his property. In ſuch caſes the injured party may repel force by force, and is not obliged to retreat, but may purſue his adverſary in order to ſecure himſelf from danger. Secondly, That which only *excuſes* him who kills another in his own defence upon a ſudden combat, having firſt retreated as far as he could with ſafety, and with a view of declining the combat, before any mortal blow given; and having no other poſſible or at leaſt probable method of eſcaping his own immediate deſtruction or great bodily harm. This is denominated in legal phraſe "homicide ſe defendendo upon chance-medley." Here *chance-medley* is uſed in the proper ſenſe of the word, as will be preſently remarked. There is a third ſort of dire neceſſity, which is not induced by the fault of either party, where one of two innocent men muſt die for the other's preſervation: this has been holden by ſome to be *juſtifiable;* perhaps it may more properly be conſidered as *excuſable: juſtification* is founded upon ſome poſitive duty; *excuſe* is due to human infirmity. The queſtions uſually made on the two former heads are, 1ſt, In what inſtance the party killing may attack or purſue? 2dly, Where he is bound to retreat? 3dly, Where the plea of neceſſity fails him altogether, notwithſtanding ſuch retreat?

Ch. V. § 7.
Ex neceſſitate, in ſelf defence.

Foſt. 273, 5, 9. &c.
Foſt. 276, 7.
4 Blac. Com. 184, 5.
1 MS. Sum. 41.
Vide ſt. 24 H. 8. c 5.
Poſt. ſ. 44. 50.
Dalt ch. 98.
Bract. 120.

§ 8.
Miſadventure and chance-medley.

2. The other kinds of homicide, not felonious, and by law deemed *excuſable*, are when the death happens either by *miſadventure*, or by *chance-medley*, properly ſo called.

3 Inſt. 55, 7.
Foſt. 275.
Vide ſupra.

The ancient legal notion of homicide by chance-medley was, when death enſued from a combat between the parties upon a ſudden quarrel; but it has ſince been frequently confounded with miſadventure or accident. Homicide by miſadventure is, when a man doing a lawful act, without any intention of bodily harm, and uſing proper precaution to prevent danger, unfortunately happens to kill another perſon. This is one ſpecies of *excuſable* homicide. But inaſmuch as no blame is imputable in any degree to the party under the circumſtances above ſuppoſed; and on the contrary, ſuch an one ſeems more entitled to compaſſion than to cenſure; it

Foſt. 258.
1 Hawk. ch. 29. ſ. 1.
1 Hale, 472.
4 Blac. Com. 182.
Ante, ſ. 6.

ſeems

Ch. V. § 8. *Miſadventure.*

ſeems to be now ſettled, whatever may have been formerly thought, that the jury under the direction of the court may acquit the party generally, without putting him to purchaſe a pardon under the ſtatute of Glouceſter, c. 9. The act upon which the death enſues muſt be lawful in itſelf; for if it be malum in ſe, the caſe will amount to felony, either murder or manſlaughter, according to the circumſtances. If it be merely malum prohibitum, as ſhooting at game by an unqualified perſon, that will not vary the degree of the offence. The uſual examples under this head are, 1ſt, where death enſues from innocent recreations; 2dly, from moderate and lawful correction in foro domeſtico; 3dly, from acts lawful or indifferent in themſelves done with proper and ordinary caution.

Vide 2 Inſt. 148. 315. Stat. of Marlb. c. 26. Foſt. 288. 4 Blac. Com. 178. *Vide* 1 Hale, 477. 492. 2 Hale, 303. Ante, f. 6. Foſt. 258.

§ 9. *The ſeveral claſſes of caſes referable to the offences before mentioned.*

Having thus aſcertained the terms made uſe of in our law for denoting the different degrees of guilt in homicide, and the nature of the puniſhments which may be inflicted on the ſeveral offenders; I now proceed to the conſideration of the facts conſtituting the ſeveral offences, and the inveſtigation of thoſe principles on which are founded the ſeveral gradations of guilt above enumerated. The ſubject of homicide has uſually been treated of under artificial terms; but for the reaſons firſt mentioned I have thought it ſerviceable to attempt a more natural arrangement of it. Homicide will therefore be conſidered as it ariſes,

Ante, 214.

I. *From malice aforethought expreſs; where the deliberate purpoſe of the perpetrator was to deprive another of life, or do him ſome great bodily harm.*

II. *From tranſport of paſſion or heat of blood; wherein is to be conſidered under what circumſtances it may be preſumed that the act done, though intentional of death or great bodily harm, was not the reſult of a cool deliberate judgment and malignity of heart, but imputable to human infirmity alone.*

III. *In the proſecution of ſome other criminal or unlawful act or purpoſe, wherein death enſues collaterally to or beſide the principal intent.*

IV. *From impropriety, negligence, or accident, in the proſecution of an act lawful in itſelf, or intended as a ſport or recreation.*

V. *From*

V. *From neceſſity or defence of a man's perſon or property, or of the property or perſons of others.* Ch. V. § 9. *The ſeveral claſſes of caſes, &c.*

VI. *In advancement or execution of the laws.*

VII. *It will be conſidered how far all or any of theſe conſiderations and circumſtances vary the nature of the offence as applied to maſters, huſbands, or eccleſiaſtical ſuperiors, killed by their ſervants, wives, or inferiors.*

I. *Homicide from Malice aforethought expreſs; where the deliberate Purpoſe of the Perpetrator was to deprive another of Life, or do him ſome great bodily Harm.* § 10.

This either ariſes,

1. *From a particular malice to the perſon killed.*
2. *From a particular malice to one, which falls by miſtake or accident upon another:* or,
3. *From a general malice or depraved inclination to miſchief, fall where it may.*

§ 11. *From particular malice to the deceaſed.*

1. The malice is either directed againſt the life of another, or againſt a man's own life.

Ante, f. 2.

Having before explained the meaning of the word malice, as applied to homicide, under the definition before given of murder, it is only neceſſary to ſay here, that in all caſes where the homicide is founded upon ſuch pre-conceived malice, whatever might be the immediate occaſion of exerting it, the crime amounts to murder. The groſſer inſtances of wilful murder, where the malignity of the heart is apparent, need no explanation: the circumſtances of every ſuch caſe are peculiar to itſelf. Perhaps ſtrong circumſtantial evidence in caſes of crimes like this, committed for the moſt part in ſecret, is the moſt ſatisfactory of any from whence to draw the concluſion of guilt: for men may be ſeduced to perjury by many baſe motives, to which the ſecret nature of the offence may ſometimes afford a temptation; but it can ſcarcely happen that many circumſtances, eſpecially if they be ſuch over which the accuſer could have no control, forming altogether the links of a tranſaction, ſhould all unfortunately

1 MS. Sum. 159

Ch. V. § 11. *From particular malice to the deceaſed.*

nately concur to fix the preſumption of guilt on an individual, and yet ſuch a concluſion be erroneous. Lord Hale however recommends, that in theſe caſes there ſhould be evidence of the dead body's having been found; to which perhaps it may be added, that the conduct of the perſon accuſed ſhould appear ſuch as is reconcileable with the facts alleged in proof of his guilt. Lying in wait, antecedent menaces, former grudges, and concerted ſchemes to do a perſon ſome bodily harm, are ſome of the many circumſtances which are evidence of a particular malice.

2 Hale, 290.

1 Hale, 451.

§ 12. *Malice by implication of law.* Foſt. 255. 1 Hale, 455. Poſt. f. 106.

The implication of malice ariſes in every inſtance of homicide amounting in point of law to murder: and in every charge of murder, the fact of killing being firſt proved, all the circumſtances of accident, neceſſity, or infirmity, are to be ſatisfactorily proved by the priſoner, unleſs they ariſe out of the evidence produced againſt him. But it is intended here only to ſpeak of the more deliberate and depraved ſpecies of that offence, where the mind has brooded upon its prey, and marked out the object of deſtruction in cool blood. And therefore ſuffice it to ſay upon this head, that in all caſes where it appears that there was an interval of reflection, or a reaſonable time for the blood if it had been heated to cool, after which the deadly purpoſe is effected; however grievous the provocation may have been, the party killing is guilty of murder; for vengeance belongs not to man. Let it alſo be remembered, that however a provocation received may rebut the implication of malice, it will be no anſwer in alleviation to expreſs malice proved. And therefore if upon a provocation received one party deliberately and adviſedly denounce vengeance againſt the other, as by declaring *that he will have his blood*, or the like, and afterwards carry his deſign into execution, he will be guilty of murder; although the death happened ſo recently after the provocation as that the law might, apart from ſuch evidence of expreſs malice, have imputed the act to unadviſed paſſion. But where freſh provocation intervenes between pre-conceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; which may be difficult in ſome caſes to ſhew ſatisfactorily, if the new provocation were a grievous one.

"*Vengeance is* "*mine: I will* "*repay; ſaith* "*the Lord.*" Rom. xii. 19. MS. Tracy, 47. 2 Vent. 159. 1 Hale, 452. Oneby's caſe, 2 Ld Ray. 1490. Poſt. f. 19, 23.

one. In ſuch caſes, ſays Hawkins, it ſhall not be preſumed that they fought on the old grudge, unleſs it appear by the whole circumſtances of the fact. But with reſpect to poiſoning, that neceſſarily implies malice, however great the provocation may have been, becauſe it is a deliberate act. On account of its ſingular enormity, it was made treaſon by the ſtat. 22 H. 8. c. 9.; but that was afterwards repealed by ſtat. 1 Ed. 6. c. 12. ſ. 10 & 13. which again makes it wilful murder, and takes away clergy.

Ch. V. § 12. *From particular malice to the deceaſed.*

1 Hawk. ch. 31. ſ. 30. 1 Hale, 452. 455. 3 Inſt. 48. 4 Blac. Com. 193. 200. Foſt. 68.

Not only he who kills another in a deliberate duel, let the provocation have been what it may, but his ſecond alſo is guilty of murder: and it has been doubted whether this does not extend even to the ſecond of him who was killed, becauſe the death happened upon a compact in which all were engaged. But I ſhall have occaſion to revert to this queſtion in another place, to which I refer.

Duelling. 1 Hale, 453. 441. Taverner's caſe, 3 Bulſtr. 171, 2. 1 Roll. Rep. 360, 1. Poſt. f. 59. Poſt. f 24.

If A. by force take the arm of B. in which is a weapon, and therewith kill C., A. is guilty of murder, but not B. But if it be only a moral force put upon B., as by threatening him with dureſs or impriſonment, or even by an aſſault to the peril of his life, in order to compel him to kill C., it is no legal excuſe; whatever conſideration ſuch a peculiar caſe as the laſt might deſerve in reſpect of puniſhment.

1 Hale, 51. 434. *Vide* poſt. f. 61.

§ 13. *Manner of procuring death not material. Murder, if by malice.*

The manner of procuring the death of another with malice is, generally ſpeaking, no otherwiſe material than as the degree of cruelty or deliberation with which it is accompanied may in conſcience enhance the guilt of the perpetrator; with this reſervation however, that the malice muſt be of *corporal* damage to the party. And therefore working upon the fancy of another, or treating him harſhly or unkindly, by which he dies of fear or grief, is not ſuch a killing as the law takes notice of. But he who wilfully and deliberately does any act which apparently endangers another's life, and thereby occaſions his death, ſhall, unleſs he clearly prove the contrary, be adjudged to kill him of malice prepenſe.

Sum. 50. 1 Hale, 429. 451. 1 Hawk. ch. 31. ſ. 4. 3 Inſt. 48. 4 Blac. Com. 200.

Such was the caſe of him who carried his ſick father againſt his will in a ſevere ſeaſon from one town to another, by reaſon whereof he died: and of the harlot who being delivered of

Palm. 548. 1 Leon. 307. 1 Hawk. ch. 31. ſ. 5. 6. 2 Hale, 431, 2.

Ch. V. § 13. *From particular malice to the deceaſed.*

of a child left it in an orchard covered only with leaves, in which condition it was killed by a kite: and of another who hid her child in a hogſtye, where it was devoured. Such alſo was the caſe of the pariſh officers who ſhifted a child from pariſh to pariſh, till it died for want of care and ſuſtenance.

MS. Tracy, 53. Palm. 548. 4 Blac. Com. 197.

3 Hale, 432.

One infected with the plague going abroad, whereby another catches the infection and dies, ſeems guilty of a great miſdemeanor at leaſt: and if he did it wilfully to deſtroy another, Lord Hale doubts whether it would not be murder. An infected perſon going out and converſing in company with an infectious ſore upon him, after command by the magiſtrates to remain at home, was made felony by the ſtat. 2 Jac. 1.; but that ſtatute, after having been continued for ſome time, is now expired. Yet an offence of this ſort in breach of quarantine is now made felony without clergy by the ſtat. 40 Geo. 3. c. 80.

2 (vulgo 1) Jac. 1. c. 31. ſ. 7.

40 Geo. 3. c. 80. *Vide* poſt. *Quarantine.*

Whether an indictment for murder could be maintained, for killing a female infant by raviſhing her, was made a queſtion in Ladd's caſe; but the judges to whom it was referred gave no opinion upon it, as the indictment was holden bad on another point.

Ladd's caſe, 1773, MS. Jud.

But where the death enſued rather from incautious neglect, however culpable, than from any actual malice or wilful diſpoſition to injure another, or obſtinate perſeverance in doing an act neceſſarily attended with danger, and regardleſs of the conſequences, the ſeverity of the law may admit of ſome relaxation: but the caſe muſt be ſtrictly freed from theſe latter incidents. As in the caſe of Self, who upon his apprentice returning to him from bridewell, whither he had been ſent for miſbehaviour, in a louſy and diſtempered condition, did not take that care of him which his ſituation required, and which he might have done; the apprentice not having been ſuffered to be in a bed on account of the vermin, but being made to lie on the boards for ſome time without covering and without common medical care. In this caſe the medical perſons who were examined were of opinion that the boy's death was moſt probably occaſioned by his ill-treatment in bridewell, and the want of care when he went home; and they inclined to think, that if he had been

Self's caſe, O. B. Feb. 1776. MS. Gould, J. (*Vide* Wade's caſe, O. B. Feb. 1784, p. 455. Seſſ. Pap. and Patmore's caſe, O. B. Feb. 1789).

Ch. V. § 13. *From particular malice to the deceaſed*

been properly treated when he came home he might have recovered. But though ſome harſh expreſſions were proved to have been ſpoken by the priſoner to the boy, yet there was no evidence of any perſonal violence having been uſed by the priſoner: and it was proved that the apprentice had had ſufficient ſuſtenance: and the priſoner had a general good character for treating his apprentices with humanity; and had made application to get this boy into the hoſpital. Under theſe circumſtances the Recorder left it to the jury to conſider whether his death were occaſioned by the ill-treatment he received from his maſter after returning from bridewell; and whether that ill-treatment amounted to evidence of malice, in which caſe they were to find him guilty of murder. At the ſame time they were told, with the concurrence of Mr. Juſtice Gould and Mr. Baron Hotham, that if they thought otherwiſe, yet as it appeared that the priſoner's conduct towards his apprentice was highly blameable and improper, they might under all theſe circumſtances find him guilty of manſlaughter; which they accordingly did. And upon the queſtion being afterwards put to the judges, whether the verdict were well found, they all agreed that the priſoner ſhould be burned in the hand and diſcharged (*a*).

Eaſt. 16 Geo. 3. (abſent Grey C. J. and Ashhurſt J.)

§ 14. *Againſt whom malice may be directed.*

Malice may be directed againſt any perſon within the king's peace. Therefore to kill an alien enemy within the kingdom is murder, unleſs in the actual heat and exerciſe of war. So to kill one attainted of felony otherwiſe than by a lawful execution; or one in a præmunire. But to kill a child in its mother's womb is no murder, but a great miſprifion: and Staundford and Lord Hale are of the ſame opinion, even where the child is born alive, and afterwards dies by reaſon of the potion or bruiſes it received in the womb:

1 Hale, 433. 5 Eliz. c. 1. 3 Inſt. 50. Sum 53. 1 Hawk. ch. 31. ſ. 16. Staundf. 21. 4 Blac. Com. 198.

(*a*) I have been the more particular in ſtating the ground of the deciſion in this caſe becauſe Mr. Juſtice Gould's note of the caſe, from whence this is taken, is evidently different from another report (Leach, C. C. 127.) of the opinion of the judges in this caſe; from whence it might be collected that there could be no gradation of guilt in a matter of this ſort, where a maſter by his ill conduct or negligence had occaſioned or accelerated the death of his apprentice; but he muſt either be found guilty of murder or acquitted: a concluſion which, whether well or ill founded, certainly cannot be drawn from this ſtatement of the caſe. The ſame opinion however is ſtated in the O. B. Seſſions Papers to have been thrown out by the Recorder in Wade's caſe before referred to in the margin.

Ch. V. § 14. *From particular malice to the deceaſed.*

which opinion they ſeem to ground on the difficulty of aſcertaining the fact: certainly not a ſatisfactory reaſon, where the fact is clearly eſtabliſhed: and according to all other opinions the latter is murder.

Malice exerted againſt party abſent. 1 Hale, 431. 455. *Vide* poſt. tit. Principal and Acceſſary.

Malice may be exerted againſt a party in his abſence; as where A. lays poiſon for B. in his victuals, which B. afterwards takes and dies. So where A. procures an ideot or lunatic to kill B., which he does. In both inſtances A. is guilty of the murder as principal, and B. is merely an inſtrument.

Keilw. 136. 1 Hale, 431. 1 Hawk. ch. 27. ſ. 6.

If one perſuade another to kill himſelf, the adviſer is guilty of murder. The ſame, if he kill the party by his own command.

§ 15. *Malice againſt Baſtards.*

One kind of wilful murder upon expreſs malice deſerves particular notice; becauſe on account of the difficulty attendant upon the proof of the fact the legiſlature have thought it neceſſary to make ſpecial proviſion for facilitating the detection of it.

21 Jac. 1. c. 27. made perpetual by 16 Car. 1. c. 4.

By the ſtat. 21 Jac. 1. c. 27. it is enacted, "that if any "woman be delivered of any iſſue of her body, which being "born alive ſhould by the laws of this realm be a baſtard; "and that ſhe endeavour privately either by drowning or "ſecret burying thereof, or any other way, either by herſelf "or the procuring of others, ſo to conceal the death thereof, "as that it may not come to light whether it were born "alive or not, but be concealed: in every ſuch caſe the "ſaid mother ſo offending ſhall ſuffer death as in caſe of "murder, except ſhe can prove by one witneſs at the leaſt, "that the child whoſe death was by her ſo intended to be "concealed was born dead."

2 MS. Sum. 428. Kel. 52, 3. 2 Hawk. ch. 46. ſ. 43. *Vide* poſt. f. 120.

This, being a very ſevere law, has been always conſtrued moſt favourably for the unfortunate object of accuſation. If ſhe called for help, or confeſſed herſelf with child, ſhe is not within the conſtruction of the ſtatute; and then it will lie on the proſecutor to prove that the child was born alive and murdered. Upon the ſame principle evidence is always allowed of the mother's having made proviſion for the birth, as a circumſtance to ſhew that ſhe did not intend to conceal it. Again, if the child be born before its time, which is to be collected

O. B. Dec. 13, 1669.

2 Hale, 289.

Ch. V. § 15. *From particular malice to the deceaſed.*

collected from circumſtances, as if it have no hair, or nails, this is preſumptive evidence that it was born dead; but it muſt be left to the jury upon all the circumſtances of the caſe. At all events if there be no concealment proved, the caſe ſtands as at common law; and the woman is not put to the abſolute neceſſity of proving that the child was born dead. And even the preſence of an accomplice has been holden to take the caſe out of the ſtatute. Jane Peat was indicted for the murder of her baſtard child, and Margaret Peat her mother was indicted at the ſame time for being preſent aiding and abetting. It appeared that the priſoner Jane when in labour was heard by perſons in an adjoining room to call to her mother, who was preſent with her. Heath J. held that this took the caſe out of the ſtatute; for if any perſon be preſent, although privy to the guilt, there can be no concealment by the mother within the ſtatute, and the caſe ſtands as at common law. And there being no evidence of guilt but the concealment by both the priſoners, they were acquitted by his direction. Mr. Juſtice Blackſtone ſays further, that it has been uſual of late years, upon trials for this offence, to require ſome ſort of preſumptive evidence that the child was born alive, before the other conſtrained preſumption, that the child whoſe death is concealed was therefore killed by its parent, is admitted to convict the priſoner.

Baſtards.

Rex v. Jane Peat, Exeter Sum. Aſſ. 1793. Poſt. f. 119. *Vide* Domat. liv. 3. tit. 6. ſ. 4. a ſimilar law temp. Hen. 3.

4 Blac. Com. 198. Mary Jefford's caſe, Exeter Sp. Aſſ. 1798. cor. Thomſon, B. S. P. *Vide* poſt. f. 119. for the form of the indictment.

Malice may alſo be directed to the deſtruction of a man's own life, which denominates the party felo de ſe: that is, where any perſon wilfully does any act to deſtroy himſelf, and is thereby killed. If A. kill B. at his own deſire, B. is not felo de ſe, becauſe his conſent was merely void; but where two agree to die together, and one prepares poiſon of which they both drink, and he who prepared it ſurvives, the other who dies is felo de ſe; becauſe the act of taking the poiſon was his own, though the other aſſiſted him in getting it.

§ 16. *Felo de ſe.*

1 Hale, 411. Ante, f. 5. 1 Hawk. ch. 27. ſ. 6. *Vide* Moor. 754.

Ch. V. § 17.

§ 17. *Malice to one which falls on another.*

2. *Homicide from a particular Malice to one, which falls by Miſtake or Accident upon another.*

Sum. 50. 1 Hale, 379. 442 446. Lyer, 128. Kel. 111, 112. 117. Pult. de Pace, 124. b. Foſt. 261 *Vide* poſt. f. 27. 32.

In theſe caſes the act done follows the nature of the act intended to be done. Therefore if the latter were founded in malice, and the ſtroke from whence death enſued fell by miſtake or accident upon a perſon for whom it was not intended, yet the motive being malicious, the act amounts to murder; or to petit treaſon, according to the relative ſituation of the parties.

1 Hale, 438.

Thus A. having malice againſt B., ſtrikes at and miſſes him, but kills C.; this is murder in A.: and if it had been without malice, but with an inſtrument or in a manner calculated to create danger, though not likely to kill, it would have been manſlaughter. Again, A. having malice againſt B., aſſaults him, and kills C. the ſervant of B., who had come in aid of his maſter: this is murder in A.; for C. was juſtified in attacking A. in defence of his maſter, who was thus aſſaulted. So if A. give a poiſoned apple to B., intending to poiſon her, and B. ignorant of it give it to a child, who takes it and dies; this is murder in A., but no offence in B.; and this, though A. who was preſent at the time endeavoured to diſſuade B. from giving it to the child.

1 Hale, 431-436. 1 Hawk. ch. 31. ſ. 42.

1 Hale, 429.

Hither alſo may be referred the caſe of one who gave medicine to a woman; and that of another who put ſkewers in her womb, with a view in each caſe to procure an abortion; whereby the women were killed. Such acts are clearly murder; though the original intent, had it ſucceeded, would not have been ſo, but only a great miſdemeanor: for the acts were in their nature malicious and deliberate, and neceſſarily attended with great danger to the perſon on whom they were practiſed.

Mary Tinckler's caſe, 6th Nov. 1781, by all the judges. MS. Gould J. poſt. f. 124.

1 Hale, 413. 1 Hawk. ch. 27. ſ. 4.

Alſo, if a man in attempting to kill another, miſs his blow and kill himſelf; or intending to ſhoot at another, the gun burſt and mortally wound himſelf; he is felo de ſe; for he is the only agent. It is alſo ſaid, that if A. aſſault B. falling down *with his knife drawn*, A. in purſuit to kill B. by haſte fall on the knife and be killed, A. is felo de ſe. But Lord Hale in his Pleas of the Crown ſeems to doubt that, and

Sum 28. Dalt. ch. 144. 3 Inſt. 54.

1 Hale, 413.

Ch. V. § 17. *From malice to one which falls on another.*

and ſays, the authorities relied on do not ſupport the poſition, for they only determine, and that rightly, that B. is not guilty at all, and not merely ſe defendendo; and that A. is not a felo de ſe, but it is only homicide by miſadventure.

On the other hand, if the blow intended againſt one, and fighting upon another, aroſe from a ſudden tranſport of paſſion, on a reaſonable provocation, which in caſe the one had died by it would have reduced the offence to manſlaughter; the fact will admit of the ſame alleviation if the other ſhould happen to fall by it.

Foſt. 262. Brown's caſe, poſt f. 27. 1 Hawk. ch. 31. f. 44.

3. *Homicide from a general Malice or depraved Inclination to Miſchief, fall where it may.*

§ 18. *General malice*

The act itſelf muſt be unlawful, attended with probable ſerious danger, and muſt be done with a miſchievous intent to hurt people, in order to make the killing amount to murder in theſe caſes: for it is from theſe circumſtances that the malice is to be inferred. But if an unlawful and dangerous act, manifeſtly ſo appearing, be done deliberately, the miſchievous intent will be preſumed, unleſs the contrary be ſhewn.

1 Hale, 475. Foſt. 261.

Thus, if a perſon, breaking in an unruly horſe, wilfully ride him among a crowd of perſons, the probable danger being great and apparent, and death enſue from the viciouſneſs of the animal, it is murder. For how can it be ſuppoſed that a perſon wilfully doing an act, ſo manifeſtly attended with danger, eſpecially if he ſhewed any conſciouſneſs of ſuch danger himſelf, ſhould intend any other than the probable conſequence of ſuch an act. But yet if it appear clearly to have been done heedleſsly and incautiouſly only, and not with an intent to do miſchief, it is only manſlaughter: though Hawkins conſiders that it would be murder if the perſon intended to divert himſelf with the fright of the crowd. So if a man, knowing that people are paſſing along the ſtreet, throw a ſtone likely to create danger, or ſhoot over the houſe or wall, with intent to do hurt to people, and one is thereby ſlain; it is murder, on account of the previous malice, though not directed againſt any particular individual: for it is no excuſe that the party was bent upon miſchief

1 Hale, 476. 4 Blac. Com. 200. 1 Hawk. ch. 29. ſ. 12. ch. 31. ſ. 61. Poſt. f. 38, &c.

1 Hale, 475. Sum. 45. Foſt. 261. 1 Ld. Ray. 143. Hawk. *ut ſupra.*

1 Hale, 475.

Ch. V. § 18. *From general malice.*

generally. But if the act were done incautiouſly, without any ſuch intent, which muſt be collected from the circumſtances, it is only manſlaughter.

4 Blac. Com. 200. 1 Hawk. ch. 29. ſ. 10. ch. 31. ſ. 46. *Vide* tit. Principal and Acceſſary.

Again; if in the proſecution of an unlawful act the party come with a general reſolution to reſiſt all oppoſers; as to commit a riot, to enter a park, &c. if death enſue upon ſuch reſiſtance, it will be murder. But this will be conſidered more fully in another place.

§ 19.

II. *Of Homicide from Tranſport of Paſſion, or Heat of Blood.*

General principles and diviſion of ſubject.

Herein is to be conſidered under what circumſtances it may be preſumed that the act done, though intentional of death or great bodily harm, was not the reſult of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone.

Upon this head it is principally to be obſerved, that whenever death enſues from ſudden tranſport of paſſion or heat of blood, if upon a reaſonable provocation and without malice, or if upon ſudden combat, it will be manſlaughter: if without ſuch provocation, or the blood has had reaſonable time or opportunity to cool, or there be evidence of expreſs malice, it will be murder. For let it be again obſerved, that in no inſtance can the party killing alleviate his caſe by referring to a previous provocation, if it appear by any means that he acted upon expreſs malice. It becomes then material to conſider,

Ante, ſ. 12. Oneby's caſe, 2 Ld. Ray 1490.

1. What is a ſufficient provocation, and up to what extent, to extenuate the guilt of homicide. 2. How far the law regards heat of blood in mitigation of homicide, independent of the queſtion of reaſonable provocation; as in caſes of mutual combat. 3. What caſes are affected by the ſtatute 1 Jac. c. 8., commonly called the ſtatute of ſtabbing. 4. How long the law will allow for the blood being heated under the circumſtances, and what ſhall be conſidered as evidence of its having cooled, before the mortal blow given.

1. Words

§ 20.

What is a ſufficient provocation.

1. Words of reproach, how grievous ſoever, are not provocation ſufficient to free the party killing from the guilt of murder; nor are contemptuous or inſulting actions or geſtures without an aſſault upon the perſon; nor is any treſpaſs againſt lands or goods. This rule governs every caſe where the party killing upon ſuch provocation made uſe of a deadly weapon, or otherwiſe manifeſted an intention to kill, or to do ſome great bodily harm. But if he had given the other a box on the ear, or had ſtruck him with a ſtick or other weapon *not likely to kill*, and had unluckily and againſt his intention killed him, it had been but manſlaughter: for no malignant intention can be collected from ſuch acts.

Foſt. 290. 1 Hale, 455, 6. 1 Hawk. ch. 31. ſ. 33. Kel. 55. 130, 1. 4 Blac. Com. 200. Rex v. Kidd, 5 St. Tr. 296. Mawgridge's caſe, 9 St. Tr. 64. Ld. Morley's caſe, 7 St. Tr. 421. Cro. Eliz. 778. Poſt. ſ. 22.

It is indeed ſaid by Lord Hale, that it was reſolved in Lord Morley's caſe that words of menace of bodily harm are a ſufficient provocation to reduce the offence of killing to manſlaughter. In the report of the ſame caſe in Kelyng, no ſuch poſition is to be found. And it ſeems that they ought at leaſt to be accompanied by ſome act denoting an immediate intention of following them up by an actual aſſault.

1 Hale, 456. Kel. 55.

Aſſault.

But any aſſault made with violence or circumſtances of indignity upon a man's perſon, as by pulling him by the noſe, if it be reſented immediately by the death of the aggreſſor, and it appear that the party acted in the heat of blood upon that provocation, will reduce the crime to manſlaughter. So, ſays Lord Hale, it would be, if A. riding on the road, B. had whipped his horſe out of the track, and then A. had alighted and killed B. The particulars of the caſe are not explained; but I ſhould preſume that the fact was done with violence or great inſolence.

Kel. 135. 4 Blac. Com. 191. Lanure's caſe, 17 Car. 1. 1 Hale, 456.

Reſtraint of liberty.

So if a man be injuriouſly reſtrained of his liberty; as where a creditor ſtood at the door of his debtor with a drawn ſword, to prevent him from eſcaping while he ſent for a bailiff to arreſt him. Or, as where a ſerjeant put a common ſoldier under an arreſt, who thereupon killed the ſerjeant with a ſword: and upon the trial the articles of war were not produced, nor any evidence given of the uſage of the army, and ſo no authority in the ſerjeant appeared.

Buckner's caſe, Styl. 467. Poſt. ſ. 29. Withers's caſe, Stafford Sum. Aſſ. 1784, cor. Buller J. afterwards before all the judges in M. 25 Geo. 3. MS. Gould and Buller, Js.

There

Ch. V. § 20. *What provocation may extenuate.*

Detecting adulterer. Foſt. 296. 1 Hale, 486. Foſt. f. 29.

There is indeed one ſpecies of provocation, which though it do not amount to a perſonal aſſault upon the party himſelf, is yet of ſo grievous a nature as the law reaſonably concludes cannot be borne in the firſt tranſport of paſſion; where the injury is irreparable and can never be compenſated. This is where a man finds another in the act of adultery with his wife; in which caſe if he kill him in the firſt tranſport of paſſion, he is only guilty of manſlaughter, and that too of the loweſt degree; and therefore the Court directed the burning in the hand to be gently inflicted, becauſe there could not be a greater provocation. But if he had killed the adulterer deliberately and upon revenge, it would be murder.

Manning's caſe, T. Ray. 212. 1 Ventr. 159.

§ 21. *A trivial aſſault no provocation for cruel revenge.* Foſt. 291. 4 Blac. Com. 199 201.

It muſt not however be underſtood that any trivial provocation, which in point of law amounts to an aſſault, or even a blow, will of courſe reduce the crime of the party killing to manſlaughter. This I know has been ſuppoſed by ſome, but there is no authority for it in the law. For where the puniſhment inflicted for a ſlight tranſgreſſion of any ſort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be conſidered as the effect of a brutal and diabolical malignity than of human frailty: it is one of the true ſymptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithſtanding ſuch provocation. Barbarity, ſays Lord Holt in Keate's caſe, will often make malice.

Comb. 408.

Stedman's caſe, O. B. Seſſions before Eaſter term 1704. MS. Tracy and Denton, 57. Foſt. 292. S. C.

The caſe of Stedman will illuſtrate this in both points of view. The priſoner, who was a ſoldier, was indicted for the murder of one Macdonel a woman. It appeared that a friend of the deceaſed being fighting with another in Covent Garden, and the priſoner running towards them, the woman ſaid to him, "you will not murder the man, will you?" Stedman replied, "what is that to you, you bitch," upon which the woman gave him a box on the ear, and then Stedman ſtruck her with the pomel of his ſword on her breaſt: thereupon ſhe fled, and he purſued and ſtabbed her in the back with his ſword. It ſeemed to Holt

Holt C. J. that this was murder; the box on the ear by the woman not being a ſufficient provocation for the killing her in that manner, and after he had given her the blow in return for the box on the ear: and it was agreed to have this found ſpecially by the opinion of all the judges there. But it afterwards appearing in the progreſs of the trial, that the woman had ſtruck the ſoldier with a patten on the face with great force, ſo that the blood flowed, it was holden clearly to be only manſlaughter. The ſmart of the wound, ſays Mr. Juſtice Foſter, and the effuſion of blood might poſſibly keep his indignation boiling to the moment of the fact.

Ch. V. § 21. *What provocation may extenuate.*

Foſt. 292.

So a ſlight blow with a cane would not in the opinion of the laſt-mentioned learned judge have juſtified the officers who came to arreſt Mr. Luttrell, in diſpatching him in the inhuman manner reported by Sir John Strange; two of them having, as he ſtates, upon the receipt of ſuch a blow, ſtabbed him in ſeveral places while he lay helpleſs on the ground, begging for mercy, and then diſpatched him with a piſtol: becauſe ſuch furious acts of revenge inflicted upon trivial provocations are true ſymptoms of that malice which conſtitutes the crime of murder.

Ib. 293.

Rex v. Reaſon and Tranter, 1 Stra. 499. Foſt. f. 86. S. C. more fully ſtated.

So if on any ſudden provocation of a ſlight nature, one beat another in a cruel and unuſual manner, ſo that he dies, though he did not intend to kill him, it is murder by expreſs malice.

4 Blac. Com. 199.

§ 22. *Smaller provocations may extenuate, unleſs revenged cruelly or with dangerous inſtruments.*

There are ſeveral inſtances of ſmaller provocations not amounting to an aſſault upon the perſon, which may yet tend to extenuate the guilt of homicide; or to ſpeak more properly, they ſerve to explain the act and rebut the preſumption of malice. Wherein however it muſt again be obſerved, that the puniſhment muſt not be greatly diſproportionate to the offence. And herein much depends upon the inſtrument or manner of chaſtiſement: if the inſtrument be ſuch in its nature as was likely to endanger life, as a peſtle, the party killing will ſtill be guilty of murder. But if it be not of a deadly nature; nor urged with brutal violence; in ſhort, if the act may fairly be attributed to an intention to correct rather than to a cruel and implacable malice,

Ante, f. 21. Foſt. 291. MS. Burnet, 44. Kel. 131. 1 Hale, 457. 4 Blac. Com. 200.

1 Hawk. ch. 31. f. 34.

Ch. V. § 22. *What provocation may extenuate.*

malice, founded in a ſpirit of revenge, it will amount only to manſlaughter.

Foſt. 292. 1 Hale, 473. 1 Hawk. ch. 31. ſ. 34. Kel. 132. Poſt. ſ. 56.

A. finding a treſpaſſer on his land, in the firſt tranſport of his paſſion beat him, and unluckily happened to kill him: this was holden to be manſlaughter. But it muſt be underſtood that he beat him not with a miſchievous intention to injure him materially, but merely to chaſtiſe for the treſpaſs, and deter him from repeating the like; and it muſt ſo appear. For if he had knocked his brains out with a bill or hedge-ſtake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a ſudden reſentment, whereof he had died, it had been murder.

R. v. John Fray, O. B. Seſſ. 1785, cor. Gould, J. Seſſ. Papers, No. 751.

Where one, having had his pocket picked, ſeized the offender, and being encouraged by a concourſe of people, threw him into an adjoining pond by way of avenging the theft by ducking him, but without any apparent intention of taking away his life, and the pickpocket was drowned; this was ruled to be manſlaughter only.

1 Hale, 456.

On words of provocation a man threw a broomſtick at a diſtance at another, and killed her; and the judges not being unanimous, a pardon was adviſed. The doubt there muſt have been upon the ground that the inſtrument was not ſuch as could probably at the given diſtance have occaſioned death or great bodily harm.

Sarah Hazel's caſe, B. R. Eaſt. 25 Geo. 3. MS.

A ſimilar doubt occurred in Sarah Hazel's caſe, on an indictment for murder. It was found upon a ſpecial verdict, that ſhe had directed her daughter-in-law, a child of ten years old, to ſpin ſome yarn; and upon her return home finding ſome of it badly done, ſhe threw a four legged ſtool at the child, and ſtruck her on the right temple, of which the child ſoon after died. The jury found alſo, that the ſtool was of ſufficient ſize and weight to give a mortal blow, *but that the priſoner when ſhe threw it did not intend to kill the deceaſed.* That ſhe afterwards threw the body into a river, and told her huſband that the child was loſt. After argument in B. R., (where ſeveral formal objections were taken to the finding,) the caſe for the difficulty of it was referred to the conſideration of all the judges; but no opinion was ever delivered, as ſome of the judges thought it a proper caſe to recommend for a pardon.

On

Ch. V. § 22. *What provocation may extenuate.*

On the argument of the above caſe, the priſoner's counſel cited a caſe tried at Norwich aſſizes in 1782, before Nares J. where it appeared that the priſoner, a ſhepherd, being angry with his boy for letting ſome ſheep eſcape, in his paſſion threw a hedge ſtake at him with ſome violence, at the diſtance of about eight or ten yards, which unfortunately killed him; and it was ruled to be only manſlaughter.

Halloway's caſe, Cro. Car. 131. Palm. 545. W. Jones, 198. 1 Hawk. ch. 31. ſ. 39. 1 Hale, 454-473. Kel. 127.

A parker finding a boy ſtealing wood in his maſter's ground bound him to his horſe's tail, and beat him. The horſe took fright and ran away, and dragged the boy on the ground till his ſhoulder was broken, whereof he died. This was ruled murder. For it was not only an illegal, but a deliberate and dangerous act; the correction was exceſſive, and ſavoured of cruelty. But if the chaſtiſement had been more moderate, it had been but manſlaughter. For between perſons nearly connected together by civil or natural ties, the law admits the force of a provocation done to one to be felt by the other: and therefore a fortiori, if the owner or maſter himſelf had caught the treſpaſſer and beat him in ſuch a manner as ſhewed a deſire only to chaſtiſe and prevent a repetition of the offence, but had unfortunately and againſt his intent killed him; it would only have been manſlaughter.

Rowley's caſe, 12 Rep. 87. 1 Hale, 453. Foſt. 294.

Rowley's caſe, as reported by Lord Coke, from whom Lord Hale cites it, was this: The priſoner's ſon fought with another boy and was beaten; he ran home to his father all bloody; who preſently took a cudgel, ran three quarters of a mile, and ſtruck (*a*) the other boy, who died. This was ruled manſlaughter, becauſe done in ſudden heat and paſſion. Upon which caſe Mr. Juſtice Foſter obſerves, that the provocation was not very grievous: the boy had fought with one who happened to be an over match for him, and was worſted, a diſaſter ſlight enough, and very frequent among boys. And therefore he is of opinion, that if upon ſuch a provocation the father, after running three quarters

(*a*) The words of Lord Hale are in the preſent tenſe. It muſt be obſerved that Mr. Juſtice Foſter's words in citing this caſe are "*beats* the other boy, who dieth of this beating." The reaſon for adverting to this difference will appear. The words in Lord Coke's report are, "ſtruck him upon the head, upon which he died."

of

Ch. V. § 22. *What provocation may extenuate.*

of a mile, had ſet his ſtrength againſt the child, and had diſpatched him with an hedge ſtake, or any other deadly weapon, or by repeated blows with his cudgel, it muſt have been murder; ſince any of theſe circumſtances would have been a plain indication of malice, or a vindictive motive.

Cro. Jac. 296.

But he obſerves that Croke reports the true grounds of the judgment: his words are, "Rowley ſtruck the child with *a little cudgel* *, of which ſtroke he afterwards died." From whence it may be very fairly collected, that the accident happened by a *ſingle ſtroke with a cudgel not likely to kill him.* Such a provocation therefore, though it might palliate a moderate chaſtiſement from the hand of a parent, whoſe paſſion might be ſuppoſed to be raiſed at the ſight of his child in the condition he was then in, yet would not have ſufficed as any manner of alleviation for an act of brutal violence; more eſpecially as the act which occaſioned his reſentment was over, and ſome time had elapſed before he could reach the object of it.

* Godb. 182. ſays, "a rod."

Ante, f. 12. and *vide* Maſon's caſe, poſt. 239.

It has alſo been ſhewn, that in ſome caſes not even previous blows or ſtruggling will extenuate homicide, if it expreſsly appear to have been committed upon malice.

Poſt. f. 62, &c.

With reſpect to provocations ariſing out of injuries done to others by officers of juſtice, or ſuch as act in that character, they will claim ſeparate conſiderations hereafter: as will

f 37.

alſo thoſe caſes of homicide ariſing from exceſs of correction in foro domeſtico.

§ 23. *a.* *Reſult of the caſes on extenuating provocations.*

In all the inſtances above enumerated the party killing is ſuppoſed to have taken all advantages in the heat of blood over the perſon ſlain; but to have received ſuch a provocation as the law preſumes might in human frailty heat the blood to a proportionable degree of reſentment, and keep it boiling to the moment of the fact: ſo that the party may rather be conſidered as having acted under a temporary ſuſpenſion of reaſon, than from any deliberate malicious motive. And it has been ſhewn, that in the caſe of a legal provocation, ſtrictly ſo conſidered, this heat will extenuate the guilt of the party acting under its adequate influence, even though he made uſe of a deadly weapon. The ſame extenuation will apply even to leſſer provocations, where the inſtrument

Ch. V. § 23. *What provocation may extenuate.*

inſtrument or force, not being in their own nature dangerous, were ſo applied as to induce a reaſonable preſumption that correction and not deſtruction were intended to be effected. It has alſo been more than once obſerved, that the puniſhment inflicted upon any ſort of provocation, whether in its nature admitted by law to be ſuch, or taken only as explanatory of the act done, muſt not greatly exceed the offence received. This has been urged with caution; becauſe in thoſe caſes where the mercy of the law interpoſes in pity to human frailty, it will not try the culprit by the rigid rule of juſtice, and examine with the moſt ſcrupulous nicety whether he cut off the exact pound of fleſh. But let it be remembered on the other hand, that whoſoever takes the diſpenſation of puniſhment into his own hand does it at his peril; and if it be found that inſtead of puniſhment he executed vengeance untempered with mercy, he can have no reaſon to complain if his excuſe for ſuch diſpenſation be more ſcrupulouſly balanced in the ſcale of juſtice.

Ante, f. 21, 22. and *vide* poſt. f. 30.

§ 23. *b.* *Provocation will not avail if ſought.*

In no caſe however will the plea of provocation avail the party, if it were ſought for and induced by his own act in order to afford him a pretence for wreaking his malice. As where A. and B. having fallen out, A. ſays he will not ſtrike, but will give B. a pot of ale to touch him; on which B. ſtrikes, and A. kills him: this is murder.

1 Hale, 457. 1 Hawk. ch. 31. ſ. 24. 2 Ld. Ray. 1496. 2 Stra. 773.

And in all caſes of provocation, in order to extenuate the offence, it muſt appear that the party killing acted upon ſuch provocation, and not upon an old grudge; for then it would amount to murder.

1 Hale, 452. Ante, f. 11, 12. 19. *nor if death on old grudge.*

Richard Maſon was indicted and convicted for the wilful murder of William Maſon his brother; but execution was reſpited to take the opinion of the Judges, upon a doubt whether upon the circumſtances given in evidence the offence amounted to murder or manſlaughter. The priſoner with the deceaſed and ſome neighbours were drinking in a friendly manner at a public houſe; till growing warm in liquor, but not intoxicated, the priſoner and the deceaſed began in idle ſport to puſh each other about the room. They then wreſtled one fall; and ſoon afterwards played at cudgels by agreement. All this time no tokens of anger appeared on either ſide,

Rd. Maſon's caſe, Winchester Sum. Aſſ. 1756. Poſt. 122. *Even blows previouſly received will not extenuate homicide upon deliberate malice and revenge; eſpecially where it is to be collected from the circumſtances that the provocation was ſought for the purpoſe of colouring the revenge.*

Ch. V. § 23. *What provocation may extenuate.*

ſide, till the priſoner in the cudgel play gave the deceaſed a ſmart blow on the temple. The deceaſed thereupon grew angry, and throwing away his cudgel, cloſed in with the priſoner, and they fought a ſhort time in good earneſt: but the company interpoſing, they were ſoon parted. The priſoner then quitted the room in anger; and when he got into the ſtreet was heard to ſay, "Damnation ſeize me if I do not fetch ſomething and ſtick him;" and being reproved for ſuch expreſſions, he anſwered, "I'll be damned to all eternity if I do not fetch ſomething and run him through the body." The deceaſed and the remainder of the company continued in the room where the affray happened; and in about half an hour the priſoner returned, having in the mean time changed a ſlight for a thicker coat. The door of the room being open into the ſtreet, the priſoner ſtood leaning againſt the door-poſt, his left hand in his boſom, and a cudgel in his right; looking in upon the company, but not ſpeaking a word. The deceaſed ſeeing him in that poſture invited him into the company; but the priſoner anſwered, "I will not come in." "Why will you not?" ſaid the deceaſed. The priſoner replied, "Perhaps you will fall on me and beat me." The deceaſed aſſured him he would not; and added, "Beſides, you think yourſelf as good a man as me at cudgels, perhaps you will play at cudgels with me." The priſoner anſwered, "I am not afraid to do ſo if you will keep off your fiſts." Upon theſe words the deceaſed got up and went towards the priſoner, who dropped the cudgel as the deceaſed was coming up to him. The deceaſed took up the cudgel, and with it gave the priſoner two blows on the ſhoulder. The priſoner immediately put his right hand into his boſom, and drew out the blade of a tuck ſword, crying, "Damn you, ſtand off or I'll ſtab you;" and immediately, without giving the deceaſed time to ſtand off, made a paſs at him with the ſword, but miſſed him. The deceaſed thereupon gave back a little, and the priſoner, ſhortening the ſword in his hand, leaped forward towards the deceaſed, and ſtabbed him to the heart; and he inſtantly died. The Judges at a conference in Michaelmas vacation unanimouſly agreed, that there are in this caſe ſo many circumſtances of deliberate malice and deep revenge

Ch. V. § 23. *What provocation may extenuate.*

revenge on the defendant's part, that his offence cannot be leſs than wilful murder. He vowed he would fetch ſomething to ſtick the deceaſed, to run him through the body. He returned to the company provided to appearance with an ordinary cudgel, as if he intended to try ſkill and manhood a ſecond time with that weapon; but the deadly weapon was all the time carefully concealed under his coat; which moſt probably he had changed for the purpoſe of concealing the weapon. He ſtood at the door, refuſing to come nearer, but artfully drew on the diſcourſe of the paſt quarrel; and as ſoon as he ſaw his brother diſpoſed to engage a ſecond time at cudgels, he dropped his cudgel and betook himſelf to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother ſtand off; but he gave him no opportunity of doing ſo before the firſt paſs was made. His brother retreated before the ſecond, but he advanced as faſt, and took the revenge he had threatened. The circumſtance of the blows before the ſword was produced, which it may be preſumed ſuggeſted the doubt, did not alter the caſe, nor did the precedent quarrel; becauſe, all circumſtances conſidered, he appeared to have returned with a deliberate reſolution to take a deadly revenge for what had paſſed; and the blows were plainly a provocation *ſought* on his part, that he might execute the wicked purpoſe of his heart with ſome colour of excuſe.

§ 24. *Death on mutual combat.* Ante, f. 19. Poſt. 295. Kel. 135. 2 Ld. Ray. 1403. 1 Hale, 453. 456. Poſt. f. 51. &c. Staunf. 15. Crompt. 28. 1 Keb. 17.

2. But there is another claſs of caſes, where the degree or ſpecies of provocation enters not ſo deeply into the merits of them as in the foregoing: and thoſe are, where upon words of reproach, or indeed any other ſudden provocation, the parties come to blows, and a combat enſues, no undue advantage being taken or ſought on either ſide: if death enſue, this amounts to manſlaughter. And here it matters not what the cauſe be, whether real or imagined, or who draws or ſtrikes firſt; provided the occaſion be ſudden, and not urged as a cloak for pre-exiſting malice. For in no caſe will the killing, though in mutual combat, admit of alleviation, if the fighting were upon malice. Nothing can be more dangerous or unjuſt in matters of this high nature, than to eſtabliſh material diſtinctions upon points which do not enter into the intrinſic merits of the caſe. Where parties upon a

Ch. V. § 24. *On mutual combat.*

ſudden quarrel agree to fight, how little does it matter, as to the point of offence, which makes the firſt aſſault; it is often purely accidental; the guilt conſiſts in the pre-conceived malice or anger againſt the party, which induces ſo unlawful an agreement. And therefore where two perſons deliberately agree to fight, and meet for that purpoſe, and one is killed; the other cannot help himſelf by alleging that he was firſt ſtricken by the deceaſed, or that he had often declined to meet him and was urged by importunity, or that he meant not to kill, but only to diſarm his adverſary: for ſince he deliberately engaged in an act highly culpable in defiance of the laws, he muſt at his peril abide the conſequences. And here it may be noted, that where the principal in deliberate duelling would be guilty of murder, ſo will his ſecond; and, as ſome have conſidered, the ſecond alſo of him who died, becauſe the fighting was upon a compact; though Lord Hale thinks the latter opinion too ſevere; but he ſays, it is a great miſdemeanor even in him.

Deliberate duelling.
1 Hawk. ch. 31. ſ. 21.
1 Hale, 452, 3.
Ante, ſ. 12.

1 Hawk. ch. 31. ſ. 31. 1 Hale, 443. 443. 453. 4 Blac. Com. 199. 11 St. Tr. 114. Coſmo Gordon's caſe, O. B. Sept. 1784, Seſſ. Pap. 1043. Poſt. ſ. 59.

§ 25. *Equality of combat neceſſary to extenuate.*

I have before ſtated, that in the caſe of mutual combat, in order to ſave the party making the firſt aſſault upon an inſufficient legal provocation from the guilt of murder, the occaſion muſt not only be ſudden, but the party aſſaulted muſt be put upon an equal footing in point of defence, at leaſt at the onſet. This is peculiarly requiſite where the attack is made with deadly or dangerous weapons.

Poſt. 295. 1 Hale, 456. Kel. 61. 2 Ld. Ray. 1403. 1 Hawk ch. 31. ſ. 27, 28.

A. uſes provoking language or behaviour towards B., who thereupon ſtrikes him, and a combat enſues, wherein A. is killed; held manſlaughter; for it was a ſudden affray, and they fought upon equal terms. But if B. had drawn his ſword and made a paſs at A., whoſe ſword was then undrawn, and thereupon A. had drawn and a combat had enſued, in which A. had been killed; this would have been murder. For B. by making his paſs while his adverſary's ſword was undrawn ſhewed that he fought his blood; and A.'s endeavouring to defend himſelf, which he had a right to do, will not excuſe B. But if B. had firſt drawn, and forborne till his adverſary had alſo drawn, it had been no more than manſlaughter.

Mawgridge,

Ch. V. § 25. *On mutual combat.*

Mawgridge, upon words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his ſword. Mr. Cope returned a bottle at the head of Mawgridge, which it was lawful for him to do in his own defence, and wounded him; whereupon Mawgridge ſtabbed Cope; which was ruled to be murder. For Mawgridge in throwing the bottle ſhewed an intention to do ſome great miſchief, and his drawing immediately ſhewed that he intended to follow up his blow.

Mawgridge's caſe, Kel. 128. 2 Ld. Ray. 1489. Poſt. 2.6. Poſt. ſ. 47. S.C.

Vide Oneby's caſe, poſt. ſ. 30.

And upon the ſame principle it ſeems to me that Ford's caſe, as reported, might be defenſible; who being in poſſeſſion of a room at a tavern, ſeveral perſons inſiſted upon having it, and turning him out, which he refuſed to ſubmit to: thereupon they drew their ſwords upon Mr. Ford and his company, and Mr. Ford drew his ſword and killed one of them; which was adjudged juſtifiable homicide. Now though the aſſailants waited till Mr. Ford had drawn his ſword, which does by no means appear; yet if more than one attacked him at the ſame time [and as he was the only one of his party who ſeems to have reſiſted, it is probable enough that ſuch was the caſe]; with great deference to thoſe (*a*) who have doubted the law of this caſe, the determination ſeems to be maintainable. If on ſuch an attack Mr. Ford had been killed, it would clearly have been murder: and therefore it may be preſumed that the memorandum in the margin of the reporter, and the quære by the commentator, muſt have been made on the ground of the reaſon ſuggeſted in the margin of Kelyng for the judgment, namely, that the killing by Mr. Ford *in defence of his own poſſeſſion of the room* was *juſtifiable*, which under thoſe circumſtances may be fairly queſtioned. On that ground indeed it might have been better ruled to be manſlaughter.

Ford's caſe, Kel. 51.

Vide poſt. ſ. 47.

§ 26. *Sufficient if the combat be equal at the onſet.*

The caſe will not be varied if, on any ſudden quarrel, blows paſs, without any intention to kill or injure another materially; and in the courſe of the ſcuffle, after the parties are heated by the conteſt, one kill the other with a deadly weapon.

(*a*) Mr. Juſtice Foſter in citing this caſe, p. 274, has put a quære to it; and in the margin of Kelyng there is a memorandum to inquire of it.

Ch. V. § 26. *On mutual combat.*

Rex v. Taylor, 5 Burr. 2793.

Three Scotch ſoldiers were drinking together in a public houſe; ſome ſtrangers in another box abuſed the Scotch nation, and uſed ſeveral provoking expreſſions towards the ſoldiers; on which one of them, the priſoner, ſtruck one of the ſtrangers with a ſmall rattan cane, not bigger than a man's little finger. The ſtranger went out for aſſiſtance; and in the mean time an altercation enſued between the priſoner and the deceaſed, who then came into the room, and who, on the priſoner's offering to go without paying his reckoning, laid hold of him by the collar and threw him againſt a ſettle. The altercation encreaſed; and when the ſoldier had paid the reckoning the deceaſed again collared him, and ſhoved him from the room into the paſſage. Upon this the ſoldier exclaimed, that he did not mind killing an Engliſhman more than eating a meſs of crowdy. The deceaſed, aſſiſted by another perſon, then violently puſhed the ſoldier out of the houſe: whereupon the latter inſtantly turned round, drew his ſword, and ſtabbed the deceaſed to the heart: adjudged manſlaughter.

Snow's caſe, Northampton Sum. Aſſ. 1776, MS. Crown Caſ. Res. and MS. Gould J. Leach, 138. S. C.

William Snow was indicted for the murder of Thomas Palmer. The priſoner, who was a ſhoemaker, lived in the neighbourhood of the deceaſed. One evening the priſoner, who was much in liquor, paſſed accidentally by the houſe of the deceaſed's mother, near which the deceaſed was at work, had a quarrel with him there, and after high words they were going to fight, but were prevented by the mother, who hit the priſoner in the face and threw water over him. The priſoner went into his houſe, but came out in a few minutes, and ſet himſelf down upon a bench before his gate, with a ſhoemaker's knife in his hand, paring a ſhoe. The deceaſed on finiſhing his work, returned home by the priſoner's houſe, and called out to him as he paſſed, "Are not you an aggravating raſcal?" The priſoner replied, "What will you be when you are got from your maſter's feet:" on which the deceaſed took the priſoner by the collar, and dragging him off the bench, they both rolled into the cartway. While they were ſtruggling and fighting, the priſoner underneath the deceaſed, the latter cried out, "you rogue what do you do with that knife in your hand," and caught at his arm to ſecure it;

Ch. V. § 26. *On mutual combat.*

but the priſoner kept his hand ſtriking about, and held the deceaſed ſo hard with his other hand that he could not get away. The deceaſed, however, at length made an effort to diſengage himſelf, and during the ſtruggle received the mortal wound in his left breaſt, having before received two ſlight wounds. The jury found the priſoner guilty of murder. But judgment was reſpited to take the opinion of the judges; who [in the abſence of De Grey C. J.] were unanimouſly of opinion that it was only manſlaughter. They thought that there was not ſufficient evidence that the priſoner lay in wait for the deceaſed, with a malicious deſign to provoke him, and under that colour to revenge his former quarrel by ſtabbing him; which would have made it murder. On the contrary he had compoſed himſelf to work at his own door in a ſummer's evening; and when the deceaſed paſſed by neither provoked him by word or geſture. The deceaſed began firſt by ill language, and afterwards by collaring and dragging him from his ſeat, and rolling him in the road. The knife was uſed openly before the deceaſed came by, and not concealed from the byſtanders; though the deceaſed in his paſſion did not perceive it till they were both down. And though the priſoner was not juſtifiable in uſing ſuch a weapon on ſuch an occaſion, yet it being already in his hand, and the attack upon him very violent and ſudden, they thought it only amounted to manſlaughter; and he was recommended for a pardon.

Michaelmas term 1776.

Serjt. Foſter's MS.

§ 27. *Where blow intended for one falls on another.*

Foſt. 262. 1 Hawk. ch. 31. ſ. 44. ante, ſ. 17. Brown's caſe, 1776, MS. Crown Caſ. Ref. Leach, 151. S. C. Poſt. ſ. 46. S. C.

In this as in the caſe of malice prepenſe and expreſs, if the blow intended for one would in law only have amounted to manſlaughter, it will ſtill be the ſame, though by miſtake or accident it kill another.

A quarrel ariſing between ſome ſoldiers and a number of Keelmen at Sandgate, a violent affray enſued, and one of the ſoldiers was very much beaten. The priſoner, a ſoldier, who had before driven part of the mob down the ſtreet with his ſword in the ſcabbard, on his return, ſeeing his comrade thus uſed, drew his ſword, and bid the mob ſtand clear, ſaying he would ſweep the ſtreet; and on their preſſing on him he ſtruck at them with the flat ſide, and as they fled purſued them. The other ſoldier in the mean time had

Ch. V. § 27. *Of mutual combat.*

got away, and when the priſoner returned he aſked whether they had murdered his comrade; and being ſeveral times again aſſaulted by the mob, he brandiſhed his ſword, and bid them keep off. At this time the deceaſed, who from his dreſs might be miſtaken for a keelman, was going along about five yards from the priſoner; but before he paſſed the priſoner went up to him and ſtruck him on the head with the ſword, of which he preſently died. This was holden manſlaughter: it was not murder as the jury had found, becauſe there was a previous provocation, and the blood was heated in the conteſt: nor was it in ſelf-defence, becauſe there was no inevitable neceſſity to excuſe the killing in that manner.

Foſt. 278.

Foſt. ſ. 54. &c.

I ſhall have occaſion to conſider hereafter, in what caſes the party, retreating from a combat before a mortal ſtroke given, ſhall be ſaid to kill his aſſailant afterwards in ſelf-defence.

§ 28. *The ſtatute of ſtabbing.* 1 Jac. 1. c. 8.

3. *As to caſes falling within the ſtatute of ſtabbing.*

Where death happens from heat of blood under particular circumſtances, the party killing may be indicted upon the ſtat. 1 Jac. 1. c. 8., commonly called the ſtatute of ſtabbing, which ouſts the offender of clergy in certain caſes therein ſpecified. This ſtatute was made, as Lord Bacon on another occaſion expreſſes himſelf, *upon the ſpur of the times*, on account of the quarrels between the Engliſh and Scotch upon the firſt union of the two crowns, and in order to obviate the inconvenience ariſing from the compaſſion of juries, who were apt to conſider that to be a provocation for extenuating murder which was not ſo in law: a proviſion altogether unneceſſary, as the common law had already fully provided for every caſe of aggravation againſt which this ſtatute was principally levelled. But whatever inconveniences might have happened from purſuing the literal conſtruction of the ſtatute, few, if any, can enſue from the interpretation which has been given of it. For it was agreed by the judges in Lord Morley's caſe, that this ſtatute was only *declaratory* of the common *law*: and Mr. Juſtice Foſter in commenting upon it has, in conformity with other opinions, declared that wherever the defendant is indicted at

Foſt. 298.

Ld. Morley's caſe, Kel. 55. 1 Hawk. ch. 30. ſ. 5. Foſt. 298. 302. Morgan's caſe, 1 Bulſtr. 87. Rex v. Taylor, 2 Burr. 2796.

at common law and alſo upon the ſtatute, the queſtion moſt worthy of conſideration is, Whether the fact upon the evidence be *murder at common law* or not? In all caſes of doubt, therefore, the conſtruction upon the ſtatute ought to be in conformity with the benign principles of the common law. And all circumſtances which at common law will ſerve to juſtify, excuſe, or alleviate, in a charge of murder have always had their due weight in proſecutions grounded on the ſtatute.

Ch. V. § 28. *Statute of ſtabbing.*

See the end of the next ſection.

The words are, "Every perſon and perſons who ſhall "ſtab or thruſt any perſon or perſons that hath not then "any weapon drawn, or that hath not then firſt ſtricken "the party which ſhall ſo ſtab or thruſt, ſo as the perſon or "perſons ſo ſtabbed or thruſt ſhall thereof die within ſix "months then next following, although it cannot be proved "that the ſame was done of malice aforethought; yet the "party ſo offending, and being thereof convicted by verdict, "confeſſion, or otherwiſe, according to law, ſhall be ex-"cluded from the benefit of clergy, and ſuffer death as in "caſe of wilful murder." With a proviſo, "that the act ſhall not extend to caſes of ſelf-defence, misfortune, or in any other manner than as aforeſaid; nor to any perſon who ſhall commit manſlaughter in preſerving the peace, or chaſtiſing or correcting his child or ſervant."

1 Jac. 1. c. 8. continued by 3 Car. 1. c. 4. and 16 Car. 1. c. 4.

§ 29. *The ſtatute extends not to aiders and abettors.* 1 Hale, 468. 2 Hale, 344. Foſt. 355. Alleyn, 44. 1 Hawk. ch. 30. ſ. 7.

1. The firſt queſtion to be conſidered is, Who ſhall be intended by "*every perſon and perſons* who ſhall ſtab," &c. The rigour of the ſtatute is confined to the very perſon ſtabbing or thruſting, and does not extend to others aiding and abetting him. And therefore where Welch and five others were indicted (16 Car.) on this ſtatute for the death of Swinnerton; becauſe it did not appear upon the evidence which of them made the thruſt, they being all preſent, they could only be convicted of manſlaughter at common law, and had their clergy. Neither are there any acceſſaries within this ſtatute.

What a ſtab or thruſt. 1 Hale, 469, 470. Foſt. 300.

2. As to what ſhall be intended to be *a ſtab or thruſt* within the meaning of the act; the thruſting with a ſtaff or any other blunt weapon ſeems within it. So ſhooting with fire arms, or ſending an arrow out of a bow, or a

Ch. V. § 29. *Statute of ſtabbing.*

ſtone from a ſling; or uſing any deviſe of that kind *holden in the hand of the party at the inſtant of diſcharging it.* Though indeed Lord Hale puts a quære to the caſe of a piſtol or a *blow* with a ſword or ſtaff, becauſe Juſtice Jones denied it: and Hawkins ſays that killing a man with a hammer or the like cannot come properly under the notion of thruſting or ſtabbing. But certainly where the weapon is *delivered out of the hand* at the time the ſtroke is given, as in Williams's caſe, where a hammer was caſt; or as in Newman's caſe, where the point of a ſword was thrown at 20 yards diſtance; it has been thought with ſtrict propriety not to come under the terms "*thruſt*" or "*ſtab.*"

1 Hawk. ch. 30. ſ. 8.

Kel. 131. Williams's caſe, W. Jones, 432. Newman's caſe, Q. B. Oct. 8. Ann. MS. Denton and Chapple. MS. Burnet, 58.

I would alſo add, that the ſtab or thruſt ought to be made with a weapon or inſtrument from whence danger was likely to enſue.

Any perſon armed in aid of the party killed at the time takes the caſe out of the ſtatute.

3. "Any perſon or perſons that hath not then any weapon drawn," &c. has been properly holden to extend to any other perſon acting in concert upon the ſame deſign with the party killed. And therefore in Buckner's caſe, who was indicted on the ſtatute for killing Horwood, it appearing that Horwood and another man had come to Buckner's lodgings, and that the other man had ſtood with a ſword undrawn at the door to keep Buckner from going out till they might bring a bailiff to arreſt him for a debt due to Horwood; and that upon ſome altercation between Buckner and Horwood, the former had ſtabbed him with a dagger which he took out of his pocket; a majority of the court held it not within the ſtatute, the intent of which was to provide againſt *ſudden killing*, which that was not; there being a previous treſpaſs and impriſonment. And they held that if two aſſault a third perſon, and one of them ſtrike him, and he kill the other who did not ſtrike, he is not within the ſtatute, for it is the aſſault and ſtriking of both.

Buckner's caſe, Sty. 467. Ante, ſ. 20.

So if the party could be armed at any time of the affray before the mortal ſtroke.

4. It has been doubted upon the words "not having then a weapon drawn," whether "*then*" were to be confined to the inſtant *the ſtab was given*, or whether it related to the whole time of the combat? In Hunter's caſe the judge's were divided in opinion upon it. The circumſtances were theſe: upon mutual words of reproach between Hunter and De Loy

Hunter's caſe, 2 Lev. 255.

Loy the former ſtruck the latter with his hand: thereupon De Loy attempted to draw his dagger at Hunter, but being prevented by the company preſent, he threw a pot at Hunter and miſſed him: on which Hunter gave De Loy the mortal wound with his ſword. Thoſe who were for the conviction admitted the pot to be a weapon drawn as long as it was in De Loy's hand; but thought that after he had thrown it out of his hand without hurt done, and was afterwards ſtabbed, the caſe fell within the ſtatute. On the other hand it was maintained that the word "*then*" referred *to the time of the fighting or controverſy* and not to the immediate inſtant of the wounding. And they thought it unreaſonable that one having a weapon drawn at one time during the controverſy, and having done all the miſchief he could with it, ſhould be within the protection of the ſtatute which was made to prevent the ſudden killing of men without provocation or defence. And they compared it to the caſe of two who are fighting, and one lets fall his ſword, or it is beat out of his hand, and he is then killed; which caſes they conceived could not be brought within the ſtatute. And it ſeems that the latter opinion being more conformable to the principles of the common law, in a caſe where the meaning of the ſtatute is at leaſt doubtful, is moſt to be relied on; more eſpecially as the priſoner in the above caſe finally had his clergy. Alſo, according to Hawkins, the diſcharging a piſtol, or throwing a pot or other dangerous weapon at the party, ſeems within the equity of the words "*having a weapon drawn.*" It appears upon the whole that if the party killed be at any one inſtant of time during the controverſy out of the protection of the ſtatute, between which time and the time of receiving the mortal wound the common law would allow for the priſoner's blood continuing to be heated, the caſe will not be governed by that ſtatute.

Ch. V. § 29. *Statute of ſtabbing.*

1 Hawk. ch. 30. ſ. 8. *Vide* infra.

What a weapon drawn.

5. It remains further to be conſidered upon the laſt mentioned words of the ſtatute, what ſhall be ſaid to be "a *weapon drawn?*" as to which an ordinary cudgel or other thing proper for defence or annoyance in the hand of the party has been holden ſufficient to take the caſe out of the ſtatute.

Foſt. 300. 1 Hale, 470. 3 Lev. 236. Sty. 468. Godb. 154. *Vide* ſupra.

Ch. V. § 29. *Statute of ſtabbing.*

Sty. 468. 3 Lev. 256.

This muſt equally govern the caſe of a ſword *in the ſcabbard*, and it extends alſo to a candleſtick or pot; but not to a ſmall riding *rod or cane ſuch as could not probably do harm*; and therefore what is ſaid by Glyn, C.J. in the caſe in Styles, that a tobacco pipe had been adjudged a weapon drawn, may perhaps admit of queſtion.

A blow given at any time before the mortal ſtroke takes the caſe out of the ſtatute. Byard's caſe, W. Jones, 340.

6. But principally it is to be conſidered, whether by the words "nor having *firſt* ſtricken the party" killing, be meant not having given the firſt blow in the affray, or only, not having ſtruck before the mortal wound was given. Now though the former opinion prevailed in Byard's caſe, with the diſſent of only one judge who adhered to the latter conſtruction; yet that caſe has been conſiderably ſhaken ſince, when the view and ſpirit of this ſtatute has been more fully ſifted and underſtood. And indeed Lord Holt and Mr. Juſtice Foſter are ſtrongly of opinion, that in the above inſtance, not only the ſpirit but the obvious meaning of the words was perverted. And Mr. Juſtice Blackſtone ſays that if the deceaſed had ſtruck at all before the mortal wound given, though the ſtabber had given the firſt blow, it ſeems the better opinion that the caſe is not within the ſtatute: and Hawkins is expreſsly to that effect. It may alſo be worth conſidering, whether the above-mentioned words, "having firſt *ſtricken*," &c. mean any thing more than having firſt *aſſaulted*, &c., and therefore whether the attempt to ſtrike, being in law an aſſault and equivalent to an actual ſtriking, is not equally within the plain intent of the act as the ſtroke itſelf; in which caſe many of the difficulties which have occurred upon the conſtruction of the words, "not having "then any weapon drawn," might have met with an eaſier ſolution under this part of the act; though they ſeem to have been otherwiſe underſtood by Glyn, C. J.

Skin. 668. Foſt. 301.

4 Blac. Com. 193, 4.

1 Hawk. ch. 30. ſ 6.

Sty. 468. *Exceptions.*

Laſtly, The exceptions introduced into this ſtatute are to be adverted to: theſe are of ſelf-defence, miſ-chance, or for preſerving the peace, or chaſtiſing the party's child or ſervant. But other caſes coming within the letter of the act, and not covered by any of thoſe exceptions, have very rightly been adjudged not to be within the meaning of it. Such is the caſe of an adulterer ſtabbed by the huſband in the act of adultery; or where a man kills a thief who aſſaults his houſe: the

Foſt. 298.

Ante, ſ. 20.

Sty. 469.

the one is manſlaughter, the other juſtifiable homicide. So where an officer puſhed abruptly and violently into a gentleman's chamber early in the morning, in order to arreſt him, not telling his buſineſs, or uſing words of arreſt; and the gentleman, not knowing that he was an officer, under the firſt ſurprize, took down a ſword that hung in the chamber and ſtabbed him; this was ruled manſlaughter at common law, though the defendant was indicted on this ſtatute: for from the officer's behaviour the defendant might reaſonably have apprehended that he came to rob or murder him. Perhaps there were circumſtances in that caſe not mentioned, which might reaſonably induce ſuch a ſuſpicion, and raiſe ſuch a fear as might fall in conſtantem virum. Upon an outcry of thieves in the night, a perſon, who was concealed in a cloſet to eſcape the obſervation of the family, but no thief, was in the hurry and ſurprize ſtabbed in the dark: this was conſidered as an innocent miſtake, and ruled to be homicide by miſadventure. It will ſuffice after theſe examples to conclude theſe obſervations on the ſtatute with the opinion delivered by Glyn C. J. in Buckner's caſe, that in order to bring a caſe within the meaning of the act *there ought to be malice.*

Ch. V. § 29. *Statute of ſtabbing.*

Exceptions. 1 Hale, 470.

Poſt. ſ. 46.

1 Hale, 42. 474. *Vide* this caſe more at large, poſt. ſ. 46.

Sty. 467. Ante, ſ. 28. *Vide* poſt. ſ. 118. for the form of indictment on this ſtatute.

§ 30. *Duration of paſſion.* Ante, ſ. 19.

4. *How long the law will allow for the blood continuing heated under the circumſtances; and what ſhall be conſidered as evidence of its having cooled.*

In every caſe of homicide, how great ſoever the provocation may have been, if there be a ſufficient time for the paſſion to ſubſide and for reaſon to interpoſe, ſuch homicide will be murder. Therefore in the caſe of an adulterer before mentioned, if the huſband kill him deliberately and upon revenge after the fact and ſufficient cooling time, the provocation will not avail in alleviation of the guilt. Poiſoning, being an act of deliberation, always ſhews malice.

Foſt. 296.

Ante, ſ. 20.

Ante, ſ. 12. 1 Hale, 455.

With reſpect to what interval of time ſhall be allowed for paſſion to ſubſide, it is much eaſier to lay down rules for determining what caſes are without the limits, than how far exactly thoſe limits extend. It muſt be remembered, that in theſe caſes the immediate object of inquiry is, whether the ſuſpenſion of reaſon ariſing from ſudden paſſion continued

General rules of evidence. Interval of time. Poſt.

Ch. V. § 30. *Duration of Paſſion.*

2 Ld. Ray. 1496.

nued from the time of the provocation received to the very inſtant of the mortal ſtroke given: for if from any circumſtances whatever it appear that the party reflected, deliberated, or cooled, any time before the fatal ſtroke given; or if in legal preſumption there was time or opportunity for cooling; the killing will amount to murder; as being attributable to malice and revenge rather than to human frailty. And it has been ſhewn that ſuch malice will be preſumed, even though the act be perpetrated recently after the provocation received, if the inſtrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature: becauſe the law ſuppoſes that a party capable of acting in ſo outrageous a manner, upon a ſlight provocation, muſt have entertained at leaſt a general if not a particular malice, and have before determined to inflict ſuch vengeance upon any pretence that offered.

Ante, f. 21, 22, 23.

Inſtrument or manner of death.

I will conſider ſhortly ſome other general circumſtances which amount to evidence of malice, in diſproof of the party's having acted under the influence of paſſion only. Thus, if between the provocation received and the ſtroke given he fall into other diſcourſe, or diverſions, and continue ſo engaged a reaſonable time for cooling; or if he take up and purſue any other buſineſs or deſign, not connected with the immediate object of his paſſion, nor ſubſervient thereto, ſo that it may be reaſonably ſuppoſed that his intention was once called off from the ſubject of the provocation. Again, if it appear that he meditated upon his revenge, or uſed any trick or circumvention to effect it; for that ſhews *deliberation*, which is inconſiſtent with the excuſe of *ſudden paſſion*, and is the ſtrongeſt evidence of malice. It may be further obſerved in reſpect to time, that in proportion to the lapſe thereof between the provocation and the ſtroke, leſs allowance ought to be made for any exceſs of retaliation, either in the inſtrument, or the manner of it. In Rowley's caſe before mentioned, if, after running three quarters of a mile, he had killed the boy who beat his ſon with an hedge-ſtake or other dangerous weapon, it would undoubtedly, according to Mr. Juſtice Foſter, have been murder. The mere length of time intervening between the injury and the retaliation aids very much the preſumption of malice in law; for that is in ſome caſes

Oneby's caſe, poſt. Kel. 56.

Ante, 251.

Ante, f. 22.

Foſt. 294.

caſes evidence in itſelf of deliberation. Therefore, though if upon a ſudden quarrel the parties agree to fight upon the ſpot; or if not having their weapons there, they preſently, without any other matter intervening, fetch them and go into the field and fight; and one fall, it will be but manſlaughter: yet if they appoint to fight the next day, or even upon the ſame day at ſuch an interval of time as that the paſſion might have ſubſided; or if, before any blows paſſed or words of anger, they agree to fight at a more convenient place, or the fight otherwiſe appear to be upon deliberation, and death enſue; it will be murder.

Ch. V. § 30. *Duration of paſſion.*

Foſt. 297. 1 Hale, 453. Kel. 27. 1 Hawk. ch. 31. f. 22. 29. MS. Tracy, 56. 4 Blac. Com. 191. 3 Inſt. 51. 1 Bulſt. 86. Ld. Morley's caſe, 7 St. Tr. 421. Kel. 56. Cromp. 23. 1 Sid. 277. Major Oneby's caſe, O. B. 12 Geo. 1. 2 Stra. 766. and 2 Ld. Ray. 1485.

Major Oneby was indicted for the murder of Mr. Gower; and a ſpecial verdict was found, ſtating, that the priſoner being in company with the deceaſed and three other perſons at a tavern in a friendly manner, after ſome time began playing at Hazard; when Rich, one of the company, aſked if any one would ſet him three half crowns; whereupon the deceaſed in a jocular manner laid down three halfpence, telling Rich he had ſet him three pieces; and the priſoner at the ſame time ſet Rich three half crowns, and loſt them to him. Immediately after which the priſoner in an angry manner turned about to the deceaſed, and ſaid, *it was an impertinent thing to ſet halfpence, and that he was an impertinent puppy for ſo doing*; to which the deceaſed anſwered, *whoever called him ſo was a raſcal.* Thereupon the priſoner took up a bottle, and with great force threw it at the deceaſed's head, but did not hit him, the bottle only bruſhing ſome of the powder out of his hair. The deceaſed in return immediately toſſed a candleſtick or bottle at the priſoner, which miſſed him; upon which they both roſe up to fetch their ſwords which then hung up in the room, and the deceaſed drew his ſword; but the priſoner was prevented from drawing his by the company: the deceaſed thereupon threw away his ſword; and the company interpoſing, they ſat down again for the ſpace of an hour. At the expiration of that time the deceaſed ſaid to the priſoner, *we have had hot words, but you were the aggreſſer; but I think we may paſs it over;* and at the ſame time offered his hand to the priſoner, who made anſwer, *No, damn you, I will have your blood.* After which the reckoning being paid, all the company except the priſoner

Ch. V. § 30. *Duration of paſſion.*

priſoner went out of the room to go home; and he called to the deceaſed, ſaying, *Young man come back, I have ſomething to ſay to you:* whereupon the deceaſed returned into the room, and immediately the door was cloſed, and the reſt of the company excluded; but they heard a claſhing of ſwords, and the priſoner gave the deceaſed the mortal wound. It was alſo found, that at the breaking up of the company the priſoner had his great coat thrown over his ſhoulders, and that he received three ſlight wounds in the fight; and that the deceaſed being aſked upon his death-bed whether he received his wound in a manner among ſwordmen called fair, anſwered, *I think I did.* It was further found that from the throwing of the bottle *there was no reconciliation between the priſoner and the deceaſed.* Upon theſe facts all the Judges were of opinion that the priſoner was guilty of murder; he having acted upon malice and deliberation, and not from ſudden paſſion. It muſt, I think, be taken upon the facts found in the verdict, and the argument of the Chief Juſtice, that after the door had been ſhut the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and ſo declared to be, was the evidence of *expreſs malice*, after the interpoſition of the company, and the parties had all ſat down again for an hour. Under thoſe circumſtances the Court were of opinion that the priſoner had had *reaſonable time for cooling:* after which, upon an offer of reconciliation from the deceaſed, he had made uſe of that bitter and deliberate expreſſion, that *he would have his blood.* And again, the priſoner remaining in the room after the reſt of the company retired, and calling back the deceaſed by the contemptuous appellation of *young man*, on pretence of having ſomething to ſay to him, altogether ſhewed ſuch ſtrong proof of deliberation and coolneſs as precluded the preſumption of paſſion having continued down to the time of the mortal ſtroke. Though even that would not have availed the priſoner under theſe circumſtances; for it muſt have been implied, according to Mawgridge's caſe, that he acted upon malice; having in the firſt inſtance, before any provocation received, and without warning

Ante, p. 243. Poſt. f. 47.

ing or giving time for preparation on the part of Mr. Gower, made a deadly aſſault upon him.

Ch. V. § 30. *Duration of paſſion.*

In like manner any circumſtance which ſhews deliberation or reflection rebuts the preſumption of paſſion. As in Bromwick's caſe, who was indicted for aiding and abetting Lord Morley in the murder of Haſtings: it appearing that when the quarrel happened at a tavern, Lord Morley objected to fighting at that time on account of the diſadvantage he ſhould have by reaſon of the height of his ſhoes; and preſently afterwards they went into the field and fought: this was relied on, as ſhewing that he did not fight in the firſt paſſion.

1 Hawk. ch. 31. ſ. 23. Bromwick's caſe, 1 Lev. 180. 1 Sid. 277. 7 St. Tr. 421.

Vide 2 Ld. Ray. 1496.

III. *Homicide in the Proſecution of ſome Act or Purpoſe criminal or unlawful in itſelf; wherein Death enſues collaterally to or beſide the principal Intent.*

§ 31.

I ſay, *collaterally to or beſide the principal intent*, in order to diſtinguiſh this kind of homicide from that before treated of under the general head of malice aforethought, where the immediate and leading purpoſe of the mind was deſtruction to another.

Death enſuing collaterally from an act malum in ſe.

And firſt it is principally to be obſerved, that if the act on which death enſue be malum in ſe, it will be murder or manſlaughter according to the circumſtances: if done in proſecution of a felonious intent, however the death enſued againſt or beſide the intent of the party, it will be murder: but if the intent went no further than to commit a bare treſpaſs, it will be manſlaughter. As where A. ſhoots at the poultry of B., and by accident kills a man: if his intent were to ſteal the poultry, which muſt be collected from circumſtances, it will be murder, by reaſon of that felonious intent: but if it were done wantonly and without that intent, it will be barely manſlaughter. A. whips an horſe on which B. is riding; whereupon the horſe ſprings out and runs over a child and kills it: this is manſlaughter in A., but miſadventure in B.

Foſt. 258, 9. Plummer's caſe, 1 Hale, 475. 3 Inſt. 56. Kel. 119. Sum. 56. 6 St. Tr. 222. 1 Hawk. ch. 29. ſ. 21. ch. 31. ſ. 42.

1 Hawk. ch. 29. ſ. 3. 1 Hale, 476.

By

Ch. V. § 31. *From an act malum in ſe.*

21 Ed. 1. ſt. 2. 1 Hale, 491. *Vide* poſt. f. 70. 46.

By the ſtatute 21 Ed. 1. de malefactoribus in parcis, "if a foreſter, parker, or warrener, find any treſpaſſers wandering within his liberty, intending to do damage therein, who will not yield after hue and cry made to ſtand unto the peace, but do continue their malice, and diſobeying the king's peace, do flee or defend themſelves with force and arms; if ſuch parker, &c. or their aſſiſtants, kill ſuch offenders in arreſting or taking them, they ſhall not be troubled for the ſame, nor ſuffer any puniſhment." But they cannot kill perſons who come to take only decayed wood. And if ſuch offenders as are mentioned in the ſtatute kill the keeper, &c. it will be murder in all; although it appear that the keeper ordering them to ſtand aſſaulted them firſt, and that they fled and did not turn till one of the keeper's men had fired and hurt one of their companions. By ſtat. 3 & 4 W. & M. owners of deer in any incloſed land, or any perſons under them, may reſiſt offenders in like manner as in ancient parks. And by ſtat. 4 & 5 W. & M. lords of manors, or any others authorized by them as game keepers, may reſiſt offenders in the night within their reſpective manors or royalties, in the ſame manner and with equal indemnity as if the fact had been committed in any ancient chaſe, &c.

1 MS. Sum. 145. 175. Sum. 37. 46. Palm. 546. 2 Roll. Rep. 120.

3 & 4 W. & M. c. 10. ſ. 5.

4 & 5 W. & M. c. 23. ſ. 4

R. v. Anneſley and Redding, 9 St. Tr. 329, 330.

Upon the trial of Mr. Anneſley and Redding in 1742 ſome doubt was intimated, whether an aſſiſtant to a legal game keeper could juſtify ſeizing a fiſhing net under the ſtat. 4 & 5 W. & M. c. 23. ſ. 5., and whether the authority were not perſonal. But without conſidering that queſtion, it is ſufficient to obſerve that that caſe did not turn upon the clauſe in the act above recited, which has expreſs reference to the powers given by the ſtat. 21 Ed. 1.; and that ſtatute extends in terms to aſſiſtants.

§ 32. *With intent of bodily harm.*

1 Hale, 39. 472. 1 MS. Sum. Poſt. 259. MS. Burnet, 47. 49. 1 Hawk. ch. 29. ſ. 10. ch. 31. ſ. 38.

He who voluntarily, knowingly, and unlawfully intends hurt to the perſon of another, though he intend not death, yet if death enſue, is guilty of murder or manſlaughter according to the circumſtances. As, if A. intending to beat B. happen to kill him, if done from preconceived malice, or in cool blood upon revenge, it will be no alleviation

viation that he did not intend all the miſchief that followed: if without ſuch motives, but upon an unlawful occaſion, as in public prize fighting, it will be manſlaughter. So, if a large ſtone be thrown at one with a deliberate intent to hurt, though not to kill him, and by accident it kill him or any other; this is murder. But the nature of the inſtrument, and the manner of uſing it, as calculated to produce great bodily harm or not, will vary the offence in all ſuch caſes. And the like rule holds where the inſtrument is levelled indiſcriminately at any perſon on whom it may happen to light.

Ch. V. § 32. *With intent of bodily harm.*

Poſt. f. 42.

Kel. 127.

So if one be doing an unlawful act, though not intending bodily harm to any perſon; as throwing a ſtone at another's horſe; if it hit a perſon and kill him, it is manſlaughter. Yet in ſuch caſes it ſeems that the guilt would rather depend on one or other of theſe circumſtances, either that the act might probably breed danger, or that it was done with a miſchievous intent.

Without intent of bodily harm. 1 Hale, 39. 475.

§ 33. *Confederacy to do unlawful acts.*

The above rule governs all caſes where divers perſons reſolve generally to reſiſt all oppoſers in the commiſſion of any breach of the peace, and to execute it with violence, or in ſuch a manner as naturally tends to raiſe tumults and affrays; as by committing a violent diſſeiſin with great numbers, or going to beat a man, or rob a park, or ſtanding in oppoſition to the ſheriff's poſſe. For they muſt at their peril abide the event of their actions who wilfully engage in ſuch bold diſturbances of the public peace. In ſuch caſes the law adopts the preſumption of fact that they came with intent to oppoſe all who ſhould hinder them in their deſign.

1 Hale, 53. 442. 445. 1 Hawk. ch. 29. ſ. 10. ch. 31. ſ. 46. 4 Blac. Com. 200. 2 Roll. Rep 120. MS. Burnet, 47. *& vide* tit. Principal and Acceſſary.

And in all ſuch inſtances, whether the breach of the peace were ſudden or premeditated, not only officers but even private perſons may interfere to ſuppreſs the riot, giving notice of ſuch their intention; and much more may they defend themſelves: and if in ſo doing they kill any of the rioters, if they could not otherwiſe accompliſh their purpoſe, it will be juſtifiable. And the killing of any perſon ſo interfering by any of the rioters would be murder in all who took part in the fact or abetted thereto.

1 Hawk ch. 28. ſ. 14. ch. 31. ſ. 48. *vide* the Riot Act, 1 Geo. 1. c. 5. tit. Riots, &c.

Vide poſt. Homicide in advancement of Juſtice.

Ch. V. § 33. *By confederacy.*

Homicide in proſecution of ſmuggling. Plummer's caſe, Kel. 109. 12 Mod 627. 1 Hale, 443. See tit. Principal and Acceſſary.

Several perſons were engaged in a ſmuggling tranſaction; and upon an attempt to oppoſe their deſign by the king's officers, one of the ſmugglers fired a gun, and killed one of his accomplices. It was agreed by the Court, that if the gun were diſcharged at the king's officers in proſecution of the original deſign, which was a fact to be found by the jury, it would be murder in them all, although one of the accomplices happened to be killed. But if done intentionally and with deliberation againſt the accomplice from anger or ſome precedent malice in the party firing, it would be murder in him only. In order, therefore, to affect the particular caſe by the general purpoſe in view at the time the death happened, the killing muſt be in purſuance of ſuch unlawful purpoſe and not collateral to it.

1 Hale, 443. Kel. 112, 113, 114.

Homicide in reſiſting a diſtreſs. Rex v. Hubſon and others, O. B. 1690, MS. Chapple J. 1 MS. Sum 186. *Vide* Leach, 6. S. C. *Vide* tit. Principal and Acceſſary.

So where the priſoners were hired by a tenant to carry away his goods to prevent a diſtreſs, and went armed with bludgeons and other offenſive weapons; and the landlord aſſiſted by others attempted to prevent it; and in the violence of the affray, after the conſtable had in vain attempted to diſperſe them, a boy ſtanding at his father's door, who took no part therein, was killed by one of the company unknown; Holt C. J. and Pollexfen C. J. held it murder in all the party, by reaſon that the priſoners came armed with offenſive weapons, and in a riotous way, and that they perſiſted in the affray after the conſtable had interfered to put a ſtop to it. But the majority of the judges held, that as the boy was unconcerned in the affray, the killing of him could not be imputed to the reſt, who were merely engaged in the general affray. That he could not be deemed an oppoſer of the party, ſo as to make him an object of this contention; and that they could no more be ſaid to have abetted the killing of him than if one of the company had killed a perſon looking out of a window.

Vide 8 Mod. 164. & 12 Mod. 629.

The reaſoning of the majority in the above caſe ſeems to have proceeded upon the defect of any evidence to ſhew, that the ſtroke by which the boy was killed was either levelled at any of the oppoſing party but had hit him by miſtake, or was levelled at him upon the ſuppoſition that he was one of the opponents; for otherwiſe it ſeems that in either of thoſe caſes the ſame guilt would have attached upon

Ch. V. § 33. *By conſederacy.*

upon all who were concerned in the ſame deſign with the ſtriker as upon the ſtriker himſelf. For if the act or deſign be unlawful and premeditated, and death happen from any thing done in the proſecution of it, it is clearly murder in all who take part in the ſame tranſaction. In the above caſe the two Chief Juſtices were of opinion, in which the others did not differ from them, that though the moving of the goods might be lawful, yet the continuing of the party together after the conſtable had ordered them to diſperſe was unlawful: and beſides, that the great numbers who were thus aſſembled, and the unuſual weapons they were armed with, did alſo make the aſſembly unlawful. Perhaps the more correct method would have been for the jury to have found the fact one way or other, whether the ſtroke which killed the boy were or were not aimed at any of the aſſailants, or levelled at him miſtaking him to be ſuch.

1 MS. Sum 187.

§ 34. *To affect all the confederates the killing by one muſt be during the actual ſtrife or abetment of all.*

But in order to make the killing, by any, murder in all of thoſe who are confederated together for an unlawful purpoſe, merely on account of the unlawful act done or in contemplation, it muſt happen during the actual ſtrife or endeavour, or at leaſt within ſuch a reaſonable time afterwards as may leave it probable that no freſh provocation intervened.

Caſe of Drayton Baſſet, 1 Hale, 440. 444, 5. Crompt. 28. Sum. 56. 1 Hawk. ch. 31. ſ. 47. Poſt. ſ. 48. S. C.

A. with 30 others entered with force into B.'s houſe and ejected him and his family. On the night of the third day after, B. and 20 others came with weapons with an intent to re-enter, and one of them caſt fire into a thatched houſe adjoining to the manſion; whereupon one of A.'s party fired a gun and killed one of B.'s party, the reſt of whom retired, and A.'s party continued in poſſeſſion ſeveral days after. This was ruled manſlaughter in A. and his company, becauſe their entry and force was illegal; but not murder, becauſe there was a ſudden provocation. It appears from one paſſage in Hale that A.'s entry was upon a claim of title, and not as an avowed wrong doer: for otherwiſe it can hardly be conceived how his tortious defence of that, which he had violently uſurped ſo recently before from the acknowledged owner, could in any ſort extenuate the homicide committed in conſequence of it. B. had an undoubted right to reſiſt at all hazards the attempt of A. to turn him

1 Hale, 444.

Ch. V. § 34. *By confederacy.*

out of his manſion; and while the uſurpation was yet recent had a right to endeavour to reinſtate himſelf in the poſſeſſion which he had juſt loſt. It ſeems to have been ſo much a continuation of the ſame tranſaction, that if B. had regained his poſſeſſion he could not have been indicted for a forcible entry; and though poſſibly it might be doubtful whether he would have been juſtified in killing any of A.'s party in the attempt after having once loſt the poſſeſſion for near three days; yet undoubtedly ſo recent and grievous a provocation would have reduced the offence to manſlaughter at leaſt. But if A. were a mere wrong doer, there does not ſeem to be a like adequate provocation to extenuate the fact committed by him in defence of his own avowed tortious act. So recent an uſurpation, and never acquieſced in, could not give him even a colour of title to the poſſeſſion againſt the owner.

This part of the ſubject however, as it affects one perſon for the act of another, is ſo intimately blended with the doctrine of Principal and Acceſſary, that to avoid repetition I refer the further conſideration of it to that title.

§ 35. *Decito an act malum prohibitum.* Foſt. 259. 1 Hale, 475. Poſt. f 41.

The other general rule is, that if an act not unlawful itſelf, as ſhooting at game, be prohibited to be done unleſs by perſons of a certain deſcription, the caſe of a perſon not coming under that deſcription offending againſt ſuch ſtatute, and in ſo doing unfortunately killing another, will fall under the ſame rule as that of a qualified man, and muſt equally be attributed to miſadventure.

IV. *Homicide from Impropriety, Negligence, or Accident, in the Profecution of an Act lawful in itſelf, or intended by way of Sport or Recreation.*

§ 36. *General principle.*

1. The boundaries between impropriety, negligence, and mere accident, are often ſcarcely perceptible; but as the difference between them leads to different concluſions as to the degree of offence, I ſhall chiefly confine myſelf under this head to point out the diſtinction; premiſing as a leading principle, that where a man, *doing a lawful act without intention*

Foſt. 258. 1 Hale, 39. 444. MS. Burnet, 43.

tion of bodily harm to any perſon, and uſing proper caution to prevent danger, unfortunately happens to kill another, ſuch act amounts only to homicide by miſadventure. The act muſt be lawful; for if it be unlawful, the caſe will be either murder or manſlaughter, as was ſhewn under the laſt head. It muſt not be done with intention of great bodily harm; for then the legality of the act, conſidered abſtractedly, would be no more than a mere cloak or pretence, and conſequently would avail nothing. The act muſt alſo be done in a proper manner, and with due caution to prevent danger.

Ch. V. § 35. *General Principle.* Ante, f. 31, 32. Infra.

§ 37. *Correction in foro domeſtico.* Foſt. 262. Kel. 28. 133. 1 Hale, 454. 457. 473, 4. 1 Hawk. ch. 29. f. 5.

Thus parents, maſters, and other perſons having authority in foro domeſtico, may give reaſonable correction to thoſe under their care; and if death enſue from ſuch correction, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the meaſure of it, or in the inſtrument made uſe of for that purpoſe, it will be either murder or manſlaughter according to the circumſtances. If done with a cudgel, or other thing not likely to kill, though improper for the purpoſe of correction, it will be manſlaughter: if with a dangerous weapon likely to kill or maim, as a peſtle or great ſtaff, it will be murder: due regard being had in both inſtances to the age and ſtrength of the party. Grey, a blackſmith, ſtruck his ſervant with a bar of iron by way of correction for improper behaviour, by which he was killed; held murder. A woman kicked and ſtamped on the belly of her child; and ruled the ſame.

Grey's caſe, Kel. 64, 5.

Yet though the correction exceed the bounds of moderation, the Court will pay a tender regard to the nature of the provocation, where the act is manifeſtly accompanied with a good intent, and the inſtrument not ſuch as muſt in all probability occaſion death; though the party were hurried to great exceſs. As was the caſe of a father, whoſe ſon had frequently been guilty of ſtealing, complaints of which had come to the father, who had often corrected him. At length the ſon being charged with another theft, and reſolutely denying it, though proved againſt him, the father in a paſſion beat his ſon with a rope by way of chaſtiſement for

Worceſter Sp. Aſſ. 1775, Ser Forſter's MS.

Ch. V. § 37. *Correction in parents, domeſtics.*

the offence ſo much, that he died. The father expreſſed the utmoſt horror, and was in the greateſt affliction for what he had done, intending only to have puniſhed him with ſuch ſeverity as to have cured him of his wickedneſs. The learned Judge who tried the father conſulted his colleague in office and the principal counſel on the circuit, who all concurred in opinion that it was only manſlaughter: and ſo it was ruled.

§ 38. *Accidents in common occupations.*

Accidents frequently occur amongſt perſons following their lawful occupations, eſpecially ſuch from whence danger may probably ariſe. If they ſaw the danger, and yet perſiſted without ſufficient warning, it will be murder. If the act were ſuch as was likely to breed danger, and they neglected the ordinary cautions, it will be manſlaughter at leaſt, on account of ſuch negligence; making due allowance for the nature of the occupation, and the probability of the danger; which if very remote, and in the particular inſtance not reaſonably to be expected, may reduce the act to miſadventure. The criterion in ſuch caſes is to examine whether common ſocial duty would, under the circumſtances, have ſuggeſted a more circumſpect conduct.

Workmen throwing rubbiſh. Foſt. 262, 3. 1 Hale, 472, 5. 2 Hawk. ch. 29. ſ. 4. 4 Blac. Com. 192. Pult. de pace, 125.

For inſtance, in the caſe of workmen throwing ſtones and rubbiſh from an houſe in the ordinary courſe of their buſineſs, by which a perſon underneath happens to be killed: if they deliberately ſaw the danger, or betrayed any conſciouſneſs of it, from whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the groſs impropriety of the act. If they did not look out, or not till it was too late, and there was even a ſmall probability of perſons paſſing by, it will be manſlaughter. But if it had been in a retired place where there was no probability of perſons paſſing by, and none had been ſeen about the ſpot before, it ſeems to be no more than accidental death. For though the act itſelf might breed danger, yet the degree of caution requiſite being only in proportion to the apparent neceſſity of it, and there being no apparent call for it in the inſtance put, the rule applies, de non exiſtentibus et not apparentibus eadem eſt ratio. So if any

Full's caſe, C. B. 1664, Kel. 40.

Ch. V. § 38. *Accidents in common occupations.*

any perſon had been before ſeen on the ſpot, but due warning were given, it will be only miſadventure. On the other hand, in London and other populous towns, at a time of day when the ſtreets are uſually thronged, it would be manſlaughter, notwithſtanding the ordinary caution uſed on other occaſions of giving warning; for in the hurry and noiſe of a crouded ſtreet few people hear the warning or ſufficiently attend to it, however loud.

Foſt. 263. Kel. 40. 1 Hawk. ch. 29. ſ. 4. 4 Blac. Com. 192. 1 MS. Sum. 134.

In driving carriages 1 Hale, 476. Foſt. 263. ante.

Again, a perſon driving a carriage happens to kill another: if he ſaw or had timely notice of the miſchief likely to enſue, and yet wilfully drove on, it will be murder; for the preſumption of malice ariſes from the doing of a dangerous act intentionally: there is the heart regardleſs of ſocial duty. If he might have ſeen the danger, but did not look before him, it will be manſlaughter, for want of due circumſpection. But if the accident happened in ſuch a manner that no want of due care could be imputed to the driver, it will be accidental death, and he will be excuſed.

O. B. Seſſ. before Mich. T. 1704, MS. Tracy, 32.

A. was driving a cart with four horſes in the highway at Whitechapel; and he being in the cart, and the horſes upon a trot, they threw down a woman who was going the ſame way with a burthen upon her head, and killed her. Holt C. J., Tracy J., Baron Bury, and the Recorder Lovel, held this to be only miſadventure. But, by Lord Holt, if it had been in a ſtreet where people uſually paſs, this had been manſlaughter; but it was clearly agreed that it could not be murder.

It muſt be taken for granted from this note of the caſe, that the accident happened in an highway *where people did not uſually paſs*; for otherwiſe the circumſtance of the driver's being in his cart, and going ſo much faſter than is uſual for carriages of that conſtruction, favoured much of negligence and impropriety: for it was extremely difficult, if not impoſſible, to ſtop the courſe of the horſes ſuddenly in order to avoid any perſon who could not get out of the way in time. And indeed ſuch conduct in a driver of ſuch heavy carriages might under moſt circumſtances be thought to betoken a want of due care, if any though but few perſons might probably paſs by the ſame road. The greateſt poſſible care is

Poſt. 340.

Ch. V. § 38. *Accidents in common occupations.*

not to be expected, nor is it required; but whoever seeks to excuse himself, for having unfortunately occasioned by any act of his own the death of another, ought at least to shew that he took that care to avoid it which persons in similar situations are most accustomed to do. Upon this supposition the death is to be referred to misadventure, which was occasioned by the head of a workman's axe flying off and killing a bystander.

1 Hale, 39. 1 Hawk. ch. 29. s. 2.

Overloading boats, &c. 10 Geo. 2. c. 31. s. 8.

Our statute law has severely animadverted on one species of criminal impropriety, whereby death is often occasioned: for by stat. 10 Geo. 2. c. 31. s. 8. if any person navigating for hire or gain on the Thames between Gravesend and Windsor receive into his tilt-boat, row-barge, ferry-boat, or other boat or wherry, a greater number of persons than the act allows, and any passenger shall then be drowned; such person being thereof lawfully convicted is guilty of felony, and shall be transported as a felon.

Stage coaches. 28 Geo. 3. c. 57.

This may serve as a caution to stage coachmen and others who overload their carriages for the sake of lucre, to the great danger of the lives of the passengers; the number of whom are now regulated by act of parliament. It is an improvident act, against which they have been warned by the voice of the legislature, as well as by general and repeated experience of the bad consequences.

Administering medicine.

One other usual act of improvidence mentioned in the books may not be improperly adverted to. If one who is no regular physician or surgeon administer medicine, or perform an operation, which contrary to expectation kills the patient, it was formerly holden manslaughter. But Lord Hale denies this very properly: it is rather misadventure. Though this doubt should make ignorant people cautious how they tamper in these matters. But if one give physic to another in sport, of which he dies, it will be manslaughter: and if given to procure an abortion, and the woman herself die, it is murder.

Bract. l. 3. c. 5. 4 Inst. 251. 3 Hale, 429. 1 Hawk. ch. 31. s. 22.

1 Hale, 431. Ante, s. 17.

§ 39. *From wilful neglect to provide against probable mischief.*

He who wilfully neglects to prevent a mischief, which he may and ought to provide against, is answerable for the consequence: as where a man, having an ox which he knows to be

Ch. V. § 39. *From wilful neglect to provide against probable mischief.*

be mischievous by being used to gore, does not put him in some place of security, but lets him range where persons are likely to pass, and he afterwards kills a man: according to some opinions, amongst which is Lord Hale's, the owner may be indicted for manslaughter (*a*). By Mr. Justice Burnet, it would not be more than manslaughter, and might be less. However, as it is agreed by all, such a person is at least guilty of a very great misdemeanour. And if the owner purposely let loose a dangerous or vicious animal, though it be only to frighten people, and it kill a man, the case may even amount to murder: still more if it were done maliciously.

1 Hale, 431. Plit. de pace, 126. 4 Blac. Com. 197. 1 Hawk. ch. 31. s. 8. MS. Burnet, 53.

§ 40. *Want of due caution in using dangerous instruments, &c.*

Death also happens from some unexpected occurrence in the course of human affairs. And herein the degree of impropriety or negligence attending the act is to be noted, in order to distinguish it from mere accidental death. The cases which occur on this head turn on the question, whether due caution have been used or not. And in general it may be observed, that the degree of caution requisite to bring the case within the limits of misadventure must be proportioned to the probability of danger attending the act *immediately conducive* to the death. I say, *immediately* conducive; because inferences of guilt are not to be drawn from remote causes, all malice apart; but must be referred to such only as are actually moving to the death. And therefore where a man leaves a loaded gun in his house, and it is afterwards discharged by another who knew not it was loaded, whereby death ensues; the first is in no respect amesnable to the laws for the consequences; though perhaps it would have been more prudent to have placed the gun out of the reach of such an accident, or to have unloaded it when it was laid by.

(*a*) The Mosaical law carried this matter still further, Exod. xxi. 29. "But if "the ox were wont to push with his horn in time past, and it hath been testified "to his owner, and he hath not kept him in, but that he hath killed a man or "a woman, the ox shall be stoned, and his owner also shall be put to death." It appears however from the next verse that in such a case his life might be ransomed by payment of the sum which was laid upon him.

One

Ch. V. § 40. *Accidents in unexpected occurrences.*

One lays poiſon to kill rats, and another takes it and dies; this is miſadventure. But it muſt be underſtood to have been laid in ſuch manner and place as not to be eaſily miſtaken for proper food; for that would betoken great inadvertence, and might in ſome caſes amount to manſlaughter.

1 Hale, 431. Sum. 50.

Burton's caſe, 1 Stra 481.

A gentleman came to town in a chaiſe, and before he got out of it fired his piſtols in the ſtreet, which by accident killed a woman. This was ruled manſlaughter: the act was likely to breed danger, and manifeſtly improper.

1 Hale, 40.

Deer having broken into the corn of A. and ſpoiled it, he went with his ſervant to watch at night with a gun, and charged him to fire when he heard any thing ruſh into the ſtanding corn: and upon A.'s ruſhing into the corn in another part of the field, the ſervant fired and killed him. In the firſt paſſage, wherein Lord Hale mentions this caſe, he ſeems to think that it amounted to manſlaughter, for want of due diligence and care in the ſervant in ſhooting upon ſuch a token as might befall a man as well as a deer: however he

1 Hale, 476.

ſays, it was a queſtion of great difficulty. But in a ſubſequent part of his work, the learned author relating the ſame caſe, which had been determined by himſelf at Peterborough, ſays, that he had ruled it to be only miſadventure; for the ſervant was miſguided by his maſter's own direction, and was ignorant that it was any thing elſe but the deer. But it ſeemed to him, that if the maſter had not given ſuch direction which was the occaſion of the miſtake, it would have been manſlaughter; becauſe of the want of due caution in the ſervant to ſhoot before he diſcovered his mark. Yet ſtrictly conſidered; if from all the other circumſtances of the caſe there appeared a want of due caution in the ſervant, I do not ſee how the command of the maſter could ſupply it; much leſs how it could excuſe him in doing an unlawful act. The excuſe of having uſed ordinary caution can only be ad-

Poſt. f. 45.

mitted where death happens accidentally in the proſecution of ſome lawful act.

Poſt. 264. 1 MS. Sum. 134. Ante, p. 263, 4.

But in none of theſe inſtances, even where the act of the party is immediately conducive to the death, does the law require the utmoſt caution that can be uſed: it is ſufficient

that a reaſonable precaution, what is uſual and ordinary in the like caſes, be taken; ſuch as hath been found by long experience in the courſe of human affairs to anſwer the end: for ſuch conduct ſhews that the party was regardful of ſocial duty, and free from any manner of guilt. And therefore upon that principle Mr. Juſtice Foſter denies Rampton's caſe to be law: and indeed there is a quære put to it in the margin of the reporter. The priſoner had found a piſtol in the ſtreet, which he had reaſon to believe was not loaded, having tried it with the rammer, which had gone down into the muſſel of the piſtol; the rammer in fact being too ſhort. He carried the piſtol home, and his wife ſtanding before him, he cocked it and touched the trigger; on which the piſtol went off and killed the woman. This was ruled manſlaughter. In truth, the man had uſed the ordinary precaution adapted to the probability of danger in ſuch caſes: he had examined the piſtol by the uſual method of trial. And though it was doubtleſs an idle frolic, yet the heart was free from all ſort of guilt, even the guilt of negligence; and therefore the act ought to have been excuſed. And the ſame

Ch. V. § 40. *Accidents in unexpected occurrences.*

Rampton's caſe, Kel. 41.

Poſt. 265.

learned Judge determined accordingly in a caſe ſomething ſimilar. Upon a Sunday morning a man and his wife going to dine at a friend's houſe in the neighbourhood, he carried his gun with him, to divert himſelf on his way; but before dinner he diſcharged it, and ſet it up in a private place in his friend's houſe. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him; which was put into the room where his wife was, ſhe having brought it part of the way. He taking it up touched the trigger, and the gun went off, and killed his wife. It came out in evidence, that while the man was at church a perſon belonging to the family privately charged the gun, and went after ſome game; but before the ſervice at church was ended, returned it loaded to the place from whence he had taken it; and where the defendant, who was ignorant of all that had paſſed, found it to all appearance as he had left it. Mr. Juſtice Foſter thought it unneceſſary to inquire whether the man had examined the gun before he caried it home: but being of opinion upon the

Ch. V. § 40. *Accidents in unexpected occurrences.*

whole evidence that he had reaſonable grounds to believe that it was not loaded, he directed the jury that if they were of the ſame opinion, they ſhould acquit him: and he was acquitted.

§ 41. *At ſports and recreations.* Foſt. 259.

2. I now come to the conſideration of accidents which happen at ſports and recreations: if death enſue from ſuch as are innocent and allowable, the caſe will fall within the rule of excuſable homicide: but if the ſport be unlawful in itſelf, or productive of danger, riot, or diſorder, from the occaſion, ſo as to endanger the peace, and death enſue; the party killing is guilty of manſlaughter.

Foſt 259. 1 MS. Sum. 131, 2. Dalt. ch. 148. 1 Hawk. ch. 29. ſ. 7. Keilw. 108. 136. Pult. de pace, 123.

It ſeems now the better opinion, that manly ſports and exerciſes which tend to give ſtrength, activity, and ſkill in the uſe of arms, and are entered into merely as private recreations amongſt friends, are not unlawful; and therefore perſons playing by conſent at cudgels (*a*), or foils, or wreſtling (*b*), are excuſable if death enſue. For though doubtleſs it cannot be ſaid that ſuch exerciſes are altogether free from danger; yet are they very rarely attended with fatal conſequences; and each party has friendly warning to be on his guard. And if the poſſibility of danger were the criterion by which the lawfulneſs of ſports and recreations were to be decided, many exerciſes muſt be proſcribed which are in common uſe, and were never heretofore deemed unlawful. And the reaſon given by Mr. Juſtice Foſter, for conſidering ſuch ſports as lawful, ſeems a good one; becauſe, ſays he, bodily harm is not the motive on either ſide; upon

1 Hale, 472.

the ſuppoſition of which motive, Lord Hale had grounded his opinion to the contrary, and that the act in ſuch caſe amounted to manſlaughter. To which it may be added, that the weapons ordinarily made uſe of upon ſuch occaſions are not deadly in their nature, unleſs urged by a malicious and vindictive ſpirit.

Sir John Chicheſter's caſe, Alleyn, 12. Keilw. 108.

Upon this diſtinction, as to the nature of the weapon, Sir John Chicheſter's caſe ſeems to have turned; who unfortunately killed his man-ſervant as he was playing with

(*a*) *Vide* Comb. 408. (*b*) Rex v. Lane, Bodmin Sum. Aſſ. 1717, per Eyre, MS. Chapple, J. from Serjt. Forſter's MS.

him. Sir John paſſed at him with his ſword in the ſcabbard, which the latter parried with a bed-ſtaff; and in the heat of the exerciſe the chape of the ſcabbard flew off, and the ſervant was killed by the point of the ſword. Mr. Juſtice Foſter thinks, in conformity with Lord Hale, that there was evidently a want of common caution in making uſe of a deadly weapon in ſo violent an exerciſe, where it was highly probable that the chape might be beaten off, which would neceſſarily expoſe his ſervant to great bodily harm. It was therefore rightly adjudged to be manſlaughter. It has often been aſked, Wherein the difference lies between a ſword in the ſcabbard and a foil? Perhaps it is not much; but the latter is certainly better prepared for the prevention of accident than the point, though blunted, of the ſcabbard: and again, the foil is calculated to bend and yield when preſſed againſt the body, conſiderably more than the ſheathed ſword. And the increaſe of danger ſeems to ariſe as well from theſe circumſtances as from the probability of the chape being beaten off. The uſual and ordinary cautions, therefore, to avoid danger, were not uſed in that caſe, which are indiſpenſably required in order to reduce the homicide to miſadventure.

Ch. V. § 41. *At Sports, &c.*

Foſt. 260. 1 Hale, 473.

It ſeems alſo, that in caſes of friendly conteſts with weapons, which, though not of a deadly nature, may yet breed danger, there ſhould be due warning given that each party may ſtart upon equal terms. For if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, from whence death enſued; the want of due and friendly caution would make ſuch act amount to manſlaughter, but not to murder, becauſe the intent was not malicious.

But though the weapons be of a dangerous nature, yet if they be not directed by the perſons uſing them againſt each other, and ſo no danger to be reaſonably apprehended; if death caſually enſue, it is but miſadventure.

1 Hale, 38, 9. 472, 5. Foſt. 259. 1 Hawk. ch. 29. ſ. 6. 1 MS. Sum. 135. Ante, ſ. 35.

As, if perſons be ſhooting at game, or butts, or any other lawful object, and a by-ſtander be killed. And it makes no difference with reſpect to game, whether the party be qualified or not. But if the act be unlawful in itſelf, as ſhooting at deer in another's park, without leave, though in

ſport

Ch. V. § 42. *At ſports, &c.*

ſport and without any felonious intent, whereby a by-ſtander is killed, it will be manſlaughter: but if the owner had given leave, or the party had been ſhooting in his own park, it would only have been miſadventure.

§ 42. *Unlawful ſports. Prize-fighting, &c.* Foſt. 261. 2 MS. Sum. 131.

But the latitude given to manly exerciſes of the nature above deſcribed, when conducted merely as diverſions among friends, muſt not be extended to legalize prize fightings, public boxing matches, and the like, which are exhibited for the ſake of lucre, and are calculated to draw together a number of idle diſorderly people. For in ſuch caſes, the intention of the parties is not innocent in itſelf, each being careleſs of what hurt may be given, provided the promiſed reward or applauſe be obtained. And again, ſuch meetings have a ſtrong tendency in their nature to a breach of the peace. And therefore in Ward's caſe, who was challenged to fight by his adverſary for a public trial of ſkill in boxing, and were alſo urged to engage by taunts, although the occaſion were ſudden, yet having killed his opponent, he was holden guilty of manſlaughter.

Ward's caſe, O. B. June 1789, cor. Aſhburſt J.

Public jouſts. Foſt. 261.

The ſame conſiderations applied formerly to public jouſts and tournaments when they were in vogue: they drew together a great concourſe of unruly ſpirits, not always conſiſtent with the public tranquillity, and ſeldom ending without bloodſhed. Such aſſemblies therefore were deemed unlawful unleſs by the command of the king.

3 Inſt. 56. 160. 1 Hale, 473.

It is remarkable that in a ſtatute paſſed in the reign of Hen. 2., whereby it was enacted, that if at a jouſt or tournament, or at the play with ſword and buckler by the king's commandment, one killed another, it ſhould be no felony; the reaſon aſſigned is, "for that *in friendly manner* they "contended to try their ſtrength, and to be able to do the "king ſervice in that kind." It ſeemed neceſſary to legalize that ſort of conteſt by ſome ſuch proviſion, not only for the reaſons juſt before aſſigned, but becauſe the parties made uſe of deadly weapons from whence it was moſt probable that miſchief might enſue, however devoid of *malice*, in the popular ſenſe of the word, the conteſt might be.

Foſt. 261. 4 Blac. Com. 183.

The cuſtom of cock throwing at Shrovetide proceeds from a vicious and depraved inclination, is frequently productive of

of diſorders, and always dangerous to by-ſtanders. Therefore where a perſon throwing at a cock, miſſed his aim and killed a child who was looking on, Mr. Juſtice Foſter ruled it manſlaughter. For firſt, the motive is far from innocent; and next, the act is in itſelf likely to breed danger. And the ſame rule applies to any idle, dangerous, and unlawful ſport from whence death enſues.

Ch. V. § 42. *At ſports, &c.*

§ 43. *Concluſion.*

From all that has been premiſed upon this ſubject it appears, that where the ſport itſelf is innocent which occaſions the death, the poſſibility of danger ariſing from it will not vary the caſe, and convert that which is a misfortune into an offence: yet that where danger may ariſe, due and ordinary caution, ſuch as is uſual under ſimilar caſes, ought to be uſed. That where the ſport itſelf is unlawful, or the motive improper, the offence will be thereby enhanced more or leſs according to the probability and greatneſs of the danger.

V. *Homicide from Neceſſity in Defence of a Man's own Perſon or Property, or of the Perſons or Property of others.*

§ 44. *Diviſion of ſubject.*

Herein may be conſidered, 1. What ſort of attack it is *lawful and juſtifiable* to reſiſt, even by the death of the aſſailant, and where the party is without any blame. 2. Where ſuch killing is only *excuſable*, or even *culpable*, and the party is not free from blame. 3. By whom ſuch a juſtification or excuſe may be urged. 4. How far ſuch neceſſity ſhall be ſaid to extend. 5. And laſtly will be conſidered certain caſes of imminent neceſſity founded on ſelf-preſervation, wherein no blame is imputable to either party.

In defence againſt ſons. Foſt. 273. 1 Hawk. ch. 28. ſ. 21. 24. 1 Hale, 445. 481. 482, 5, 8. 493. 1 MS. Sum 151. 4 Blac Com 180. Pult de pace, 121. b.

1. A man may repel force by force in defence of his perſon, habitation, or property, againſt one who manifeſtly intends or endeavours, *by violence or ſurprize*, to commit a *known felony*, ſuch as murder, rape, robbery, arſon, burglary, and the like, upon either. In theſe caſes he is not obliged to retreat, but may purſue his adverſary until he has

Ch. V. § 44. *Againſt known felons.*

has ſecured himſelf from all danger; and if he kill him in ſo doing, it is called juſtifiable ſelf-defence: as on the other hand, the killing by ſuch felons of any perſon ſo lawfully defending himſelf will be murder. But a bare fear of any of theſe offences, however well grounded; as that another lies in wait to take away the party's life, unaccompanied with any overt act, indicative of ſuch an intention; will not warrant him in killing that other by way of prevention: there muſt be an actual danger at the time.

1 Hale, 465.

1 Hale, 52.

1 Hale, 485, 6. Pult. de pace, 121, 2. Sum. 40. 1 Hawk. ch. 28. ſ. 23. Kel. 132. Dalt. ch. 127. ſ. 6. *Vide* poſt. f. 56.

There muſt be a *felony* intended; for if one come to beat another, or to take his goods, merely as a treſpaſſer; though the owner may juſtify the beating of him ſo far as to make him deſiſt; yet if he kill him, it is manſlaughter. But if the other had come to rob him, or take his goods as a felon, and were killed in the attempt, it would be juſtifiable in ſelf-defence.

24 H. 8. c. 5. 1 Hale, 487.

The ſtatute 24 Hen. 8. c. 5., which was made in affirmance of the common law, reciting, that it had been in doubt whether "if any perſon attempt feloniouſly to rob "or murder any perſon in or near any common highway, "&c. or in their manſion-houſes, &c. or do attempt to "break any dwelling-houſe in the night-time, and ſhould "happen in ſuch their felonious intent to be ſlain by the "perſon ſo attempted to be robbed or murdered, or by any "perſon being in their dwelling-houſe ſo attempted to be "burglariouſly broken, &c. he ſhould forfeit his goods and "chattels; as any other perſon ſhould do that *by chance* *Vide* ante, f. 7, 8, Poſt. f. 50. "*medley* killed another in his defence; declares that ſuch "perſon, being indicted or appealed for the ſame, ſhall "upon his trial be fully acquitted and diſcharged, in "the like manner as if he had been acquitted of the death "of ſuch perſon." And there is an expreſs exemption by the ſtatute from any forfeiture. But though the ſtatute only mentions certain caſes, it muſt not be taken to imply an excluſion of any other inſtances of juſtifiable homicide which ſtand upon the ſame foot of reaſon and juſtice. Thus the killing of one who attempts the wilful burning of an houſe is free from forfeiture without the aid of this ſtatute. And though it only mentions the breaking the houſe

Poſt. 276. 1 Hale, 487, 8. 4 Blac. Com. 180. 26 Aſſize, 23.

houſe in the night time; which I conceive muſt be intended of ſuch a breaking as is accompanied with a felonious intent; yet a breaking in the day time with the like purpoſe muſt be governed by the ſame rule. In like manner as a lodger or ſojourner in the houſe has been holden to be equally indemnified as the maſter in killing ſuch a felonious aſſailant.

Ch. V. § 44. *Againſt known felons.*

Cooper's caſe, Cro. Car. 544. Poſt. 274. Poſt. f. 57.

§ 45. *Not extending to ſecret felonies without force.*

There ſeems however to be a diſtinction between ſuch felonies as are attended with force, or any extraordinary degree of atrocity, which in their nature betoken ſuch urgent neceſſity as will not allow of any delay, and others of a different ſort, if no reſiſtance be made by the felon; and therefore a party would not be juſtified in killing another who was attempting to pick his pocket. But if one pick my pocket, and I cannot otherwiſe take him than by killing him; this falls under the general rule concerning the arreſting of felons. The above is further confirmed by the term *known* felony, made uſe of in our books, which contra-diſtinguiſhes it from ſecret felonies; and ſeems to imply, that the intent to murder, raviſh, or commit other felonies, attended with force or ſurprize, ſhould be *apparent*, and not be left in doubt: for otherwiſe the party killing will not be juſtified. It muſt plainly appear, ſays Lord Hale, ſpeaking of a felonious attack upon B., by the circumſtances of the caſe, as the manner of the aſſault, the weapon, &c. that his life was in imminent danger, otherwiſe the killing of the aſſailant will not be juſtifiable ſelf-defence.

1 Hale, 4SS. 4 Blac. Com. 180, 1. 11 Rep. 82. b.

MS. Burner, 39.

Poſt. 274.

1 Hale, 484. Poſt. f. 53.

§ 46. *Killing by miſtake on reaſonable grounds for imputing felonious intention.*

Yet ſtill if the party killing had reaſonable grounds for believing that the perſon ſlain had a felonious deſign againſt him, and under that ſuppoſition kill him; although it ſhould afterwards appear that there was no ſuch deſign, it will only be manſlaughter, or even miſadventure; according to the degree of caution uſed, and the probable grounds for ſuch belief. As where an officer, early in the morning, puſhed abruptly and violently into a gentleman's chamber in order to arreſt him, *not telling his buſineſs, nor uſing words of arreſt*; and the gentleman *not knowing that he was an officer*,

1 Hale, 470. Poſt. 299.

Ch. V. § 46. *Againſt ſuppoſed felons.*

(1 Jac. 1. c. 8.)

officer, under the firſt ſurprize, took down a ſword that hung in the chamber, and ſtabbed him: it was ruled manſlaughter at common law, though the defendant was indicted on the ſtatute of ſtabbing. It is to be inferred from the form of the indictment, and what is ſaid by Lord Hale, that the bailiff had no offenſive weapon in his hand from whence the party might reaſonably have preſumed that his life or property was aimed at; and therefore there ſeems to have been a manifeſt want of caution in not demanding the reaſon of ſuch intruſion by a ſtranger; eſpecially as ſome interval muſt have elapſed before the ſword was taken down and drawn.

Brown's caſe, ante, f. 27.

In Brown's caſe before mentioned, if he had killed one of the keelmen who had aſſaulted him and his companion, under the ſame circumſtances as there occurred, it would have been manſlaughter; and therefore, though he killed another perſon by miſtake, who was guiltleſs of any offence towards him; yet the circumſtances being ſuch as might have reaſonably induced him to believe that the deceaſed was one of the keelmen, it was ſtill but the ſame degree of offence.

Levet's caſe, Cro. Car. 538. 1 Hale, 42. 474.

Upon an indictment againſt Levet, for the death of Frances Freeman, it appeared that the defendant being in bed and aſleep in his houſe, his maid-ſervant who had hired the deceaſed to help her to do her work, as ſhe was going to let her out about midnight, thought ſhe heard thieves breaking open the door; upon which ſhe ran up ſtairs to her maſter, and informed him thereof; who riſing ſuddenly and running down ſtairs with his ſword drawn, the deceaſed hid herſelf in the buttery, leſt ſhe ſhould be diſcovered. Levet's wife, obſerving ſome perſon there, and not knowing her, but conceiving ſhe had been a thief, cried out, *here they be that would undo us.* Thereupon Levet ran into the buttery *in the dark*, not knowing the deceaſed, but *taking her to be a thief*; and *thruſting with his ſword before him*, killed her. This was ruled to be miſadventure. Poſſibly, ſays Mr. Juſtice Foſter, it might have been better ruled manſlaughter, due circumſpection not having been uſed. But with great deference to ſo high an authority, the latter obſervation, upon which indeed the whole queſtion turns,

Fost. 299.

Ch. V. § 46. *Againſt ſuppoſed felons.*

turns, ſeems to require further conſideration before the judgment be impeached. It can hardly be taken upon the ſtate of the caſe, that *Levet* ſaw a defenceleſs woman ſtanding alone, in a ſituation incapable of harming him or his family; but the tranſaction is ſtated to have happened in the dark, upon a cry of thieves, a ſtranger diſcovered ſculking from obſervation; it not even appearing, that the perſon was perceived to be a woman, or that there might not be more than one perſon: on the contrary, what was ſaid by the wife, in the hearing of all parties, was rather calculated to impreſs the defendant with the belief that there were more. The very manner in which he made the attack beſpeaking his doubt upon it; for he advanced *in the dark, thruſting his rapier before him.* And even though it ſhould be deemed neceſſary under ſuch circumſtances of alarm to give warning to the party, which has never been holden, yet it ſeems to have been done in this caſe by what was ſaid by the wife, to all appearance in the hearing of the deceaſed, as well as of Levet; to which no explanation was even offered by the deceaſed. This therefore ſeems properly enough to be one of thoſe caſes mentioned by Lord Hale, where the ignorance of the fact excuſes the party from all ſort of blame. And Hawkins, in mentioning the caſe, ſays, that it ſeems the defendant may *juſtify* the fact under theſe circumſtances, inaſmuch as it has not the appearance even of a fault. Perhaps it is more properly *excuſable.*

1 Hale, 42.
1 Hawk. ch. 28. ſ. 27.
MS. Barnet, 40.
ad idem.

Sir William Hawkeſworth being weary of life, and willing to be rid of it by the hand of another; having firſt blamed his keeper for ſuffering his deer to be deſtroyed, and commanded him to execute the law; came himſelf into his park at night, as if with intent to ſteal the deer; and being queſtioned by the keeper, who knew him not, and refuſing to ſtand or anſwer, was ſhot by the keeper. This, ſays Lord Hale, was holden excuſable homicide by the ſtatute *de malefactoribus in parcis*; becauſe the keeper was in no fault.

1 Hale, 40.

Ante, f. 31.

So a commander coming upon a ſentinel in the night in the poſture of an enemy, to try his vigilance, is killed by him as ſuch: this is no offence, but miſadventure.

1 Hale, 42.

Ch. V. § 47.

§ 47. *Concerning apparency of intent to commit felony.* Mawgridge's caſe, Kel. 119. 128. 130. 9 St. Tr. 61. Foſt. 278. Ante, f. 25. S.C.

Other caſes have occurred, wherein the queſtion has turned upon the apparency of the intent in one of the parties to commit ſuch felony as will juſtify the other in killing him. As in Mawgridge's caſe; who upon words of anger between him and Mr. Cope threw a bottle with great violence at the head of the latter, *and immediately drew his ſword:* on which Mr. Cope returned a bottle with equal violence; which, ſays Lord Holt, it was lawful and juſtifiable for Mr. Cope to do; for he who hath ſhewn that he hath malice againſt another is not fit to be truſted with a dangerous weapon in his hand. The words previouſly ſpoken by Mr. Cope could be no juſtification for Mawgridge; and it was reaſonable for the former to ſuppoſe his life in danger when attacked with ſo dangerous a weapon, and the aſſault followed up by another act indicating an intention of purſuing his life; and this at a time when he was off his guard, and without any warning. This latter circumſtance forms a main diſtinction between that caſe and the caſe of death enſuing from a combat, where both parties engage upon equal terms: for there, if upon a ſudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who firſt has recourſe to a deadly weapon ſuſpend his arm till he has warned the other, and given him time to put himſelf upon his guard; and afterwards they engage on equal terms; in ſuch caſe it is plain that the deſign of the perſon making ſuch aſſault is not ſo much to deſtroy his adverſary at all events, as to combat with him, and to run the hazard of his own life at the ſame time. And that would fall within the ſame common principle which governs the caſe of a ſudden combat upon heat of blood, which has been before treated of. But if ſeveral attack a perſon at once with deadly weapons, as may be ſuppoſed to have happened in Ford's caſe; though they wait till he be upon his guard; yet it ſeems (there being no compact to fight) that he would be juſtified in killing any of the aſſailants in his own defence; becauſe ſo unequal an attack reſembles more a deſire of aſſaſſination than of combat.

2 Ld. Ray. 1493. 1 Hawk. ch. 31. ſ. 28. Kel. 130. Ante, f. 24. Ante, f. 25.

In another caſe, however, where the aſſault, though a very violent one, was plainly with a view to chaſtiſe the party for his miſbehaviour, and there appeared no intent to aim

Ch. V. § 47. *Againſt expected felony.*

aim at his life; his killing the aſſailant was holden not to be lawful or excuſable under the plea of ſelf-defence. That was Nailor's caſe, tried before Holt C. J., Tracy J., and Bury B. The priſoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night the fact was committed: his father ordered him to go to bed, which he refuſed to do: whereupon a ſcuffle happened between the father and ſon. The deceaſed, who was then in bed, hearing the diſturbance, got up, threw the priſoner on the ground, and fell upon him and beat him; the priſoner lying upon the ground with his brother upon him, not being able to avoid his blows or make any eſcape from his hands. And as they were ſtriving together, the priſoner gave his brother the mortal wound with a penknife. At a conference of all the judges after Michaelmas term 1704, it was unanimouſly holden to be manſlaughter; for there did not appear to be any *inevitable neceſſity*, ſo as to excuſe the killing *in that manner*. The deceaſed did not appear to have aimed at the priſoner's life, but only to have intended to chaſtiſe him for his miſbehaviour to his father: and to excuſe homicide upon the ground of ſelf-defence, there muſt always appear to have been ſuch a degree of neceſſity as may reaſonably be deemed inevitable. At the conference in the above caſe Powell J. put the caſe; If A. ſtrike B. *without any weapon*, and B. retreat to a wall, and there ſtab A., that will be manſlaughter; which Holt Chief Juſtice ſaid was the ſame as the principal caſe: and that was not denied by any of the judges. For it cannot be inferred from the bare act of ſtriking, *without any dangerous weapon*, that the intent of the aggreſſor roſe ſo high as the death of the party ſtricken: and without there be a plain manifeſtation of a felonious intent, no aſſault, however violent, will *juſtify* killing the aſſaillant under the plea of neceſſity.

Nailor's caſe, O. B. 1704. MS. Tracy. 1 MS Sum. 156. S. C. Poſt f. 55. S C.

§ 48. *Party juſtifying killing on neceſſity muſt be wholly without fault.* 1 Hawk. ch. 28 ſ. 22. Ante, f. 24.

In no caſe can a man juſtify the killing of another under the pretence of neceſſity, unleſs he were wholly without any fault imputable by law in bringing that neceſſity upon himſelf. And therefore where A. with many others had on pretence of title forcibly ejected B. from his houſe; and B. on

Ch. V. § 48. *Party juſtifying muſt be blameleſs*

Caſe of Drayton Buſſet, 1 Hale, 440. 444.

on the third night returned with ſeveral perſons with intent to re-enter; and one of B.'s friends attempted to fire the houſe; whereupon one of A.'s party killed one of B.'s with a gun; held manſlaughter in A.; becauſe the entry and holding with force was illegal.

1 Hale, 453. 1 Hawk. ch. 31. ſ. 25. Sum. 48.

If A. challenge B. who declines to fight, but lets A. know that he will not be beaten, but will defend himſelf: and B. going about his occaſions, and wearing his ſword, be aſſaulted by A. and killed; this is clearly murder. But if B. had killed A. upon that aſſault, it would have been ſe defendendo, if he could not otherwiſe have eſcaped, or bare manſlaughter if he might and did not. But if B. had only made this a diſguiſe to evade the law, and had purpoſely gone to a place where it was probable he ſhould meet A.; then it had been murder: but herein the circumſtances at the time of the fact done muſt guide the jury.

Kel 58. 61. 128. Foſt. 277. 1 Hawk. ch. 31. ſ. 27. Fuſt. de pace, 122. b. Maſgridge's caſe, 9 St. Tr. 65.

Neither does it lie in the mouth of the party firſt making a felonious attack upon another, without any lawful provocation, to urge, even in alleviation, this plea of neceſſity in ſelf-defence, though perhaps it exiſted in fact. For if A. of malice prepenſe aſſault B. to kill him, and B. draw his ſword in his lawful defence and attack A., and purſue him, and then A. for his own ſafety give back and retreat to a wall; and B. ſtill purſuing him with his drawn ſword, A. to ſave his own life kill B.; this is murder in A.: for A. having attacked and endeavoured to kill B. upon malice in the firſt inſtance, he is anſwerable for all the conſequences of which he was the original cauſe. And the attack and purſuit of B. ſhall not excuſe him; becauſe it was lawful in B. to purſue A. until he was entirely out of danger; which he could not be ſaid to be ſo long as A. might renew his attack. A fortiori, the ſame rule holds if A. had merely feigned to retreat in order to give himſelf a colour for wreaking his malice againſt B. It is true that Lord Hale, in treating upon this ſubject, puts the caſe, that A. *by malice* makes a *ſudden* aſſault upon B., who ſtrikes again, and purſuing hard upon A., A. retreats to the wall, and in ſaving his own life kills B.: which he ſuppoſes would be only ſelf-defence; grounded upon the opinion of Dalton. But the caſe in Dalton is merely that of a ſudden affray: and

2 Hale, 482.

1 Hale, 479, 480. Poſt. ſ. 54.

Dalt. ch. 150. ſ. 8.

Ch. V. § 48. *Party juſtifying muſt be blameleſs.*

and in order to reconcile the above paſſage with all the other books, and with other paſſages of the ſame author, it muſt be underſtood that he is not ſpeaking of a felonious aſſault with malice by A., with intent to kill B. *unprepared*; but either ſuch an aſſault as could no way endanger him, or at leaſt upon mutual combat: and even then if the firſt aſſault were *with malice* in the legal underſtanding of the term, the opinion deſerves further conſideration, as will appear hereafter.

1 Hawk. ch. [illegible] ſ. 13.

Poſt. ſ. 54.

§ 49. *Officers of juſtice.*

With reſpect to officers of juſtice, and other perſons interfering to preſerve or reſtore the peace, who are bound to do their duty at all hazard, they will deſerve ſeparate mention in another place.

Poſt. ſ. 63, &c.

§ 50. *Excuſable ſelf-defence.*

2. I come next to conſider the principle of thoſe caſes where the killing in ſelf-defence is only excuſable, which Mr. Juſtice Foſter calls "*ſelf-defence culpable*, but through the benignity of the law *excuſable*:" which diſtinction he grounds upon this, that the neceſſity is in ſome meaſure founded upon the fault of the party urging it in his excuſe, which it is not in the caſes of *juſtifiable* ſelf-defence above conſidered. This excuſable ſelf-defence is diſtinguiſhed in the ſtatute 24 H. 8. c. 5. by the deſcription of "homicide upon *chance-medley* in ſelf-defence:" which word *chance-medley* is therein uſed in its ancient legal ſignification; and means, when death enſues from a combat between parties on a ſudden quarrel. And a difference is therein raiſed, reſpecting the forfeiture, between this ſpecies of ſelf-defence and that which is juſtifiable: the forfeiture ſtill remaining in the caſe of homicide upon chance-medley in ſelf-defence; though the party has now a pardon and writ of reſtitution of his goods as a matter of courſe and right, only paying for ſuing out the ſame.

Foſt. 273, 5. 279.

24 H. 8. c. 5. Foſt. 275. 4 Blac. Com. 184. Ante, ſ. 7, 8. 24.

4 Blac. Com. 188. Foſt. 288.

§ 51. *Difference between chance medley and manſlaughter.*

It has been ſhewn, that where death enſues from a combat on a ſudden quarrel, without prepenſe malice, ſuch act amounts but to manſlaughter; being attributed to heat of blood ariſing from human infirmity. Now in order to reduce ſuch offence from manſlaughter to ſelf-defence upon chance-medley, it is incumbent on the defendant to prove two

Ante, ſ. 24.

Ch. V. § 51. *Excuſable ſelf-defence on combat.*

Foſt. 277, 8. 1 Hale, 483. 1 MS. Sum. 155. 4 Blac. Com. 184. Pult. de pace, 122.

Poſt. f. 54.

4 Blac. Com. 184.

Foſt. 277.

Vide poſt.

things; 1ſt, that before a mortal ſtroke given he had declined any further combat, and had retreated as far as he could with ſafety; 2dly, that he then killed his adverſary through mere neceſſity, in order to avoid immediate death. And it ſeems that any caſe, which without theſe two circumſtances would have amounted to more than manſlaughter, cannot by their concurrence be *excuſed* upon the foot of ſelf-defence upon chance-medley; though a paſſage of Lord Hale, which will be mentioned preſently, may ſeem to countenance an exception to this remark. With the general poſition however, above laid down, agrees Mr. Juſtice Blackſtone; who ſays, that the true criterion between homicide upon chance-medley in ſelf-defence and manſlaughter ſeems to be, that when both parties are actually combating at the time when the mortal ſtroke is given, the ſlayer is guilty of manſlaughter: but if the ſlayer had not began to fight, or having began had endeavoured to decline any further ſtruggle, and afterwards being cloſely preſſed by his antagoniſt kill him to avoid his own deſtruction; this is homicide excuſable in ſelf-defence. And to the ſame effect Mr. Juſtice Foſter obſerves, that in *both* caſes it is ſuppoſed that paſſion had kindled on each ſide, and blows paſſed between the parties; but that in the caſe of manſlaughter, it is either preſumed that the combat on both ſides had continued to the time the mortal ſtroke was given; or that the party giving ſuch ſtroke was not at that time in imminent danger of death. My reaſon for dwelling ſo much upon this will appear when I come preſently to conſider Lord Hale's opinion on the ſubject.

§ 52. *Diſtinction between chance-medley and miſadventure.*

1 Hale, 472. 1 Hawk. ch. 27. ſ. 4, 5.

It has been further obſerved by Lord Hale, that in homicide in ſelf-defence it ſeems neceſſary for ſome *act* to be done by the party killing; for if he be *merely paſſive*, it will make it only a killing by miſadventure. But whether one of the inſtances he gives altogether comes up to the principle intended to be laid down might perhaps admit of diſpute. It is this; A. aſſaults B., who flies to the wall, or falls, *holding his ſword in his hand*, on which A. runs or falls violently, *without any thruſt or ſtroke offered at him by B.*; and is killed. This, he ſays, is by miſadventure. Now if the

Ch. V. § 52. *Excuſable ſelf-defence on combat.*

Antè, f. 8.

the action of B. in holding up the ſword were voluntary, and intended for his defence, it ſeems a great degree of refinement to diſtinguiſh ſuch an act as that from an actual movement of B. towards his adverſary; ſuppoſing him to have been in no greater blame in bringing on the quarrel in the one caſe than in the other, and to be urged by the like imminent neceſſity for the preſervation of his life. Nor does this at all fall in with the definition before given of homicide by miſadventure. The other inſtance indeed put of B.'s falling with the inſtrument in his hand ſeems more like an involuntary act, and comes nearer to the notion of one *merely paſſive*; though if he had before drawn his ſword in his defence, inaſmuch as danger muſt neceſſarily reſult from ſuch an act and the very nature of the occaſion, perhaps there is ſtill no reaſon for making a diſtinction. For ſuch a difference once eſtabliſhed in this caſe may lead to others where it might be more important. But if the caſe here meant to be put be that of a felonious attack by A. upon B. without any manner of fault in the latter; then the difference lies merely in words: for whether B. defended himſelf by action, or merely by preſerving a paſſive guard, if I may uſe the expreſſion, is preciſely the ſame with reſpect to all legal conſequences; he would be equally entitled to an abſolute acquittal in both caſes.

§ 53. *As to the firſt aſſault.*

Foſt. 277. MS. Tracy, 42. Pult. de pace, 122. 1 Hale, 479. antè, f. 24.

1 Hawk. ch. 29. ſ. 17.

1 Hale, 482. Sum. 42.

As in the caſe of manſlaughter upon ſudden provocation, where the parties fight upon equal terms, *all malice apart*, it matters not who gave the firſt blow; ſo in this caſe of excuſable ſelf-defence, the firſt aſſault in a *ſudden affray*, *all malice apart*, will make no difference, *if either party quit the combat, and retreat before a mortal wound be given.* But Hawkins thinks this opinion is too favourable to the firſt aſſailant, even upon a *ſudden* quarrel; inaſmuch as the neceſſity was induced by his own fault. And Lord Hale ſeems to diſtinguiſh the caſe of him who is firſt attached from the aſſailant, with reſpect to the point of retreating. For if A. aſſault B. ſo fiercely that giving back would endanger his life; in which caſe it is agreed that the party thus attacked need not retreat in order to bring his caſe within the rule of neceſſity in ſelf-defence; or if in the aſſault B. fall to the ground, whereby he could not fly; in ſuch

1 Hawk. ch. 29. ſ. 14. 4 Blac. Com. 185. 3 Inſt. 56. Hale, ut ſupra.

Ch. V. § 53. *Excuſable ſelf-defence on combat.*

ſuch caſe if B. kill A. it is in ſelf-defence upon chance medley. But if B. had returned A.'s aſſault ſo fiercely that he could not retreat without danger; or if A. had fallen to the ground, and then had killed B. who was aiming at his life, ſtill this ſhould not be interpreted to be done in ſelf-defence upon chance medley; becauſe, as it has been ſaid, a fall not being voluntary as a flight is, it does not thereby appear that A. declined fighting; and therefore B. cannot ſafely quit the advantage he has gotten. So that in the caſe of the aſſailant there muſt be an actual unequivocal retreat and quitting of the combat as far as he can, in order to reduce the killing by him to ſelf-defence upon chance medley: and this his intention muſt not be ſhewn by any ambiguous or caſual act, ſuch as his falling; otherwiſe, as Lord Hale obſerves, all caſes of murders or manſlaughters would by interpretation be turned into ſelf-defences. Nor in any caſe will a retreat avail, if it be feigned in order to get an opportunity or interval by parting to enable him to take advantage of this excuſe. Yet at any rate I think there is great difficulty in applying the diſtinction above taken by Lord Hale and Hawkins againſt him who makes the firſt aſſault, to the caſe of mutual combat by conſent, though upon a ſudden occaſion, where neither of the parties makes an attack till the other is prepared; becauſe in theſe caſes it matters not who gives the firſt blow; it forms no ingredient in the merits of the queſtion.

Vide 1 Hale, 482. n.

Vide ſupra et ante, f. 24.

§ 54. *When the firſt aſſault is upon malice.*

In all the above caſes of excuſable ſelf-defence, it muſt be taken that the attack was made upon a ſudden occaſion, and not premeditated or with malice. For if one attacked another with a dangerous weapon unprepared, with intent to murder him, that would ſtand upon a different foot, as hath been ſhewn: and in that caſe, if the perſon whoſe life was ſought killed the other, that would be in ſelf-defence properly ſo called, which does not induce any forfeiture. But if the firſt aſſault be *upon malice*, and the flight be feigned as a pretence for carrying that malice into execution, it would undoubtedly be murder; for then the flight rather aggravates the crime, as it ſhews more deliberation.

Pult. de pace, 122. b.

Ante, f. 44.

Foſt. 277. MS. Tracy. 42.

And

Ch. V. § 54. *Excuſable ſelf-defence on combat.*

And ſo, ſays Lord Hale, in ſome paſſages, where the parties appoint to fight; though one retreat as far as he can with ſafety before he kill the other, it is murder; *becauſe their meeting was a compact and an act of deliberation*; and therefore all that follows thereupon is preſumed to be done in purſuance thereof; *and he ſhall not take advantage of the neceſſity which he created by his own act.* But in another place he makes a *quære* even in that caſe, if it appeared that before the mortal wound the party killing had truly declined the fight, and offered to yield, or had actually run away as far as he could, but had been purſued by the other, who refuſed to decline the combat. And again, he puts the caſe of A. making a *ſudden* aſſault *by malice* upon B., who ſtriking again and purſuing hard upon A., A. retreats to the wall, and in ſaving his own life kills B.; this, he thinks, may be ſelf-defence upon chance medley. Some obſervation has already been made upon this latter paſſage, which may ſerve in ſome degree to reconcile it with other authorities: and it is evident that he does not there ſpeak of a *premeditated* combat, as in the firſt paſſage; becauſe he uſes the term of *ſudden* aſſault. It is equally difficult to conceive that by the term *malice* he could mean a pre-exiſting malice, in other words, that deliberate rancour of heart which is meant to be denoted by the term malice in its ſtrict legal ſenſe: for in the ſame place, he puts the caſe where A. and B., *between whom there was malice*, met *caſually*, and B. being aſſaulted and driven to the wall by A., killed him in his own defence; this, ſays he, is *ſe defendendo*, and ſhall not be heightened by the former malice into murder or manſlaughter; *for it was not a killing on account of the former malice, but upon a neceſſity impoſed upon him by the aſſault of A.* If this reaſoning be juſt, the other concluſion cannot be true, that if upon ſuch a malicious aſſault by A., B. had driven him to the wall, and then A. had killed B., it would only have been in ſelf-defence. Neither does this reaſoning apply in ſupport of the *quære* made by Lord Hale to the firſt poſition laid down by him, reſpecting a retreat from a deliberate and preconcerted combat; of which he had ſaid, that the party retreating could not avail himſelf; *becauſe he ſhould not take advantage of the neceſſity which he created by his own deliberate*

1 Hale, 452. 479. Ante, f. 12. 24.

1 Hale, 452. Burnet's MS. 42.

1 Hale, 479. 480.

Ante, f. 43.

Copſtone's caſe, 1 Hale, 479. 487.

Ch. V. § 54. *Excuſable ſelf-defence on combat.*

Ante, f. 51.

deliberate act; namely, by the compact to meet and fight his antagoniſt. And it may be queſtioned how far that *quære* is reconcileable with other authorities. For in the paſſages before cited from Foſter and Blackſtone Js., they both reaſon upon the ſuppoſition, that in order to excuſe the perſon retreating upon the foot of ſelf-defence, the fighting muſt not have been upon malice; and that in all caſes where the two ingredients of the retreat before a mortal ſtroke, and the inevitable neceſſity, are wanting, the caſe would amount to manſlaughter; which clearly is not applicable to the caſe of deliberate duelling. Again, the very denomination of "ſelf-defence upon chance medley," to which, if excuſable at all, the death muſt be attributed in the inſtance put, does in its nature imply that the combat was *upon a ſudden occaſion* at leaſt, whether upon an old grudge or a new quarrel. Added to which, it is laid down generally, in many books, that if a man aſſault another on malice prepenſed, and then fly to the wall, and there kill him *in his own defence*, he is guilty of murder in reſpect of his firſt intent. Blackſtone expreſsly puts the ſame caſe of a duel as Lord Hale had firſt done, but without ſubjoining the ſame doubt: and it was conſidered as ſettled law by the Chief Juſtice in delivering the judgment in Oneby's caſe. But at the ſame time it muſt be obſerved, that in ſome at leaſt of the other books referred to, the rule ſeems to have been more particularly referable to caſes, not of mutual combat, but of a previous felonious attack by one of the parties on the other, unprepared and without his aſſent, which the other afterwards reſiſted.

1 Hawk. ch. 29 ſ. 17 ch 31. ſ. 26. Foſt. 276, 7. Kel. 58. 128, 9. Sum. 42. 47. 4 Blac. Com. 185. 2 Ld. Ray. 1491.

Upon the whole, it may be difficult to make a diſtinction in ſtrictneſs of law between the caſe of him who makes a felonious attack with malice upon the life of another, armed and prepared by agreement to meet and reſiſt him, and the caſe of one who makes a ſimilar attack, without notice to his adverſary: and yet in eſtimating the real atrocity of the two caſes, there is no generous mind which could heſitate to pronounce on which ſide the advantage lay. Thus much, however, may be obſerved, that the reaſon why in the latter caſe flight ſhall not avail the aggreſſor is, becauſe after ſuch an attack he is not fit to be truſted ſo long

Ch. V. § 54. *Excuſable ſelf-defence on combat.*

long as by any reaſonable poſſibility he may renew the ſame attempt; and his opponent having a right by law to purſue him till he is out of all danger, the firſt cannot in conſequence have a contrary right to reſiſt. But when perſons meet upon compact to fight, that of itſelf preſuppoſes a degree of confidence in each other that neither will take any unfair advantage: and there, neither of them can have a right to purſue his adverſary in the ſame manner as in the other caſe: and conſequently, if one of them expreſsly renounce the unlawful compact, and give reaſonable grounds for inducing a belief that he no longer ſeeks to hurt his opponent; as the other has no legal authority for miſtruſting the truth of the offer, nor any right to purſue his advantage; ſo it may be urged that there is no reaſon why the law ſhould, after ſuch expreſs renunciation of the unlawful compact, with-hold from the firſt the general right of ſelf-defence; at leaſt none upon the ground of inconſiſtent rights, as in the other caſe. Yet ſtill it may be doubtful whether admitting the full force of this reaſoning, the offence can be leſs than manſlaughter; or whether in ſuch caſe the party can altogether excuſe himſelf upon the foot of neceſſity in ſelf-defence; becauſe the neceſſity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the firſt inſtance deliberately foreſeen and reſolved upon in defiance of the law: and ſo far it varies this caſe from that of a combat on a ſudden occaſion without malice, where both parties are preſumed to act without deliberation, under the immediate impulſe of paſſion, and blind to the conſequences.

§ 55. *As to the exiſtence of the neceſſity to kill ſufficient to excuſe.*

Ante, f. 50. and the authorities there cited.

Nailor's caſe, Ante, f. 47.

As to the other point to be eſtabliſhed, namely, the exiſtence of the neceſſity under which the party killing endeavours to excuſe himſelf; he can in no caſe ſubſtantiate ſuch excuſe if he kill his adverſary, even after a retreat; unleſs there were reaſonable ground to apprehend that he would otherwiſe have been killed himſelf. And therefore where nothing appeared in Nailor's caſe above mentioned to ſhew that the deceaſed aimed at the priſoner's life; although he held him down on the ground beating him, and the priſoner could not avoid his blows; it was ruled manſlaughter. It is

Ch. V. § 55. *Excuſable ſelf-defence on combat.*

is to be noted in that caſe, that the priſoner ſtruck the mortal blow with a penknife, which was a dangerous, miſchievous weapon; from whence it was to be preſumed, that he intended to rid himſelf of the chaſtiſement, which his brother was then inflicting on him, by his death. Mr. Juſtice Foſter, in alluding to this caſe, ſeems to lay a ſtreſs upon the want of an inevitable neceſſity, ſo as to excuſe the killing *in that manner*. But if it appeared that a party who was engaged in ſuch an affray, without any fault of his own, had retreated as far as he could, [as in the above caſe, where he was thrown upon the ground, and the deceaſed was upon him,] or otherwiſe teſtified an intention to decline the controverſy; and then being hard preſſed, in mere defence of his perſon from the continued blows of his adverſary gave a blow with his *hand*, or in any other manner *not likely to kill*; and it may fairly be preſumed that he had no ſuch intention, but only to make him deſiſt; it rather ſeems that ſuch act, though death enſue, is either excuſable in ſelf-defence, or attributable to miſadventure; although the party's life were not in danger at the time. For no man is required by law to remain defenceleſs aud ſuffer another to beat him as long as he pleaſes without reſiſtance; although it be evident that the other did not aim at his life; but he may lawfully exert ſo much force as is neceſſary to compel him to deſiſt. Upon the ſame principle as governs the caſe, where the party upon an inſufficient provocation, ſuch as words, ſtrikes a blow which unfortunately and beſide his intention kills another; if it were with his hand or a ſtick or other weapon not likely to kill, it is but manſlaughter; which, had it been with a dangerous weapon, would have been murder. And it amounts to manſlaughter in the former caſe, becauſe the act of ſtriking at all is unlawful; but in the caſe now under conſideration, it is not unlawful for a man to ſtrike with or uſe whatever force may be ſufficient to prevent another from beating him, (ſhort of intentionally killing him, unleſs for the neceſſary preſervation of his own life,) provided he cannot eſcape from the blows by any other means, and did not bring upon himſelf ſuch ill treatment by his own illegal act. And therefore it may be a queſtion, whether, under ſuch circumſtances, the death may not be attributed to miſ-

Foſt. 278.

Infra.
Ante, f. 44.

Kel. 131.
Foſt. 292.

adventure

adventure; being unintentional in the party ſtriking, who was in that inſtance doing no more than he lawfully might. I ſay, to miſadventure rather than to homicide in ſelf-defence, becauſe this latter ſeems more properly to imply that the party ſtriking aimed at the life of the other, or intended him ſome great bodily harm, but that the fact is either juſtifiable or excuſable, being induced by neceſſity, and for the preſervation of his own life. The caſe put therefore, where the ſtriker does not aim at the other's life, nor does any act calculated in common experience to endanger it, but only intends to make him deſiſt from his unlawful aſſault by ordinary means, and in ſo doing unexpectedly happens to kill him, ſeems rather attributable to miſadventure, than to ſelf-defence upon chance-medley.

Ch. V. § 55. *Excuſable ſelf-defence on combat.*

In defence of Property.

§ 56. *In defence of property againſt treſpaſſers.* Ante, f. 44, 45.

With reſpect to attacks upon property, it has been ſhewn before, that it is lawful to repel even by the death of the aggreſſor any felonious attempt upon it, under the reſtrictions before noticed. But where a forcible attack is made upon the dwelling-houſe of another, *without any felonious intent*, but barely to commit a treſpaſs, ſome further caution is to be obſerved.

1 Hale, 445. 485, 6. Cook's caſe, Cro. Car. 537.

If A. in defence of his houſe kill B. a treſpaſſer, who endeavours to make an entry upon it, it is at leaſt common manſlaughter, unleſs indeed there were danger of his life. But if B. had entered into the houſe, and A. had gently laid his hands upon him to turn him out, and then B. had turned upon him and aſſaulted him, and A. had killed him, (not being otherwiſe able to avoid the aſſault, or retain his lawful poſſeſſion,) it would have been in ſelf-defence. So it had been if B. had entered upon him and aſſaulted him firſt, though his entry were not with intent to murder him, but only as a treſpaſſer to gain the poſſeſſion. In ſuch caſe A. being in his own houſe, need not fly as far as he can, as in other caſes of ſelf-defence; for he has the protection of his houſe to excuſe him from flying; as that would be to give up the poſſeſſion of his houſe to his adverſary by his flight. But in theſe caſes the homicide is excuſable rather than juſtifiable; and therefore a forfeiture is incurred, but a pardon iſſues of courſe.

1 Hawk. ch. 28. f. 23. ante, f. 7.

On

Ch. V. § 56. *In defence of property againſt treſpaſſers.*

R. v. Willoughby and another, Bodmin Sum. Aſſ. 1791. MS.

On the other hand, if the owner of the houſe be killed in a ſtruggle between him and thoſe who unlawfully reſiſt his turning them out of his houſe, where they had no right to remain, it will be murder. Two ſoldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refuſed, alleging the unreaſonableneſs of the hour, and adviſed them to go to their quarters; whereupon they went away uttering imprecations. In an hour and a half afterwards, when the door was opened to let out ſome company who had been detained there on buſineſs, one of them ruſhed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the ſame anſwer: and on his refuſing to depart, and perſiſting to have ſome beer, and offering to lay hold of the landlord, the latter at the ſame inſtant collared him; the one puſhing and the other pulling each other towards the outer door; where when the landlord came he received a violent blow on the head with ſome ſharp inſtrument from the other ſoldier, who had remained without, which occaſioned his death a few days afterwards. Mr. Juſtice Buller held this to be murder in both, notwithſtanding the previous ſtruggle between the landlord and one of them. For the landlord did no more in attempting to put the ſoldier out of his houſe at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken: more eſpecially as there was reaſonable evidence of the priſoners having come the ſecond time with a deliberate intention to uſe perſonal violence in caſe their demand for beer was not complied with.

Kel. 132. Foſt. 291. Ante, f. 22.

But where the treſpaſs is barely againſt the property of another, the law does not admit the force of the provocation ſufficient to warrant the owner in making uſe of any deadly or dangerous weapon. As if upon ſight of one breaking his hedges the owner take up an hedge ſtake, and knock him on the head and kill him; this would be murder; becauſe it was an act of violence much beyond the proportion of the provocation. And ſtill more where ſuch or the like violence is uſed after the party has deſiſted from the treſpaſs. But if the beating were with an inſtrument

or in a manner not likely to kill, it would only amount to manſlaughter: and it is even lawful to exert ſuch force againſt a treſpaſſer, who comes without any colour to take the goods of another, as is neceſſary to make him deſiſt.

Ch. V. § 56. *In defence of property.*

1 Hale, 473. 486.

3. *As to the perſons by whom ſuch juſtification or excuſe may be urged;*

§ 57. *Who may juſtify for injuries to another. Interfering againſt known felons.*

In all caſes where a felonious attack is made, a ſervant or any other perſon preſent may lawfully interpoſe to prevent the miſchief intended; and if death enſue, the party ſo interpoſing will be juſtified. Thus, in the inſtances of arſon or burglary, a lodger may lawfully kill the aſſailant in the ſame manner as the owner himſelf might do. This is ſubject however to the ſame limitations I before noticed. In this reſpect I ſee no difference between the caſe of the perſon aſſaulted and thoſe who come in aid againſt ſuch felons. And the legiſlature itſelf ſeems to have conſidered them on the ſame foot; for in the caſe of the Marquis de Guiſcard, who ſtabbed Mr. Harley ſitting in council, they diſcharged the party who gave the mortal wound from all manner of proſecution on that account; and declared the killing to be a *lawful and neceſſary action.*

Foſt. 274. 1 Hale, 484, 5. 2 Hawk. ch. 12. ſ. 19. R. v. Cooper, Cro. Car. 544. Ante, f. 44, 45.

9 Ann. c. 16.

§ 58. *Interfering in mutual combats or ſudden affrays between others.*

But the caſe of third perſons interfering in mutual combats or ſudden affrays, except as mediators to preſerve the peace, requires greater caution. Lord Hale puts this caſe: If A., B., and C. be walking in company together, and C. aſſault B. who flies, and is in danger of being killed from C.'s purſuit, unleſs preſent help be afforded; and A. thereupon kill C. in defence of the life of B.; it ſeems that in this caſe of ſuch an inevitable danger of the life of B., the killing of C. by A. is in nature of ſelf-defence: but then, he adds, it muſt plainly appear by the circumſtances of the caſe, as the manner of the aſſault, the weapon with which it was made, &c. that B.'s life was in imminent danger. It ſeems as if Lord Hale had doubted of the caſe of a ſtranger's interfering in the ſame manner, by having ſubjoined a *quære* to the next ſentence, where ſuch a caſe is put. But if the killing of B. by C. would have been murder; and on the other hand, the killing of C. by B.

1 Hale, 484.

Ante, f. 45.

Ch. V. § 58. *Interference of third perſons.*

would have been juſtifiable ſelf-defence; then I conceive clearly that the killing of C. by A. although a ſtranger, in defence of B., upon view of the imminent and otherwiſe unavoidable danger of his life, would alſo have been juſtifiable; becauſe the motive of his interference was laudable, namely, to prevent a felony which would otherwiſe have been committed. So if A. had interfered with a view to preſerve the peace between B. and C., giving due notice of his intention, and not with a view to take part with either; and had been under the neceſſity of killing C. in order to preſerve his own life or that of B., which could not otherwiſe be preſerved; it would equally have been juſtifiable: becauſe even private perſons are bound to prevent a felony being committed by all poſſible lawful means, without expoſing their own lives; though if their zeal carry them thus far, the law will not put them in a worſe ſituation on that account. But if A., a ſtranger, take part on a ſudden with either B. or C., who are engaged together in an affray, wherein both are in the eye of the law blameable, although perhaps in different degrees; and afterwards kill either, although in the neceſſary defence of the other; it cannot be leſs than manſlaughter: for he who thus officiouſly interferes without any previous knowledge of the merits of the diſpute, not to preſerve the peace but to partake in the broil, is himſelf highly culpable; having leſs provocation to heat his blood than probably the parties themſelves had who originally engaged in the diſpute. And therefore his caſe does in this reſpect ſtand in a far leſs favourable light than that of a friend or ſervant who have a prior intereſt in the ſafety of the perſon for whoſe ſake they interfere; or even than the caſe of a ſtranger who happened to be privy to the whole cauſe and progreſs of the diſpute. But ſuppoſe the killing of C. by B. would under the circumſtances have been clearly excuſable ſelf-defence; and on the other hand the killing of B. by C. would have been manſlaughter at leaſt: as where B. had declined a combat in which both had been ſuddenly engaged, and had retreated as far as he could with ſafety, but C. had perſiſted in the attack and put B.'s life in peril; and A. a ſtranger, not knowing the cauſe of the diſpute, had taken part with

1 Hale, 484.

Kel. 136.

B.

B. and had ſlain C. in the neceſſary defence of B.: it ſeems that the merits of A.'s caſe ought rather to depend in part upon the actual ſituation of the combatants at the time he took part in the conteſt, than altogether upon the merit of B.'s, of which he was entirely ignorant; although B.'s merit would have great weight in the deciſion: which ſhould induce perſons to be extremely cautious how they interfere too haſtily in the diſputes of others, unleſs as mediators to preſerve the peace. And therefore if at the time of A.'s actual interference, the danger of B. was ſo urgent that A. could only prevent his death by killing C.; poſſibly under theſe circumſtances A. might excuſe the homicide upon the ſame neceſſity as B., although he engaged not ſo much to preſerve the peace between both as to aid B. in his neceſſity: but if he engaged with intent to part them, giving due notice, without deſigning to kill C., and was only induced thereto by the ſpeedy neceſſity which enſued, it would be even juſtifiable. On the other hand, if he took part with B. before the actual exiſtence of the neceſſity under which he was ſtruggling againſt C., and afterwards killed C. upon the urgency of B.'s danger; it is very much to be doubted whether he can *excuſe* himſelf afterwards upon the ground of a neceſſity, which was not the motive of his interference, and did not exiſt at the time that he engaged. For generally ſpeaking, if there be an affray, and an actual fighting and ſtriving between perſons, and another run in and take part with one party and kill the other; this is manſlaughter: and that, whether the quarrel between the two were ſudden or malicious, if the party interfering did not know it to be malicious. And the reaſon why B. would be excuſed in the caſe put, if at all, is becauſe he endeavoured to decline the combat, and could not for the fierce attack of C. upon him; but A. continued in the combat of his own accord; and if he did ſo, he could not excuſe the killing of C. upon the foot of neceſſity, although ultimately his own life might have been in danger; much leſs then can he excuſe it on the ground of B.'s neceſſity; for that was not the motive of his interference at firſt; and he had done no act as B. had done, to ſhew his inclination to abandon the affray, and that he only

Ch. V. § 58. *Interference of third perſons.*

Kel. 61, 62.

1 Hawk. ch. 31. ſ. 35. co. 3 Rep. Rep. 408. Kel 58 113. 136. Poſt. de pace, 124. b. Poſt. 1. 89.

Ch V. § 58. *Interference of third perſons.*

continued in it afterwards to prevent a felony from being committed.

1 Hale, 438 484. Sum. 52. Cro. Jac. 296. Kel 88. 136. 1 Hawk. ch 31. § 44. Plow 100. Poſt. ſ. 131.

If A. and B. fight upon malice, and C. the friend or ſervant of A., not being acquainted therewith, come in and take part againſt B. and kill him; this is murder in A., but only manſlaughter in C.: otherwiſe if C. had known that the fighting was upon malice; for then it would have been murder in both. But if A. had been aſſaulted, and had retreated as far as he could, and then his ſervant had killed the aſſailant; it would have been *ſe defendendo*. But if the ſervant had killed him before the maſter had retreated as far as he could, it would have been manſlaughter in the ſervant. And the law is the ſame in the caſe of the maſter killing the other in defence of the ſervant. But if there be only angry

Kel. 62. 136.

words between A. and B.; and C. the friend of A. ſtrike B. with a bowl or other dangerous inſtrument, and kill him; this would be murder.

Vide poſt. ſ. 89.

Upon the whole, although Lord Hale and others appear ſometimes to intimate a diſtinction in theſe reſpects between the caſes of ſervants and friends, and that of a mere ſtranger; yet it muſt be confeſſed that the limits between both are no where accurately defined. And after all, the nearer or more remote connexion of the parties with each other ſeems more a matter of obſervation to the jury as to the probable force of the provocation, and the motive which induced the interference of a third perſon, than as furniſhing any preciſe rule of law grounded on ſuch a diſtinction.

§ 59. *Death of party interfering.* Kel. 66.

On this head of interference by a third perſon, it remains to be obſerved, that if two be fighting, and another interfere with intent to part them, but do not ſignify ſuch intent, and he be killed by one of the combatants; this is but manſlaughter: for the latter might think that he came in aid of his opponent, unleſs he had ſome notice of his real intent. And this rule holds even in the caſe of a peace-officer.

1 Hawk. ch. 31. ſ. 51.

Though generally ſpeaking, if ſuch a one or his aſſiſtant be killed in any affray, whether by thoſe at firſt engaged therein or by any others in aid of them, the caſe demands

Poſt. ſ. 63. 81. &c.

very different conſideration; which will be treated of at large

large hereafter. It is for the moſt part murder in all concerned, where due notice has been given.

Ch V. § 59. *Death of party interfering*

Some judges have ſaid *arguendo*, that if two be fighting upon malice, and a ſtranger interfering to part them, and giving notice of his deſign, be killed by one of the combatants, it is murder in both; becauſe each intended to have killed the other: though other judges differed as to this concluſion: and Lord Hale in citing the caſe diſapproves of it to that extent, unleſs both ſtruck him. But it was clearly agreed to be murder in him who ſtruck, and alſo in the companions of that party. The like conſiderations will govern the caſe where a ſtranger, interfering to part two others fighting upon a ſudden occaſion, is ſlain by either. But then he muſt give ſpecial notice of his deſign, and act accordingly, otherwiſe the offence will not be more than manſlaughter, there being no previous malice, and the blood being heated in the affray.

Manſell and Herbert's caſe, Dy. 128 b. 1 Hale, 441. Ante, ſ. 12. 24.

Vide poſt. ſ.

4. *How far the neceſſity ſhall be ſaid to extend.*

§ 60. *Duration of the neceſſity.* 1 Hale, 485. 4 Blac. Com 185.

Inaſmuch as the juſtification or excuſe of which I have been treating is founded on the plea of neceſſity, it will not in either caſe extend beyond the actual continuance of that neceſſity which alone warrants it. And therefore though the party upon whom a felonious attack is firſt made be not obliged to retreat, but may purſue the felon till he find himſelf out of danger; yet if the felon were killed after he had been properly ſecured, and there were no longer any apprehenſion of danger, ſuch killing would be murder. Though perhaps if the blood were ſtill hot from the conteſt or purſuit, it might be only manſlaughter, on account of the high provocation. Hawkins indeed ſays,

1 Hawk. ch. 28, ſ. 21.

that if a ſervant coming ſuddenly, and finding his maſter robbed and ſlain, fall on the murderer immediately and kill him, it may be juſtified; for he does it in the heat of his ſurprize, and under juſt apprehenſions of the like attempt on himſelf. But he adds, that in other circumſtances (which muſt be underſtood where he has no juſt reaſon to apprehend the like attempt on himſelf, and the fact is not recent,) he could not have juſtified the killing of ſuch an one, but ought to have apprehended him. The fact will be

Ch. V. § 60. *Duration of the neceſſity.*

either murder or manſlaughter, according to the circumſtances above alluded to.

§ 61. *Unfortunate neceſſity.* 4 Blac Com 186. 1 Hawk. ch. 28. ſ. 26.

5. Neceſſity induced by mutual misfortune.

There are beſides ſome caſes where neceſſity may be urged for the death of an innocent man, and renders the party *excuſable* without any culpability; or, as ſome leſs correctly have ſaid, *juſtifiable*; though the difference in ſuch caſes is not worth examination. As where two perſons being ſhipwrecked, and getting on the ſame plank; it is found not able to ſave them both, and one thruſts the other from it whereby he is drowned. Yet, according to Lord Hale, a man cannot even excuſe the killing of another who is innocent, under a threat however urgent of loſing his own life unleſs he comply. But if the commiſſion of treaſon may be extenuated by the fear of preſent death, and while the party is under actual compulſion, there ſeems no reaſon why this offence may not alſo be mitigated upon the like conſideration of human infirmity. But if the party might, as Lord Hale in one place ſuppoſes, have recourſe to the law for his protection againſt ſuch threat, it will certainly be no excuſe for committing the murder.

1 Hale, 51. 434. Ante, ſ. 12.

Vide ante, ch. 2. ſ. 15.

VI. *Homicide in the Advancement or Execution of the Laws.*

§ 62. *Introduction.*

This branch of the ſubject will comprehend not only the duties of the ſeveral officers and miniſters of juſtice, and of all thoſe who come in aid of them, with the extent of their ſeveral powers in the different caſes falling under their cognizance; but alſo the relative duty of the ſubject in each of thoſe inſtances: how far the one may juſtify or excuſe compulſion; to what extent the other may exert reſiſtance.

Trial by battle, 1 Hawk. ch. 28. ſ. 16.

With reſpect to the obſolete method of trial by battle, it may be diſmiſſed at once by obſerving, that if either of the champions killed the other, ſuch homicide was according to the barbarous notions of ancient juriſprudence reckoned juſtifiable, as being the juſt judgment of God.

Ch. V. § 63. *Protection of officers, &c.*

§ 63. *General principles. Protection of officers of juſtice, &c. againſt reſiſtance.* Poſt. 270. 308. &c. 1 Hale, 457. Poſt. ſ. 67.

It may be premiſed generally, that where perſons having authority to arreſt or impriſon, or otherwiſe to advance or execute the public juſtice of the kingdom, and uſing the proper means for that purpoſe, are reſiſted in ſo doing, and the party reſiſting is killed in the ſtruggle; ſuch homicide is juſtifiable. And on the other hand, if the party having ſuch authority, and executing it properly, happen to be killed; it will be murder *in all who take a part in ſuch reſiſtance*: this being conſidered by the law as one of the ſtrongeſt indications of malice, an outrage of the higheſt enormity, committed in defiance of public juſtice againſt thoſe who are under its ſpecial protection. But if the officer or perſon endeavouring to make the arreſt had no legal authority for that purpoſe, or, which is the ſame thing, none be ſhewn to the court; then the killing him by the party againſt whom ſuch illegal violence is committed can only amount to manſlaughter. Withers, a common ſoldier, was indicted for murder in ſtabbing a ſerjeant in the ſame regiment, who had arreſted him for ſome alleged miſdemeanour, and was conducting him to priſon. The priſoner at firſt ſubmitted to go, but ſhortly after ran away. The ſerjeant overtook and collared him, inſiſting on his going with him: the priſoner refuſed to go: and during the altercation the ſerjeant having taken a ſtick out of the priſoner's hand and thrown it away, ſhortly after the latter drew the ſerjeant's ſword, and plunged it in his body, and killed him. The jury found him guilty of murder. The articles of war, under which the ſerjeant might have juſtified the arreſt, were not produced in evidence; and no other authority appearing for the arreſt, the judges were all of opinion that the conviction was wrong; for that an aſſault or reſtraint of liberty, (no provocation being ſought by the priſoner,) was ſufficient to reduce the offence to manſlaughter: and ſo it was ruled in Buckner's caſe, upon the ſtatute of ſtabbing. But it was agreed in Sir Charles Stanley's caſe, that if the party who is arreſted yield himſelf and make no reſiſtance, but others endeavour to reſcue him, and he do no act to declare his joining with them; if thoſe who come to reſcue him kill any of the bailiffs; this is murder in them, but not in the party arreſted.

Rex. v. Withers, Stafford Sum. Aſſ. 1784, cor. Buller J. afterwards before all the judges in Mich. term following. MS. Gould and Buller Js.

Buckner's caſe, ante, ſ. 29.

Reſiſtance by third perſons. Sir Charles Stanley's caſe, Kel. 87. *vide* 1 Hale, 464, 5.

Ch. V. § 62. *Protection of officers, &c.*

(*Vide* Jackſon's caſe, poſt. 1 298.)

Vide ante, f. 58. Poſt. f. 83.

arreſted. Otherwiſe if he do any act to countenance the violence of the reſcuers; as in the principal caſe by having firſt fired at the bailiff, and afterwards throwing him down. So if a man be arreſted, and he and his company endeavour a reſcue; and while they are fighting, one who knows nothing of the arreſt coming by kill one of the bailiffs in aid of the perſon arreſted; he is guilty of murder: for a man muſt take the conſequences of joining in any unlawful act, ſuch as fighting; and his ignorance will not excuſe him where the fact is made murder by the law without any actual precedent malice, as in the caſe of killing an officer in the due execution of his office. But in another report of the ſame caſe it is ſaid to have been reſolved, that if one not knowing the cauſe of the ſtruggle interfered between the bailiff and the party arreſted, *with intent to prevent miſchief* (which appeared to be the caſe of Andrews) it was not murder in him, though the bailiff's aſſiſtant were killed by one of the reſcuers: and Andrews was afterwards acquitted by the jury.

R. v. Sir Chas. Stanſſie and Andrews, Sid. 160. MS. Burnet, 46. accord.

A. beat B. a conſtable, who was in the execution of his office, and they were parted; and then C. a friend of A. fell upon the conſtable and killed him in the ſtruggle: but A. was not engaged in this after he was parted from B. And it was holden by Holt, C. J. and Rookſby, that this was murder only in C.; and A. was acquitted, becauſe it was a ſudden quarrel, and it did not appear that A. and C. came upon any deſign to abuſe the conſtable.

At Hertford, temp. Will. 3. ex inciſium. MS. Tracy, 53.

But if A. who began the riot or affray, had ſtill continued in it till it ended in the death of the conſtable; though he did not commit the fact, he would be a principal murderer.

Regina v. Wallis and others, O. B. 1703, cor. Holt C. J. et al. Juſt. Salk. 335.

Officers protected eundo, morando, et redeundo. Foſt. 308. 1 Hale, 464.

This protection of the law extends to its officers, not only while actually engaged in the execution of their office at the ſcene of action, but alſo *eundo, morando, et redeundo*. And therefore if one come to execute his office, and meeting with great oppoſition retire, and in the retreat be killed; this will be murder. And on the ſame principle, if he meet with oppoſition, and be killed before he come to the place; ſuch oppoſition being intended to prevent his doing his duty; this will alſo amount to murder; however

ever the homicide might otherwiſe have admitted of alleviation. Ch. V. § 63. *Protection of officers, &c.*

Caution neceſſary before officer kills another on reſiſtance. 1 Hale, 481. 489. 494. 2 Hale, 84. Goffe's caſe, 1 Vent. 216. MS. Tracy, 57. Poſt. f. 74.

But though it be not neceſſary that the officer ſhould retreat at all, yet he ought not to come to extremities upon every ſlight interruption, nor unleſs upon a reaſonable neceſſity, in order to execute his duty. And therefore where a collector having diſtrained for a duty laid hold of a maid-ſervant who ſtood at the door to prevent the diſtreſs being carried away, and beat her head and back ſeveral times againſt the door-poſt, of which ſhe died: although the court held her oppoſition to the officer to be a ſufficient provocation to extenuate the homicide; yet they were clearly of opinion that he was guilty of manſlaughter in ſo far exceeding the neceſſity of the caſe. And where no reſiſtance at all is made, and yet the officer kills, it will be murder. So if the officer kill the party after the reſiſtance be over, and the neceſſity has ceaſed, it is manſlaughter at leaſt; and if the blood had time to cool, it would, I conceive, be murder.

MS. Burnet, 37.

§ 64. *Aſſiſtants.* Foſt. 272. 309. 1 Hale, 461, 3.

Again, perſons coming in aid of officers in the execution of their duty, and every man lending his aſſiſtance to a conſervator of the peace in the preſervation thereof, or attending for that purpoſe whether commanded or not, and even private perſons under certain circumſtances interpoſing to prevent miſchief in caſe of an affray, or uſing their endeavours to bring felons or ſuch as have given a dangerous wound to juſtice, are under the ſame protection as are the ordinary miniſters of juſtice.

Vide ante, f. 59. Poſt. f. 71.

§ 65. *Diviſion of the ſubject. Powers and duties of officers in the ſeveral caſes.*

But in order to underſtand more thoroughly the powers and duties incident to the miniſters of juſtice, and thoſe who lend their aſſiſtance in the advancement of the laws in the ſeveral ſituations wherein they may be called upon to act, the ſubject may be conſidered in a three-fold point of view;

1. *Touching the arreſt of perſons.*

2. *Touching the ſafe cuſtody of perſons arreſted, and in confinement.*

3. *Touching the execution of criminals.*

1. *Touching*

Ch. V. § 66. *On arreſt for felony.*

I. *Touching Homicide on the Arreſt of Perſons.*

§ 66. *Arreſt. Introduction.*

The powers delegated by the law to its officers in this particular are proportioned to the urgency of the caſe; they are greater in caſes of felony than in matters of mere miſdemeanor; and leaſt of all in civil ſuits. It will be proper therefore to take ſeparate notice of each: after which I ſhall touch, fourthly, upon the peculiar caſe of preſſing. I ſhall then have occaſion to conſider, fifthly, how far the legality and formal execution of proceſs is material in any of thoſe caſes; and therein where doors may be broken open; and how far third perſons may avail themſelves of any defects in the proceſs or mode of executing the arreſt.

1. *Homicide happening in the arreſt of perſons upon a felony done or ſuppoſed.*

§ 67. *Arreſt on felony committed.*
1 Hale, 481. 489. 2 Hale, 75, 6. 91. 101, 2. Foſt. 271. 309. St. 9 Ann. c 16. 2 Hawk. ch. 28. ſ. 11. 2 Hawk. ch 12. ſ. 1. 4 Blac. Com. 180. 3 Inſt. 118. 220, 1. St. 3 H. 7. c. 1. Pult. de pace, 120. b. *Vide* Riot Act, poſt. p. 304.

If a felony be committed and the felon fly from juſtice, or a dangerous wound be given, it is the duty of every man to uſe his beſt endeavours for preventing an eſcape; and if in the purſuit the felon be killed, where he cannot be otherwiſe overtaken, the homicide is juſtifiable. This rule is not confined to thoſe who are preſent, ſo as to have ocular proof of the fact, or to thoſe who firſt come to the knowledge of it: for if in theſe caſes freſh ſuit be made, and *a fortiori* if hue and cry be levied, all who join in aid of thoſe who began the purſuit are under the ſame protection of the law. The ſame rule holds if a felon after arreſt break away as he is carrying to gaol, and his purſuers cannot retake without killing him. But if he may be taken in any caſe without ſuch ſeverity, it is at leaſt manſlaughter in him who kills him: and the jury ought to inquire, whether it were done of neceſſity or not.

Ante, f. 63. Foſt. 272.

Rex v. Jackſon and others, Newgate Lent Vac. 26 Car. 2. 1 Hale, 464.

On the other hand, if the felons reſiſt and kill any of the purſuers, it will be murder in all who take part in ſuch reſiſtance. Upon a robbery committed by ſeveral, the party robbed raiſed hue and cry, and the country purſued the robbers. One of them turned on the purſuers, the reſt being in the ſame field and having often reſiſted them; and the one refuſing to yield, killed one of the purſuers. It

Ch. V. § 67. *On arreſt for felony.*

It was ruled, 1ſt, that this was murder; becauſe the country upon hue and cry levied are authorized by law to purſue and apprehend the malefactors; and here was a felony committed, and that by the perſons purſued. 2dly, That although there were no warrant of a juſtice of peace to raiſe hue and cry, nor any conſtable in the purſuit, yet the hue and cry was a good warrant in law for the purſuers to apprehend the felons; and therefore the killing of any of the purſuers was murder. 3dly, That inaſmuch as all the robbers were of a company, and made a common reſiſtance, and ſo one animated the other, all thoſe who were of the company of the robbers in the ſame field, though at a diſtance from Jackſon who killed the purſuer, were principals. 4thly, That one of the malefactors having been apprehended and in cuſtody before the party was hurt was not guilty; unleſs it appeared, that after his apprehenſion he had animated Jackſon to commit the murder.

§ 68. *On purſuit of another by miſtake on felony committed.* Foſt. 318. 1 Hale, 490. 2 Hale, 78. 119.

Suppoſing a felony to have been actually committed, but not by the perſon ſuſpected and purſued, the law does not afford the ſame indemnity to ſuch as *of their own accord* engage in the purſuit, how probable ſoever the ſuſpicion may be: for an innocent perſon is not bound to take notice of a private man's ſuſpicion or authority. But in ſuch caſe the homicide by either party, whether in the flight or on reſiſtance, will amount to manſlaughter: the one not having uſed due diligence to be apprized of the truth of the fact; the other not having ſubmitted himſelf to juſtice; ſince if his caſe would bear it he might have reſorted to his ordinary remedy for the falſe impriſonment.

Vide Levet's caſe, ante, p. 274.

It ſeems that the ſame rule would govern the caſe of ſuch as purſue of their own accord upon miſtaken information that a felony had been committed; but clearly not if it were urged as a pretence.

Arreſt upon authority by miſtake. Foſt. 318. 1 Hale, 489, 490. 1 Hawk. ch. 28. ſ. 12. 2 Hawk. ch. 12. ſ. 16, 17. ch. 13. ſ. 11. 3 Inſt. 118. 4 Inſt. 177.

But if a peace-officer, or indeed any other perſon ſpecially delegated, have a warrant (*a*) from a proper magiſtrate for the apprehending of B. *by name*, upon a charge of felony;

(*a*) And by ſtat. 22 G. 2. c. 44. ſ. 6. if the warrant be formal in the frame of it the officer executing it miniſterially is indemnified, though the magiſtrate iſſuing it exceed his juriſdiction.

or

Ch. V. § 68. *On arreſt for felony.*

or if B. ſtand indicted for felony; or if the hue and cry be duly levied againſt B. *by name*; or if he eſcape after having been legally arreſted (and laying hold of the priſoner and pronouncing words of arreſt is an actual arreſt; and indeed without actually laying hold of him, if he had before ſubmitted to the arreſt): in theſe caſes if B. though innocent fly, or turn and reſiſt, and in the purſuit or ſtruggle be killed by ſuch peace-officer or ſpecial bailiff, or his aſſiſtants, or by any perſon joining in the hue and cry; the perſon ſo killing will be indemnified. For theſe perſons were, in the ſeveral inſtances put, in the diſcharge of a duty required from them by law, and ſubject to puniſhment in caſe of a wilful neglect of it. As on the other hand, if any of theſe be killed by B. it will be murder in him and any of his accomplices joining in that outrage.

(Genner v. Sparks, Salk. 79. 6 Mod. 173. Cole v. Cameron, M. 22 Geo. 3. B. R.)

Ante, f. 67.

2 Hale, 84, 5. *Sed vide* 1 Hale, 489, 490.

Lord Hale indeed thinks that what has been ſaid above with reſpect to the arreſt of perſons ſtanding indicted for felony, againſt whom no warrant can be produced at the time, muſt be underſtood of arreſts by officers who are ſuch *virtute officii*, and have ſuch a ſpecial duty impoſed upon them; and does not extend to arreſts by private perſons of their own authority. Hawkins, who alludes to the ſame power of arreſt by officers in this inſtance, alleges this reaſon for it; becauſe there is a charge againſt the party on record. If this were all, it would not readily occur why officers only could take notice of a charge on record. But the diſtinctions I have before noticed between officers and private perſons are founded on this principle, to diſcourage perſons from proceeding to extremities upon their own private ſuſpicion or authority. On which account a private man is not bound to act in this caſe as in ſome others which have been mentioned; and therefore the law does not hold out the ſame indemnity to him; but his entire juſtification muſt depend upon the fact of the party's guilt, which at his peril he muſt make out, otherwiſe he will at leaſt be guilty of manſlaughter. Whereas conſtables and other peace-officers are *ex officio* not merely permitted but enjoined by law to arreſt the parties, as well on probable ſuſpicion of felony, as in caſe of felony actually committed: and this is a ſuſpicion grounded on the higheſt authority, namely,

1 Hawk. ch. 28. ſ. 22.

2 Hale, 83. 92.

2 Hale, 85. 87. 91. 3.

Ch. V. § 68. *On arreſt for felony.*

namely, the finding of the fact by the grand inqueſt on oath. Still however it may be urged that if the fact of ſuch indictment found againſt the party be known to thoſe who endeavour to arreſt him in order to bring him to juſtice, it cannot be truly ſaid that they act upon their own private ſuſpicion or authority, and therefore they ought to have equal protection with the ordinary miniſters of the law. At any rate, it is a good cauſe of arreſt by private perſons, if it may be made without the death of the felon. And if the fact of his guilt be neceſſary for their complete juſtification, I conceive that the bill of indictment found by the grand jury would for that purpoſe be *primâ facie* evidence of the fact, till the contrary were proved.

Dalt. ch. 170. ſ. 5.

§ 69. *Conſtable acting on information of private perſon.*

If a private perſon ſuſpect another of felony, and lay ſuch ground of ſuſpicion before a conſtable, and require his aſſiſtance to take him, the conſtable may juſtify killing the party if he fly, though in truth he were innocent. But in ſuch caſe, where no hue and cry is levied, certain precautions muſt be obſerved: 1. The party ſuſpecting ought to be preſent; for the juſtification is that the conſtable did aid him in taking the party ſuſpected. 2. The conſtable ought to be informed of the grounds of ſuſpicion, that he may judge of the reaſonableneſs of it. From whence it ſhould ſeem that there ought to be a reaſonable ground ſhewn for it: otherwiſe it would be immaterial whether ſuch information were given to the conſtable or not, as to the point of his juſtification. And it was formerly ſuppoſed to be neceſſary that there ſhould have been a felony committed in fact, of which the conſtable muſt have been aſcertained at his peril. But in *Samuel* v. *Payne* and others, it was determined that a peace-officer might juſtify an arreſt on a charge of felony on reaſonable ſuſpicion, without a warrant; although it ſhould afterwards appear that no felony had been committed; but that a private individual in ſuch a caſe could not. The reaſon of this is apparent; for if, as Lord Hale obſerves in one place, the conſtable cannot judge whether the party be guilty or not till he come to his trial, which cannot be till he be apprehended; (which he thinks a ſufficient reaſon for juſtifying him in killing the party accuſed, if

2 Hale, 79, 80. 91, 2, 3. 3 Inſt. 221. Sum. 36, 7. Ledwith v. Catchpole, E. 23 G. 3. Cald. 291. 11 St. Tr. 321.

Samuel v. Payne, Doug. 359. 1 MS. Sum. 92.

2 Hale, 93. and *vide* ib. 84. 89.

Ch. V. § 69. *On arreſt for felony.*

if he fly from the arreſt and cannot otherwiſe be overtaken, however innocent he may afterwards appear to have been;) ſo it muſt be equally impoſſible for the conſtable to aſcertain whether a felony were actually committed or not: but in moſt caſes he muſt take both the one and the other upon the credit of the party who lays the charge before him. Therefore all that can in reaſon be required of him is that he ſhould inform himſelf as well as he can of the circumſtances; and that the relation of the party ſhould appear credible. And it is the duty of all perſons to ſubmit themſelves to the known officers of the law.

Under what circumſtances doors may be legally broken open in the ſeveral caſes of felony done or ſuppoſed, in miſdemeanors, and in civil ſuits, will be ſhewn at large hereafter.

Poſt. f. 87.

2. *As to arreſts in caſes of miſdemeanor and breach of the peace.*

§ 70. *On arreſt for miſdemeanors.* Poſt. 271. 1 Hale, 53. 481. 495, 6. 2 Hale, 117. 1 MS. Sum. 143.

It is not lawful to kill the party accuſed if he fly from the arreſt, though he cannot otherwiſe be overtaken, and though there be a warrant to apprehend him; and generally ſpeaking it will be murder; but under circumſtances it may amount only to manſlaughter, if it appear that death was not intended. But, as in caſe of felony, ſo here, if the officer meet with reſiſtance and kill the offender in the ſtruggle, he will be juſtified; and if he be killed, it will be murder. And he is bound at common law and by the ſtat. 17 Ric. 2. c. 8. to ſuppreſs all riots, and is puniſhable if he neglect it. In ſome inſtances however of flight in caſes of flagrant miſdemeanors, ſuch as the one before mentioned of a dangerous wound given, and ſome others which will be remarked, the ſame extremity may be reſorted to if the party cannot be otherwiſe overtaken: but this is founded upon a preſumption that the offence may turn out to be felony. The like ſeverity is juſtifiable againſt treſpaſſers come to hunt in legal foreſts, parks, chaſes, or warrens, who will not ſurrender themſelves on demand to the keepers; but fly, and cannot otherwiſe be overtaken: and if the keeper be killed it is murder.

On a dangerous wound given. Ante, f. 67. 3 H. 7. c 1.

Treſpaſſers in foreſts. St. de Maleſ. in Parc. 21 E. 1. ſt. 2. 3 & 4 W. & M. c. 10. ſ. 5. 1 Hale, 491. 1 Hawk. ch. 28. ſ. 15. 9 St. Tr. 315. 4 Blac. Com. 180. Ante, f. 31. Comyn. Rep. 16. 2 Roll. 120. Palm. 546.

It

Ch. V. § 70. *On arreſt for miſdemeanor.*

It is ſaid by Hawkins and others, that every private perſon may by the common law arreſt any ſuſpicious night-walker, and detain him till he give a good account of himſelf. Lord Hale carries the matter ſomewhat farther, and ſays, that if peace-officers meet with night-walkers or perſons unduly armed, whom by ſtat. 2 Ed. 3. c. 3. and 5 Ed. 3. c. 14. they are required to apprehend till morning that they may be examined, and who will not yield themſelves, but reſiſt or fly before they are apprehended, and they are upon neceſſity ſlain, becauſe they cannot be otherwiſe overtaken; it is no felony in the officers or their aſſiſtants; though the parties killed were innocent. But unleſs there were a reaſonable ſuſpicion of felony, in ſuch a caſe, it may be a matter of doubt at this day whether ſo great a degree of ſeverity would be either juſtifiable or neceſſary, eſpecially in the caſe of bare flight. Both thoſe ſtatutes were levelled againſt particular deſcriptions of offenders who roved about the country in bodies in a daring manner. In Tooley's caſe it was conſidered, that the taking up of a perſon in the night as a night-walker and diſorderly perſon, though by a lawful officer, would be illegal, if the perſon ſo arreſted were innocent, and there were no reaſonable grounds of ſuſpicion to miſlead the officer. And in a MS. note of that caſe given by the editor of Lord Hale, Lord Holt is made to ſay, that of late conſtables had made a practice of taking up people only for walking the ſtreets; but he knew not whence they had ſuch an authority. But it has been holden that one may be indicted for being a common night-walker, as for a miſdemeanor.

Night-walkers. 2 Hawk. ch. 13. ſ. 6. ch. 8. ſ. 38. *vide* 2 Inſt. 52. 1 Roll. Rep. 237. Latch. 173. Poph. 208. 9 Co. 68 b. 2 Hale, 85. 97.

Tooley's caſe, 2 Ld. Ray. 1302. Poſt. f. 89.

2 Hale, 89. (n *f*).

Latch. 173. Poph. 208. 2 Hawk. ch. 8. ſ. 38.

§ 71. *Breaches of the peace in view of the conſtable or party interpoſing;*

A conſtable or other known conſervator of the peace may lawfully interpoſe upon his own view to prevent a breach of the peace, or to quiet an affray; and if he or any of his aſſiſtants, whether commanded or not, be killed, it will be murder in all who take part in the reſiſtance; there being either implied or expreſs notification of the character in which he interpoſed. What will amount to implied legal notification will be ſeen hereafter.

1 Hale, 463. 1 Hawk. ch. 31. ſ. 44. Poſt. 310, 311. Kel. 66. Poſt. f. 81.

But

Ch. V. § 71. *On arreſt for miſdemeanor.*

Foſt. 272. 311. Kel. 66. 115. 1 Hawk. ch. 31. ſ. 45. 2 Inſt. 52. Stamf. 13.

But private perſons interpoſing in the caſe of ſudden affrays, to part the combatants or prevent miſchief, muſt undoubtedly give expreſs notice of their friendly intent: after which ſhould they be aſſaulted by either of the combatants, and in the ſtruggle ſhould happen to kill him, this will be juſtifiable homicide. But if the party ſo interpoſing with ſuch notice ſhould be killed by either of the affrayers, it will be murder in the perſon ſo killing; but not in the other, unleſs he had alſo ſtruck him.

1 Hale, 442.

1 Hale, 53. 494, 495. MS. Tracy, 36.

2 Hawk. ch. 28. ſ. 14.

In the caſe of a riot or rebellious aſſembly the peace-officers and their aſſiſtants, endeavouring to diſperſe the mob, are juſtified both at common law and by the riot act 1 Geo. 1. c. 5. in proceeding to the laſt extremity in caſe the riot cannot otherwiſe be ſuppreſſed. And Hawkins ſeems to think that this power extends alſo to private perſons acting of their own accord, if they cannot otherwiſe quell the riot; upon the ground that it is every man's duty to interfere for the preſervation of the peace, and to

Poph. 121.

arm himſelf for that purpoſe. And this was ſo reſolved by all the judges in Eaſter term, 39 Eliz.; though they thought it more diſcreet for every one in ſuch a caſe to attend and aſſiſt the king's officers in ſo doing.

Peace-officers taking oppoſite parts. 1 Hale, 460.

But where two conſtables took oppoſite parties in an affray, and one of them was killed; this was ruled to be only manſlaughter; notwithſtanding each had enjoined the other party to deſiſt: and it was not murder, ſays Lord Hale, inaſmuch as each had as much authority as the other. Perhaps it had been better expreſſed to have ſaid, that inaſmuch as they acted not ſo much with a view to keep the peace as in the nature of partiſans to the different parties, they acted altogether out of the ſcope of their characters as peace-officers, and without any authority whatever. For if one having a competent authority iſſue a lawful command, it is not in the power of any other, having an equal authority in the ſame reſpect, to iſſue a command contrary to the firſt; for that would be to legalize

Ibid.

confuſion and diſorder. And therefore, ſays Lord Hale, if the ſheriff having a writ of poſſeſſion againſt the houſe and lands of A.; and A. pretending it to be a riot upon him, gain

gain the conſtable of the vill to aſſiſt him, and to ſuppreſs the ſheriff or his bailiff; and in the conflict the conſtable be killed; this is not ſo much as manſlaughter: but if any of the ſheriff's officers be killed, it is murder; becauſe the conſtable had no authority to encounter the ſheriff's proceeding or acting by virtue of the king's writ.

Ch. V. § 71. *On arreſt for miſdemeanor.*

Upon theſe principles a caſe was ruled by Mr. Juſtice Heath upon an indictment for an aſſault and reſcue; where the ſheriff's officers having apprehended a man by virtue of a writ againſt him, a mob collected and endeavoured by violence to reſcue the priſoner. In the courſe of the ſcuffle, which was at ten o'clock at night, one of the bailiffs having been violently aſſaulted ſtruck one of the aſſailants, a woman, and as it was thought for ſome time had killed her: whereupon and before her recovery was aſcertained the conſtable was ſent for, and charged with the cuſtody of the bailiff who had ſtruck the woman. The bailiffs on the other hand gave the conſtable notice of their authority, and repreſented the violence which had been previouſly offered to them; notwithſtanding which he proceeded to take them into cuſtody upon the charge of murder, and at firſt offered to take care alſo of their priſoner; but the latter was ſoon reſcued from them by the ſurrounding mob. And the woman having recovered, the bailiffs were releaſed by the conſtable the next morning. Heath J. was clearly of opinion, that the conſtable and his aſſiſtants were guilty of the aſſault and reſcue, and directed the jury accordingly (*a*).

Exeter Sum. Aſſ. 1795.

§ 72. *Arreſt by conſtable for breach of peace out of his view.*

It has been often in queſtion how far a conſtable, or other peace officer, is warranted in arreſting one upon a charge by another of a mere breach of the peace after the affray is ended and the peace reſtored, without a ſpecial warrant from a magiſtrate. The better opinion however ſeems to be that he hath no ſuch authority. Certainly not, as for the purpoſe of impriſoning or compelling the party to find

2 Inſt. 52. 2 Hawk. ch. 12. ſ. 20. and ch 13. ſ. 8. 2 Ld. Ray. 1501. Strickland v. Bell, Dalt. ch. 2. ſ. 7.

Maidſtone Sum. Aſſ. 1787, cor. Gould J. MS Skarret's caſe, T. 35 Eliz.

(*a*) The jury however acquitted the defendants.

Ch. V. § 72. *On arreſt for miſdemeanor.*

ſureties (*a*). Yet Lord Hale (*b*), and ſome later authorities, have holden that he may arreſt the party upon the charge of another, though the affray be over, for the purpoſe of bringing him before a juſtice to find ſureties or for appearance. But where time and circumſtances will admit of it, the better way is to apply to a magiſtrate for a warrant. It ſeems clear however that if one menace another to kill him, upon complaint thereof to the conſtable forthwith, he may, in order to avoid the preſent danger, arreſt the party and detain him till he can conveniently bring him to a juſtice of the peace. But this power is grounded on the duty of the officer to prevent a probable felony, and muſt be governed by the ſame rules which apply to that caſe; though Dalton extends it even to the prevention of a battery.

2 Hale, 88.

Dalt. ch. 116. f. 3.

§ 73. *Arreſt on proceſs.* Foſt. 311. Poſt. f. 78. 80, 81.

In the caſe of arreſts upon proceſs, whether by writ or warrant, if the officer named in the proceſs give notice of his authority, and reſiſtance be made, and he be killed; it will be murder; if in fact ſuch notification were true, and the proceſs legal; for after ſuch notification the parties oppoſing the arreſt acted at their own peril.

3. *As to Arreſts in civil Suits.*

§ 74. *Arreſt in civil ſuits.* 1 Hale, 481. 1 Hawk. ch. 28. ſ. 18. 20. Foſt. 271. 1 MS. Sum. 143.

In civil ſuits, if the party againſt whom the proceſs has iſſued fly from the officer endeavouring to arreſt him, and be killed by him in the purſuit, Lord Hale thinks it is murder: but Mr. Juſtice Foſter ſays it will be murder or manſlaughter as circumſtances vary the caſe. For if the officer in the heat of the purſuit, and merely in order to overtake the defendant, ſhould trip up his heels or give him a ſtroke with an ordinary cudgel or other weapon *not likely to kill*, and death ſhould unhappily enſue; this will not amount to more than manſlaughter. The blood was heated in the purſuit, and no ſignal miſchief intended. But if he made uſe of a deadly weapon, it will amount to murder. The miſchievous vindictive ſpirit determines the nature of the offence. I

(*a*) Yet Lord Coke ſays (4 Inſt. 265.) that a conſtable may take ſurety of the peace by obligation.

(*b*) 2 Hale, 90. Handcock v. Sandham and others, Sittings after Hil. 1785, at Weſtm. cor. Ld. Mansfield. And Williams v. Dempſey, Guildh. Sitt. after Mich. 1787. cor. Buller J. MS.

doubt

Ch. V. § 74. *Arreſt in civil ſuits.*

doubt whether Lord Hale, or any of the writers on the ſame ſubject, meant to carry the doctrine further; though they may not have expreſſed themſelves ſo guardedly as Mr. Juſtice Foſter has done. It rather ſeems that Lord Hale intended only to ſpeak of the officer's intentionally killing the defendant in his flight, not being able to overtake him. The caſe of a defendant flying after an arreſt actually made, or out of cuſtody in execution for debt, ſeems alſo to be governed by the ſame rules. But certainly, in caſe of reſiſtance made, the perſon having authority to arreſt may repel force with force, and need not give back; and if death unavoidably enſue in the ſtruggle, he will be juſtified: as on the other hand the killing him will be murder: and the caſe in Rolle, where the officer was holden guilty of manſlaughter, becauſe in ſuch caſe he had not firſt given back as far as he could before he killed the party who had eſcaped out of cuſtody in execution for a debt, and reſiſted being retaken, ſeems to ſtand alone, and has been diſapproved of. In all theſe caſes, however, the party muſt have ſome notification of the officer's buſineſs.

Vide 1 Roll R. 18).

Foſt 270, 1. 1 Hale, 481. 4 Inſt. 52. 2 Hawk. ch. 23. ſ. 17. 18. Ante, f. 63.

1 Roll. Rep 139. *Vide* ante, f. 63.

But no private perſon can of his own authority arreſt in civil ſuits.

1 Hawk. ch. 28. ſ. 19.

4. *Preſſing.*

§ 75. *Preſſing.* See the argument of Mr. Fuller when Recorder of [illegible] in the caſe of Alexander Broadley, Foſt 154. 1 Hawk. ch. 22. ſ. 2. Ex parte Sofely, Eaſt's Rep. 393. 1 Eaſt's Rep. 106. 1 Ed. 3. c. 5. 11 H. 7. c. 1. 16 & 17 Car. 1. c. 23. Dixon's caſe, poſt. f. 80. Poſt. f. 76. 79.

There are yet two other occaſions wherein the arreſt and detention of perſons of a particular deſcription may be juſtified for the ſafety of the ſtate; one of theſe is in the caſe of mariners, who are legally impreſſed to ſerve on board his majeſty's ſhips of war: and the other in caſe of danger from invaſion or inſurrection, when the crown has a right to require the perſonal ſervice of every man capable of bearing arms. Of the former right, which is and always has been in common exerciſe, it is to be obſerved; 1. That the right of impreſſing for the ſea ſervice is confined to mariners (*a*). 2. There muſt be a legal warrant. 3. It muſt, as in other caſes, be executed by a proper officer. The two laſt points will be conſidered in their proper places.

(*a*) The preſs-warrant, as appears by Rex v. Sofely, 1 Eaſt's Rep. 466. extends in terms to "ſeamen, ſeafaring men, and others whoſe occupations and callings are "to work in veſſels and boats upon rivers." And ſee there the conſtruction put upon theſe words.

Ch. V. § 75. *On preſſing.*

If there be a proper officer with a legal warrant to impreſs, and the party endeavoured to be taken, being a fit object of that ſervice, refuſe to ſubmit, and reſiſt, and kill the officer or any of his aſſiſtants, they doing no more than is neceſſary to impreſs the mariner, and overcome the reſiſtance; it follows by every legal analogy that ſuch a caſe would amount to murder. On the other hand, if the party attempted to be preſſed be killed in ſuch ſtruggle it ſeems juſtifiable, provided the reſiſtance could not otherwiſe be overcome; and the officer need not give way, but may freely repel force by force. And if the right of preſſing do not ſtand on this firm foot, it were better abandoned altogether, than by putting officers on performing a ſervice to which an oppoſition is partially encouraged, thereby to promote bloodſhed and diſorder inſtead of duty and ſubmiſſion to the law. But in caſe the party fly, the killing by the officer in the purſuit to overtake him would be manſlaughter at leaſt, and in ſome caſes murder, according to the rules which govern the caſe of miſdemeanors; paying attention nevertheleſs to thoſe uſages which have prevailed in the ſea ſervice in this reſpect, ſo far as they are authoriſed by the Courts which have ordinary juriſdiction over ſuch matters, and are not expreſsly repugnant to the laws of the land.

Ante, p. 302. 307.

Poſt. p. 312.

Rex v. Phillips, Cowp. 832.

An officer in the impreſs ſervice put one of his ſeamen on board a boat belonging to one William Collyer, a fiſherman, with intent to bring it under the ſtern of another veſſel in order to ſee if there were any fit objects for the impreſs ſervice on board. The boat ſteered away in another direction; and the officer purſued in another veſſel for three hours, firing ſeveral ſhots at her with a muſket loaded with ball *for the purpoſe of hitting the hallyards and bringing the boat-to*, which was found to be the uſual way; one of which ſhots unfortunately killed Collyer. The Court ſaid it was impoſſible for it to be more than manſlaughter. This I preſume was on the ground that the muſquet was not levelled at the deceaſed, nor any bodily hurt intended to him. But inaſmuch as ſuch an act was calculated to breed danger, and not warranted by law, though no bodily hurt were intended, it was manſlaughter; and the defendant was burned in the hand.

5. Next

Ch. V. § 76. *Legality of proceſs, and formality of the arreſt.*

5. Next comes under conſideration *how far the legality of proceſs or formality in the manner of making the arreſt may be material upon queſtions of homicide on arreſts*: and herein ſeveral matters are to be attended to.

§ 76.

Ante, f. 66. 73. 1 MS. Sum. 163.

1. That the Court or perſon from whom the proceſs iſſues has a competent juriſdiction and authority. 2. That the proceſs itſelf, be it by writ or warrant, be ſo far legal that it be not defective in the frame of it. 3. That the party executing the proceſs or making an arreſt virtute officii, be a lawful officer for that purpoſe, or an aſſiſtant to ſuch; and that there be due notification thereof. 4. That the proceſs be executed or arreſt made duly and according to law; and herein, where doors may be broken open. 5. How far a defect in any of theſe particulars may be urged by a third perſon who officiouſly interferes to prevent the arreſt.

§ 77.

Juriſdiction legal. Simſon's caſe, 4 Inſt. 355. 1 MS Sum. 163. Foſt. 311. 9 Co. 68.

1. Lord Coke ſays, that a conſtable endeavouring to arreſt by warrant from the High Commiſſion Court being killed in the attempt, 'it was only ſe defendendo in the party; for the conſtable had no lawful authority. But this has been doubted by good advice; and it has been thought with more propriety that it would be manſlaughter; becauſe there was no neceſſity for recurring to ſuch an extremity. And this ſeems to be now ſufficiently eſtabliſhed by Withers's caſe before mentioned. The warrant in truth makes no difference on ſuch an occaſion; but the caſe ſhould be judged upon its own merits, independent of that fact.

White Cook's caſe, p. 3.

Withers's caſe, ante, p. 307. MS. Tr.

By the ſtat. 24 Geo. 2. c. 44. ſ. 6. If the warrant be regular in the frame of it, the officer executing it miniſterially is indemnified againſt any action for damages by the party injured; though the magiſtrate by whom it was iſſued exceeded his juriſdiction.

24 Geo. 2. c. 44. *Proceedings againſt officers executing illegal warrants*

§ 78.

Proceſs legal in its frame. 1 MS. Sum. 163. Foſt. 311. 1 Hale, 459. 1 Hawk. P. C. c. 28. ſ. 18. 9 Co. 68.

2. It is ſufficient if the proceſs itſelf be legal in the frame of it, and iſſue in the ordinary courſe of juſtice from a court or perſon having juriſdiction in the caſe. No error or irregularity in the previous proceeding will affect it, or excuſe the party killing the officer in the execution of it from the guilt of murder. And therefore if a capias ad ſatisfaciendum, fieri facias, writ of aſſiſtance, or any other writ of the like

Ch. V. § 78. *Legality of proceſs and arreſt.*

like kind, iſſue directed to the ſheriff, and he or any of his officers be killed in the execution of it; upon an indictment for this murder it is only neceſſary to produce the writ or warrant, without ſhewing the judgment or decree: for however erroneouſly the proceſs iſſued, the ſheriff muſt obey, and is juſtified by it. And ſo it was ruled by Lord Hardwicke in the caſe of Rogers. So though the cauſe be not expreſſed with ſufficient particularity, the officer is juſtified if enough appear to ſhew that the magiſtrate had juriſdiction over the ſubject matter. This muſt however be underſtood of a warrant containing all the eſſential requiſites of one.

R. v. Rogers, Cornwall Sum. Aſſ. 1735. 1 MS. Sum 164. 1 Hale, 460.

Falſity of charge immaterial. 1 MS. Sum. 164.

In all kinds of proceſs both civil and criminal, the falſity of the charge contained in ſuch proceſs, that is, the real injuſtice of the demand in the one caſe, or the party's innocence in the other, will afford no matter of alleviation for killing the officer: for every man is bound to ſubmit himſelf to the regular courſe of juſtice. And therefore where an eſcape warrant had been obtained improperly and by perjury, it varied not the offence of him who killed the officer in attempting to execute it. But if the proceſs be defective in the frame of it; as if there be a miſtake in the name, or addition of the party; or if the name of the party or of the officer be inſerted without authority, and after the iſſuing of the proceſs; and the officer in attempting to execute it be killed; this is only manſlaughter in the party whoſe liberty is invaded.

Curtis's caſe, Foſt. 135.

Foſt. 312. 1 Hale, 457. Cro. Car. 371. W. Jones, 346.

R. v. Stockley, 1772. Serjt. Foſter's MS. 1 Hale, 457.

The priſoner Stockley, about Lady-day 1753, had been arreſted by Welch the deceaſed, at the ſuit of one Bourn, but was reſcued; and afterwards declared, that if Welch offered to arreſt him again he would ſhoot him. A writ of reſcue was made out at the ſuit of Bourn, and carried to the office of Mr. Deacle, who acted for the under-ſheriff of Staffordſhire, to have warrants made out on the ſame. The under-ſheriff's cuſtom was to deliver to Deacle ſometimes blank warrants, ſometimes blank pieces of paper under the ſeal of the office, to be afterwards filled up as occaſion required. Deacle made out a warrant againſt Stockley upon one of theſe blank pieces of paper, and delivered it to Welch, who inſerted therein the names of Thomas Clewes and William Davil on the 12th of July 1753. On the 19th of September

tember following Welch, Davil, Clewes, and Howard to whom Stockley had declared he would ſhoot Welch, went to arreſt Stockley on this warrant. Clewes and Davil having the warrant went into the priſoner's houſe firſt, and called for refreſhment; but an alarm being given that Welch was coming, the door was locked: upon which Clewes arreſted the priſoner on this illegal warrant; who thereupon fell upon Clewes, and thruſt him out of doors, but kept Davil within, and beat him very dangerouſly, he crying out murder. On hearing this Welch and Howard endeavoured to get into the houſe, and Welch broke open the window, and had got one leg in, when Stockley ſhot and killed him. The priſoner abſconded, and was not apprehended till December 1771. He was tried at the Lent aſſizes following for murder, when the jury found expreſsly that the deceaſed attempted to get into the houſe to aſſiſt in the arreſt of Stockley. Howard, Clewes, and Davil, being dead, their depoſitions before the coroner were read; and minutes were taken of the above facts for a ſpecial verdict; but to ſave expence they were referred to the judges of B. R. (but not argued;) who certified that the offence amounted in point of law only to manſlaughter. The priſoner was thereupon branded and impriſoned nine months.

Ch. V. § 78. *Legality of proceſs and arreſt.*

Blank warrants illegal.

The practice of iſſuing blank warrants, which occurred in the above caſe, has been very general, and is highly reprehenſible. To ſay the leaſt of it, it withdraws from the miniſters of juſtice that protection which the law when properly executed was meant to afford them; and thereby holds out a temptation to future reſiſtance. Upon the occaſion juſt mentioned it ſerved as a cloak to ſcreen a deſperate and atrocious offender from the puniſhment which he ſo well merited. It is true, that his ignorance of the defect in the warrant at the time did not vary the caſe in ſtrictneſs of law: but there was this additional circumſtance in his caſe which may deſerve to be well weighed, that he had before deliberately reſolved upon ſhooting Welch in caſe he offered to arreſt him again, which in all probability it might be his duty to do. This was relied on by ſome of the judges in Curtis's caſe, as indicative of premeditated malice and cruelty, and therefore ſufficient of itſelf to warrant a con-

Vide Curtis's caſe, Foſt. 137, 8. ante 310.

Ch. V. § 78. *Legality of proceſs and arreſt.*

viction for murder, independant of the legality of the warrant, which was there however holden to be legal. The practice I have alluded to was lately reprobated in a caſe of a ſimilar nature; where the ſheriff having directed a warrant to A., by name, and all his other officers; B.'s name (another of the ſheriff's officers) was inſerted after the warrant was ſigned and ſealed by the ſheriff; and therefore an arreſt by B. was holden illegal.

ouſin v. Bar- 2 W. Bl. 35 G. 3. 1 Term Rep. 122. poſt.

§ 79. *Free warrants. Vid* Foſt. 154. &c. ante, f. 75.

With regard to preſs-warrants, they have in modern times been iſſued from the board of Admiralty, grounded upon an order of his Majeſty in council; and are directed to ſome one particular officer, who is therein directed not to intruſt any perſon with the execution of it but a commiſſioned officer, whoſe name and office ſhall be inſerted on the back of the warrant.

§ 80. *Arreſt by a legal officer.* Sum. 169. 1 Hale, 457. 459. Ante. f. 76. Gordon's caſe, Foſt. f. 81.

3. The party taking upon him to execute proceſs, whether by writ or warrant, muſt be a legal officer for that purpoſe, or an aſſiſtant to ſuch, and he muſt give due notification of his buſineſs. If he be a conſtable or other known officer de facto, acting within his diſtrict, it is ſufficient without proving his appointment and ſwearing in. If an officer make an arreſt out of his proper diſtrict, or have no warrant or authority at all; as if his name be inſerted after the iſſuing of the writ or proceſs without lawful authority; he is no legal officer, nor entitled to the ſpecial protection of the law: and therefore if he be killed by the party injured in the ſtruggle, it is only manſlaughter. On the other hand, if the ſuppoſed officer purpoſely kill the other party for not ſubmitting himſelf to ſuch illegal arreſt, it will generally ſpeaking be murder: that is, in all caſes at leaſt where an indifferent perſon acting in the like manner without any ſuch pretence would be guilty to that extent.

O. B. 12 Oct. 1670, Rookeby's MS. cited in Serjt. Foſter's MS.

Thus a warrant having been directed from the Admiralty to Lord Danby to impreſs ſeamen, one Browning his ſervant, *without any warrant in writing*, impreſſed one who was no ſeaman, who trying to eſcape was killed by Browning: adjudged murder.

So

Ch. V. § 80. *Arreſt by a legal officer.*

So in Walter Dixon's caſe, the captain of the Royal Sovereign man of war had a warrant for impreſſing mariners, upon which a deputation was indorſed in the uſual form to one Stafford, a lieutenant. The mate of the Royal Sovereign, together with the priſoner Dixon and ſome others, but without either the captain or lieutenant, impreſſed one Anthony How, who never was a mariner, but was ſervant to a tobacconiſt. How made ſome reſiſtance, and for that purpoſe drew a knife which he held in his hand; whereupon Dixon with a large walking-ſtick, about four feet long and a great knob at the end of it, gave How a violent blow on the ſide of his head, of which he died in about fourteen days. This was adjudged murder: for in this caſe the capture and detention of How were unlawful on two accounts; firſt, becauſe neither the captain or lieutenant were preſent, and Dixon was no lawful officer for that purpoſe, or aſſiſtant to ſuch. Secondly, becauſe How was not a proper object to be impreſſed. Under theſe circumſtances it was lawful for How to defend himſelf; and Dixon's killing him in conſequence of an unlawful capture and detention was murder.

Dixon's caſe, Kingſton Aſſ. 1756, cor Denniſon, J. 1 MS. Sum. 170. [ſaid to be 1758, in Serjt. Foſter's MS.]

In Borthwick's caſe, where a preſs warrant had been directed to lieutenant William Palmer, enjoining all mayors, &c. to aid and aſſiſt him, *and thoſe employed by him* in the execution thereof; and he had given *verbal* orders to the defendant and ſeveral others to impreſs certain ſeafaring men of whom he had received intelligence: ſuch delegation was holden to be clearly bad; and the execution of the warrant by the priſoners, Palmer not being there, illegal. In that caſe it was expreſsly found to be the conſtant uſage and invariable cuſtom of the navy for all commiſſioned officers having in their cuſtody ſuch preſs warrants to give verbal orders to ſuch petty officers (of whom there was one amongſt the priſoners in this caſe) whom they may think fit to employ upon the impreſs ſervice; and that ſuch petty officers uſually act without any other authority than ſuch verbal orders. No ſtreſs however could be laid on an uſage directly repugnant to the laws of the land.

Borthwick's caſe, Dougl. 207.

Ante, 308.

In Alexander Broadfoot's caſe before mentioned, the lieutenant of the preſs-gang, to whom the execution of it was properly deputed, having remained in King Road in the port

Broadfoot's caſe, 1743, Foſt. 154. ante,

Ch. V. § 80. *Arreſt by a legal officer.*

port of Briſtol while his boat's crew went ſome leagues down the channel in the boat by his directions to preſs ſeamen; and in the furtherance of that ſervice one of the preſs-gang being killed by a mariner on board a veſſel which they boarded with intent to preſs thoſe whom they found there, though before any perſonal violence offered by the preſs-gang; it was holden to be only manſlaughter. But if a warrant be directed to ſeveral, any of them may execute it.

1 Hale, 459.

Officer acting out of his juriſdiction. 1 Hale, 458, 9. ante, f. 51. 55.

In like manner, if proceſs be executed out of the juriſdiction of the court from whence it iſſues, the killing the officer attempting to enforce the execution of it upon the party would be only manſlaughter. But if the proceſs be directed to a particular conſtable by name, or even by his name of office, and he execute it within the juriſdiction of the court or magiſtrate iſſuing the ſame, although it be out of the conſtable's vill, that will be ſufficient.

2 Hawk. ch. 13. f. 27. 30. *Vide* Tooley's caſe, poſt. f. 89.

§ 81. *Due notice to the parties.* Ante, f. 71. 80.

But further, the parties upon whom proceſs is to be executed muſt have due notice of the officer's buſineſs, in order to make their reſiſtance in the higheſt degree criminal. And unleſs there be ſome notification to them in one or other of the ways after mentioned, the killing of the officer upon reſiſtance made againſt the arreſt will not be murder. Thus where a bailiff puſhed abruptly and violently into a gentleman's chamber early in the morning in order to arreſt him, but not telling his buſineſs or uſing words of arreſt; and the party not knowing that the other was an officer, in the firſt ſurprize ſnatched down a ſword which hung in his room and killed the bailiff, this was ruled to be manſlaughter.

1 Hale, 470; O. B. 1657; Foſt. 298. ante, f. 46.

Foſt. 310, 311. 1 Hale, 460, 1, 2. Kel. 66. 115.

With regard to ſuch miniſters of juſtice who in right of their offices are conſervators of the peace, and in that right alone interpoſe in the caſe of riots and affrays, it is neceſſary in order to make the offence of killing them amount to murder, that the parties concerned ſhould have ſome notice of the intent with which they interpoſe: otherwiſe the perſons engaged may in the heat and buſtle of an affray imagine that they come to take a part in it. But in theſe caſes a ſmall matter will amount to a due notification. It is ſufficient if the peace be commanded, or the officer in any other manner declare

declare with what intent he interpoſes. Or if the officer be within his proper diſtrict, and known or but generally acknowledged to bear the office he aſſumes; or if in order to keep the peace he produce his ſtaff of office, or any other known enſign of authority, the law will preſume that the party killing had due notice of his intent, eſpecially if it be in the day-time. In the night indeed, when ſuch enſigns of authority cannot be diſtinguiſhed, ſome further notification is neceſſary; and commanding the peace, or uſing words of the like import notifying his buſineſs, will be ſufficient. Theſe kinds of notification by implication of law hold alſo in caſes where ſuch officers, having warrants directed to them as ſuch to execute, are reſiſted in the attempt. And therefore in Thomas Gordon's caſe, who was indicted for the murder of George Linnell, conſtable of Pattiſhall, in the execution of his office, in attempting to arreſt the priſoner in his own houſe, by virtue of a warrant obtained againſt him from a juſtice of peace, at the inſtance of one Pratt, for an aſſault, which warrant had been directed to *the conſtable of Pattiſhall*, and delivered by Pratt to the deceaſed to execute as conſtable of the pariſh: it appearing that the deceaſed at the time he went to the priſoner's houſe in the day time to execute the warrant had his conſtable's ſtaff with him, and gave notice of his buſineſs; and further, that he had before acted as conſtable of the pariſh, and was generally known as ſuch. At a conference of all the judges on this caſe, they were of opinion that this was ſufficient evidence and notification of his being conſtable; although there were no proof of his appointment, or of his having been ſworn into the office.

Ch. V. § 81. *Notice of the officer.*

Poſt. f. 84.

Gordon's caſe, Northamp. Sp. Aſſ. 1 89, cor. Thomſon B. MS. Buller J. poſt. f. 122. S.C.

26th June 1789.

So ſays Lord Hale; if the officer be demanded he muſt ſhew his warrant; but if he doth it virtute officii as conſtable, &c. it is ſufficient to notify that he is conſtable, or that he arreſts in the king's name.

1 Hale, 583. Mackally's caſe, 9 Co. 69. Poſt. f. 84.

§ 82. *Notice to ſome and not to others.* 1 Hale, 438. 446. 461. Kel. 115, 116.

But it is alſo ſaid in the books, that if there be a ſudden affray, and the conſtable come in, and endeavouring to appeaſe it be killed by one of the company who knew him; (by which to be ſure muſt be underſtood the ſame ſort of knowledge as has been before expreſſed;) it is murder in that one,

Ch. V. § 82. *Notice of the officer.*

one, and in the reſt who knew the conſtable and abetted the other in the fact: but if they knew him not, it would be only manſlaughter in them, though murder in thoſe who did know him. And if others continuing in the affray neither knew the conſtable nor abetted to his death, they would not be guilty even of manſlaughter; though Lord Hale (perhaps over cautiouſly if in truth there were no abetment) expreſſes ſome doubt of this. But if the affray had been deliberately engaged in, if the parties had engaged to make a common cauſe and to maintain it by force, and the conſtable or any other perſon oppoſing them in it had been killed, it would have been murder in all; as is ſhewn more at large in another place. Yet the doctrine of implied malice ſeems to be carried further in Young's caſe; where it is laid down, that if upon an affray the conſtable or others in his aſſiſtance come to ſuppreſs it and preſerve the peace, and be killed in executing their office, it is murder in law, although the murderer knew not the party killed, and though the affray were ſudden; becauſe he ſet himſelf againſt the juſtice of the realm. In order however to reconcile this with other authorities, it ſeems that the party killing muſt have had *implied* notice of the character in which the peace officer and his aſſiſtants interfered, though not a perſonal knowledge of them.

Ante, f. 32.

Young's caſe, 4 Co. 40. b. 3 Inſt. 52.

1 Hawk. ch. 31. f. 51, 52, 53. Kel. 87. 4 Co. 40. b.

It is however agreed, that if a bailiff or other officer be reſiſted in the regular diſcharge of his duty in executing proceſs againſt a party, and a third perſon, even the ſervant or friend of the party reſiſting, come in and take part againſt the officer and kill him, it will be murder, though he knew him not.

How far theſe authorities are ſtrictly reconcileable is fit to be inquired into. And perhaps it muſt be underſtood in the latter caſe mentioned, that in order to make it murder in the ſervant or friend, the party whom they came in to aſſiſt muſt have had due notice of the officer's authority; and that if the offence would not have been murder in the party himſelf reſiſting, for want of ſuch notice, neither would it in the caſe of the ſervant or friend under the like ignorance. So in the caſe of a deliberate breach of the peace, all the perſons acting upon the ſame deſign muſt abide the conſequences

quences of each other's acts; and therefore the knowledge of one will be the knowledge of all, and the wilful reſiſtance of one to the officer the wilful reſiſtance of all. But in the caſe of a *ſudden* affray, which is the caſe firſt put by Lord Hale, where there is no joint engagement to ſtand by each other in the proſecution of ſome unlawful act, there each man's caſe ſtands more upon its own particular merits, and ſhall be judged ſimply upon what the party intended to do, and actually did. Therefore if one in a *ſudden* affray neither knew the conſtable in the manner before ſtated, nor actually abetted to his death, he ſhall not be charged therewith. But if he actually abetted any perſon who had ſuch knowledge of the officer, then his caſe ſeems at firſt ſight not diſtinguiſhable from that of the ſervant or friend who come in ſuddenly and aſſiſt one who is knowingly reſiſting an officer in the execution of proceſs, and muſt according to the rule which governs that caſe abide the conſequences: and yet the books do make a diſtinction between them, though the occaſion with reſpect to the friend or ſervant interfering without notice be as ſudden as the caſe put of the affray in which the conſtable interferes. The ground of the diſtinction, if any, between theſe two caſes ſeems to be, that thoſe who are already engaged with others in an affray may in the heat of action reaſonably ſuſpect that one who interferes againſt them, without declaring or otherwiſe manifeſting his purpoſe, is come in aid of their opponents; and if the occaſion be ſudden, and there be no illegal concert, each man's caſe, as I before obſerved, ſtands more upon its own ground: and as it would only have been manſlaughter if the party not knowing the conſtable had killed him in the affray with his own hand, ſo his caſe cannot be made worſe by his caſually and ignorantly abetting another who did know him in the ſame act. Whereas one who wilfully engages in cool blood in a breach of the peace, by aſſaulting another, inſtead of endeavouring to aſſuage the diſpute, is bound firſt to ſatisfy himſelf of the juſtice of the cauſe he eſpouſes at his peril. And further, in the caſe of a ſudden affray, the conſtable is bound to give a general notice to all concerned in caſes where notice is not preſumed by law, and therefore ſome evidence is neceſſary of the notice having reached the party charged: whereas in the caſe

Ch. V. § 82. *Notice of the officer.*

Ante, f. 58.

Ch. V. § 82. *Notice of the officer.*

caſe of an arreſt, it is only neceſſary that the party himſelf who is the object of the arreſt ſhould have notice; becauſe none other but himſelf is immediately concerned: and the officer is not bound to give notice to every perſon who may think proper officiouſly to interfere in oppoſition to him.

§ 83. *Notice to one ignorantly but bona fide interfering to preſerve the peace against an officer.*

But if a ſtranger ſeeing two perſons engaged, one of whom being a bailiff was attacking the other with a ſword, which other was reſiſting an arreſt by ſuch bailiff; and the ſtranger, *not knowing the bailiff, but intending to preſerve the peace, and prevent miſchief*, interfere between them and defend the party attacked, and in ſo doing happen to kill the bailiff; this may poſſibly fall under a different conſideration: and in the caſe of one Andrews under the like circumſtances, it was holden not to be murder. This caſe however is reported very differently by Kelyng, who ſays, that Andrews was acquitted for want of ſufficient evidence of the fact of abetting to the death: and that it was agreed by all the Court, that if a man be arreſted, and he and his company endeavour a reſcue; and while they are fighting, one who knows nothing of the arreſt, coming by the way, goes in aid of the perſon arreſted and draws his ſword; there if any of the bailiffs be killed, the perſon who joined in aid againſt them, though he did not know of the arreſt, yet is guilty of murder: *for*, ſays he, *a man muſt take heed how he joineth in any unlawful act, as fighting is;* for if he doth, he is guilty of all that follows (*a*). This reaſoning however ſeems more applicable to the caſe where a ſtranger interferes *not with intent to prevent miſchief, or to keep the peace* under the miſtaken belief of its being violated, which ſeems to be the caſe as reported by Sidderfin, but, as in the caſe commonly put, for the expreſs purpoſe of aiding one of the parties againſt the other; in which caſe there can be no doubt he muſt abide the conſequences at his peril. And there is the leſs reaſon for extending the law further; becauſe as it is the duty of every private man interfering to preſerve the peace to give

R. v. Sir C. Standlie and Andrews, Sid. 159. MS. Burnet, 56. accord. Kel. 86.

Ante, f. 63.

(*a*) 1 Keble, 584, reporting the ſame caſe very ſhortly ſays, It was adjudged that if any caſually aſſiſt againſt the law, and kill the bailiff, it is murder; *eſpecially if he knew the cauſe.*

expreſs notice of his intention, the bailiff has an opportunity of correcting his miſtake.

Ch. V. § 83. *Notice of the officer.*

§ 84. *Notice on proceſs.* 1 MS. Sum. 169. ante f. 81.

What has been before obſerved reſpecting notice holds in all caſes of arreſts upon proceſs. The party muſt have ſome notification of the officer's buſineſs, or the killing of him will not be murder. If he be a known ſworn officer, the law in the inſtances above mentioned will imply notice: if he be a ſpecial bailiff named in the proceſs, he muſt declare his buſineſs and authority, as by uſing words of arreſt or the like: and if ſuch declaration be true and the proceſs legal, and afterwards he be killed, it is murder: for after that declaration the party killing acted at his peril. But if the officer declare his buſineſs, it is not neceſſary he ſhould produce the warrant itſelf where it is not demanded. It is alſo ſaid, that if a bailiff or conſtable be ſworn and commonly known to be ſuch, and act within his own precinct, he need not ſhew his warrant to the party, though he demand a ſight of it, but the officer ought to tell him the ſubſtance of it: but that all others, or theſe, if acting out of their precincts, ought to ſhew it if demanded. If this be underſtood merely of the warrant conſtituting him bailiff or conſtable, it may be true under the circumſtances before noticed: but with reſpect to the writ or proceſs itſelf againſt the party, there is no difference between the public or private bailiff; for in either caſe, if the party ſubmit to the arreſt and demand it, he is bound to ſhew at whoſe ſuit, for what cauſe, out of what court the proceſs iſſues, and when and where returnable. In no caſe however is he required to part with the warrant out of his own poſſeſſion; for that is his juſtification.

Foſt. 311. 1 Hale, 461. Mackally's caſe, 9 Co. 68, 9.

1 Hale, 458. 2 Hawk. ch. 13. ſ. 28.

Ante, f. 81.

1 Hale, 458. a. 6 Co. 54. 9 Co. 69.

§ 85. *Where officer's buſineſs known, notice unneceſſary.* Mackalley's caſe, 9 Co 69. 1 Hale, 458. 461. Pew's caſe, Cro. Car. 183. Kel. 67.

But it was ruled in Mackalley's caſe, that if the party know the officer and his buſineſs, it is not neceſſary to give expreſs notice thereof. And this extends as well to a ſpecial bailiff as to a known officer. As where Pew ſaid to a bailiff who came to arreſt him, "*Stand off, I know you well enough, come at your peril.*" And upon the bailiff's taking hold of him, Pew killed him; which was holden murder.

Ch. V. § 86. *Arreſt to be duly made.*

4. *That the Proceſs be executed or Arreſt made duly and according to Law.*

§ 86. *Arreſt to be duly made.*

1 Hale, 459. 1 MS. Sum. 92, 5 Co. 59.

If the warrant be directed to ſeveral, any of them may execute it. And in no caſe of arreſt is a conſtable bound to carry a priſoner before a particular magiſtrate deſired by the priſoner himſelf, but he may follow his own diſcretion; unleſs the warrant be ſpecial, and direct otherwiſe.

1 MS. Sum. 170. Foſt. 319.

If the officer in executing his office exceed his authority, the law gives him no protection in that exceſs. And it not only behoves the miniſters of juſtice and other public officers, but likewiſe private perſons endeavouring to arreſt or impriſon in the ſeveral caſes already treated of, to be very careful that they do not miſbehave themſelves in the diſcharge of their duty; for if they do they may forfeit this ſpecial protection. And therefore Mr. Juſtice Foſter thinks that the killing of Mr. Luttrel in the manner reported by Strange would clearly have been murder in the officers who committed that fact. The facts are there ſtated to be, that Luttrel, being arreſted for a ſmall debt, prevailed on one of the officers to go with him to his lodgings, while the other was ſent to fetch the attorney's bill, in order as Luttrel pretended to have the debt and coſts paid. Words aroſe at the lodgings about civility-money, which L. refuſed to give, and went up ſtairs pretending to fetch money for the payment of the debt and coſts, leaving the officer below. He ſoon returned with a brace of loaded piſtols in his boſom, which at the importunity of his ſervant he laid down on the table, ſaying, *he did not intend to hurt the officers, but he would not be ill uſed.* The officer who had been ſent for the attorney's bill ſoon came to the lodgings; and words of anger ariſing, L. ſtruck one of the officers on the face with a walking cane, and drew a little blood; whereupon both of them fell upon him; *one ſtabbed him in nine places: he all the while on the ground begging for mercy, and unable to reſiſt them: and one of them fired one of the piſtols at him while on the ground, and gave him his death's wound.* This is reported to have been manſlaughter, by reaſon of the firſt aſſault with the cane. On this ſtate of the facts, the learned Judge is of opinion that the revenge taken was out of all proportion to the

Foſt. 292. Rex v. Tranter, and Reaſon, 1 Stra. 499. ante, f. 21.

Ch. V. § 86. *Arreſt to be duly made.*

the offence, and indicated a diabolical fury. But he rectifies the report by the addition of ſeveral material circumſtances mentioned in the State Trials. 1. That L. had a ſword by his ſide, which after the affray was found drawn and broken. 2. When he laid his piſtols on the table he declared that he had brought them down, *becauſe he would not be forced out of his lodgings.* 3. He threatened the officers ſeveral times. 4. One of the officers was wounded in the hand with a piſtol ſhot, both the piſtols having been diſcharged in the affray, and alſo ſlightly in the wriſt with ſome ſharp-pointed weapon; and the other had a ſimilar wound in the hand. 5. The evidence was only, that while on the ground L. held up his hands *as if* begging for mercy. Upon this the chief juſtice directed the jury, that if they believed that L. endeavoured to reſcue himſelf, which he ſeemed to think, and very probably was the caſe, it would be juſtifiable homicide in the officers. However, as L. gave the firſt blow accompanied with menaces to the officers, and conſidering the circumſtance of his producing loaded piſtols to prevent their taking him from his lodgings, which it would have been their duty to have done if the debt had not been paid or bail given, he declared it could be no more than manſlaughter.

6 St. Tr. 195.

§ 87. *Breaking doors.*

The queſtion which moſt frequently occurs under the head of which I am now treating is, in what caſes doors may be broken open in order to make an arreſt?

Privilege confined to civil ſuits. 1 MS. Sum. 171. Foſt. 319. 2 Hawk. ch. 14. Cooke's caſe, Cro. Car. 537, 8.

In civil ſuits the officer cannot juſtify the breaking open an outward door or window to execute the proceſs: if he do he is a treſpaſſer, and conſequently cannot be deemed acting in diſcharge of his duty. In ſuch caſe therefore, if the occupier of the houſe reſiſt the officer, and in the ſtruggle kill him, it is only manſlaughter. For every man's houſe is his caſtle for ſafety and repoſe for himſelf and his family. And it is not murder in this caſe, ſays Lord Hale, becauſe it is unlawful in the officer to break the houſe to arreſt. 2dly, It is manſlaughter, becauſe he knew him to be a bailiff. But 3dly, had he not known him to be a bailiff, or one who came on that buſineſs, it had been no felony, becauſe done in his houſe. This laſt inſtance, which is ſet in oppoſition

1 Hale, 458.

Ch. V. § 87. *Breaking doors.*

to the ſecond, muſt be underſtood to include at leaſt a reaſonable ground of ſuſpicion that the party broke the houſe with a felonious intent; and that the party did not know, as in the ſecond inſtance, nor had reaſon to believe that it was merely as a treſpaſſer with a different intent.

No privilege in criminal caſes. 1 MS. Sum. 171, 2. Foſt. 320. 1 Hale, 459.

This privilege extends no further than as againſt arreſts upon proceſs in civil ſuits. For where a felony has been committed, or dangerous wound given, or even where a miniſter of juſtice comes armed with proceſs founded on a breach of the peace, the party's own houſe is no ſanctuary for him, but the doors may be forced after the notification, demand, and refuſal aftermentioned.

Poſt. 324.

1 MS. Sum 172. Foſt. 321. 2 Hawk. ch. 14. ſ. 7. *Vide* Samuel v. Payne, Ante, ſ. 69.

But though a felony have been actually committed, yet a bare ſuſpicion of guilt againſt the party will not warrant a proceeding to this extremity, unleſs the officer be armed with a magiſtrate's warrant grounded on ſuch ſuſpicion. It will at leaſt be at the peril of proving that the party ſo taken on ſuſpicion was guilty.

2 Hale, 92.

But according to Lord Hale, if there be a charge of felony laid before the conſtable, and reaſonable ground of ſuſpicion thereon; or if there be an affray in an houſe, whereby

2 Hale, 95.

there is likely to be bloodſhed or diſorder; or any unwarrantable diſturbance at any unſeaſonable time of night, eſpecially in alehouſes, or the like places of public reſort which are under the peculiar ſuperintendance of the police; the conſtable or his watch may break open doors to ſuppreſs

2 Hawk. ch. 14. ſ. 8.

the diſorder. And Hawkins, who agrees herewith, adds further, that the conſtable may do the like when an affray has been made within his view; and on his immediate purſuit of the affrayers to apprehend them, they fly to an houſe into which he is not ſuffered to enter.

3 Jac. 1. c. 4. ſ. 35. *Popiſh recuſants.* *Forcible entry.* 2 Hawk. ch. 14. ſ. 4. 6. *Capias utlag.* or *capias pro fine.* *Hab. fac. poſſ.* 5 Co. 93. b. 2 Hawk. ch. 14. ſ. 5. *Warrant of juſtice.*

The like force may be uſed with the like precautions by ſtat. 3 & 4 *Jac.* 1. for the taking of a popiſh recuſant ſtanding excommunicated for ſuch recuſancy: Or where a forcible entry or detainer is either found by inquiſition before juſtices of peace, or appears on their own view: Or upon a capias utlagatum, or capias pro fine, in any action whatever: Or to execute an habere facias poſſeſſionem: Or on the warrant of a juſtice of peace for levying a penalty on a conviction grounded on any ſtatute authorizing the ſame. But in theſe caſes it is required

Ch. V. § 87. *Breaking doors.*

27 G. 2. c. 20.

required by ſtat. 27 G. 2. c. 20. that the officer executing ſuch warrant ſhall, if required, ſhew the ſame to the perſon whoſe goods and chattels are diſtrained, and ſhall ſuffer a copy thereof to be taken.

Privilge confined to outward d ors. 1 MS. Sum. 171. Foſt 321. 1 Hale, 458.

Further, the above-mentioned rule, though founded in a laudable jealouſy of private liberty, yet encroaching in ſome degree on public juſtice, is not one of thoſe which will admit of any extenſion. It is therefore confined even in civil caſes to *outward* doors and windows only, ſuch as are intended for the ſecurity of the houſe againſt perſons from *without* endeavouring to break in. For if the officer find the outward door open, or it be opened to him from within and he enter that way, he may then break open any *inward* door, if he find that neceſſary to execute his proceſs.

Lee v. Gaſſel, Cowp. 1.

In the caſe of Lee v. Gaſſel, the defendant had for ſeveral years rented a firſt and ſecond floor in the houſe of A. as tenant from year to year, and A. occupied the ground floor. The outer door being opened the officer entered, and after notification of his buſineſs, demand, and refuſal, broke open the door of Gaſſel's chamber: and it was ruled that he was juſtified in ſo doing.

Baker's caſe, at Serjeant's Inn, Mich. Term 1775, before all the judges, Crown Caſ. Reſ. MS. & Leach. 106. laſt edit. 131. S. C.

In Baker's caſe, (where indeed there was proof of a previous reſolution in the priſoner to reſiſt the officer, whom he afterwards killed in attempting to attach (*a*) his goods in his dwelling-houſe in order to compel an appearance in the county court,) the outer door, through which the deceaſed paſſed was divided into two parts, the lower hatch of which was cloſed, and the upper part open. The officer put his arm over the hatch to open it, on which a ſtruggle enſued between him and a friend of the priſoner, in the courſe of which, the officer having prevailed, the priſoner ſhot at and killed him: and held murder.

To the occupier and his family. Foſt. 320. 1 MS Sum. 170, 1. 5 Co. 93.

Again, this privilege of a man's caſtle from any outward breach extends only to thoſe caſes where *the occupier or any of his family*, who have their domicile, their ordinary reſidence there, are the objects of the arreſt: for if a ſtranger, whoſe ordinary reſidence is elſewhere, upon purſuit take refuge in the houſe of another, ſuch houſe is no caſtle of *his*, and therefore he cannot claim the benefit of ſanctuary

(*a*) The objection principally turned on the legality of the attachment, which was ſigned by the county clerk (whoſe proper duty it was) in his own cauſe; but this being a mere miniſterial act was holden to be immaterial.

Ch. V. § 87. *Breaking doors.*

in it. It muſt be obſerved, however, that in all caſes where the doors of ſtrangers are broken open upon ſuppoſition of the perſon ſought being there, it muſt be at the peril of finding him there: unleſs as it ſeems where the parties act under a magiſtrate's warrant.

2 Hale, 103. *Vide* Foſt. 321.

Confined to arreſts in the firſt inſtance. Foſt. 320. 1 Hale, 459. Salk. 79. 2 Hawk. ch. 14. ſ. 9.

This privilege is alſo confined to arreſts in the *firſt* inſtance. For if a man who is legally arreſted, (and laying hold of the priſoner and pronouncing words of arreſt is an actual arreſt,) eſcape from the officer, and take ſhelter, though in his own houſe, the officer may upon freſh purſuit break open the door in order to retake him, having firſt given due notice of his buſineſs, and demanded admiſſion, and been refuſed. If it be not, however, upon freſh purſuit, it ſeems that the officer ſhould have a warrant from a magiſtrate.

John Stevenſon's caſe, 10 St. Tr. 462.

Neither would the officer be warranted in breaking open doors to retake his priſoner if the firſt arreſt had been illegal; as by the warrant having been filled up after it had been ſealed (*a*). And therefore in ſuch caſe after the officer had made an arreſt on civil proceſs, being obliged to retire by the party's ſnapping a piſtol at him ſeveral times, and having returned again with aſſiſtants who attempted to force the door, on which the man within ſhot one of them; it was ruled to be only manſlaughter.

Previous notification and demand of entrance. Foſt. 320. 1 MS. Sum. 171. 2 Hawk. ch. 14. ſ. 1.

Laſtly, it is to be obſerved, that not only in this, but in every caſe, whether criminal or civil, where doors may be broken open in order to make an arreſt, there muſt be a previous notification of the buſineſs and a demand to enter on the one hand, and a refuſal on the other, before the parties proceed to that extremity. And in all caſes if the officer, or his aſſiſtants, having entered a houſe in the execution of his duty, be locked in, they may juſtify breaking open the doors to regain their liberty.

2 Hawk. ch. 14. ſ. 11.

§ 88. *Time for making arreſt.* 1 Hale, 457. 1 Hawk. ch. 31. ſ. 55. 9 Co. 66. a. 29 Car. 2. c. 7.

In reſpect to the time for executing proceſs, it may be done at night as well as by day; and therefore killing the bailiff or other officer on pretence of his coming at an unſeaſonable hour would be murder. But ſince the ſtat. 29 Car. 2. c. 7. ſ. 6. all proceſs, warrants, &c. ſerved or executed on a Sun-

(*a*) If the warrant be filled up by the magiſtrate before he iſſues it, though ſigned before, it is regular, and killing the officer in endeavouring to arreſt the party is murder. Cited by Lord Kenyon in R. v. The Inhabitants of Winwick, 8 Term Rep. 455. as a caſe determined ſome years ago.

a Sunday are void, except in caſes of treaſon, felony, or breach of the peace: And therefore an arreſt on any other account made on that day is the ſame as if done without any authority at all. Though it may ſerve to explain the occaſion.

Ch. V. § 88. *Time of arreſt.*

§ 89. *How far a third perſon interfering to prevent arreſt, and killing the officer, can avail himſelf of the illegality of ſuch arreſt.*

It remains to be conſidered, *how far any defect in the frame of the proceſs, or any other illegality in the arreſt, may be urged in defence of a third perſon who interferes to prevent it, and kills the officer in ſo doing.*

The queſtion in a legal form is reduceable to this, How far the mere view of a perſon under arreſt, or about to be arreſted, ſuppoſing it to be illegal, is *of itſelf* ſuch a provocation to a by-ſtander, as will extenuate his guilt in killing the officer, in order to ſet the party free in the one inſtance, or prevent the arreſt in the other? The affirmative part of this queſtion was maintained to the full extent of it by ſeven judges againſt five, in the caſe of Tooley and others. There one Bray, who was a conſtable of St. Margaret's pariſh in Weſtminſter, came into the pariſh of St. Paul Covent Garden, where he was no conſtable and conſequently had no authority; and there took up one Ann Dekins, under ſuſpicion of being a diſorderly perſon, but who the ſpecial verdict found had not miſbehaved herſelf, and againſt whom Bray had no warrant. While he had her in cuſtody they were met by the priſoners, who were all ſtrangers to Dekins, and who drew their ſwords and aſſaulted Bray to reſcue her from his cuſtody: but upon his ſhewing them his conſtable's ſtaff, and declaring he was about the queen's buſineſs and intended them no harm, they put up their ſwords, and he carried the woman to the round-houſe in Covent Garden. Soon after the priſoners drew their ſwords again, and aſſaulted Bray on account of the impriſonment of the woman, and in order to get her diſcharged; whereupon Bray called Dent to his aſſiſtance to keep the woman in cuſtody, and defend himſelf from the violence of the priſoners; when one of the priſoners before any ſtroke received gave Dent a mortal wound. All the judges except one agreed that Bray acted without any authority; but that one thought that ſhewing his ſtaff was ſufficient; and that with reſpect

Rex v. Tooley and others, 2 Ld. Ray. 1296. poſt. 329. 1 Hawk. ch. 31. ſ. 54. *Vide* Foſt. 312.

Ch. V. § 89. *How far ill-gality of arreſt an excuſe for third perſons.*

to the priſoners he was to be conſidered as conſtable de facto. But the main point on which they differed was, whether the illegal impriſonment of a ſtranger were under theſe circumſtances a ſufficient provocation to by-ſtanders, or, as Lord Holt expreſſed himſelf, a provocation to all the ſubjects of England. The five judges who held the caſe to be murder thought that it would have been a ſufficient provocation to a relation or friend, but not to a ſtranger. The other ſeven thought there was no ground for making ſuch a diſtinction, and that it was a provocation to all whether ſtrangers or otherwiſe, ſo as to reduce the offence to manſlaughter; it being a ſudden action, without any precedent malice, or apparent deſign of doing hurt; but only to prevent the impriſonment of the woman, and to reſcue one who was unlawfully reſtrained of her liberty. But they admitted, that all perſons interfering in the caſe of an arreſt by officers of juſtice did it at their peril in caſe the arreſt ſhould be lawful. The opinion however maintained by the ſeven judges in the above caſe has been very ably combated by Mr. Juſtice Foſter, who holds that the kind of provocation which extenuates homicide into manſlaughter muſt be a ſudden provocation immediately felt by the party himſelf at the time of the fact, and not a reſentment ſuggeſted by reflection or political reaſonings for an injury done to a ſtranger, and the conſequence of that injury to the public in general. The caſe, he ſays, was in truth no more than this: the priſoners ſaw a woman, a perfect ſtranger to them, led to the round-houſe, under a charge of a criminal nature; and this afterwards appeared to have been an illegal arreſt; but which was *not known to them at the time*. Upon which they had at the firſt meeting with the conſtable drawn their ſwords upon him, unarmed as he was againſt ſuch weapons, but ſoon put them up again, appearing to be pacified; and cool reflection ſeemed in ſome meaſure to have taken place. At the ſecond meeting, which was after the woman was in the round-houſe, the deceaſed received his death's wound before a blow was given, or for aught appeared offered on the part of him or his party. This he conſiders as grounded rather upon reſentment or a principle of revenge for what had paſſed before, than upon any hope or endeavour to aſſiſt the woman. And without entering

Vide Rex v. Keate, Com. Rep. 13. ad idem.

Ante, f. 58.

Foſt. 312.

entering into the merits of Hopkins Hugget's caſe, (which he ſeems to doubt,) he diſtinguiſhes this of Tooley's, as well from that, as from the caſe of Sir Henry Ferrer's ſervant, both of which were mainly relied on in Tooley's caſe: for in both there was an affray, wherein the blood might be heated before the mortal wound was given. In the latter, after Sir Henry had ſubmitted to the arreſt, his ſervant *quarrelled* with the officer, and fought and killed him. According to the report the reſcue was a mere pretence; and therefore the caſe was clearly no more than manſlaughter; being homicide upon a ſudden affray; without entering into the queſtion of the illegality of the arreſt. And the ſame might be ſaid of Hopkins Hugget's caſe as ſtated by Lord Hale. It was a ſudden quarrel and affray, and a combat between him and an aſſiſtant of the preſs-maſter, upon ſome rudeneſs offered on the part of the aſſiſtant. Though Kelyng reports the caſe to have turned on the illegality of the impreſs, being without any proper warrant, and the provocation ſuch an act of oppreſſion may be preſumed to give to every man, whether friend or ſtranger, to endeavour a reſcue.

Ch. V. § 89. *How far ill-gality of arreſt an excuſe for third perſons.*

Cro. Car. 371.

1 Hale, 465. poſt. 328.

Kel. 59.

Mr. Juſtice Foſter adds to his obſervations on theſe caſes, that he is firmly perſuaded, that on ſuch occaſions as theſe a general ſubmiſſion to the known badges of authority, exacted from all perſons ſtrangers to the party ſuppoſed to be injured or his cauſe, would greatly conduce to the ſtability of government in the fate of which all private rights are involved. From whence it ſeems, that with reſpect to mere ſtrangers at leaſt he rather inclined to favour the opinion of the ſingle judge, who held in Tooley's caſe, that Bray's acting as conſtable de facto was ſufficient to conſtitute the crime of murder as againſt the priſoners. But the difficulty lies in making out the fact of Bray's having acted as conſtable de facto, as was obſerved by Lord Holt in anſwering that argument. For though it be not neceſſary, according to Gordon's caſe, to prove the appointment and ſwearing in of ſuch an officer, yet evidence of his being generally received by the pariſh, and known as ſuch, ſeems to be neceſſary before he can be conſidered even as conſtable de facto. Whereas in Tooley's caſe another perſon was actually inveſted with the office.

Foſt. 317.

Ante, p. 315.

Ch. V. § 89. *How far illegality of arreſt an excuſe for third perſons.*

It may be worthy of conſideration whether the illegality of an arreſt does not place the officer attempting it exactly on the ſame foot as any other wrong-doer: and whether in the caſe of interference by a ſtranger or any other perſon, the queſtion of provocation ought not to be governed by the ſame rules as regulate ordinary caſes of the like ſort. The four judges who differed in Hugget's caſe, though they do not in terms adopt this concluſion, yet argue from the ſame premiſes. The circumſtances of that caſe, as ſtated more at large by Kelyng, were theſe: Berry and two others preſſed a man, without any warrant for ſo doing; to which the man quietly ſubmitted, and went along with them. The priſoner with three others ſeeing them inſtantly purſued them, and required to ſee their warrant: on which Berry ſhewed them a paper, which the priſoner and his aſſociates ſaid was no warrant; *and immediately drew their ſwords to reſcue the impreſſed man,* and *thruſt* at Berry. Whereupon Berry and his two companions drew their ſwords, and a fight enſued, in which Hugget killed Berry. Now on that ſtatement of the caſe, unleſs an illegal arreſt be ſtill ſuppoſed to be a provocation to all the people of England, as was ſaid in Tooley's caſe, Hugget upon the principle already ſtated was undoubtedly guilty of the murder. For, as was urged by thoſe four judges, if A. aſſault B. without any provocation, and draw his ſword and paſs at him; and then B. to defend himſelf draw his ſword, and they fight together; if A. kill B., it is murder; and B.'s drawing his ſword to defend himſelf ſhall not leſſen the other's offence. And they were alſo of opinion, *that nothing but an open affray or ſtriving can be a provocation to any perſon to meddle with an injury done to another,* ſo as to leſſen the offence to manſlaughter, if in that meddling he kill a man; and not even that, as hath been ſhewn, in the caſe of a lawful arreſt. But, ſay the ſame judges, where people are at peace, there if another man, upon ſuſpicion that an injury is done to one of them, will aſſault and kill him whom he ſuppoſes did the injury, this is murder. And they held, that the caſe in 12 Rep. 87. where two who were playing at bowls quarrelled, and a third perſon in revenge of his friend ſtruck the other with a bowl and killed him; which was ruled to be only manſlaughter;

Ante, f. 20, &c.

Hugget's caſe, Kel. 59. Ante, 327.

Vide 1 Hale, 465. Ante, f. 58.

Ante, f. 63. 83, 84.

ter; muſt be intended to mean that the two men who fell out were actually *fighting together* at the time; for if words only had paſſed between them, it would have been murder; to which all the other judges agreed. And the four held Hugget's caſe to be much ſtronger than that, *becauſe the impreſſed party himſelf was quiet and made no reſiſtance, and becauſe they who meddled were no friends or acquaintance of his,* but *mere ſtrangers,* and did not ſo much as deſire thoſe who had him in cuſtody to let him go, *but preſently without more drew their ſwords and ran at them* (*a*). And they thought it of dangerous conſequence to give any encouragement to private men to take upon themſelves to be the aſſertors of other men's liberties, and to become patrons to reſcue them by force from wrong, eſpecially in a nation where there are good laws for the puniſhment of all ſuch injuries: and one great end of law is to right men by peaceable means, and to diſcountenance all endeavours to right themſelves, much leſs other men, by force.

Ch. V. § 89. *How far illegality of arreſt an excuſe for third perſons.*

Upon the ſame reaſoning, on the want of ſufficient provocation, Tooley's caſe ſtands (ſays Mr. Juſtice Foſter on another occaſion) on no better grounds than the opinions of ſeven learned judges againſt five: for there the mortal blow was given before any ſtroke given or offered by the other party, or any other legal provocation to them, unleſs the illegality of the woman's impriſonment, as it eventually appeared, were a provocation to every ſubject (*b*).

Ante, 325. Foſt. 138.

(*a*) Hugget's caſe is ſtated very differently by Lord Hale; according to whom it was no more than this: a preſs-maſter, with the aſſiſtance of C. ſeized B. for a ſoldier; D. finding fault with the rudeneſs of C. *there grew a quarrel between them,* and D. killed C.

1 Hale, 465. *Vide* Foſt. 314.

(*b*) *Vide* Mary Adey's caſe, O. B. 1779, where the ſame kind of queſtion aroſe. The priſoner, who cohabited with one Farnello, killed an aſſiſtant of the conſtable who came to take him up as as a vagrant under the 19 G. 2. c. 10.; he in truth not being an object of the act, but not having made any reſiſtance himſelf to the arreſt. Leach, 189. ſays, that the priſoner, whoſe caſe was argued upon a ſpecial verdict before all the judges, lay 18 months in gaol, and was then diſcharged. Upon inquiry, however, it appears, that pending the conſideration of the caſe by the judges ſhe eſcaped during the riots in 1780, and was never re-taken. MS. Buller J. And vide the note to the laſt edit. of Leach, 1 vol. 245. 253.

Ch. V. § 90. *Touching ſafe cuſtody after arreſt.*

II. *Touching the ſafe Cuſtody of Perſons arreſted and in Confinement.*

§ 90. Ante, f. 65.

This is either with reſpect to the officers making the arreſt, or with reſpect to the gaoler to whoſe cuſtody the priſoners are afterwards conſigned.

Safe cuſtody by officer arreſting.

1. The firſt ſubject of inquiry is already exhauſted; it having been before obſerved, that after an arreſt once legally made, (and laying hold of a priſoner and pronouncing words of arreſt is an actual arreſt,) if the party eſcape, or with his conſent be reſcued from the officer, the latter may lawfully kill him, in the caſe of an arreſt for felony actually committed, or whether committed by him or not, if he had been arreſted upon a proper warrant, or hue and cry had been raiſed againſt him by name, or he had ſtood indicted for felony: but if in any of theſe caſes the officer might have otherwiſe taken him, it will be at leaſt manſlaughter. And it has alſo been ſhewn, that whether in civil or criminal caſes the officer may kill the party who is the object of the arreſt, or any other perſon actually reſiſting him in his endeavours for that purpoſe, without being obliged firſt to retreat. But that in caſes of arreſt for miſdemeanors, or in civil ſuits, it is unlawful to kill a priſoner who eſcapes from the arreſt by bare flight, without any actual reſiſtance; and conſequently the caſe will be either murder or manſlaughter according to the circumſtances. Again, it has been ſhewn that in all caſes after an arreſt once made, the officer may on freſh ſuit break open doors to retake his priſoner if he eſcape or be reſcued.

Ante, f. 68. 1 Hale, 489. Pult. de pace, 221.

Ante, f. 67. Sum. 36, 37. 3 Inſt. 221.

Ante, f. 63. 67. 70, 71. 74.

1 Hale, 481. Ante, f. 70. 74.

Ante, f. 87.

§ 91. *By Gaolers.* Foſt. 321. 1 Hale, 481.

2. Gaolers and their officers are under the ſame ſpecial protection as other miniſters of juſtice: and therefore if in the neceſſary diſcharge of their duty they meet with reſiſtance, whether from the priſoners themſelves in civil or criminal ſuits, or from others on behalf of ſuch priſoners, they are not obliged to retreat as far as they can with ſafety, but may freely and without retreating repel force with force. And if the party ſo reſiſting happen to be killed, this on the part of the gaoler or his officer, or any perſon coming in aid of him, will be juſtifiable homicide. On the other

other hand, if any of theſe ſhould fall in the conflict, this will amount to wilful murder in all perſons joining in ſuch reſiſtance.

Ch. V. § 91. *Touching ſafe cuſtody by gaolers.*

But an aſſault upon a gaoler, which would warrant him (apart from any perſonal danger) in killing a priſoner, muſt it ſhould ſeem be ſuch from whence he might reaſonably apprehend that an eſcape was intended, which he could not otherwiſe prevent. And Hawkins ſeems to underſtand this matter in the ſame manner when he ſays, that if a criminal, *endeavouring to break the gaol*, aſſault the gaoler, the latter may lawfully kill him in the affray.

1 MS. Sum. 145. ſemb. Pult. 120, 1.

1 Hawk. c. 28. ſ. 13.

§ 92. *Dureſs by gaolers.* Foſt. 321. 1 Hale, 466. 3 Inſt. 52. Poſt. ch. 6. ſ. 2.

The law however watches with a jealous eye over the conduct of theſe officers; and therefore if a priſoner under their care die, whether by diſeaſe or accident, the coroner, upon notice of ſuch death, (which notice the gaoler is obliged to give in due time,) ought to reſort to the gaol, and there, upon view of the body, make inquiſition into the cauſe of the death. And if it were owing to cruel and oppreſſive uſage on the part of the gaoler, or any officer of his, or in the language of the law to dureſs of impriſonment, it will be murder *in the perſon guilty of ſuch dureſs*. For though in civil ſuits the principal may in ſome inſtances be anſwerable for the fault of his deputy, yet in criminal caſes each man muſt anſwer for his own acts or defaults. If a gaoler, knowing that a priſoner infected with the ſmall-pox lodged in a certain room in the priſon, confined another priſoner againſt his will in the ſame room, in conſequence of which the latter, who had not had the diſtemper, *of which the gaoler had notice*, caught it and died of it; this, being done from a deliberate malignant motive, would clearly be murder in the gaoler.

Caſtell widow v. Bambridge and Corbett, 2 Stra. 856. 9 St. Tr. 177. 181. Foſt. 322.

On an indictment for the murder of one Arne, a priſoner in the Fleet, the jury found ſpecially, that the defendant Huggins was by letters patent conſtituted warden of the Fleet, with power to execute the office by deputy; that he appointed Gibbon his deputy, who acted as ſuch; that Barnes was Gibbon's ſervant, and was to take care of the priſoners, and particularly of Arne; but that he put him into a new-built room which was over the common ſewer, the

Rex v. Huggins and Barnes, 2 Stra. 882. Foſt. 322. *Vide* Rex v. William Stevenſon, O. B. Sept. 1784, Seſſ. Papers 1177.

Ch. V. § 92. *Touching safe cuſtody by gaolers.*

the walls of which were damp and unwholeſome, and kept him without fire, chamberpot, or other neceſſary convenience for forty-four days. That Barnes knew the unwholſome ſituation of the room; and that for fifteen days at leaſt before the death of Arne Huggins knew the condition of the room, he having been that once preſent at the priſon, and ſeen Arne under ſuch dureſs of impriſonment, and turned away; at which time Barnes ſhut the door of the room, in which Arne continued till he died. That by dureſs of the impriſonment Arne had ſickened and died. That during the time Gibbon was deputy Huggins ſometimes acted as warden. The Court were clearly of opinion upon theſe facts that Barnes was guilty of murder. They were deliberate acts of cruelty, and enormous violations of the truſt repoſed by the law in its miniſters of juſtice. But they alſo thought that Huggins was not guilty. It could not be inferred from the bare ſeeing the deceaſed once during his confinement that Huggins knew his ſituation was occaſioned by the improper treatment, or that he conſented to the continuance of it. They ſaid it was material that the ſpecies of dureſs by which the deceaſed came to his death could not be known by a bare looking in upon him. Huggins could not know the circumſtances under which he was placed in the room againſt his conſent, or the length of his confinement, or how long he had been without the decent neceſſaries of life: and it was likewiſe material that no application was made to him, which perhaps might have altered the caſe. Beſides, the verdict finds that Barnes was the ſervant of Gibbon, and Gibbon had the actual management of the priſon; and they ſeemed to think that the accidental preſence of the principal would not amount to a revocation of the deputy's authority.

§ 93. *Execution.*

III. *Touching the Execution of Criminals in Purſuance of the Judgment.*

1 Hale, 497.

The deliberate uncompelled extrajudicial killing of any perſon, though attainted of treaſon or felony, or in a præmunire, is murder; unleſs done upon due proceſs and according

according to law, in which caſe the act is juſtifiable from neceſſity. Under this head I ſhall take the conſideration of the matter higher up than the mere act of execution, and examine, 1. How far the witneſſes on whoſe evidence the verdict and judgment are founded are implicated in the rectitude of the conſequent execution. 2. How far the judge who pronounces or the officers who execute the judgment are anſwerable for the legality of it. 3. To what extent the execution muſt conform to the judgment. 4. That the execution be done by a lawful officer.

Ch. V. § 93. *In execution of judgment.*

§ 94. *As to witneſſes.*

1. It has been much doubted whether a perſon wilfully giving falſe teſtimony againſt another in order to accompliſh his death can be indicted of murder, if the innocent party be convicted thereon and ſuffer death by the judgment of the law. The only inſtance of a proſecution of this ſort in modern times was in the caſe of Macdaniel, Berry, and Jones, who were indicted for murder, upon a conſpiracy of this nature againſt one Kidden, who was convicted and executed for a robbery upon the highway, upon the evidence of Berry and Jones. They were all convicted upon this indictment, in which the ſpecial matter was ſet forth; but judgment was reſpited in order that the point of law might be more fully conſidered upon a motion in arreſt of judgment. But the Attorney-General declining to argue the point, the priſoners were diſcharged of that indictment. Mr. Juſtice Foſter intimates a ſtrong opinion againſt the validity of ſuch an indictment, chiefly as it ſeems on the ground of its diſuſe for many ages paſt; though he admits that there are ſtrong paſſages in our ancient writers which greatly countenance ſuch a proſecution. And we have the authority of Mr. Juſtice Blackſtone for ſaying, that the Attorney-General, in the caſe of Macdaniel and the others, did not decline arguing the point of law from any apprehenſion that it was not maintainable (*a*), but from other prudential reaſons; and therefore that nothing ſhould be concluded from the waving of that proſecution. What the chief of thoſe

3 Inſt. 48. Foſt. 131. Rex v. Macdaniel Berry and Jones, in 1756. *Vide* 10 St. Tr. 446 Leach, 39. and Barrington on the Statutes, 56.

Vide Mirr. ch. 1. ſ. 9. Brit. c. 52. Brac. lib. 3. c. 4. *Vide* 1 Hawk. ch. 31. ſ. 7. 4 Blac. Com. 196. 3 Inſt. 91.

(*a*) The author has heard Lord Mansfield C. J. make the ſame obſervation; and ſay, that the opinions of ſeveral of the judges at that time, and his own, were ſtrongly in ſupport of the indictment.

prudential

Ch. V. § 94. *As to Witneſſes.*

prudential reaſons was he alludes to in the ſame paſſage, namely, to avoid the danger of deterring witneſſes from giving evidence upon capital proſecutions if it muſt be at the peril of their own lives. With reſpect to the offence in foro conſcientiæ, it is without doubt as aggravated a ſpecies of murder as any that can be conceived.

§ 95. *As to the judge and officer.* 1 Hale, 497.

2. As to the reſponſibility of the judge who pronounces, and the officer who executes the ſentence, it does not ſeem to be very accurately defined. Lord Hale ſays, that it is neceſſary, firſt, that he who gives ſentence of death againſt a malefactor be authorized by lawful commiſſion or charter, or by preſcription, to have cogniżance of the cauſe. Secondly, That he who executes ſuch ſentence be authorized ſo to do; otherwiſe it will be murder or manſlaughter, or at leaſt a great miſpriſion in the judge who pronounced, and in the officer who executed ſuch ſentence. But where their reſpective authorities are complete, the execution of ſuch ſentence is the cleareſt inſtance of juſtifiable homicide. The magnitude of the offence, where the act becomes ſuch for want of due authority, ſeems to depend upon the degree of colour under which either the judge or officer acted who have acted improperly. If the perſon who pronounced the ſentence had no colour of authority at all, it is undoubtedly murder in him and in the perſon who knowingly executed ſuch a ſentence. But if there be but ſlight colour, and the judge acted bonâ fide and under a belief, though miſtaken, that he had competent juriſdiction, he could not I think be guilty of murder. As if juſtices of peace, whoſe commiſſion extends to try felonies but not treaſons, gave judgment of death on an indictment for treaſon; though this would be erroneous, yet, ſays Lord Hale, they would not be guilty of murder, having ſome colour for proceeding therein; becauſe all treaſon is felony, though it be ſomething more: but tha it would be a great miſpriſion in ſuch juſtices. Yet it is now notorious that their commiſſion does not confer any ſuch authority. If however the juſtices had juriſdiction over the offence, and the proceedings only were erroneous, the juſtices only to whom ſuch error was known, and who notwithſtanding wilfully proceeded, would be guilty of felony, and

1 Hawk. ch. 28. ſ. 4, 5. ch. 31. ſ. 59. 1 Hale, 497. 500, 1. 4 Blac.Com. 178.

1 Hale 454. 497, &c.

Vide Farrington's caſe, T. Jones, 222. 1 rem. P.C. 250. 1 MS. Sum. 138, 9. 1 Hawk. ch. 28. ſ. 6. 1 Hale, 501.

and not the officer who executed their ſentence. But where perſons act by virtue of a commiſſion, which if it were ſtrictly regular would give them full authority, but it happens to be defective only in ſome point of form, it ſeems that they are no way criminal. As where a commiſſion is determined by the neglect of the clerk to adjourn, a judgment afterwards would indeed be erroneous, but the judge who inadvertently pronounced as well as the officer who executed the ſentence would be excuſed.

Ch. V. § 95. *As to judge and officer.*

1 Hawk. ch. 31. ſ. 60. 1 Hale, 498.

§ 96. *Execution muſt conform to the ſentence.*

3. The execution muſt not vary from the judgment, otherwiſe, according to Lord Coke and Lord Hale, the officer executing it will be guilty of felony at leaſt, if not of murder. And therefore, ſay they, if the judgment be to be hanged, and the officer behead the party, it is holden murder. But this is not univerſally true. If indeed the officer of his own head and without warrant or colour of authority vary from the judgment, he may be criminal to that degree. But if the officer have a warrant from the crown for beheading a perſon under ſentence of death for felony, and act accordingly, this would not be criminal. For though the king cannot by his prerogative vary the execution ſo as to aggravate the puniſhment beyond the intention of the law, yet he may mitigate the pain or infamy of it. And even without any warrant the common practice in burning female offenders beforé the act of the 30 Geo. 3. c. 48. was to ſtrangle them at the ſtake before the fire had reached them: but now by that act they are to be hanged as other offenders.

3 inſt. 52. 211. 1 Hale, 433. 454. 466. 501. 2 Hale, 411. Foſt. 267, 9. 4 Blac.Com. 405. 1 MS. Sum. 142. 4 St. Tr. 129.

§ 97. *Muſt be by proper officer.*

4. The execution muſt be performed by the proper officer or his appointed deputy. And if one without any authority were to take upon him to execute ſentence of death, it would be murder.

1 Hawk. ch. 28. ſ. 9. 2 Hawk. ch. 51. ſ. 6.

1 Hale, 497. Sum. 35. 4 Blac. Com. 178, 9. Dalt. ch. 150.

Ch. V. § 98. *Deſcription of offence.*

VII. *How far all or any of the Circumſtances treated of under the foregoing Heads vary the Degree and Puniſhment of the Offence of Homicide committed againſt Maſters, Huſbands, or eccleſiaſtical Superiors, reſpectively, by their Servants, Wives, or eccleſiaſtical Inferiors.*

§ 98. *Nature of offence.* 25 E. 3. ſt. 5. c. 2. *vide* 1 Ed. 6. c. 12. ſ. 1. 1 Hale, 377. 3 Inſt. 19. Foſt. 106. 323. 326, 7. 1 Hawk. ch. 32. ſ. 6. Sum. 24. 1 Hale, 378. 2 Hale, 184.

The ſtat. 25 E. 3. ſt. 5. c. 2. aſcertained and limited the offence of petit treaſon to the three inſtances above mentioned out of ſeveral others, which were ſo conſidered at common law.

Petit treaſon, which is a ſpecies of felony, is the higheſt degree of murder: it is murder aggravated by circumſtances of a treaſonable kind. And therefore if the fact appear to have happened upon a ſudden falling out, or in the party's neceſſary defence, or under any circumſtances which at common law would reduce the crime below murder, it cannot be petit treaſon, but will fall under the ſame conſiderations as if the party had been indicted of murder. And ſo a pardon of murder, or an exception of murder in a pardon of all felonies generally, includes petit treaſon. It only remains therefore to be conſidered in what inſtances the ſeveral relations above referred to are of force to denominate the killing petit treaſon.

§ 99. *By a ſervant.* 1 Hale, 380. Sum. 23. 1 Hawk. ch. 32. ſ. 2, 3, 4. 4 Blac. Com. 203. 3 Inſt. 20. Keilw. 204. Daliſon, 14. Dalt. ch. 142.

1. A ſervant killing his maſter. Under the term *maſter* is included miſtreſs or his maſter's wife. And if a ſervant kill his maſter after departure from his ſervice, upon malice conceived before, this will be petit treaſon. So if a ſon kill his father or mother, to whom he is bound apprentice, or by whom he is maintained, and to whom he does any neceſſary ſervice, although he receive no wages, yet by reaſon of the ſervice he may be indicted by the deſcription of ſervant within the act.

§ 100. *By a wife.* 3 Inſt. 20. 1 Hale, 381. 4 Blac. Com. 203. *et vid. authorities ſupra.*

2. A wife killing her huſband is petit treaſon; but a huſband killing his wife is only murder; becauſe of the obedience which in relation of law is due from the wife to the huſband.

band. A wife though divorced a menſa et thoro is ſtill within the ſtatute, becauſe the vinculum matrimonii ſubſiſts. But a wife de facto is not ſufficient: and therefore if a man marry a ſecond wife, living the firſt, the ſecond is not within the ſtatute, unleſs under circumſtances ſhe might be conſidered as a ſervant, which however Lord Hale ſeems to doubt. Ch. V. § 100. *By a wife.*

As to what ſhall be deemed ſufficient evidence of marriage in proſecutions of this ſort, it may be collected from the following caſe in addition to the general authorities already in print. *Evidence of marriage. Vide* title Polygamy.

Mary Norwood was indicted before Mr. Serjeant Burland for traiterouſly poiſoning and murdering her huſband Joſeph Norwood. It was objected by the priſoner's counſel that there was no proof of actual marriage, and that ſuch proof could only be by producing a copy of the regiſter of ſuch marriage, or by ſome perſon who was preſent at the time. The evidence of marriage was, firſt, cohabitation as man and wife for ſeven years, excepting three months within the laſt two years, when ſhe eloped with another man, but returned and cohabited again with Joſeph Norwood. Secondly, about a year before the murder the priſoner went to a neighbour's and aſked him, whether ſhe had better poiſon her huſband or part from him, for one or other ſhe muſt do. Thirdly, that after the poiſon taken ſhe deſired a ſurgeon to come and ſee *her huſband*; and ſpoke of him to ſeveral others who were about him during his illneſs by the name of *huſband*. Fourthly, the deceaſed after the poiſon taken ſpoke of her by the name of *his wife*. Fifthly, the priſoner's brother who appeared as a witneſs for her, and who ſix years before had lived with her and Joſeph Norwood, ſpoke of knowing them ever ſince they were *married*. Upon this evidence of the marriage the priſoner was convicted; but execution was reſpited to have the opinion of the judges. And on the 24th of April 1765, at Serjeants' Inn, Lord Mansfield, Lord C. B. Parker, Smythe, Bathurſt, Perrot, and Aſton Js. being all who were preſent, were of opinion that the marriage was ſufficiently proved, and that ſhe ought to be executed. They ſaid, this would be ſufficient evidence for a biſhop to certify a marriage upon a plea of ne unques accouplez, &c. Mary Norwood's caſe, Taunton Lent Aſſ. 1765; Serj. Forſter's MS.

Ch. V. § 101. *By a clergyman.*

§ 101.
4 Blac. Com. 203.
1 Hale, 381.
3 Inſt. 20.

3. A clergyman killing his eccleſiaſtical ſuperior to whom he owes obedience is alſo guilty of petit treaſon. A clergyman is underſtood to owe canonical obedience to the biſhop who ordained him, to him in whoſe dioceſe he is beneficed, and alſo to the metropolitan of ſuch ſuffragan or dioceſan biſhop. If he have livings in two dioceſes, the biſhops of both are his immediate ordinaries; for he ſwears obedience to both.

§ 102. *Principals and acceſſaries.*
1 MS. Sum. 118.
1 Hale, 379. 381, 2.
1 Hawk. ch. 32. ſ. 6. 3 Inſt. 20.
Fitz. Cromp. Juſt. 19.

There are acceſſaries before and after in petit treaſon, as in caſe of felony; but ſome diſtinctions are to be noted.

If a ſervant kill his maſter by the procurement of the wife who was abſent, it is petit treaſon in the ſervant, and the wife is acceſſary thereto. But if a ſtranger had done it by the procurement of either in their abſence, it would have been murder in the ſtranger, and the wife or ſervant would have been acceſſary to the murder: for where the principal is only a felon the acceſſary cannot be a traitor. But if a ſtranger had done it by the procurement and in the preſence of the wife or ſervant (and their being in the ſame houſe is in law a preſence); it would have been petit treaſon in the wife or ſervant, and murder in the ſtranger: and the ſame if the ſtranger were an acceſſary. And ſo if a ſervant and a ſtranger conſpire to rob the maſter, and the ſervant be preſent when the maſter happens to be killed in the proſecution of the original deſign, the ſervant is guilty of petit treaſon. The ſame if the ſervant or wife, intending to kill a ſtranger, kill the one his maſter, or the other her huſband, by accident. The ſame rule holds throughout, mutatis mutandis, for an inferior clergyman in relation to his ſuperior.

(Fitz. Cromp. Juſt. 20.)

1 Hale, 380.
Dalt. ch. 142. ſ. 3, 3.
Plowd. 475.

§ 103. *Indictment and verdict.*
Foſt. 325. 328.
2 Hale, 378.
(*Vide* a caſe in 6 St. Tr. 224. contra, cited by Mr. Juſtice Foſter, & rejected.)
Swan's caſe, Foſt. 104.

Lord Hale and Mr. Juſtice Foſter ſay, that a perſon guilty of petit treaſon may be indicted of murder; though the latter thinks it more adviſeable for the court to diſcharge the jury of that indictment, and order an indictment for petit treaſon to be preferred; becauſe the judgment is different, and alſo the trial in reſpect of the number of challenges, which in petit treaſon is 35. In Swan's caſe, whoſe trial was poſtponed after he had been arraigned upon an indictment for murder, to which he had pleaded, it was thought more adviſeable to prefer a new bill charging him with petit treaſon, on which he was afterwards convicted. But upon an indictment

Ch. V. § 103. *Indictment and verdict.*

1 Hale, 184-292.
Henrietta Radburne's caſe, O. B. July 1787. MS. Buller J.
Vide poſt. S. C. ſ. 124.

dictment for petit treaſon, if the killing of the deceaſed with malice be proved, but not the relation between the parties; or if the fact can only be proved by one witneſs, or by the examination of the deceaſed before a magiſtrate by virtue of the ſtat. of Ph. & M. (*a*), the priſoner may be found guilty of murder upon that indictment, and acquitted of the treaſon. And the ſame was done in Radburne's caſe upon an indictment and inquiſition for petit treaſon, by the direction of Wilſon J., which was afterwards approved of by the judges on a conference. By a parity of reaſoning, the priſoner upon ſuch an indictment may be acquitted of the treaſon and found guilty of manſlaughter.

1 Hale, 378.
2 Hale, 292.

Foſt. 329.
Swan's caſe, ib. 104, 7.
Dalſon, 16.

Likewiſe, one may be charged with petit treaſon and another with murder in the ſame indictment. And ſuch indictment concluding that they "feloniouſly, traiterouſly, "and of malice aforethought murdered," &c. is good for both, reddendo ſingula ſingulis. But if they cannot agree in their challenges they muſt be tried ſeparately; the one being entitled to 35, the other only to 20 challenges.

Foſt. 337.

2 Hale, 246.
Vide Foſt. 328, 9.

Anterfoits acquit, ſays Lord Hale, upon an indictment for murder, is a good bar to an indictment for petit treaſon, and e converſo. Mr. Juſtice Foſter however ſpeaks with more heſitation of the former caſe.

An appeal of death lies as well in petit treaſon as in murder.

Foſt. 323.

§ 104. *Witneſſes and trial.*
1 Ed. 6. c. 12. ſ. 22. Foſt. 227. 233. 328. 337.
5 & 6 Ed. 6. c. 11.
2 Hale, 184. 269. 339.
Ante, p. 128, &c.
1 & 2 Ph. & M. c. 10. ſ. 7.
1 Inſt. 24. 27.
Vide 1 Hale, 316.
Foſt. 337.

The ſtat. 1 Ed. 6. c. 12. expreſsly requires two witneſſes upon the indictment and at the trial, as well in petit treaſon as in high treaſon. The ſtat. 5 & 6 Ed. 6. c. 11. by general words extending to all treaſons, requires that the witneſſes, if living, ſhall be examined in perſon upon the trial, in open court. For the fuller conſideration of which ſtatutes I muſt refer to the chapter upon high treaſon. The ſtat. 1 & 2 Ph. & M. c. 10. enacting, that the trial for any treaſon ſhall be according to the courſe of the common law, includes petit treaſon; and it ſeems to follow from thence that the trial per medietatem linguæ is taken away, which is the opinion of Mr. Juſtice Foſter.

As to other general matters relating to petit treaſon and murder, they are conſidered under the appropriate branches of the general head of Homicide. And miſpriſion of petit treaſon is included under the former general title of miſpriſion of treaſon.

Ante, 139.

(*a*) St. 1 & 2 Ph. & M. c. 10. and 2 & 3 Ph. & M. c. 10. extending only to

Ch. V. § 105. *Indictment and evidence.*

Of the Indictment, and Appeal, and Evidence.

§ 105. *General rules.*

The peculiarities in the form of indictments and appeals for homicide relate principally to the manner of describing the fact whereby the death was occasioned, and the evidence applicable thereto: but I shall also advert to some general rules touching these matters.

Indictment for murder most usual in cases of homicide. 1 MS. Sum. 33. 2 Hale, 60. 158.

In most cases where justice requires that a man should be put upon his trial for killing another, it is usual (and proper, if there be any doubt) to charge him in the indictment for murder, because in many instances it is a complicated question; and no injury can thereby happen to the individual at all comparable to the evil example of a lax administration of justice in this respect: for the verdict and judgment will still be adapted to the nature of the offence, such as it appears upon the evidence. And where a party is committed upon such a charge, he may be brought up by habeas corpus before the court of K. B., and if a clear case be laid before the court, whereby the homicide appears to be either justifiable or excusable, they will upon view of the depositions and commitment admit the party accused to bail; as in Mrs. Barney's case, (temp. W. 3.) where the charge clearly appeared to be groundless. But justices of peace ought not to bail in such cases, but should commit till the next coming of the justices of gaol delivery. And even where the offence, if specially presented, would be short of felony, the prisoner if charged with murder has this advantage, that an acquittal thereof is a perpetual bar against any other indictment for the same death.

Vide Latch. 12. T. Jones, 222. Co. Entr. 356. b.

MS. Tracy,

1 Hawk. ch. 29. s. 23. 2 Hale, 158.

Appeal. 2 Inst. 316. Latch. 126.

No appeal lies for homicide less than manslaughter.

§ 106. *Presumption of malice from the fact of killing.* Foft. 255. 290. 1 Hale, 455. 471. Kel. 27. 50. 1 Hawk. ch. 31. s. 32. 4 Blac. Com 201. Ante, s. 12.

On every charge of murder, the fact of killing being first proved, the law presumes it to have been founded in malice until the contrary appear: and therefore all circumstances alleged by way of justification, excuse, or alleviation, must be proved by the prisoner, unless they arise out of the evidence produced against him. Upon the truth of these facts so alleged the jury alone are to decide; but whether, taking them to be true, the homicide be justified, excused, or alleviated, is a matter of law upon which the jury ought to be guided by the direction of the court.

As

As to the Form of the Indictment.

Ch. V. § 107. *Manner of death.*

§ 107. 2 Hawk. ch. 23. s. 79. 84. ch. 25. s. 57.

It is essentially necessary to set forth particularly the manner of the death, and the means by which it was effected; and an omission in this respect is not aided by a general conclusion, that the defendant so murdered, &c. This in the case of an appeal is necessary, not only at the common law, but by the stat. of *Gloucester*, *c.* 9. which expressly requires, that it shall *declare the deed.* And therefore if a person be indicted or appealed for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting, starving, or strangling. But if the mean of death proved agree in substance with that charged, it is sufficient. Thus where the death is occasioned by any weapon, the name or description of that weapon ought to be stated; yet if it appear that the party were killed by a different weapon, it maintains the indictment: as if a wound or bruise be alleged to be given with a sword, and it prove to be with a staff, or axe, this difference is immaterial. And the same if the death be laid to be by one sort of poisoning, and it turn out to be by another: but some sort or other must be alleged in the indictment; which ought in this as well as all other respects to be as closely adapted to the truth as possible. In Sharwin's case the indictment was for assaulting one with a certain offensive weapon commonly called *a wooden staff*, with a felonious design to rob him; and it proved to be with a stone; and held well, upon a conference between the judges: for they produce the same sort of mischief, namely, by blows and bruises; and this would be sufficient on an indictment for murder.

2 Hale, 185. Sum. 265. 4 Blac. Com. 196. 2 Hawk. ch. 46. s. 37. 2 Inst. 319.

Sharwin's case, Oakham 8th July 1785, cor. Gould j.

In Mich. T. 1785, MS. Buller J.

§ 108. *How the instrument was holden, and the value of it.* 2 Hale, 185. *Vide* 2 Hawk. ch. 23. s. 79. 80. &c.

Where the death is occasioned by any instrument holden in the hand of the party killing at the time, it should be so alleged; which is either done by stating that it was holden in both hands, or in the right or left hand; though I do not find the grounds for this particularity; and Hawkins does not mention this in enumerating the necessary requisites in an appeal or indictment. Regularly also the value of the instrument should be stated, or else it should be alleged to be of no value. The reason of which is, that the weapon whereby the death of a man is caused is a deodand forfeited

Ch. V. § 108. *By what inſtrument, and how holden.*

to the king; and the townſhip ſhall be charged for the value, if delivered to them. But this ſeems not to be eſſential.

§ 109. *Alleging the ſtroke.*
2 Hale, 184. Sum. 207. Lorkin's caſe, 1 Buſtr. 124. MS. Tracy, 55. 2 Inſt. 319. 2 Hawk. ch. 23. ſ. 82. Cro. Jac. 635. Dy. 99. Long's caſe, 5 Co. 122.

Where the death is occaſioned by a wound, bruiſe, or other aſſault, the ſtroke ſhould be expreſsly laid. For want of this an indictment ſtating that the party of malice aforethought murdered or gave a mortal wound, without ſaying that he *ſtruck*, &c. was holden bad. Yet Hawkins obſerves, that in Croke's report this opinion ſeems to be queſtioned: and adds, that he finds no reaſon given why that word ſhould be of ſuch abſolute neceſſity, it not being ſo much as pretended in Long's caſe, which ſeems to be the chief foundation of the opinion, that it is an appropriate word of art: but that all that ſeems there contended for is, that where the death is occaſioned by any external violence coming under the notion of ſtriking, it muſt expreſsly appear that a ſtroke was given. However Hawkins ſays, that it is not ſafe to

MS. Tracy, 55.

omit the word where the fact will warrant it. Of courſe it cannot be neceſſary in the caſe of poiſoning, ſtarving, or the like, where no actual force is exerted or aſſault made.

§ 110. *Deſcription of wound.*
2 Hale, 185. 2 Hawk. ch. 23. ſ. 80. 4 Co. 40. b.

It ought to be ſhewn in what part of the body the deceaſed was ſtruck or wounded when the killing is of that ſort. Therefore if it be ſaid to be on the arm, hand, or ſide, without ſaying either right or left, it is not good: or if it be only ſaid *about* the breaſt. And if any of the wounds be laid with uncertainty, the laying of others with ſufficient certainty will not help the indictment, if there be a general concluſion that the party died of the wounds above mentioned. But where there is a ſufficient certainty, the addition of a further uncertain deſcription of the ſame wound will not vitiate it; for the latter may be rejected as ſurpluſage. Regularly too the length and depth of the wound is to be

2 Hale, 186. 2 Hawk. ch. 23. ſ. 81. 2 Inſt. 318. 4 Co. 42. a.

ſhewn; but this is not neceſſary in all caſes, as where a limb is cut off, or the death be effected by bruiſes: and if a man be ſhot or run through the body, it ſeems ſufficient to ſay that the defendant ſtruck the perſon killed in ſuch a part of his body, and gave him in ſuch a part a mortal wound, penetrating into and through his body. But in regard to

2 Hale, 186.

much

much of what is ſaid above, this is to be noted, that though the manner and place of the hurt and its nature be requiſite to be ſtated as to the formality of the indictment, and it is fit to be done as near the truth as may be; yet if upon evidence it appear to be another kind of wound in another place, of which the party died, it is ſufficient to maintain the indictment. The reaſon ſtated in the books for requiring this minute particularity is, that the court may ſee that the wound was of ſuch a nature from whence death might enſue. In all caſes of doubt therefore a ſtatement ſufficient for that purpoſe ſeems to be enough.

Ch. V. § 110. *Deſcription of wound.*

Vide 2 Hawk. ch. 23. ſ. 81. 2 Inſt. 318. 4 Co. 40. b.

§ 111. *Death by means ſtated to be alleged.*
2 Hale, 186.

But in all caſes the death by the means ſtated muſt be poſitively alleged, and cannot be taken by implication: and therefore where the mean of death is alleged to be by any ſtroke, the indictment ſhould proceed to aver that the priſoner thereby gave to the deceaſed a mortal wound or bruiſe whereof he died; or where by poiſon, after ſtating particularly the manner of the poiſon's being adminiſtered, that the party died of the poiſon ſo taken and the ſickneſs thereby occaſioned. Merely ſtating the death to be by means of raviſhing an infant (waving the queſtion whether ſuch a mean of death could be deemed murder), without any allegation that the wound, bruiſe, or hurt was mortal, was holden not to be ſufficient.

1 Hawk. ch 23. ſ. 82, 83. Kel. 125.

Lad's caſe, Eaſter Term 1774. before all the judges at Serjeants' Inn, MS. Cro. Caſ. Ref. and MS. Gould J. Leach. 91. S. C.

§ 112. *Time and place:*
2 Hale, 179. 186. 1 Hawk. ch. 37. ſ. 6. 2 Hawk. ch 23. ſ. 33. 90. 91. 3 Inſt. 49. 53. Ealing's caſe, poſt. ſ. 133. *Vide* Cotton's caſe, Cro. Eliz. 738. 2 Inſt. 319.

It is neceſſary to allege the time and place as well of the wound as of the death; the latter in order that it may appear that the offence is cognizable by the court before whom the party is tried. And where by the ſtat. 2 & 3 Ed. 6. c. 24. the party is indicted in the county where the death happened, though the ſtroke were given in another, yet ought the ſtroke to be alleged in the county where it really was. The ſtat. of Glouceſter, (6 Ed. 1. c. 9.) requires alſo the vill or town to be named in appeals. The like rule is to be obſerved in the indictment of offenders under the ſtat. 28 H. 8. c. 15. and 33 H. 8. c. 23. for murders committed on the ſea or in other places there named; the offence muſt be alleged where committed. The reſpective times of the wound and death are alſo required to be ſhewn in order that it may ap-

Ut ſupra, and 1 Hale, 428. 426. 8. 2 Hawk ch. 32. ſ. 9. 10. 3 Inſt. 53.

Ch. V. § 112. *Time and place.*

2 Inſt. 318. 4 Blac. Com. 197. Plat. de pace, 125. a.

pear that the deceaſed died within a year and a day from the ſtroke or other cauſe of death; in the computation of which the day on which the act was done ſhall be reckoned the firſt. This may be done either by ſtating that he died inſtantly of the wound, or that he languiſhed of the ſame till the day mentioned, when he died of the ſaid mortal wound. The ſame law as to the computation of time holds in the caſe of an inquiſition of felo de ſe. But though the day or year be miſtaken, yet it is not material; if it appear by the evidence that the death happened within the time limited; without which the law does not attribute the death to the ſtroke or poiſon. In appeals indeed the ſtat. of Glouceſter, c. 9. requires alſo the hour to be ſtated; but it has been holden that an omiſſion in that reſpect is not fatal; becauſe the common law did not require it, and the ſtatute is in the affirmative. Yet the uſual way is to allege, that the fact was done *about ſuch an hour*: but a variance in the evidence is immaterial. That ſtatute alſo requires the year, and time of the king's reign, to be given to the ſtroke and death.

6 Ed. 1. c. 9. 2 Hawk. ch. 23. ſ. 33. 86, 87. 88. 2 Inſt. 318.

§ 113. *Evidence of death from cauſe alleged. Vide* references to laſt ſection. 1 Hale, 428. 1 Keb. 17. MS. Burnet, 55.

As to what ſhall be deemed ſufficient evidence of the death having happened from any prior injury; it is obſervable, that though the ſtroke were not ſo mortal in itſelf but that with good care and under favourable circumſtances the party might have recovered; yet if it were ſuch from whence danger might enſue, and the party neglected it, or applied inefficacious medicines, whereby the wound which at firſt was not mortal in itſelf turned to a gangrene or produced a fever, whereof he died, the party ſtriking ſhall anſwer for it, being the mediate cauſe of the death. This was holden in Rew's caſe, which was afterwards agreed to be law at the Old Bailey by Lord Ch. J. Parker and Tracy J. The ſame rule holds if a man's death be haſtened by a ſtroke which irritates and increaſes a diſeaſe which he had before, though poſſibly he would otherwiſe have died in a ſhort time; for, as Rolle C. J. ſaid, an offender of ſuch a nature ſhall not apportion his own wrong. But if the hurt given were not dangerous in itſelf, but with ill application or otherwiſe the party die; and it clearly appear that the death was owing to ſuch application and not to the hurt received, though adminiſtered in conſequence of ſuch hurt; it is not homicide.

Rew's caſe, Kel. 26. MS. Tracy, 53.

Ch. V. § 113. *Evidence of cauſe of death.*

§ 114. *Name of deceaſed.* 2 Hale, 181. 6. 2 Hawk. ch. 23. ſ. 78. 3 St. S. Sum. 45. 22 Aſſ. 106. 4 Co. 41. b.

If the name of the deceaſed be not known, it may be laid to be a certain man to the jurors unknown. But in an appeal his name muſt be ſhewn, for none but the widow or heir can bring ſuch appeal. But it is not neceſſary, though uſual, to allege that the party ſtricken was in the peace of God and of the king.

§ 115. *Special circumſtances of the caſe.* 2 Hawk. ch. 46. ſ. 41. Mackalley's caſe, 9 Co. 62, 3. 7.

It is very unuſual and always unneceſſary to ſtate more of the ſpecial circumſtances of the caſe in an indictment for murder, than what are compriſed in the rules here ſpecified. Nevertheleſs, if an indictment ſet forth all the ſpecial matter in reſpect whereof the law implies malice, a variance between the indictment and the evidence is not material, provided the ſubſtance of the matter be found. As where an indictment for the murder of a ſerjeant at mace in London, upon an arreſt, ſuppoſed that the ſheriff made a precept to ſuch ſerjeant for the arreſt; und upon the evidence it appeared that there was no ſuch precept, but that the ſerjeant made the arreſt ex officio at the plaintiff's requeſt upon the entry of the plaint, according to the cuſtom of the city: for the ſubſtance of the matter was, whether the defendant killed an officer in the lawful execution of legal proceſs.

§ 116. *Terms of art.* 1 Hale, 466. 2 Hale, 184. 186, 7. 344. Foſt. 256. 303, 4. 2 Hawk. ch. 23. ſ. 77. 83. ch. 25. ſ. 55. 4 Blac. Com. 307. Yelv. 205. Cro. Jac. 283. MS. Burnet, 43. 1 Bulſtr. 144. Dy. 69. a. 261. a. 4 Co. 39. b. 41. Kel. 124. 1 Hale, 450. 466.

The act by which the death is occaſioned, whether it be by means of any aſſault or force upon the perſon, or by craft, as poiſoning or the like, muſt not only be ſtated to be done feloniouſly in common with other indictments or appeals for felony, but muſt be alleged to be done *of malice aforethought*, in order to conſtitute the offence murder. And it is equally neceſſary to ſtate that the defendant *murdered* the deceaſed; for this is a term of art, and cannot be otherwiſe expreſſed. An indictment for manſlaughter merely charges that the defendant feloniouſly *ſlew* or *killed* the deceaſed. And death by miſadventure or chancemedley is charged to have been done *caſually, and by misfortune, and againſt the will of the defendant*. If an indictment barely allege that the mortal ſtroke

Ch. V. § 116. *Terms of art.*

ſtroke was given *felonioufly*, or that the defendant *murdered*, &c. without adding *of malice aforethought*; or if it only charge that he *killed* or *ſlew*, without averring that he *murdered* the deceaſed, the defendant can only be convicted of manſlaughter. In appeals it was formerly the courſe only to charge the fact to have been done nequiter et in feloniâ, omitting "of malice aforethought." But other and later precedents follow the form of indictments for murder; which now ſeems the proper way. In petit treaſon the indictment or appeal further charges the fact to have been done *traiterouſly*. Where the indictment charges that A. felonioufly and of his malice aforethought aſſaulted B. and with a ſword, &c. *then and there* ſtruck him, &c. the firſt allegation of "*felonioufly and of his malice aforethought*" applied to the aſſault runs alſo to the ſtroke, to which it is eſſential. An indictment againſt Mary Nicholſon, for poiſoning Elizabeth Atkinſon, ſtated that the priſoner "*did wilfully, felonioufly, and of her malice aforethought* mix poiſon, viz. white arſenic with flour and milk, with intent that the ſame ſhould be afterwards baked and eaten by the deceaſed, *and* the ſaid flour and milk ſo mixed with the poiſon as aforeſaid did, with the intent aforeſaid, *then and there deliver to the deceaſed*," &c. This was holden ſufficient by all the judges, without adding the words "felonioufly and of her malice aforethought" again to to the allegation of the delivery of the poiſon. For they conſidered that thoſe words firſt mentioned ran through the ſubſequent allegation, coupled as they were by the word *and*, and the words *then and there*. In the ſame caſe it was alſo ruled that the allegation of ſuch *delivery* of the poiſon to the deceaſed was proved by ſhewing that the priſoner put the poiſon in a pudding meal which was in a bowl in the milk-houſe, from whence it was taken by the deceaſed as uſual to make the pudding for the family, and afterwards eaten by her.

Foſt. 256. 1 MS. Sum. 159 Staundf. 78. b. 79. b. *ſed vide* Foſt. 323. Co. Entr. 53. b. 56. b. 57. 59. 5 Burr. 2647. 2 Hale, 178 184 2 Hawk. ch. 23. ſ. 88.

Mary Nicholſon's caſe, before Rooke J. Durham Sum. Aſſ. 1798, MS. Jud.

Upon a conference of the judges, 6th Nov. 1798. (abſent Eyre C. J.)

The words "*with force and arms*" are not neceſſary in an appeal any more than in an indictment for this offence, being ſo fully implied.

33 H. 8. c. 8. 2 Hawk. ch. 23. ſ. 85. ch. 25. ſ. 90, 91. 2 Hale, 187.

For other general requiſites of an indictment for the various kinds of homicide in common with other offences, I refer for brevity ſake to the general head of Proſecution by indictment.

If

If the bill of indictment be for murder, and the grand jury return it only a true bill for manſlaughter, and ignoramus as to murder, the uſual courſe has been ſaid to be, in the preſence of the grand jury, to ſtrike out "*maliciouſly*" and "*of malice aforethought*" and the charge of *murder*. Though Lord Hale thinks it better to preſent a new bill to them for manſlaughter. And though the ſame indictment may charge one with murder and another with manſlaughter, yet certainly if it charge both with murder, the grand jury cannot find it a true bill againſt one, and manſlaughter as to the other; but it is a good finding againſt the one for murder, and there ought to be a new bill againſt the other for manſlaughter.

Ch. V. § 116. *Terms of art.*

Alterations by grand jury on different findings. 2 Hale, 162. 1 Roll. Rep. 408. 1 Sid. 230.

Cary's caſe, 3 Bulſtr. 206. Poſt. 350.

§ 117. *Apt concluſion.*

Finally, the murder is charged upon the party by way of concluſion, and as a conſequence from the antecedent matter, which is poſitively alleged, to the following effect: "and ſo the ſaid A. him the ſaid B. in manner and by the "means aforeſaid felonioufly, wilfully, and of his malice "aforethought did (poiſon) kill and murder." The ſame concluſion ſeems now to be the moſt proper in appeals. And ſuch a general concluſion is peculiarly applicable where the ſtroke, &c. is at one time or place, and the death at another; but in thoſe caſes if the day be ſpecially alleged, it ſhould be that on which the party died, and not that on which he was ſtricken; for it is no murder till he die; and if it be otherwiſe averred it is naught.

2 Hawk. ch. 23. ſ. 88. ch. 25. ſ. 55. Kel. 125.

Ante, 346. 2 Hawk. ch. 23. ſ. 79. 1 Hale, 427. 2 Hale, 188. 2 Hawk. ch. 23. ſ. 88.

§ 118. *Indictment on ſtat. of ſtabbing.*

With reſpect to offenders againſt the ſtatute of ſtabbing, (1 *Jac.* 1. *c.* 8.) it is ſaid to have been uſual to prefer two indictments, one for murder, and the other for manſlaughter under the ſtatute; and to put the priſoner to plead to both; and to charge the jury with the indictment for murder. But as all the ſubſtantial purpoſes of juſtice may be anſwered by either of theſe indictments, I ſee no reaſon for this practice. The indictment for killing under the ſtatute muſt be ſpecially formed purſuant thereto, in order to ouſt the priſoner of his clergy; namely, that he did with a ſword, &c. *ſtab* the deceaſed, *he having no weapon drawn, nor having ſtruck firſt*; otherwiſe it will be but manſlaughter at common law. And it alſo ſeems neceſſary to allege the death

1 Jac. 1. c. 8. 1 Hale, 468. Cro. Cir. Comp. 312. Foſt. 299.

Ante, ſ. 28.

of

Ch. V. § 118. *On ſtat. of ſtabbing.*

of the party within ſix months after the ſtab or thruſt, according to the requiſition of the ſtatute, or at leaſt it ſhould ſo appear to have been upon the face of the indictment. How far any omiſſions in theſe reſpects may be ſupplied by a recital of the ſtatute, or an apt concluſion, will be noticed in another place.

Vide *general title Proſecution by Indictment.*

1 Hale, 468, 469. 1 Hawk. ch. 30 ſ. 9. 2 Hawk. ch. 25. ſ. 115. Sum 266. Poſt. 349. Ante, ſ. 28. &c.

But though the indictment uſually conclude "againſt the form of the ſtatute," and therefore it is beſt to follow the common uſage, yet ſuch concluſion is not neceſſary, becauſe the ſtatute makes no new offence, but only takes away clergy from the old one. From hence too it follows that if the offence be taken out of the ſtatute by the evidence, yet the defendant may be found guilty of manſlaughter at common law notwithſtanding ſuch concluſion. On the other hand, a conviction on this ſtatute has been holden ſufficient to anſwer the inquiſition for murder. John Cowland was indicted on the ſtatute for killing Andrew Skanning, and was at the ſame time charged on an indictment for murder, and on the coroner's inquiſition for the ſame, and being found guilty on the ſtatute, he had judgment on all together.

John Cowland's caſe, O. B. Dec. 1700, per Turton and Powell Js. Serjt. Forſter's MS.

Clergy.
1 Hale, 468.
2 Hale, 344.
1 Hawk ch. 30. ſ. 9.
Poſt. ſ. 121.

No other being ouſted of clergy by the ſtatute but he who actually ſtabs or thruſts, the fact muſt be laid truly. Wherefore if A. be indicted for ſtabbing, and B. and C. for aiding and abetting; and it be found that B. gave the ſtroke, and that A. and C. were aiding and abetting; not only A. and C., but B. alſo, ſhall have their clergy; becauſe the indictment brings him not within the ſtatute; but they may all be found guilty of manſlaughter at common law; as B. and C. might be if A. had been proved to have ſtabbed the party as laid; in which caſe A. would be ouſted of clergy; and this notwithſtanding the aiding and abetting is alſo laid to be *againſt the form of the ſtatute*; which is inſenſible, and ſhall be rejected as ſurpluſage: and ſo the aidors and abettors may be puniſhed as for manſlaughter at common law, though the verdict of guilty purſued the indictment.

(Ld. Cornwallis's caſe, Dom Proc. 1678, 2 St. Tr. 730.)

§ 119. *Indictment on ſtat. 21 Jac. 1. for concealing the death of baſtard.* 2 MS. Sum. 488.

The indictment on the ſtat. 21 Jac. 1. c. 27. for concealing the death of a baſtard child, in order to put the mother upon proof by one witneſs that it was born alive, muſt charge

Ch. V. § 119. *On 21 Jac. 1. for concealing death of baſtard.*

charge that ſhe was delivered of a child (male or female), which by the laws of the kingdom was a baſtard; that it was born alive; and ſome manner of killing it muſt be alleged, as by ſtrangling or otherwiſe: but it is not neceſſary to conclude contra formam ſtatuti; nor to charge that the mother concealed the death, though it be neceſſary to prove it; for the ſtatute creates no new crime, but only makes the concealment evidence of having murdered it. This was ſettled in Ann Davis's caſe by the advice of all the judges, upon a ſearch of precedents, which were all found to have been drawn in that form after the 4th of Car. 1.

2 Hale, 190. 288. 2 Hawk. ch. 46. ſ. 43. *Vide* ante, ſ. 15. and p. 348.

Ann Davis's caſe, Kel. 32.

It ſeems alſo from Peat's caſe, that if the indictment againſt the principal alſo charge the preſence of an accomplice at the fact, there can be no conviction upon this ſtatute; becauſe it appears upon the very face of the record that there could be no concealment by the mother.

Jane Peat's caſe, ante, ſ. 15.

§ 120. *Form of appeal, vide general title of proſecution by appeal.* 2 Hawk. ch. 23. ſ. 33. 34. 1 Hale, 427. 3 MS. Sum. 8.

Some things are neceſſary to be added in reſpect to appeals of death, not referable to indictments. By the ſtatute of Gloceſter, c. 9. the appeal muſt be brought within a year and a day after the deed done; which is now ſettled to be computed from the day of the death, including that day; and as againſt an acceſſary after, from the day of the receipt. It may be brought either by a wife for the death of her huſband, or by an heir for the death of his anceſtor.

By the wife. 2 Hawk. ch. 23. ſ. 36 to 38. 3 MS. Sum. 5. (printed page 181.) 2 Inſt. 68.

In the firſt caſe ſhe muſt be innocent of the fact, and prove herſelf lawful wife of the deceaſed: wherefore ne unques accouplez in loial matrimonie is a good plea in bar, and triable by the Biſhop's certificate. But it is no defence that the wife had eloped from the deceaſed, or that he ſtood attainted. But a ſubſequent marriage, whether before or after the appeal commenced, is a bar; ſo that even after judgment ſhe cannot pray execution: though it do not appear in this latter caſe but that the court ex officio, or at the demand of the king, may award execution, to prevent a failure of juſtice, as the attainder is a bar to any new proſecution.

By the heir. 2 Hawk. ch. 23. ſ. 39 to 43. 3 MS. Sum. 6. 11. (printed page 181, 2, 7.) Staundf. 59.

2dly, The appeal of death by an heir, (who muſt be heir male; though deriving through a female is ſufficient) can only be where the deceaſed left no wife, unleſs ſhe were implicated

Ch. V. § 120. *Form of appeal.*

plicated in the guilt: for though ſhe marry afterwards, or die within the year and day, he cannot have an appeal. He muſt be heir general by the common courſe of the law, and not ſpecial heir by the cuſtom, or one of the half blood. In every caſe it muſt appear by the writ or count in what manner the appellant is heir: and it follows that if the dec ſed were attainted, as he could have no heir, ſo there could be no appeal by any as ſuch. But if the heir general himſelf be implicated, the next heir ſhall have the appeal againſt him as if he were dead without iſſue. But the appeal does not go over if the heir general be attainted or die, within the year and day. Neither in the caſe of the heir general dying after judgment can the next heir, as it ſeems, pray execution; though perhaps the court ex officio or on demand of the king may award it, for the reaſon before mentioned.

§ 121. *Accomplices.*

I come now to conſider this part of the ſubject as it is applicable to accomplices and acceſſaries in general.

MS Tracy, 55. cites 3 Bulſtr. 206. ante, f. 58.

Several perſons preſent at the death of a man may be charged with different degrees of homicide in the ſame indictment, as one with murder, another with manſlaughter. For if there be no malice in the party ſtriking, but malice in an abettor, it will be murder in the latter, though only manſlaughter in the former. But if the bill be framed for murder againſt two, and the grand jury find it a true bill as to one and manſlaughter as to the other, there ought to be a new bill preferred for manſlaughter againſt the laſt.

2 Hawk. ch. 31. f. 49. 2 Hawk. ch. 29. f. 7.

Ante, 347.

2 Hawk. ch. 23. f. 76.

In appeal where ſeveral are preſent at the fact, and one only actually does it, and the others abet him, the plaintiff may either elect to ſuppoſe in his declaration that all did the fact, or ſhew the ſpecial matter. For in theſe caſes all the parties are principals, and the blow of one is in law the blow of all. For which reaſon an indictment that A. gave the mortal blow, and B., C., and D. were preſent and abetting, is ſuſtained by evidence, that B. gave the blow, and A., C., and D. were preſent and abetting. Upon the like indictment, evidence that E., though not named therein, gave the blow, and that A., B., C., and D. were preſent and abetting, would be ſufficient; or even that a perſon unknown gave the blow.

1 MS. Sum. 483. Sum. 265. Foſt. 351. 1 Hale, 437. 463. 2 Hale, 185. 292. 314, 345. 2 Hawk. ch. 46. f. 39. Plow. 98. 100, 1. Mackally's caſe, 9 Co. 67 b. R. v. Borthwick and others, Doug. 207. R. v. Plummer, Kel. 109. Sand. 109. ante, f. 118.

Ch. V. § 121. *Accomplices.*

blow. But it is otherwiſe, as I have ſhewn on the ſtatute of ſtabbing, being a particular law, and pointed at the actor himſelf.

Acquittal of principal, conviction of abettor.

Whether if the perſon charged as principal be acquitted, a conviction of another charged in the indictment as preſent aiding and abetting him in the murder be good, was doubted by ſome judges in Shaw's caſe; though a majority of them at laſt thought the conviction proper; the indictment concluding that both murdered, &c., and the verdict finding that the priſoner did the fact. But no expreſs determination was made on the caſe, as it was thought by the judge who tried him a proper caſe for a pardon on the ſpecial circumſtances.

Alex. Shaw's caſe, Suſſex Sp. Aſſ. 1785, debated in Eaſt. and Trin. terms following, MS. Gould and Buller Js., S. C. reported in Leach 290. laſt edit. 398.

Regina v. Wallis and others, O. B. 1703, cor. Holt C. J. et al. Juſt. Salk. 334.

But this point was expreſsly decided in Wallis's caſe, which does not appear to have been referred to on the laſt-mentioned occaſion. That was an indictment againſt A. for murder, and alſo againſt Wallis and others as perſons preſent, aiding and abetting A. therein. A. was firſt tried upon this indictment and acquitted, and afterwards Wallis was tried upon it. And per Holt C. J. Though the indictment be againſt the priſoner for aiding, aſſiſting, and abetting A. who was acquitted, yet the indictment and trial of this priſoner is well enough; for all are principals, and it is not material who actually did the murder.

How abetment laid.

2 Hawk. ch. 23. f. 89. 4 Co. 42. b.

The abetment ſhould in all caſes be laid to the ſtroke, and not to the death, if they are laid on different days: or the allegation may be general, that the defendant was preſent, aiding and abetting at the felony and murder as aforeſaid, committed in manner and form aforeſaid.

Huſband and wife.

Kel. 31.

If the wife be an accomplice with her huſband in murder, ſhe ſhall anſwer for it notwithſtanding her huſband's preſence; contrary to the general rule of law in caſes of felony, which ſuppoſes her to act under his coercion.

§ 122. *Acceſſories.*

Ante f. 121. Foſt. 361.

The ſame rule of evidence which I have above adverted to as governing the caſe of accomplices charged as principals, or vice verſâ, does not altogether apply to that of principals and acceſſaries, whoſe offences are of a more diſtinct nature: ſo far however as the offence charged and proved againſt an acceſſary is in ſubſtance the ſame, the ſame rule prevails,

Ch. V. § 122. *Acceſſaries.*

prevails. Thus an indictment of A. as acceſſary to B. and C. is proved by evidence of his being acceſſary to B. only. But if two be indicted as principals, and it appear that one of them were acceſſary before, he ſhall be diſcharged of that indictment. In like manner one indicted as acceſſary before cannot be convicted upon evidence proving her to have been preſent aiding and abetting at the fact. This was the caſe of Winifred Gordon, who together with Thomas Gordon were indicted, for that *they* on the 23d July 1788 *made an aſſault* on George Linnel, a conſtable, in the execution of his office; that Thomas Gordon ſhot and killed him; and that Winifred Gordon "before the felony and murder aforeſaid by the ſaid T. G. in manner and by the means aforeſaid done and committed, to wit, on the ſaid 23d of July, with force and arms at, &c. then and there feloniouſly, wilfully, and of her malice aforethought did incite, move, inſtigate, ſtir up, counſel, direct, adviſe, and command him the ſaid T. G. the felony and murder aforeſaid in manner and by the means aforeſaid to do and commit;" and then concluded that both the priſoners "in the manner and by the means aforeſaid then and there feloniouſly, wilfully, and of their malice aforethought did kill and murder the ſaid George Linnell," &c. After argument in the Exchequer-chamber, it ſeemed to be the opinion of all the judges, though they differed in other reſpects, that this indictment only amounted to a charge as againſt Winifred Gordon of being an acceſſary before, though it charged her, as it ſhould ſeem improperly, with having joined in the aſſault againſt the deceaſed. And indeed the counſel for the proſecution admitted that it muſt be ſo conſidered upon the authority of Haydon's caſe; where it is holden neceſſary to charge a principal in the ſecond degree with being preſent aiding and abetting. But it was the opinion of all the judges that ſhe might be indicted again as principal; in which the four concurred, if, as the others thought, ſhe could not be convicted upon this indictment charging her as acceſſary before.

Sum. 265, 6. 2 Hawk. ch. 46. ſ. 40. Rex v. Winifred Gordon, Northampton Lent Aſſ. 1789, MS. Buller J. ante, f. 81. and tit Principal and Acceſſary S. C. *vide* 2 Inſt. 282.

24th June 1789.

4 Co. 42. b.

An indictment againſt one as acceſſary before to murder, charging that he "maliciouſly excited, moved, and procured," &c. is ſufficient to ouſt clergy, by force of the 4 & 5 Ph. & M.; the words whereof are, "that all

2 Hawk. ch. 33. ſ. 25. Lodowike Grevil's caſe, And. 195.

perſons who maliciouſly *command, hire, or counſel* any perſon," &c.; for the counſelling another is neceſſarily included in the *exciting, moving, and procuring* him. And the word *wilful* [murder] in the ſtatute is ſufficiently expreſſed by laying the murder to be *of malice aforethought*.

Ch. V. § 122. *Acceſſaries.*

Acceſſaries in another county.

Where acceſſaries in one county to a murder committed in another are indicted in the county where they became acceſſaries, under the ſtat. 2 & 3 Ed. 6. c. 24. ſ. 2. the indictment ought to recite the fact, that the principal committed the act in another county, and not barely that he was indicted for it there; for that is only an argument, and no direct averment that he did it.

2 Hawk. ch. 29. ſ. 51. Lord Sanchar's caſe, 9 Co. 118.

§ 123. *No acceſſaries before in manſlaughter.*

As there can be no acceſſaries before to manſlaughter, it follows that an indictment againſt any one as ſuch is purely void. And ſo if the indictment be for murder, and the principal be only found guilty of manſlaughter, thoſe who are indicted as acceſſaries before muſt be diſcharged of that indictment: but not the acceſſary after, though the principal have his clergy, ſince the ſtat. 1 Ann. ſt. 2. c. 9. ſ. 1. which makes a conviction in this reſpect equivalent to an attainder.

1 Hale, 437. 450. 466.

2 Hawk. ch. 29. ſ. 24. 41, 2, 3, 4.

§ 124. *Declarations of deceaſed.*

Beſides the uſual evidence of guilt in general caſes of felony, which is elſewhere treated of, there is one kind of evidence more peculiar to the caſe of homicide, which is the declaration of the deceaſed after the mortal blow, as to the fact itſelf, and the party by whom it was committed. Evidence of this ſort is admiſſible in this caſe on the fulleſt neceſſity (*a*); for it often happens that there is no third perſon preſent to be an eye-witneſs to the fact; and the uſual witneſs on occaſion of other felonies, namely, the party injured himſelf, is gotten rid of. But in order to preſerve as far as

Vide general title Evidence in Felony. Rex v. Reaſon and Tranter, 6 St. Tr. 201, &c. 1 Stra. 499. Ealing's caſe, O. B. Dec. 1720, per King C. J. *vide* 12 Vin. Abr. 118.

(*a*) But neceſſity is not the general ground of its admiſſibility: for evidence of the declaration of a convict at the time of his execution was offered upon the indictment of one Drummond for robbery, in order, as was ſuppoſed, to ſhew that he the convict was the perſon who had committed the robbery: but the evidence was rejected by Eyre B. and Gould J. on the ground that as the party was then attainted his teſtimony could not have been received even on oath; and conſequently not his dying declaration, which can only be admitted on the preſumption that it was made under the ſame ſanction as an oath. George Drummond's caſe, O. B. Sept. 1784, Leach, 275.

Ch V. § 124. *Evidence. Declarations of the deceaſed.*

Vide tit. Witneſs.

Woodcock's caſe, O.B. 1789, poſt. 356. and John's caſe, poſt. 357.

Margaret Tinckler's caſe, Durham, 1781, cor. Nares J. MS. Gould J. and MS. Crown Caſ. Reſ.

poſſible the purity and rectitude of ſuch evidence, it muſt appear that the deceaſed at the time of making ſuch declarations was conſcious of his danger; ſuch conſciouſneſs being conſidered as equivalent to the ſanction of an oath, and that no man could be diſpoſed under ſuch circumſtances to belie his conſcience: none at leaſt who had any ſenſe of religion. But ſuch conſciouſneſs need not have been expreſſed by the deceaſed: it is enough if it might be collected from circumſtances. And the court are to judge of this conſciouſneſs previous to the admiſſion of this ſort of teſtimony.

Margaret Tinckler was indicted for the murder of Jane Parkinſon, by inſerting pieces of wood into her womb. A ſecond count charged her as acceſſary before the fact. It was proved by ſeveral witneſſes, that from the firſt time of the deceaſed taking to her bed, which was on the 12th of July, ſhe thought ſhe muſt die, making uſe of different expreſſions, as, *that ſhe was going; that ſhe was working out her laſt*; and exclaiming, *Oh! that Peggy Tinckler has killed me.* She lingered till the 23d, when ſhe died. She never was up but once during that time, when on telling a friend who attended her that ſhe thought herſelf better, ſhe adviſed her to get up, which the deceaſed did, and walked as far as the paſſage going out of the room, but was forced to return and go to bed again. It appeared by the teſtimony of ſeveral witneſſes, that from the moment of her taking to her bed till the time of her death ſhe had declared, *that Tinckler had killed her and dear child*, (ſtating the particular means uſed, which agreed with the charge in the indictment.) And during the ſame period ſhe had declared more particularly, "that ſhe was with child by one P. a married man, who, being fearful leſt his wife ſhould hear of it if ſhe were brought to bed, adviſed her to go to the priſoner, a midwife, to take her advice how ſhe ſhould get rid of the child, being then five or ſix months gone." "That the priſoner gave her the advice" in queſtion, which ſhe followed accordingly. It was proved by the teſtimony of a witneſs, that three days before the delivery, which was on the 10th July, ſhe ſaw the deceaſed in the priſoner's bed-chamber, when the priſoner took her round the waiſt and ſhook her in a very violent manner ſix different times, and toſſed her up

Ch. V. § 124. *Evidence. Declarations of the deceaſed.*

up and down: and that ſhe was afterwards delivered at the priſoner's houſe. The deceaſed alſo declared during her illneſs, that after her delivery the priſoner gave her the child to take home; and bid her go to bed that night and ſleep, and get up in the morning and go about her buſineſs, and nobody would know any thing of the matter; but that appearing very ill the next day at a relation's houſe, they had ordered her to go home and go to bed, which ſhe did. The child was born alive, but died inſtantly; and the ſurgeons, who were examined, proved that it was perfect. There was no doubt but that the deceaſed had died by the acceleration of the birth of the child: and upon opening her womb it appeared that there were two holes cauſed by the ſkewers, one of which was mortified, the other only enflamed; and other ſymptoms of injury appeared. A ſhort time before her death ſhe was aſked whether the account ſhe had from time to time given of the occaſion of her death, and the priſoner's treatment of her were true; and ſhe declared it was. It was objected that the above evidence of the deceaſed's declarations ought not to be admitted, as ſhe herſelf was particeps criminis, and likewiſe as it appeared at the time of her declarations ſhe was better, or thought herſelf ſo. But Nares J. was of opinion, that however this objection might hold with reſpect to the ſecond count, in which the priſoner was charged as an acceſſary with the deceaſed, yet the deceaſed was not willingly or knowingly an acceſſary to her own death; and therefore it was like the common caſe of any other murder. And as to the objection that ſhe once thought herſelf better, and tried to get up, yet the ſame declarations ſhe then made had been made repeatedly before to perſons whom in confidence ſhe told that ſhe never ſhould ſurvive, when ſhe firſt took to her bed; and ſhe had repeated the ſame declarations the day before ſhe died, and within a few hours of her death. And as to the fact itſelf, he was clearly of opinion it was murder, on the authority of Lord Hale. (1 Hale, 429.) The jury found the priſoner guilty on the firſt count, charging her as a principal in the murder, and execution being reſpited to take the opinion of the judges on the whole caſe, they all met to conſider of it: and were unanimouſly of opinion that theſe declarations of the deceaſed were legal evidence: Firſt day of Mich. term 1781, at Serjeant's Inn.

Ch. V. § 124. *Evidence. Declarations of the deceaſed.*

dence: for though at one time the deceaſed thought herſelf better, yet the declarations before and after and home to her death were uniform and to the ſame effect. And as to her being particeps criminis, they anſwered, that if two perſons be guilty of murder, and one be indicted and the other not, the party not indicted is a witneſs for the crown. And though the practice be not to convict on ſuch proof uncorroborated, yet the evidence is admiſſible; and here it was ſupported by the proof of the priſoner toſſing the deceaſed in her arms in the manner ſtated. Moſt of the judges indeed held that the declarations of the deceaſed were alone ſufficient evidence to convict the priſoner; for they were not to be conſidered in the light of evidence coming from a particeps criminis; as ſhe conſidered herſelf to be dying at the time, and had no view or intereſt to ſerve in excuſing herſelf, or fixing the charge unjuſtly on others. But others of the judges thought that her declarations were to be ſo conſidered; and therefore required the aid of the confirmatory evidence.

MS. Buller J.

In the caſe of Henrietta Radburne, who was indicted for petty treaſon in murdering her miſtreſs Hannah Morgan, the depoſition of the latter before her death before a magiſtrate, by whom it was authenticated in the preſence of the priſoner, was read in evidence, though made by her when under no apprehenſion of danger: but this was evidence by force of the ſtatutes of Ph. & Mary (*a*): and the priſoner was convicted of the murder and acquitted of the petit treaſon; which was afterwards approved of by all the judges. And it was obſerved by many of them, that the ſtatutes of Philip and Mary do not extend to treaſon.

R. v. Radburne, alias Gibbons, O. B. July 1787, cor. Wilſon J. MS. Buller J. *Vide* general title Evidence, Depoſitions, and 2 Leach. 512. S. C.

In Woodcock's caſe it was conſidered, that ſuch an examination taken before a magiſtrate who attended for the purpoſe at the place where the deceaſed was then lying after the mortal wound received, and without hopes of recovery, not being taken in the preſence of the priſoner in the manner deſcribed by the acts (*a*), could not be received in evidence, qua examinations, after her death: but they were received as authentic declarations of the deceaſed in extremis, there being then no probability of her recovery, though ſhe herſelf expreſſed no ſenſe of her danger, but lay quietly reſigned and ſubmitting to her fate. In Trowter's caſe the court

Woodcock's caſe, O. B. 1789, cor. Lord C. B. Eyre, Aſhurſt J. and Adair Serjt. Recorder, Leach, 397. new edit. 563. *Vide* Dingler's caſe, ib. 638.

Trowter's caſe, B. R. E. 8 G. 1. 20 Vin. Abr. 118.

(*a*) 1 & 2 Ph. & M. c. 13. and 2 & 3 Ph. & M. c. 10.

would

would not admit parol evidence of the declarations of the deceaſed which had been reduced into writing.

Ch. V. § 124. *Evidence. Declarations of the deceaſed.*

On the proſecution of Thomas John for the murder of Rachael his wife, it was proved by the confeſſion of the priſoner himſelf in converſation with others before his wife's death, that in September 1789, upon a quarrel between them, he had laid hold of his wife, and they had fallen down, he uppermoſt, and he had given her ſeveral violent kicks and blows, ſo that according to his own words, he knew ſhe never would raiſe her hand againſt him again. It was alſo proved that ſhe died in the ſame month; that ſhe was taken ill on a Friday, took to her bed the next day, and died on the Sunday ſevennight following, being confined to her bed by her illneſs, which was ſevere, the whole time. But it did not appear that ſhe had expreſſed any apprehenſion of danger, though ſhe retained her ſenſes till the day before her death. Three witneſſes depoſed to converſations during her illneſs, at which the huſband was preſent, in which ſhe attributed her ſituation to his ill treatment; and the conduct and anſwers of the huſband were given in evidence, although it was objected on his behalf that what was ſaid by the wife even in the preſence of the huſband, and to which he returned anſwers tending to charge himſelf, ought not to have been received. Evidence was alſo given of her declarations in the priſoner's abſence, after ſhe was confined to her bed, all of which tended to ſhew the circumſtances of violence he had committed upon her. It was objected, that the declarations of the wife in the abſence of the priſoner ought not to have been admitted in evidence, as it was not proved that ſhe conſidered herſelf at the time as a dying perſon; the evidence not being expreſs on that head: but that if the evidence were admiſſible, it ought to have been left to the jury to conſider whether the wife were at the time conſcious of approaching death. Objection was alſo made, that theſe being declarations of a wife againſt her huſband were not on that account evidence. The court was of opinion, that the reaſon of the rule that a wife ſhall not be admitted to give evidence againſt her huſband did not apply to this caſe. And upon the other point, that the evidence of the ſtate of the wife's health, at the time the declarations were made, was

Thomas John's caſe, Carmarthen Sp. Seſſ. 1790, MS. Buller J. *Whether or not the declarations of the deceaſed were made under an apprehenſion of danger muſt be determined by the judge, in order to receive or reject the evidence, and not by the jury after the evidence is received. The apprehenſion of danger may appear either from the expreſs declaration of the deceaſed at the time, or may be inferred from the ſtate of the wound or illneſs or other circumſtances indicating the ſame.*

Vide general title *Witneſs.*

 ſufficient

Ch. V. § 124. *Evidence. Declarations of the deceased.*

ſufficient to ſhew that ſhe was actually dying; and that it was to be inferred from it, that ſhe was conſcious of her ſituation: and no particular direction was given to the jury on the ſubject. The jury having found the priſoner guilty, theſe points were referred to the judges; who at a conference in Eaſter term 1790 all agreed that it ought not to be left to the jury to ſay, whether the deceaſed thought ſhe was dying or not; for that muſt be decided by the judge before he receives the evidence. And if a dying perſon either declare that he knows his danger, or it is reaſonably to be inferred from the wound or ſtate of illneſs that he was ſenſible of his danger, the declarations are good evidence. But as to the declarations themſelves in this caſe, all the judges, except two, thought that there was no foundation for ſuppoſing that the deceaſed conſidered herſelf in any danger at all.

Henry Welbourn's caſe, Lincoln Sum. Aſſ. 1792, cor. Aſhhurſt J. MS. Buller J. To the ſame effect as the laſt caſe; and further, *If the deceaſed thought ſhe ſhould recover at the time the declarations were made, they ought not to be received in evidence.*

Upon the proſecution of Henry Welbourn for the murder of Elizabeth Page by poiſon, a witneſs depoſed that the deceaſed and the priſoner lived with her as her ſervants; that perceiving the deceaſed alter and appear very ill, ſhe taxed her with being with child, which ſhe owned, and the next day continuing very ill ſhe confeſſed ſhe had taken ſomething; at which time the witneſs believed that the deceaſed was ſenſible of her ſituation and danger, though ſhe did not ſay ſo. But when the apothecary came to ſee her the ſame evening ſhe ſaid that ſhe was very bad, and did not know if ſhe ſhould get the better of it. The apothecary himſelf depoſed that when he firſt ſaw the deceaſed ſhe was then apparently dying; but he believed that ſhe was not ſenſible of her danger; that after he had been with her ſome time he made her ſenſible of her danger, in order that he might get from her what ſhe had done. She deſired him to give her ſomething to eaſe her pain. He told her he muſt firſt know what ſhe had done; and that ſhe would not live 24 hours unleſs proper relief were afforded. (She did not in fact live above an hour afterwards.) The witneſs had no other reaſon for thinking that ſhe knew her danger from any thing that ſhe ſaid, except that on his telling her of her danger ſhe told him what was the cauſe, which ſhe had before refuſed to do. She then deſcribed to him the ſymptoms of pain which ſhe had felt, and again repeated that ſhe wiſhed

wiſhed he would give her ſomething to compoſe her. The witneſs then again urged the neceſſity of knowing the cauſe of thoſe ſymptoms, and ſhe told him with reluctance, that ſhe had been three or four months gone with child, and that during the laſt fortnight ſhe had been conſtantly prevailed upon to take bitter apple in order to procure an abortion; but that not producing the deſired effect, the perſon had prevailed on her to take a white powder, (which was the day before ſhe was taken ill,) and that the ſymptoms came on in about three or four hours after. The witneſs then urged her to ſay by whom ſhe had been prevailed upon, when with increaſed reluctance and heſitation ſhe told him it was by her fellow-ſervant Welbourn; and that he had prevailed upon her by aſſuring her that there was no crime in procuring an abortion whilſt the child was ſo young. At this moment ſhe was free from pain, and the witneſs thought that a mortification had taken place. From the deceaſed's deſcription of the white powder, and from the inſpection of the body afterwards, the witneſs believed it to be arſenic. On his croſs examination he ſaid that at the time ſhe made this declaration he believed that ſhe thought ſhe was getting well from the being ſo free from pain. It appeared from other witneſſes that on the day when the deceaſed had ſaid that ſhe had taken the white powder, the priſoner and ſhe were obſerved in diſcourſe together; and he was ſhaking a bottle of ſomething: and he had before applied for ſome bitter apple, which the witneſs had refuſed to get him. It was left to the jury to conſider, whether from the whole of the evidence they were ſatisfied that the deceaſed at the time ſhe made the declarations was ſatisfied of the danger of her ſituation? and whether they thought thoſe declarations true? and that her death was owing to poiſon adminiſtered by the priſoner? in which caſe they ſhould find him guilty. The jury accordingly found him guilty. But a doubt afterwards occurring to the learned judge, whether, though in the firſt part of the apothecary's evidence he ſwore that he made the deceaſed ſenſible of her danger before ſhe made the declaration, yet as he afterwards ſaid that at the time ſhe made the declaration *ſhe believed that ſhe was getting better from the pain ceaſing*, he ſhould not have re-

Vide poſt. 360.

Ch. V. § 124. *Evidence. Declarations of the deceased.*

jected the evidence and directed an acquittal: the prisoner was therefore respited to take the opinion of the judges on the case. In Michaelmas term 1792 a majority of the judges were of opinion that it did not sufficiently appear that the deceased knew or thought she was in a dying state when she made the declaration: on the contrary she had reason to think that if she told what was the matter with her she might have relief and recover. But as to what the apothecary had said on his cross examination they laid no stress on it, being mere opinion unwarranted by fact. And they all agreed that whether the deceased thought herself in a dying state or not was matter to be decided by the judge in order to receive or reject the evidence, and that that point should not be left to the jury (*a*).

§ 125. *Articles of war.* Rex v. Withers, Staff. Aff. 1784, cor Buller J. and by all the judges in Mich. term 1784, MS. Gould and Buller Js. 5 Term Rep. 446.

The articles of war are frequently required to be given in evidence on prosecutions for homicide: for it has been ruled that the Court cannot take judicial notice of them without their being proved: but that a copy purporting to be printed by the king's printer, is sufficient. In Withers's case, there being no such evidence, nor any evidence of the usage of the army, it was holden that the prisoner, who was a private soldier, and had killed the deceased a serjeant in the same regiment, upon an arrest by the latter, and after a struggle between them, could only be guilty of manslaughter.

§ 126. *Trial.*

Of the Trial, Arraignment, Verdict, and Judgment.

Where this offence may be examined into and tried is the next object of inquiry; and this resolves itself into seven different considerations. 1. Where the stroke and death happen in the same county. 2. Where they happen in different counties. 3. Where one is accessary in one county to a murder committed in another. 4. Where both the stroke and death happen in Wales, or one in Wales and the other in an English county. 5. Where the one happens at sea or out of England and the other within a county.

(*a*) Vide Woodcock's case, O. B. 1789, Leach. 397. where that fact was left to the jury by Ld. C. B. Eyre.

6. Where

6. Where both the stroke and death happen at sea; or, Ch. V. § 126. *Trial.*
7. In parts beyond the sea.

§ 127. *Stroke and death in same county.*

1. Regularly by the common law in this as in other matters of criminal jurisprudence the offence must be inquired of and tried in the same county in which it was committed. But the stat. 33 Hen. 8. c. 23. enacts, that upon examination before three of the council, treasons, misprisions thereof, and murders, committed in any place within the king's dominions or without, may be inquired of, heard, and determined in any county where the king by his commission of oyer and terminer shall appoint. This seems not repealed by the stat. 1 & 2 W. & M. c. 10. as to murder; the circumstances required by the statute of Henry 8. being observed; which I shall presently have occasion to mention again.

3 Inst. 27. 1 Hale, 283. 374. 2 Hale, 22. 163, 4. 2 Hawk. ch. 25. s. 35, 36. 33 H. 8. c. 23. Eyr's case, O. B. Dec 1 20. Roache's case, Dec. 1775. Post. s. 133.

If a person be stricken and die in the county of A., and the body be found in B., it shall be removed into A. for the coroner of that county to take the inquest.

2 Hale, 66. 1 MS. Sum. 54.

Verge.

Also by the statute of Articuli super chartas, c. 3. special provision is made concerning homicide within the verge.

2 Inst. 549, 550. 2 Hale, 54.

§ 128. *Stroke and death in different counties.*

2. Where the stroke and death are in different counties, it was doubtful at common law whether the offender could be indicted at all, the offence not being complete in either; though the more common opinion was, that he might be indicted where the stroke was given; for that alone is the act of the party, and the death is but a consequence, and might be found though in another county: and the body was removed into the county where the stroke was given (*a*). But now by the stat. 2 & 3 Ed. 6. c. 24. s. 2. it is enacted, "that "where any person shall be feloniously stricken or poisoned "in one county, and die of the same stroke or poisoning in "another county, an indictment thereof found by jurors "of the county where the death shall happen, (whether "before the coroner, or before the justices, &c. having "authority to inquire, &c. which extends to the Court of

1 Hawk. ch. 31. s. 13. 2 Hawk. ch. 25. s. 36. ch. 29. s. 48, 49, 50. 1 Hale, 426. 2 Hale, 66. 163. Post. s. 131. 2 & 3 Ed. 6. c. 24. (1 MS. Sum. 54. 2 Hale, 66.) 3 Inst. 49. 135. 2 Hawk. ch. 29. s. 52.

(*a*) That opinion, however, is contrary to the sense of the legislature as expressed in the stat. 2 & 3 Ed. 6. c. 24. s. 2. which declares that "in such case it hath not been found by the laws or customs of this realm that any such indictment thereof can be taken in either of the said two counties."

"King's

Ch. V. § 128. *Stroke and death in different counties.*

" King's Bench in the county where it fits, and to the lord " ſteward on the trial of a peer,) ſhall be as good and ef- " fectual in law as if the ſtroke or poiſoning had been " committed and done in the ſame county where the party " ſhall die, or where ſuch indictment ſhall be ſo found." By this the trial is now ſettled to be in the county where the death happens.

Appeal.

The ſame ſtatute (ſ. 3.) alſo provides, " that an appeal of " murder may be commenced, taken, and ſued in the ſame " county where the party ſo felonioufly ſtricken or poiſoned " ſhall die, as well againſt the principals as acceſſaries in " whatſoever county or place the acceſſaries ſhall be guilty. " And the juſtices before whom any ſuch appeal ſhall be " commenced, ſued, and taken within the year and day " after ſuch murder and manſlaughter committed and done " ſhall proceed againſt ſuch acceſſaries in the ſame county " where ſuch appeal ſhall be ſo taken, in like manner and " form as if their offence had been committed in the ſame " county where ſuch appeal ſhall be ſo taken, as well con- " cerning the trial by the jurors of ſuch county where ſuch " appeal ſhall be taken upon the plea of not guilty, as " otherwiſe."

1 Hawk. ch. 31. ſ. 13. 2 Hawk. ch. 23. ſ. 35. 7 H. 7. 8. b.

Bulwer's caſe, 7 Co. 2. and 2 Hale, 163. *Vide* 2 G. 2. c. 21.

At common law the appellant had his election to bring the appeal in either county, in which caſe it was triable by a jury returned from each. This joinder is certainly unneceſſary under the ſtatute of Ed. 6. where the trial is in the county where the death happened. Yet it ſeems from ſome authorities that the election to proſecute the appeal in either county ſtill continues.

§ 129. *Acceſſaries in one county to murder in another.* 1 Hale, 427. 2 & 3 Ed. 6. c. 24. ſ. 4.

3. At common law the coroner might upon view of the body in the county where the fact happened inquire of all acceſſaries or procurers, though in another county.

But by ſ. 4. of the ſtat. 2 & 3 Ed. 6. c. 24. " where any " murder or felony ſhall be committed in one county, and " another perſon ſhall be acceſſary thereto in any other " county, then an indictment found againſt ſuch acceſſary " and acceſſaries before the juſtices of peace or other juſtices " or commiſſioners to inquire of felonies in the county " where ſuch offence of acceſſary, &c. ſhall be committed, " ſhall

" ſhall be as effectual in law as if the ſaid principal offence " had been committed within the ſame county where the " the indictment againſt ſuch acceſſary ſhall be found. And " that the juſtices of gaol delivery or oyer and terminer, or " two of them, of or in any ſuch county where the offence " of any ſuch acceſſary ſhall be committed, upon ſuit to " them made, ſhall write to the cuſtos rotulorum or keeper " of the records where ſuch principal ſhall be attainted or " convicted, to certify them whether ſuch principal be at- " tainted, convicted, or otherwiſe diſcharged of ſuch prin- " cipal felony; who thereupon ſhall make ſufficient certi- " ficate thereof in writing under their ſeal or ſeals to the " ſaid juſtices; after which the juſtices of gaol delivery or " of oyer and terminer or other there authorized ſhall pro- " ceed upon every ſuch acceſſary in the county where he " became acceſſary, in ſuch manner and form as if both " the ſaid principal offence and acceſſary had been commit- " ted in the ſaid county where the offence of acceſſary was " committed. And every ſuch acceſſary, &c. ſhall anſwer upon " arraignment, and receive ſuch trial, judgment, order, and " execution, and ſuffer ſuch forfeitures, pains, and penalties " as is uſed in other ſuch caſes of felony."

Ch. V. § 129. *Acceſſaries in one county to murder in another.*

See further title Proſecution by Indictment—(Trial-County).

§ 130. *In Wales.* 26 H. 8. c. 6. ſ. 6. *vide* more at large under the general title *Proſecution by Indictment*—(Trial—County). 1 Hale, 156, 7. 2 Hale, 38. 1 Hawk. ch. 31. ſ. 14. *Stroke in Engliſh county and death in Wales, or vice verſa.* Ante, ſ. 128. 1 Hale, 158. 2 Roll. Rep. 28.

4. By the ſtat. 26 H. 8. c. 6. murders and other felonies committed in Wales may be inquired of and tried upon an indictment " in the next adjoining Engliſh county where the king's writ runneth," which has been always conſtrued to mean Salop and not Cheſter, as is elſewhere ſhewn more particularly, in conſidering the general conſtruction upon this and other ſimilar ſtatutes. Appeals however muſt ſtill be brought in the proper county.

But ſuppoſing the ſtroke given in an Engliſh county, and the death in Wales, there ſeems to be ſome difficulty in aſcertaining where the trial ſhall be. For though I ſee no reaſon to doubt but that the ſtat. 2 & 3 Ed. 6. c. 24. ſpeaking of " the counties of *this realm*," muſt neceſſarily include Wales, even without the aid of the 20 Geo. 2. hereafter mentioned; yet the ſtat. 26 H. 8. is not according to the literal terms of it ſo plainly calculated to meet this caſe; for that ſtatute only provides for murder and felonies done

or

Ch. V. § 130. *Stroke in Engliſh county and death in Wales, or vice verſa.*

or committed in Wales; and by the ſuppoſition of the ſtatute itſelf of Ed. 6. it could not be ſaid that a murder could be committed in Wales unleſs both the ſtroke and death were there. The two ſubſequent ſtatutes of Geo. 2. taken together, leave this queſtion as it ſtood before. Of the ſtat. 2 Geo. 2. c. 21. it is ſufficient for the preſent to obſerve, that it provides for caſes where either the ſtroke or the death alone happen in *that part of Great Britain called England.* According to a literal conſtruction of this ſtatute ſtanding alone or with reference to antecedent ſtatutes in pari materia, it might be preſumed that where the ſtroke was in an Engliſh county and the death in Wales, the trial of the offender was intended to be had in the former. But by the ſtat. 20 Geo. 2. c. 42. ſ. 3. (*a*) it is enacted *and declared*, "that in *all* caſes where *the kingdom of England* "or *that part of Great Britain called England, hath* "*been*, or *ſhall be* mentioned in *any* act of parliament, "the ſame *has been* and *ſhall* from henceforth be deemed "and taken to comprehend and include the dominion of "Wales and town of Berwick-upon-Tweed." It muſt therefore be taken in general that the mention of *England* in any act of parliament includes *Wales*; with this reſervation only, that the contrary is not apparent from the ſubject matter as in the above ſtat. of Hen. 8. (*b*). The queſtion then reverts to the mutual operation of the ſtatutes of H. 8. and Ed. 6. upon each other. On the one hand it may be ſaid that the ſtat. of H. 8. proceeding merely upon the ſuppoſition that an impartial trial before the grand ſeſſions could not be inſured in all caſes where the fact itſelf was committed in Wales; yet if the ſtroke were in an Engliſh county, and the death only happened in Wales, a Welch jury muſt be as indifferent as any other upon the trial of the offender: and that that ſtatute being in derogation of the common law ought not to be extended beyond the ſtrict letter of it to include caſes probably not within the view of the legiſlature at the time. On the other hand, if the true

Poſt. 366.

1 Hale, 157.

(*a*) It is worthy of remark that this clauſe, ſo general and extenſive in its operation, ſhould be found in an act of parliament with the following title, "An "act to enforce the execution of an act of this preſent ſeſſion for granting to his "majeſty ſeveral rates and duties on houſes, windows, and lights."

(*b*) *Wales* is there contraſted with *the ſhires of England.*

object

object of the ſtat. of H. 8. be conſidered, and the ſtat. of Ed. 6. be compared therewith, as made in pari materia, it ſeems to lead to a different conſtruction. The ſtat. of H. 8. had in view to ſecure the impartial adminiſtration of criminal juſtice, which the experience of the times had ſhewn could not be certainly attained before the ordinary tribunals. It gave an option, therefore, to the parties concerned in caſes of felony to ſubſtitute the trial before an Engliſh judge and jury in place of the ordinary one before the grand ſeſſions. The ſtat. of Ed. 6. created no new felony, but merely removed the difficulty which was ſuppoſed to exiſt in the trial of murder where the ſtroke was in one county and the death in another. The legal effect of it is to provide that ſo far as concerns the trial of murder the offence ſhall be conſidered as committed in the county where the party dies: the trial there, ſays the legiſlature, ſhall be as good and effectual *as if the ſtroke or poiſoning had been committed and done in the ſame county where the party ſhall die.* Therefore if the death be in a Welch county; and for the purpoſe of trial the ſtroke is to be conſidered as given in the ſame county; then the ſtat. of H. 8. attaches, the ſole object of which in this reſpect was to give an option to remove ſuch trials as would otherwiſe be had in Wales into the next adjoining Engliſh county: ſuch muſt have been the obvious conſtruction if the two proviſions had been contained in the ſame act; and the two ſtatutes being ſo far in pari materia, and the one not profeſſing to be a repeal of the other, they muſt be made to ſtand together if poſſible, and have a relative conſtruction put upon them. On the other hand, by the ſame rule of conſtruction, if the ſtroke be in Wales and the death in any Engliſh county, the trial muſt be in ſuch Engliſh county, according to the ſtatute of Ed. 6., the ſtat. of H. 8. not attaching in that caſe.

Ch. V. § 130. *Stroke in Engliſh county and death in Wales, or vice verſa.*

(*Vide* 1 Hale, 157. as to the Grand Seſſions.)

5. Where the ſtroke is at ſea or out of England, and the death in a county, or vice verſâ.

§ 131. *Stroke or death at ſea or out of England.*

It ſeems to have been a matter of great doubt, whether the killing of one who died at land of a wound received at ſea could be inquired of by the common law; (certainly not at leaſt by the ordinary commiſſion of oyer and terminer within

3 Inſt. 48. 1 Hale, 426. 2 Hale, 163. 1 Hawk. ch. 31. ſ. 11, 12. *Vide* ante, ſ. 128.

Ch. V. § 131. *Stroke or death at ſea or out of England.*

within a county;) becauſe, though the place where the ſtroke was given might pertain to the realm of England, yet not being within the body of any county, no venire could come from thence: neither could the admiral inquire of it, becauſe the death happened out of his juriſdiction. And for the ſame reaſon it could not be determined by ſpecial commiſſioners under the ſtat 27 H. 8. c. 4. or 28 H. 8. c. 15.; they being confined to inquire of murders at ſea: nor, as Lord Hale ſays, by the conſtable and marſhal, which was the opinion of Lord Coke founded on the ſtat. 13 Ric. 2. ſtat. 2. But according to Lord Hale it might be determined in B. R. ſitting in the county where the party died, or by a ſpecial commiſſion of oyer and terminer, the nature of which he explains in another place. Theſe methods of proceeding had however fallen into diſuſe ſo long ago at leaſt as the end of Edward the third's reign; and the only juriſdiction to which we can with any certainty now refer in this reſpect, till a very late period, is the commiſſion authoriſed by the ſtat. 33 H. 8. c. 23. hereafter mentioned, which under the requiſites there ſet forth might be conſidered as extending to this caſe: but that only related to the principal offenders, and did not extend to acceſſaries.

2 Hale, 20. 3 Inſt. 48. Poſt. f. 132.

Vide 2 Hale, 12—15.

Poſt. f. 133. 2 Hale, 22.

1 Hawk. ch. 31. ſ. 11.

But for preventing any failure of juſtice, and for taking away all doubts touching the trial of murders in the caſes hereinafter mentioned, it is enacted by ſtat. 2 Geo. 2. c. 21. "that where any perſon ſhall be feloniouſly ſtricken or poiſoned upon the ſea, or at any place out of that part of Great Britain called England, and ſhall die of the ſame ſtroke or poiſoning within that part of Great Britain called England; or where any perſon ſhall be feloniouſly ſtricken or poiſoned at any place within that part of Great Britain called England, and ſhall die of the ſame ſtroke or poiſoning upon the ſea, or at any place out of that part of Great Britain called England, in either of the ſaid caſes an indictment thereof found by the jurors of the county in that part of Great Britain called England in which ſuch death, ſtroke, or poiſoning ſhall happen reſpectively as aforeſaid, whether it ſhall be found before the coroner upon the view of ſuch dead body, or before the juſtices of the peace or other juſtices or commiſſioners who ſhall have "authority

2 Geo. 2. c. 21.

"authority to inquire of murders, ſhall be as good and effectual in law as well againſt the principals as the acceſſaries, as if ſuch felonious ſtroke and death, or poiſoning and death thereby enſuing, and the offence of ſuch acceſſaries, had happened in the ſame county where ſuch indictment ſhall be found: and that the juſtices of gaol delivery and oyer and terminer in the ſame county where ſuch indictment ſhall be found, and alſo any ſuperior court in caſe ſuch indictment ſhall be removed, &c. ſhall and may proceed upon the ſame in all points, &c. as they might or ought to do in caſe ſuch felonies, ſtroke and death, or poiſoning and death, and the offence of ſuch acceſſaries had happened in the ſame county where ſuch indictment ſhall be found. And every ſuch offender ſhall anſwer upon their arraignments, and have the like defences, advantages, and exceptions, (except challenges for the hundred,) and ſhall receive the like trial, judgment, order, and execution, &c. as if their (reſpective) offences had happened in the ſame county where ſuch indictment ſhall be found."

Ch. V. § 131. *Stroke or death at ſea or out of England.*

Where one ſtanding on the ſhore ſhot at another ſtanding in the ſea, who afterwards died on board a ſhip, all the judges held that the trial muſt be in the Admiralty court, and not at common law.

Coombe's caſe, 20th Jan. 1786, MS. Buller J. Leach. 302. laſt edit. 432. S. C.

§ 132. *Stroke and death at ſea.*

6. Where both the ſtroke and death are at ſea, or in havens, &c.

By ſtat. 28 H. 8. c. 15. it is enacted, "that all treaſons, felonies, murders, &c. committed upon the ſea, or in any other haven, river, creek, or place where the admiral has or pretends to have power, authority, or juriſdiction, ſhall be inquired, tried, heard, determined, and judged in ſuch ſhires and places in the realm as ſhall be limited by the king's commiſſion or commiſſions to be directed for the ſame, in like form and condition as if any ſuch offence had been committed upon the land. And ſuch commiſſions ſhall be under the king's great ſeal directed to the admiral or his deputies, &c. and to three or four ſuch other ſubſtantial perſons as ſhall be appointed by the Lord Chancellor to hear and determine ſuch offences after "the

28 Hen. 8. c. 15.

Ch. V. § 132. *Stroke and death at ſea, &c.*

Vide title Piracy.

"the common courſe of the laws of this realm uſed for "treaſons, felonies, murders, &c. committed upon the land "within this realm."

As to the particular manner of proceeding under this ſtatute, and the extent of the admiralty juriſdiction, they will be conſidered when I come to treat of piracy and other offences committed at ſea triable under the ſpecial commiſſion founded thereon. It will ſuffice here to obſerve, that the

15 Ric. 2. c. 3. 4 Inſt. 137.

ſtatute 15 Rich. 2. c. 3. gives the admiral juriſdiction to inquire "of the death of a man, and of a maihem done in "great ſhips hovering in the main ſtream of great rivers, "only beneath the bridges of the ſame rivers nigh to the "ſea, and in none other places of the ſame rivers." But this, ſo far as it extends to give the admiral juriſdiction within the bodies of counties, muſt be taken very ſtrictly;

2 Hale, 16. 54.

for according to Lord Hale it extends only to rivers that are arms of the ſea, namely, that flow and re-flow and bear great ſhips; and as he inclines to think, only to ſuch deaths and mayhems as happen in thoſe great ſhips. This juriſdiction however is only concurrent with, and not in excluſion of the common law; for the ſame author ſays, the coroner of the county may inquire in any great river upon theſe articles, *where a man can ſee from one ſide to the other:* or as Hawkins

2 Hawk. ch. 9. ſ. 14.

ſays, *where a man ſtanding on one ſide may ſee what is done on the other.*

2 Hale, 54.

The inquiſitions taken before the coroner of the Admiralty are returned before the commiſſioners under the 28 H. 8. c. 15. Thoſe before the coroner of the county are to be returned before commiſſioners of gaol delivery for the county.

39 Geo. 3. c. 37. Ante, ſ. 4.

Offenders may now be found guilty of manſlaughter before commiſſioners under the ſtat. of H. 8.

§ 133. *Stroke and death in foreign parts.* 3 Inſt. 48. 1 Hawk. ch. 31. ſ. 11.

7. In regard to homicide committed in foreign parts, Lord Coke ſays, that if two of the king's ſubjects go over into a foreign realm and fight there, and the one kill the other, this may be heard and determined before the conſtable and marſhal; relying principally on the ſtat. 13 Ric. 2. c. 2. which ſays, that "to the conſtable it pertaineth to "have conuſance of contracts concerning deeds of arms or "of

"of war out of the realm, &c. which cannot be determined "or diſcuſſed by the common law." But this ſeems always to have been a doubtful conſtruction of that ſtatute, and may probably be denied at this day when that juriſdiction has fallen into diſuſe. The ſame may be ſaid of the ſtatute 1 H. 4. c. 14. which ſays, that all appeals for things done out of the realm ſhall be heard and determined before the ſame juriſdiction. But by ſtat. 33 H. 8. c. 23. (which with reſpect to the trial of murder ſtands unrepealed by the ſtat. 1 & 2 Ph. & M. c. 10.) it is enacted, "that if any perſon "being examined before the king's counſel, or three of "them, upon any treaſons, miſpriſions of treaſons, or mur-"ders, do confeſs the ſame, or are vehemently ſuſpected "thereof by the ſaid council upon ſuch examination, the "Lord Chancellor, by the king's command, ſhall ſend a "commiſſion of oyer and terminer under the great ſeal to "ſuch perſons and into ſuch ſhires or places as ſhall be "named and appointed for the ſpeedy trial of ſuch offenders; "which commiſſioners ſhall have power and authority to "inquire, hear, and determine all ſuch offences within the "ſhires and places limited by their commiſſion by a jury "returned by the ſheriff, &c. in whatever other ſhire or "place *within the king's dominions or without* ſuch offences "ſo examined were committed." "And no challenge for "the ſhire or hundred (but for want of freehold) ſhall be "allowed."

Ch. V. § 133. *Stroke and death in foreign parts.*

Vide ante, ſ. 131.

33 Hen. 8. c. 23. 1 Hale, 283. 374. 2 Hale, 22. 164. 3 Inſt. 27.

(Repealed as to treaſons by 1 & 2 Ph. & M. c. 10.)

This ſtatute extends not to acceſſaries.

1 Hawk. ch. 31. ſ. 11. 1 MS. Sum. 54.

There does not appear to have been much uſe made of this ſtatute. One inſtance is to be found of a proceeding under it for a murder committed in England, in the caſe of Ludowick Grevil (*a*), where the judges reſolved that he being charged as *acceſſary*, his caſe was not within the act, acceſſaries not being named. In another inſtance Edward Ealing was indicted for the murder of Charles Bignell at the Dollars in the kingdom of Sweden in partibus tranſmarinis extra Angliam. The precepts for the return of the grand inqueſt and jury for the trial of the iſſue recite the commiſſion of the ſeſſions of oyer and terminer "ad inquirendum

Ludowick Grevil's caſe, 1 And. 194. temp. Eliz.

Rex v. Ealing at Ely, O. B. Dec. 1720. Ex relatione Foſter j. Serjt. Foſter's MS. 1 MS. Sum. 54. cites Ld King's MS 300. *Vide* 8 Mod. 144.

(*a*) See this caſe differently and as it appears incorrectly reported in Crompt. Juſt. 22. cited in 1 Hale, 283. and 2 Hale, 22.

Ch. V. § 133. *Stroke and death in foreign parts.*

" per ſacramentum bonorum et legalium hominum civitatis " London de quibuſcunque proditionibus, miſpriſionibus " proditionum, et murdris extra Angliam ubicunque perpe- " trat. ſecundum actum parliamenti domini Henrici octavi " predict. 33. et ad eaſdem proditiones et alia premiſſa (hac " vice) audiend. et terminand." It was inſiſted by Ealing's counſel before King Ch. J., Eyre Ch. B., and Baron Montague, that the ſtat. 38 H. 8. extended only to murders committed in England; that ſo a murder in one ſhire may by that act be tried in any other ſhire, but not to murders committed out of the realm. But the court reſolved that it did extend to murders committed out of the realm: and indeed the ſtatute is clear as to that point. And they ſaid, that a like commiſſion had been granted in the late queen's time in the caſe of one Chambers, indicted at the Old Bailey June 1709, for a murder committed extra regnum Angliæ ff. apud Barcelona in regno Hiſpaniæ. The court then proceeded to try Ealing, who was convicted and executed (*a*).

Vide 8 Mod. 144. S. C. mentioned.

10 & 11 W. 3. c. 25. ſ. 13. In Newfoundland, &c. *Vide* tit. Piracy.

By ſtat. 10 & 11 W. 3. c. 25. ſ. 13. murder and all other capital crimes in Newfoundland and the iſles thereto belonging are triable in any county here. Since when the acts of the 32 Geo. 3. c. 46. and 33 Geo. 3. c. 76. have enabled his majeſty to erect courts of civil and criminal juriſdiction there, which are " to hold plea of all crimes and miſde- " meanors committed within the iſland of Newfoundland, " and on the iſlands and ſeas to which ſhips or veſſels repair " from the iſland of Newfoundland for carrying on the fiſh- " ery, and on the banks of Newfoundland, in the ſame " manner as plea is holden of ſuch crimes and miſdemean- " ors in England." Theſe acts are continued by the 34 Geo. 3. c. 44. and 35 Geo. 3. c. 25. But nothing appears therein to ſhew that the juriſdiction under the ſtatute of King William is taken away.

(*a*) Jacob's Law Dict. tit. Homicide, ſ. 5. mentions another inſtance of a commiſſion iſſued againſt Capt. Rocke for killing Mr. Ferguſon at the Cape of Good Hope: but no time is mentioned.

II. *Arraign-*

II. *Arraignment.*

Ch. V. § 134.

§ 134. *Arraignment.*

If there be an indictment for murder, and the coroner's inquiſition againſt the ſame perſon at the ſame ſeſſions of gaol delivery for the ſame offence, the practice is to arraign and try the priſoner upon both, in order to avoid the plea of auterfoits acquit, or attaint; and to indorſe his acquittal or attainder upon both preſentments.

§ 135. *Manner of taking and conſtruing verdict.* 1 Hale, 449. 2 Hale, 302. 2 Hawk. ch. 47. ſ. 8. Plow. 101. Ante ad incipium, and ſ. 15. Radburne's caſe, ante, p. 339. 356. Ante, ſ. 118. 1 Hale, 449, 450. 2 Hawk. ch. 23. ſ. 95.

Upon every indictment for petit treaſon or murder, the jury may negative the higher offence, and find their verdict for any leſſer ſpecies of homicide; the ſeveral degrees of which I firſt had occaſion to conſider. It has alſo been ſhewn in what caſes they may properly find a general verdict of *not guilty*, or find the ſpecial matter, and leave the party to ſue out his pardon under the ſtatute of Glouceſter, c. 9. And the ſame rule holds in the caſe of indictments framed on the ſtatute of ſtabbing. So in appeals, the defendant in an appeal of murder may be found guilty of manſlaughter only; and the appellant in that caſe ſhall not be nonſuited. And though it were formerly conſidered to be optional in the jury upon an appeal of murder, if the caſe appeared to be only manſlaughter, to find accordingly, or to acquit the defendant altogether, yet it is now ſettled that they muſt find the manſlaughter.

Guilty in different degrees. Ante, ſ. 58. 82. 1 Hale, 438-446. 2 Hawk. ch. 29. ſ. 7. 15. Ld. Mohun's caſe, Dom. Proc. 1692. 4 St. Tr. 541. *Vide* tit. Mayhem.

Again, ſeveral perſons preſent at a homicide committed may be guilty in different degrees. Thus one who joins in an affray on a ſudden may be only guilty of manſlaughter, though he gave the ſtroke; while another who abetted him, being before deliberately engaged in the affray, upon malice, may be guilty of murder. Alſo a wife or ſervant may be guilty of petit treaſon and a ſtranger of murder, being all preſent at the fact. So one may be guilty only of a treſpaſs and aſſault; while another perſon preſent may be guilty of felony in maiming by lying in wait. In ſuch caſe the former, if indicted for the felony, is entitled to a general acquittal.

Special finding. Mackally's caſe, 9 Co. 69. Holloway's caſe, Palm. 548.

If the jury find the ſpecial matter from whence the law preſumes malice, though they do not expreſsly find the malice in fact, yet judgment of death muſt be given thereon. So though they do not find that the ſtroke was felonious.

Ch. V. § 135. *Commitment and bail.*

3 H. 7. c. 1. Kel. 75. *Vide* 5 & 6 W. & M. c. 13. Chetwynd's case, B. R. H. 17 G. 2. 2 Str. 1203.

The ſtat. 3 H. 7. c. 1. empowers the court before whom one is acquitted upon an indictment for murder, either as principal or acceſſary, to commit or bail him until the year and day after the fact committed, that in caſe an appeal be brought, he may be forthcoming. But this extends not to perſons found guilty of manſlaughter or ſe defendendo, or homicide by miſchance, nor to ſuch as plead the king's pardon.

§ 136. *Form of judgment. Petit Treaſon.*

Vide ante, p. 137. 3 Inſt. 211. 1 Hale, 382. n. 2 Hale, 399. Foſt. 107. 336. 4 Blac. Com. 204.

The judgment in petit treaſon is the ſame as in the lower ſpecies of treaſon before conſidered, namely, to be drawn (on a hurdle) and hanged until dead. It was formerly different in the caſe of women, who were adjudged to be drawn and burned; but this was altered by the ſtat. 30 Geo. 3. c. 48. by which they are ſubjected to the ſame judgment in all reſpects as men, and particularly with reſpect to the proviſions of the ſtat. 25 Geo. 2. c. 37.

Murder.

25 G. 2. c. 37. ſ. 1.

The judgment in murder was the ſame as in other caſes of capital felony, namely, to be hanged by the neck until dead. But by the ſtat. 25 Geo. 2. c. 37. in order to ſtigmatize and deter perſons from the commiſſion of this heinous offence, it is enacted, "that all perſons who ſhall be found "guilty of wilful murder be executed according to law, "on the day next but one after ſentence paſſed; (unleſs it "happen to be Sunday, and then on the Monday following)." And (by ſ. 2.) "The body of ſuch murderer ſo convicted "ſhall, if ſuch conviction and execution ſhall be in the "county of Middleſex, or within the city or liberties of "London, be immediately conveyed by the ſheriff, &c. to "the hall of the Surgeon's Company, or ſuch other place "as the ſaid company ſhall appoint for this purpoſe, and "be delivered to ſuch perſon as the ſaid company ſhall ap-"point, who ſhall give the ſheriff, &c. a receipt for the ſame: "and the body ſo delivered ſhall be diſſected and anato-"mized by the ſaid ſurgeons, &c. And in caſe ſuch con-"viction and execution ſhall be in any other county or "place in Great Britain, then the judge or juſtice of aſſize "or other proper judge, ſhall award the ſentence to be "put in execution the next day but one after ſuch convic-"tion (except as aforeſaid); and the body of ſuch mur-"derer

"derer ſhall in like manner be delivered by the ſheriff to "ſuch ſurgeon as ſuch judge or juſtice ſhall direct for the "purpoſe aforeſaid." And (by ſ. 3.) "the ſentence ſhall "be pronounced in open court immediately after the "conviction of ſuch murderer, unleſs the court ſhall ſee "reaſonable cauſe for poſtponing the ſame. In which "ſentence ſhall be expreſſed, not only the uſual judgment "of death, but alſo the time appointed thereby for the exe-"tion thereof, and the marks of infamy directed for ſuch "offenders." Ch. V. § 136. *Form of Judgment in murder.*

Stay of execution. 4 Blac. Com 202.

Sect. 4. enables the judge for reaſonable cauſe to ſtay execution; "regard being always had to the true intent and "purpoſe of this act." By ſ. 6. "ſuch judge or juſtice "may appoint the body of any ſuch criminal to be hung "in chains. But in no caſe whatever the body of any "murderer ſhall be ſuffered to be buried, unleſs after ſuch "body ſhall have been diſſected and anatomized as afore-"ſaid. And ſuch judge or juſtice ſhall, and he is hereby "required to direct the ſame either to be diſpoſed of as "aforeſaid, to be anatomized, or to be hung in chains, in "the ſame manner as is now practiſed," &c.

Serjt. Forſter's MS. ex relatione Clive J. Foſt. C. L. 1

At a meeting of the judges in June 1752, to conſider of this law, in the caſe of Swan and Jefferys, they agreed that this ſhould be the ſentence or judgment:—

"That you be taken from hence to the priſon from "whence you came, and that you be taken from thence on "the day of inſtant (or next) to the place of "execution, and that you be there hanged by the neck till "your body be dead; and that your body when dead be "taken down, and be diſſected and anatomized." They alſo reſolved that the judgment for diſſecting and anatomizing, and touching the time of execution, ought to be pronounced in caſes of petit treaſon, though murder only is mentioned, and in that caſe too the time of execution to be a part of the judgment.

There was ſome doubt whether either judgment of diſſection or hanging in chains might not be given; and if the firſt were pronounced, whether if no ſurgeon would take the body it might not be hung in chains. But on debate

Ch. V. § 136. *Form of Judgment in murder.*

it was agreed by nine judges, that in all cases within the act the judgment for dissecting and anatomizing *only* should be part of the judgment pronounced; and if it were thought adviseable, the judge might afterwards direct the hanging in chains by special order to the sheriff, pursuant to the proviso for that purpose in the statute: and so is the practice.

Ld. Ferrers' case, Dom. Proc. 1760. Foft. 138.

This statute extends to peers convicted in parliament.

Should the day appointed by the judgment for the execution lapse before such execution done, a new time may be appointed (in the case of a peer) either by the high court of parliament, before which such peer shall have been attainted; or by B. R., the parliament not then sitting; the record of attainder being properly removed into B. R.

Regulations for treatment of murderers.

By s. 6. of the abovementioned statute, a murderer after conviction is directed to be confined in a separate cell, and that no person but the gaoler or his servants shall have access to him, without licence under the hand of the judge or sheriff. But in case the judge shall stay execution he may relax these restraints by licence in writing signed by him. By s. 8. the convict shall between sentence and execution be fed with bread and water only (except on receiving the sacrament, or necessaries administered medicinally by a professional man) under a penalty upon the gaoler of 20*l.* and imprisonment till it be paid, and forfeiture of his office. By s. 9. "if any person shall rescue or attempt to "rescue any person out of prison, committed for or found "guilty of murder; or rescue or attempt to rescue any "person convicted of murder going to execution, or during "execution, every such offender shall be deemed guilty "of felony, and suffer death without benefit of clergy."

Rescuers before execution.

After execution.

And by s. 10. "If any person shall after such execution "rescue or attempt to rescue the body of such offender out "of the custody of the sheriff or his officers, during the "conveyance of such body to any of the places directed by "this act, or from the Company of Surgeons, &c. or from "the house of any surgeon where the same shall have been "deposited in pursuance of this act, he shall be deemed "guilty of felony, and be liable to be transported for seven "years

"years, &c. and be subject to the like punishment and "methods of conviction in case of returning into or being "found at large within Great Britain within the said term "of seven years, in all respects as by law other felons are "subject to in case of unlawfully returning from transportation."

Ch. V. § 136. *Rescue of the body, &c.*

In manslaughter. Ante, 1. 4, 5, &c.

The judgment in cases of manslaughter and other less degrees of homicide have been before mentioned.

CHAP. VI.

Of the reſpective Duties of the Vill, the Coroner, and others, upon a Homicide committed.

1. *As to the Duty of the Vill, Hundred, Conſtable, &c.*
Perſons, preſent at the Fact omitting to arreſt Offender, or give Notice, or raiſe Hue and Cry, indictable. § 1.
Conſtable, Vill, Hundred, &c. anſwerable for like Omiſſion, or Eſcape of Offender. *ib.*
Or for not giving due Notice to Coroner before the Body be buried. - - - § 2.
Who liable for negligent Eſcape, after Caption. § 3.
2. *As to the Duty of the Coroner.* - - § 4.
How puniſhable for Neglect. *ib.*
Inquiſition to be *ſuper viſum Corporis.* ib.
Where the Body cannot be found, Inquiſition to be by Juſtices, &c. - - - § 5.
Of what and how the Coroner is to inquire by ſtat. 4 Ed. 1. ſt. 2. - - - § 6.
Not of Acceſſaries after. *ib.*
Upon whom and on what Occaſions the Inquiſition ought to be taken: Not vexatiouſly, or unneceſſarily, or by way of Extortion. - - § 7.
Puniſhment of Coroner extorting Money to omit taking Inquiſition. *ib.*
Manner and Form of the Inquiſition. - § 8.
Inquiſition by one of ſeveral Coroners good; but not by Deputy. *ib.*
Evidence to be heard for the Party accuſed as well as for the Crown. - - - § 9.
By ſtat. 1 & 2 Ph. & M. c. 13. Effect of Evidence to be put in Writing, and certified to the next Aſſizes, and Witneſſes bound over. *ib.*
Puniſhment of Coroner for Miſbehaviour. § 10.

The

The ſeveral Sorts of Inquiſition. - § 11.
1. Finding the Death *by the Viſitation of God.* - *ib.*
2. *By an inanimate or irrational Thing.* - § 12.
Deodands. What are ſuch. - § 13.
How the Value to be aſſeſſed. Relation of Forfeiture. *ib.*
3. *By the Act of the Deceaſed.* - - § 14.
Relation of Forfeiture of Felo de ſe. *ib.*
Form of ſuch Inquiſition. - - § 15.
How far traverſable. - - § 16.
Evidence of Inſanity. - - § 17.
4. *By the Act of another.* - - § 18.
Who to be bound over. *ib.*
Jury may find the Fact done by one not charged. *ib.*
Preſentment of Flight, how far traverſable. § 19.
Fees of Coroner. - - - § 20.

Touching the Arreſt of Offenders on Homicide committed.

§ 1. *Arreſt of offender on homicide committed.*

IT may not be deemed unneceſſary, in addition to what has been already ſaid upon the ſubject of Homicide, to take a ſhort review of thoſe proviſions which the law has made for the furtherance of juſtice in this reſpect. In no inſtance has greater care been taken for the ſpeedy detection and puniſhment of the guilty.

And firſt concerning the ſteps neceſſary to be taken upon the fact of an homicide committed.

1 Hale, 448. 2 Hale, 75, 6. 2 Hawk. ch. 12. ſ. 1. 4. Wilburn's caſe, Noy. 50. 4 Ed. 1. ſt. 2. *Duty of conſtable, &c. on notice.*

If any private perſon of full age be preſent when a murder or manſlaughter is committed, or dangerous wound given, and do not his beſt endeavour to apprehend the malefactor, and raiſe the hue and cry, he ſhall be fined and impriſoned. The conſtable or other head officer of the town or vill ought alſo to be made acquainted with the fame by thoſe to whom knowledge of the fact firſt comes, that he may uſe all due diligence for the apprehenſion of the offender, and raiſe hue and cry: for the neglect of which he is in like manner puniſhable: and particularly in default of raiſing the hue

Ch. VI. § 1. *Arreſt of perſons preſent.*

hue and cry he ſhall forfeit 5 l. by ſt. 8 Geo. 2. c. 16. ſ. 11. to be recovered by ſuit or information within ſix months after.

Duty of vill, &c.
1 Hale, 448. 604.
2 Hale, 73.
2 Hawk. ch. 12. ſ. 2, 3.
3 H. 7. c. 1.
Kel. 5.

Of hundred and county.

Again, if any ſuch offence be committed in an incloſed town, either by day or night, or within the precincts of any other town or vill in the day time while day light laſts, and the offender be not taken, the town or vill may be amerced upon a preſentment thereof either by the coroner or grand inqueſt before the juſtices of gaol delivery, or by the juſtices of the peace. And if the vill be not ſufficient to anſwer the amerciament, the hundred ſhall be charged therewith, and, in default of that, the county.

§ 2. *Notice to be given to coroner.*
1 Hale, 424.
2 Hale, 57, 8.
Sum. 170. *Vide* 2 Bac. Abr. tit. Coroner.
2 Hawk. ch. 9. ſ. 23. R. v. Clerk. Salk. 377.
7 Mod. 10.
R. v. Solgard.
2 Str. 1095.
Vide poſt. ſ. 7.

In the next place, in all caſes of notice or reaſonable ſuſpicion that a party has come to a violent or unnatural death, the vill, or hundred, or (even in the caſe of the natural death of a priſoner) the gaoler, ought to ſend for the coroner before the body is buried; otherwiſe they ſhall be amerced, on preſentment either by the grand inqueſt, or by the coroner. In like manner any individual is indictable for preventing or withholding the coroner from doing his duty by viewing the body. But if the death, however ſudden, were from fever or other apparent viſitation of God, there is no occaſion (with the exception above-mentioned) to ſend for the coroner.

2 Hale, 57, 8.
Sum. 170.
2 Hawk. ch. 9. ſ. 23.

The vill, &c. is alſo liable to be amerced in the ſame manner if it ſuffer a body that died an unnatural death to remain unburied for an unreaſonable time till it putrify, before they ſend for the coroner.

§ 3. *Liability for eſcapes.*
1 Hale, 489, 490.
2 Hale, 73, 4.

If the offender were taken by the townſhip, and delivered to the ſheriff or his bailiff, or to the gaoler of the county, and then an eſcape happen, the townſhip or vill is not chargeable, but the ſheriff or bailiff. But if he be in the guard of the conſtable carrying him to gaol, even though the gaoler refuſed to take him, and he eſcaped, it is a charge on the vill. Nay, though in the flight he be ſlain for neceſſity of retaking him, becauſe he reſiſted. And if the killing be out of any vill, the hundred is anſwerable for the eſcape in the like manner.

Thus

Ch. VI. § 3.

Thus much of negligent eſcapes; ſuch as are voluntary will fall under a different conſideration in another place.

Vide offences againſt lawful cuſtody.

§ 4. *Duty of coroner.*
2 Hale, 58.
2 Hawk. ch. 9. ſ. 29. 1 H. 8. c. 7.

If the coroner neglect to come in convenient time after notice, he ſhall be fined and impriſoned: to enforce which the ſtat. 1 H. 8. c. 7. directs that he ſhall forfeit 40 s. for every ſuch default; concerning which the juſtices of peace and of aſſize have power to inquire. And if he make no inquiſition at all upon a perſon ſlain, or do not return the ſame to the next gaol delivery, he ſhall forfeit 5 l. for every default, by the ſtat. 3 H. 7. c. 1. And if upon a preſentment by the grand inqueſt of a death of which the coroner ought to have taken cognizance, no ſuch preſentment be found in the coroner's roll, he is puniſhable even at common law by fine and impriſonment.

3 H. 7. c. 1.
2 Hale, 58.

Inquiſition to be made ſuper viſum corporis.
1 Hale, 58, 9.
2 Hawk. ch. 9. ſ. 23, 24.
1 Bac. Abr. 753.
1 Str. 22. 167. 533. 2 Lev. 140.

If the body be buried before the coroner come, though he ought to record it, that it may be inquired by whoſe default it ſo happened, yet he ſhould direct it to be taken up, if it may poſſibly be done without danger of infection, in order that the inquiſition may be taken ſuper viſum corporis, without which it is void; and he would be obliged to make a new one upon ſuch view. However, where a body has been ſo long buried that it may reaſonably be preſumed that the view of it could be of no manner of uſe for the information of the jurors, the court into which the coroner's inquiſition is returned will, upon affidavit of the circumſtances, in diſcretion refuſe to receive or file it. And in ſuch caſes, or where the inquiſition has been quaſhed in B. R., the coroner ought not to dig up the body, unleſs he have a ſpecial writ or order from the court for that purpoſe.

§ 5. *Where the body not found.*
1 Hawk. ch. 27. ſ. 12. 23.
1 Hale, 414. 419.
3 MS. Sum. 312.
3 Inſt. 55.
1 Burr. 27.

Where the body cannot be found, ſo that the coroner, who has authority only ſuper viſum corporis, cannot proceed; or where it would be dangerous or unneceſſary to dig it up; or as it ſeems where the coroner neglects to take any inquiſition, the inquiry may be by juſtices of peace, who by their commiſſion have a general power to inquire of all felonies; or it may be in the King's Bench, if the felony were committed in the county where that court ſits; or by the juſtices of oyer and terminer.

What

Ch. VI. § 6.

§ 6.
Of what and how the coroner is to inquire.
4 Ed. 1. ſt. 2. *Vide* 3 H. 7. c. 1. and other ſtatutes there referred to.

What the general authority of the coroner is, and in what manner it ſhould be exerciſed, may be ſeen in the ſtat. 4 Ed. 1. de officio coronatoris, which enacts "that "the coroner, when commanded by the king's bailiffs or by "honeſt men of the country, ſhall go to the places where "any be ſlain or ſuddenly dead or wounded, and ſhall "forthwith command four of the next towns (*a*) or five or "ſix to appear before him, in ſuch a place; and when they "are come thither, the coroner, upon the oath of them, "ſhall inquire (*b*) if they know where the perſon was ſlain, "whether it were in any houſe, field, bed, town, tavern, "or company, and who were there." "Likewiſe it is to "be inquired who were culpable either of the act or of "the force; and who were preſent, either men or women, "of what age, if they can ſpeak, or have any diſcretion. "And ſuch as are found culpable by inquiſition ſhall be "taken and delivered to the ſheriff, and committed to "gaol; and ſuch as be found, and be not culpable, (i. e. the "witneſſes, and theſe the coroner ſhall bind over by recog-"nizance to the next aſſizes,) ſhall be attached until the "coming of the juſtices, and their names written in the "coroner's roll. If any be ſlain and the body found in "the fields or woods; firſt, it is to be inquired whether "he were ſlain in the ſame place or not; and if it were "brought and laid there, endeavour ſhall be made to follow "their ſteps who brought the body thither; whither brought "upon a horſe or in a cart. Alſo it ſhall be inquired whe-"ther the dead perſon were known or a ſtranger, and "where he lay the night before. And if any be found "culpable of the murder, the coroner ſhall immediately "go into his houſe, and inquire what goods he has, &c. "how much land and the yearly value, and what corn on "the ground, which ſhall be valued and delivered to the "townſhip, which ſhall be anſwerable before the juſtices

(*a*) For this purpoſe the coroner iſſues a precept to the conſtables of ſuch townſhips to return a competent number of jurors, viz. not leſs than 12. 2 Hale, 59. Or he may ſend his precept to the conſtable of the hundred. 3 MS. Sum. 317. If the conſtable make no return, or the jurors do not appear, their defaults are to be returned, and they ſhall be amerced before the judges of gaol delivery. Ib. and 2 Hale, 62.

(*b*) The jury are ſworn and charged by the coroner to inquire upon view of the body, how the party came by his death. 2 Hale, 60.

"for

"for all; and the land ſhall remain in the king's hands "until the lords of the fee have made fine for it, &c." Ch. VI. § 6. *Of what and how to inquire.*

"Alſo it is to be enquired of thoſe who are drowned or "ſuddenly dead; and after it is to be ſeen of ſuch bodies "whether they were ſo drowned or ſlain, or ſtrangled by "the ſign of a cord tied ſtraight about their necks, or about "any of their members, or upon any other hurt found upon "their bodies: whereupon they ſhall proceed in the form "above ſaid. And if they were not ſlain, then ought the "coroners to attach the finders, and all others in company.

"Upon appeal of wounds and ſuch like, eſpecially if the "wounds be mortal, the parties appealed ſhall be taken "immediately, and kept until it be known perfectly whe-"ther he that is hurt ſhall recover or not; and if he die, "the offenders ſhall be kept: and if the party recover, the "offenders ſhall be attached by four or ſix pledges after, "as the wound is great or ſmall: if it be for a maim, he "ſhall find more than four pledges: and two pledges if it "be for a ſmall wound without mayhem. Alſo all wounds "ought to be viewed; the length, breadth, and depth, and "with what weapons, and in what part of the body the "wound or hurt is, and how many wounds there be, and "who gave them: all which muſt be inrolled by the coroner.

"Moreover if any be appealed, the party appealing of the "fact ſhall be taken, and the party appealed of the force "ſhall be attached alſo, and kept in ward until the parties "appealed of the fact be attainted or delivered.

"Alſo horſes, boats, carts, &c. whereby any are ſlain, "that properly are called deodands, ſhall be valued, and "delivered unto the towns as beforeſaid."

"If any be ſuſpected of the death of any man, being in "danger of life, he ſhall be taken and impriſoned as before "is ſaid."

It is obſervable that this ſtatute being wholly directory and in affirmation of the common law neither reſtrains the power of the coroner, nor excuſes him from any part of his duty not mentioned therein, which was incident to his office before. 2 Hawk. ch. 9. ſ. 21.

The coroner has no authority to inquire of acceſſaries after the fact, as he has of acceſſaries before. 1 Hale, 416. 2 Hale, 63. 2 Hawk. ch. 9. ſ. 26. Moor, 29.

Ch. VI. § 6. *Of what and how to inquire.*

Ch. 5. f. 132.

With reſpect to the line of demarcation between the juriſdiction of the county coroner, and that of the coroner of the admiralty it has been conſidered in the laſt chapter.

§ 7. *Upon whom the inquiſition to be taken.* 1 Hale, 424. 2 Hale, 57, 58. *Vide* 1 Bac. Abr. tit. Coroner.

First the inquiry is to be made "when commanded by the king's bailiffs or by honeſt men of the country" upon ſuch as "be ſlain, or ſuddenly dead or wounded." This power is however to be exercifed within the limits of a ſound diſcretion. There ought at leaſt to be a reaſonable ſuſpicion that the party came to his death by violent or unnatural means: for if the death, however ſudden, were from fever, or other apparent viſitation of God, there is no occaſion (with the exception before mentioned in caſe of priſoners) for the coroner's interference. And the court of B. R. on two ſeveral occaſions within my own memory blamed the coroners of Norfolk (*a*) and Angleſea (*b*) for holding repeated and unneceſſary inqueſts, for the ſake of enhancing their fees, on bodies and parts of bodies of perſons unknown, which were caſt up by the ſea ſhore, without the ſmalleſt probability or ſuſpicion of the deaths having happened in any other manner than by the unfortunate perils of the ſea.

(*a*) This was upon an application for a mandamus to the juſtices of Norfolk to allow the coroner certain items in his account. M. 33 Geo. 3. MS.

(*b*) The coroner of Angleſea's caſe. E. 40 G. 3.

Rex v. Harriſon. M. 40 G. 3. B. R. MS.

One Harriſon coroner of the county of Cumberland was convicted for extortion in his office, in taking a ſum of money for not holding an inqueſt on the body of a young woman, which he had no authority for doing. On the defendant's being brought up for judgment the circumſtances of the caſe appeared to be that the party had by accident broken her leg, which was afterwards amputated, and after ſome weeks ſhe died in conſequence of the fever attending it, and was buried. Some days after the coroner threatened to have the body taken up and an inquiſition taken on it, unleſs a certain ſum were paid. For which offence the court ſentenced him to pay a fine of 100 l., to be impriſoned for ſix months, and to be amoved from his office. And Mr. Juſtice Groſe in paſſing ſentence ſaid, that the coroner under theſe circumſtances had no pretence or authority for taking any inquiſition at all; but if the caſe had warranted his ſo doing, he was equally criminal in having extorted money to refrain from doing his office.

Next,

Ch. VI. § 8.

§ 8. *Manner and form of inquiſition.* 2 Inſt. 148. 2 Hale, 59. 2 Hawk. ch. 9. f. 22. Pinner's caſe, Cro. Eliz. 31.

Next, as to the manner of taking the inquiſition; the jurors muſt be at leaſt twelve in number, half of whom in the caſe of a priſoner's dying in gaol ought to be priſoners if there were ſo many, and it ought to appear in every inquiſition at what place or places, and by what jurors by name, it was taken, and that they were ſworn. But it is ſufficient to ſay that it was taken by the oaths of lawful men of the country, without ſtating that they were of the next adjacent towns.

2 Hawk. ch. 9. f. 25. 3 Bulſtr. 173. 1 Bac. Abr. 753.

Though the inquiſition muſt be taken on the view of the body, yet it is not neceſſary that it ſhould be taken in the very ſame place; but it ſeems that the coroner may adjourn the jury from time to time, and from one place to another; but the real place ſhould be ſtated in the inquiſition.

3 Inſt. 72. Staundf. 51. b. (*a*) Rex v. Beavers and others, B. R. temp. Ld. Mansfield, MS. (*b*) R. v. Js. of Norfolk, M. 33 G. 3. MS. (*a*)

The inquiſition muſt be on parchment; and ſome have been quaſhed for being on paper (*a*). It muſt be ſigned by all the jury (*b*) as well as the coroner; otherwiſe it is void. And the cuſtom is for the coroner and the jury to ſet their ſeals thereto; but I find no expreſs authority for this.

Cro. Jac. 635.

In all reſpects it ſeems that an inquiſition before the coroner for the death of another ought to be as formal and certain as any other indictment.

1 Hale, 417. 2 Hale, 56. 58. 1 Bac. Abr. 757.

An inquiſition taken before one of ſeveral coroners ſuper viſum corporis is ſufficient, though all muſt join in an outlawry: but it cannot be done by deputy. But in the caſe of the non-appearance of juries, conſtables, &c. he cannot fine or amerce; but muſt preſent the matter to the next juſtices of gaol delivery, who have power to fine.

2 Hale, 62.

§ 9. *Evidence.* 2 Hale, 60, 1, 2. 157. Scorey's caſe, M. 24 G. 2. 1 Leach. 50. 2 Sid. 90. 101. 1 Hale, 425. *Depoſitions.* 1 & 2 Ph. & M. c. 13. f. 5.

The coroner's inqueſt muſt hear evidence on oath as well for the party accuſed as for the king, if it be offered to them; becauſe the proceeding is not ſo much an accuſation on an indictment, as an inquiſition of office to inquire truly how the party came to his death: and for an omiſſion in this reſpect an inquiſition of felo de ſe was quaſhed by B. R.

The ſt. 1 & 2 Ph. & M. c. 13. enacts "that every coroner "upon any inquiſition before him found, whereby any

(*a*) *The inquiſitions there were only ſigned by the coroner and the foreman of the jury.*

"perſon

Ch. VI. § 9. *Evidence on Inquiſition.*

Witneſſes to be bound over by recognizance.

" perſon or perſons ſhall be indicted for murder or man-
" ſlaughter, or as acceſſary or acceſſaries to the ſame before
" the murder, &c. ſhall put in writing the effect of the
" evidence given to the jury before him, being material.
" And as well the juſtices of the peace (two, one
" being of the quorum) as the ſaid coroner ſhall bind
" all ſuch by recognizance or obligation as do declare
" any thing material to prove the ſaid murder, &c.
" to appear at the next general gaol delivery to be
" holden within the county, city, or town corporate
" where the trial thereof ſhall be; then and there to
" give evidence againſt the party ſo indicted at the time
" of the trial; and ſhall certify as well the ſame evidence
" as ſuch bond or bonds in writing as he ſhall take, toge-
" ther with the inquiſition or indictment before him taken
" or found at or before the time of the trial thereof to
" be had."

It is true that the ſtatute does in terms only require the coroner to put in writing *the effect* of the evidence. But this muſt not be taken to give him a latitude, ſuch as hath been but too often taken by perſons of this deſcription to the great perverſion of truth and juſtice, of putting down not the words of the witneſſes but his own conception of their tendency. It is doubtleſs the meaning of the act that the examination of the witneſſes ſhould be taken down with the greateſt poſſible accuracy as to all material points of the inquiry: otherwiſe one great benefit of the act which is to enable the court to compare the examination with the evidence then given muſt be defeated. *The effect* mentioned therein means the true and genuine ſenſe of the evidence as delivered in detail, not indeed in letters, ſyllables, or even words; though theſe ſhould not needleſsly be departed from; but the fair and obvious meaning of the words ſpoken, and not the final reſult of the evidence. Complaints have in my own memory been made by judges on the circuits of the culpable neglect of coroners in this reſpect, and threats of exemplary puniſhment holden out to them to prevent a repetition of the ſame abuſe in future.

I have

I have before noticed the preſentments of the coroner for breaches of duty in others towards him, and by whom the puniſhment ſhall be awarded. In like manner he himſelf is puniſhable for neglect or miſbehaviour in his office in the inſtances before alluded to. But further the ſt. 3 Ed. 1. c. 9. directs that if any coroner &c. for reward, prayer, fear, or affinity, conceal &c. the felonies done in his liberties, or will not arreſt the felons there, or will not do his office for favour to ſuch miſdoers, and be attainted thereof, he ſhall be impriſoned one year, and pay a grievous fine, or if he have not wherewith to pay ſhall be impriſoned three years. Ch. VI. § 10.

§ 10. *Puniſhment of the coroner.* Ante, ſ. 1. 2. 4. 8. 3 Ed. 1. c. 9.

In Lord Buckhurſt's caſe a coroner not returning his inquiſition of murder to the next gaol delivery, but ſuppreſſing it, was diſcharged from his office, and fined 100 l. 1 Keb. 280.

Alſo the ſtat. 1 & 2 Ph. & M. c. 13. enacts that " if any " coroner or juſtice of the peace ſhall offend in any thing " contrary to the true intent and meaning of the ſaid act, " the juſtices of gaol delivery of the ſhire, &c. where ſuch " offence ſhall happen to be committed, upon due proof " thereof by examination before them, ſhall for every ſuch " offence ſet ſuch fine on every ſuch juſtice of peace " and coroner as they ſhall think meet, and eſtreat the " ſame," &c. 1 & 2 Ph. & M. c. 13. ſ. 5. Ante, ſ. 9.

And further by ſt. 25 Geo. 2. c. 29. " If any coroner who " is not appointed by virtue of an annual election or nomi- " nation, or whoſe office of coroner is not annexed to any " other office, ſhall be lawfully convicted of extortion, or " wilful neglect of his duty, or miſdemeanor in his office, " it ſhall be lawful for the court before whom he ſhall be " ſo convicted to adjuge that he be removed from his " office." 25 G. 2. c. 29. ſ. 6.

§ 11. *The ſeveral ſorts of inquiſition.*

Having ſaid thus much of the authority of the coroner in general, there remains only to be conſidered the ſeveral ſorts of inquiſitions which may be taken by him touching the death of a perſon. And theſe are either where the death is found to be

1. *By the viſitation of God.*
2. *By means of ſome inanimate or irrational thing.*

Ch. VI. § 11. *The several sorts of inquisition.*

3. *By the party's own act.*
4. *By the act of another.*

By visitation of God. Ante, f. 7. 1 Hale, 418. 2 Hale, 62.

1. The coroner has no power to take inquisitions except where the death is sudden or otherwise unnatural; and if the inquest find that the party died by the visitation of God, there is no more to be done; only the inquisition together with the examinations are by the st. 3 H. 7. c. 1. to be returned to the next gaol delivery, or into B. R.

§ 12. *By an inanimate or irrational thing.* 1 Hale, 418. 2 Hale, 62.

2. If the death be found by misadventure, as by a fall from a cart or the like, the coroner is to take the examination, and return the same with the inquisition to the next gaol delivery; and further to inquire of the deodand, the value thereof, and in whose hands it is; and to seize and deliver the same to the township to be answerable for it to the king, by stat. 4 Ed. 1. st. 2.

2 Hawk. ch. 9. § 2nd Allen, 51. 1 Hale, 422. 2 Hale, 62.

But if the deceased were killed by a fall from a bridge, by reason of its being out of repair, or were drowned in a pit, the township who neglected to repair the one or stop up the other, if they were bound so to do, shall, on inquisition by the coroner finding such fact, be amerced by the justices of gaol delivery.

§ 13. *Deodands.* Fost. 265. 2 Hale, 419, 420.

Deodands, so called from the former application of them to pious uses, though now part of the revenues of the crown unless granted out, are those forfeited things which moved to or occasioned the death of a person. They are of two sorts; 1. Such things as moved to the death; 2. Such as, though at rest, yet were the immediate occasion of it. Where a person is killed by an instrument made use of for that purpose, such instrument is forfeited; and that is the reason why a value is set upon it in the indictment. If a man fall from his horse and be killed, or in watering his horse be drowned; if it happened in either case from the fault of the animal it is a deodand; otherwise not, as was solemnly adjudged 5 Ed. 3. and therefore if in the latter case the man was drowned by the violence of the stream, the horse is no deodand. If a ship or a boat be in fresh water, and a man be killed by a fall therefrom, in strictness the ship or boat was forfeited, but not the merchandize; though

Cro Jac. 483. 2 Ro Rep. 23. 1 Hale, 422. 1 Hawk. ch. 26. § 6.

Ch. VI. § 13. *Deodands.*

though this severity is never practised at this day: but if the death happened by any particular merchandize falling on him, that alone was forfeited and not the ship; and that rule is now applied in the practice of juries to the ship itself: the particular part of which immediately conducive to the death is considered as a deodand. But the law of deodands does not take place in salt water, which includes all arms of the sea, as far as it flows and reflows, though within the body of a county. Of things at rest nothing which is part of or fixed to the freehold at the time can be forfeited; and the same appears to be now considered with respect to a bell in a steeple or wheel of a mill. And though it is said that a hay rick from whence a man falls and is killed shall be a deodand, yet Lord Hale notes that it is not so adjudged.

1 Hale, 422, 334. 1 Hawk. ch. 26. § 6. 1 Hale, 420 422. 1 Hawk. ch. 26. § 5. 1 Lev. 136. Raym. 97. 6 Mod. 187. 1 Sid. 206, 7. 2 Bac. Abr. 293.

This further distinction is also to be noted, that if an infant under 14 years of age fall from any thing at rest, it shall not forfeited; he not being considered of sufficient discretion to take common precaution. But if the thing moved to his death, as an animal, a falling tree, or moving carriage, then it is a deodand. In the latter instance both horses as well as carriage are in strictness forfeited: but if the deceased fall from the wheel when not in motion, then that only is a deodand.

1 Hale, 420 422.

Assessment of the value. Fost. 266. 2 Bac. Abr. 294.

But these forfeitures, being founded on the superstition of an ignorant age, rather than in principles of reason and policy, have for a long time met with but little countenance in Westminster Hall. For when juries have taken upon them to exercise a discretion, in strictness beyond their province, in reducing the quantity of the forfeiture, as in finding the wheel only of a moving carriage as the deodand, and setting a small value even on that wheel, (which in fact is the usual practice,) the court of K. B. have refused to interfere on behalf of the lord. They have often interposed the authority of the court as the sovereign coroners in this case, and also in the case of suicide, in favour of the subject, and to save the forfeiture, but never to his prejudice. In the case of the King v. Rolfe, coroner of Kent, where the inquest found that A. B. sitting on his waggon accidentally fell to the ground, and that the horses drawing the

R. v. Rolfe, H. 5 G. 2.

Ch. VI. § 13. *Deodands.*

waggon forward one of the fore wheels cruſhed his head, of which he inſtantly died; and then concluded that the wheel only (on which they ſet a ſmall value) moved to his death: Mr. Monpeſſon lord of the franchiſe moved to quaſh the inquiſition, on affidavit that the waggon and horſes were equally inſtrumental in the death; which indeed the finding of the jury ſufficiently implied. But the court were very clear that neither they nor the coroner could oblige the jury to conclude otherwiſe than they had done, and would not ſuffer the affidavit to be read. A like determination took place in the caſe of the King v. Grew, in Michaelmas 29 Geo. 2.

Rex v. Grew, M. 29 G. 2.

Sum. 34. Plowd. 260, &c.

The relation of the forfeiture is to the ſtroke ſo as to avoid all meſne conveyances.

2 Hale, 419. Ante, f. 5. et infra.

Regularly deodands are to be found by the coroner's inqueſt; but if omitted by him they may be found before commiſſioners of gaol delivery, oyer and terminer, and of the peace.

§ 14. *Inquiſition of Felo de ſe.*

3. If the inqueſt find a man felo de ſe, they ought to find the ſpecial matter, and alſo what goods and chattels he had, and of what value; and ſeize and deliver the ſame to the townſhip to be ameſnable to the king or the lord of the franchiſe. And without either ſuch an inquiſition by the coroner where the body can be found, or by the juſtices in the caſes before mentioned, there can be no title to the forfeiture.

2 Hale, 62. 3 Hawk. ch. 27. ſ. 9. 1 Hale, 414. 1 Saund. 363. n. by Serjt. Wil. Rams. Poſt. 266.

The forfeiture in this caſe is of goods and chattels only, and not of lands.

1 Hale, 413. Plowd. 261. 3 Inſt. 55. 1 Bac. Abr. 748. *Vide* Crimes, Felony, Forfeiture.

With reſpect to the time to which ſuch forfeiture relates, there is a difference of opinion. If one might reaſon from analogy a priori on ſuch a ſubject, it ſhould ſeem that the forfeiture ought to relate to the inquiſition or preſentment, which in this caſe ſupplies the place of a conviction; but the current of authorities refers it to the ſtroke, though Lord Hale combats this opinion in his principal work, and conſiders that it is referable only to the death.

Vide 3 Inſt. 54. 1 Hawk. ch. 27. ſ. 10. Sum. 29. 4 Blac. Com. 190. Plowd. 261, 2. 1 Lev. 8. 1 Hale, 414.

All

All inquiſitions of a felo de ſe, being in nature of indictments, ſeem to require the ſame formality and certainty as if they were ſuch. The inquiſition charges that the party feloniouſly and voluntarily killed and murdered himſelf againſt the peace, &c. But inquiſitions of this ſort have been holden good without the concluſion that the party murdered himſelf. And if the inquiſition be full in ſubſtance and only defective in form, the coroner may be ſerved with a rule to amend it; or if the finding of the goods be omitted, that may be ſupplied by a writ of melius inquirendum directed to the ſheriff. But if the inquiſition be not intelligible, or defective in ſubſtance, or if there be great proof of bad practice in the coroner, the court of B. R. will quaſh it on motion, and direct the juſtices of peace to inquire, and that their inquiſition ſhall be traverſed at the then next aſſizes.

Ch. VI. § 15. *Felo de ſe.*

§ 15. *Form of inquiſition.*

1 Hawk. ch. 27. ſ. 13. 1 Hale, 412. 1 Salk. 377. 1 Keb. 66. *Vide* Saund. 356. note (2) by Mr. Serjt. Williams. 1 Hawk. ch. 27. ſ. 15. 1 Hale, 415. 3 Mod. 101. *Vide* 2 Lev. 146. 152. 2 Hawk. ch. 9. ſ. 56. T. Jones, 198. 1 Ventr. 352. Ante, f. 5.

Next, how far theſe inquiſitions of felo de ſe are concluſive.

§ 16. *Not concluſive.*

It is clear that thoſe taken before the juſtices, or before the ſheriff on a writ of melius inquirendum, may be traverſed: but as to thoſe taken before the coroner upon view of the body Lord Coke thought they were not traverſable. But the reaſons ſuggeſted by Staundford, whom he quotes, are very unſatisfactory: and by the better opinions ſuch inquiſitions are traverſable as well as thoſe before the juſtices. It ſeems indeed very unjuſt that the perſonal repreſentatives of a man ſhould be concluded by an inquiſition which may be taken in their abſence, and that too in the caſe of a forfeiture. The proper courſe ſeems to be for the adminiſtrator to remove the inquiſition into B. R. by certiorari, and to ſuggeſt himſelf aggrieved by it. But it ſeems not to be traverſable, ſo as to make one felo de ſe who is found not to be ſo.

3 Inſt. 55. Staundf. 185. d. 1 Hale, 414 to 417. 1 Hawk. ch. 27 ſ. 11, 12. 2 Hawk. ch. 9. ſ. 55. *Vide* Authorities collected by Serjt. Williams, Saund. 362. n. 1. 1 Ventr. 239.

It may not be uſeleſs to obſerve, that this offence of ſuicide can only be committed by one who is of years of diſcretion, and in his ſenſes at the time of the ſtroke. But the excuſe of infanity ought not to be ſtrained to that length to which it is ſometimes carried by the coroner's juries,

§ 17. *Evidence of inſanity.*

4 Blac. Com. 189. 1 Hale, 412.

Ch VI. § 17. *Felo de se.*

namely, that the very act of ſuicide is an evidence of inſanity; as if every man who acted contrary to reaſon had therefore no reaſon at all. For the ſame argument would prove every other criminal non compos as well as the ſelf-murderer. But this being a caſe of forfeiture, very ſlight evidence of derangement at the time will warrant them in finding that fact. The conſequences of finding one felo de ſe have been ſhewn before.

Ante, f. 14.

§ 18. *Death by another.* 2 Hale, 63.

4. If the party be ſlain by another, and the felon be not not known, the coroner's inqueſt are to find accordingly; and he ſhall bind over the firſt finder of the body to the next gaol delivery, and return his examinations therewith by ſtat. 1 & 2 Ph. & Mary, c. 13. But if the felon be known, the inqueſt ſhall find him guilty of the death; and alſo inquire of all who were preſent aiding and abetting, and of acceſſaries before, but not after. But though a certain perſon be charged before the coroner, and the jury be directed to inquire particularly as to his guilt, yet if it appear upon examination before them that the perſon accuſed be innocent, and that a ſtranger be guilty, they may find accordingly: and this is not extrajudicial, becauſe the jury were bound to inquire what perſon committed the fact.

1 & 2 Ph. & M. c. 13 ſ. 5. 2 Hale, 63.

3 MS. Sum. 27.

§ 19. *Flight.* 2 Hale, 63, 64.

It is alſo their duty to inquire, whether the principal or acceſſaries fled for the homicide; in which caſe the party flying forfeits all his goods and chattels, although afterwards acquitted of the charge; and they ſhall find the value of the goods, and ſeize and commit them to the townſhips as in other caſes.

Ante, f. 12.

Whether traverſable.

Whether the preſentment by the coroner of the flight be traverſable is ſtill more doubtful than that of a felo de ſe. By the current of authorities it ſeems taken for granted that it is not. Yet the reaſons urged by Lord Hale why an inquiſition of felo de ſe may be traverſable ſeem equally applicable to this: nor does he ſeem to be perfectly ſatisfied upon the preſent point: for in another paſſage he ſays it is doubted; and cites Staundford P. C. Lib. 3. c. 21., who makes it a queſtion, and aſſigns as the ſuppoſed reaſon why it is not, that only goods and chattels are thereby forfeited,

Ante, f. 16. 1 Bac. Abr. 755. *V. de* 1 Hale, 416, 17. 2 Hale, 63, 4.

1 Hale, 363.

Ch. VI. § 19. *Inquiſition of death againſt another.*

2 Hawk. ch. 9. ſ. 54. 1 Bac. Abr. 755. & *vide* Saund. 363. note by Serjt. Williams.

ſeited, and de minimis non curat lex; which can hardly be admitted as a ſufficient reaſon at this day. And Hawkins ſays, it is now generally holden at this day that ſuch preſentment may be traverſed. Certainly however the inquiſition before the juſtices finding a flight is traverſable.

§ 20. *Fees.* 3 H. 7. c. 1.

By the ſtat. 3 H. 7. c. 1. the coroner was entitled to a fee of 13 s. 4 d. for every inquiſition of homicide taken, payable out of the goods and chattels of the felon or out of the amerciaments on the townſhip in caſe of his eſcape. But by ſtat. 1 H. 8. c. 7. he was to do his office gratis in caſe of homicide by miſadventure, and not by any perſon's hand. In addition to the above, by the ſtat. 25 Geo. 2. c. 29. "for every inquiſition, not taken upon the view of a body dying in gaol or priſon, duly taken within England, by any coroner, in any townſhip or place contributing to the county rates, the ſum of 20 s., and for every mile which he ſhall be compelled to travel from the uſual place of his abode to take ſuch inquiſition the farther ſum of 9 d. ſhall be paid him out of the county rates, by order of the juſtices of peace in their quarter ſeſſions. And for every inquiſition taken on the body of one dying in gaol or priſon, a ſum not exceeding 20 s. in the diſcretion of the ſaid juſtices." By ſ. 5. no coroner of the king's houſehold and of the verge, nor any coroner of the Admiralty, or of the county palatine of Durham, or of the city of London and borough of Southwark, nor of any city, &c. liberty or franchiſe (*a*), not contributory to the county rates ſhall be entitled to any fees by this act, but only to ſuch as they were before entitled to.

1 H. 8. c. 7.

25 G. 2. c. 29. ſ. 1.

(*a*) R v. The Juſtices of the W. R. of Yorkſhire, 7 Term Rep. 52.

CHAP. VII.

OF MAYHEM, OR FELONIOUS MAIMS.

1. *Of Maims at common Law.* - - § 1.
Such bodily Hurts as render a Man leſs able to defend himſelf or annoy his Adverſary. Felony, puniſhable by Fine and Impriſonment. *ib.*

2. *Of Maims by Statute.* - - - § 2.
5 H. 4. c. 5. 37 H. 8. c. 6.; but principally by 22 & 23 Car. 2, c. 1. called the Coventry Act; whereby certain Injuries maliciouſly done to the Tongue, Eye, Noſe, Lip, or any Limb or Member, by lying in wait, are made Felony without Benefit of Clergy. *ib.*

i. What a maiming or diſfiguring within the Coventry Act. - - - - § 3.
Slitting of the Noſe. *ib.*

ii. As to the Perſon aimed at. - - § 4.
Maiming one's ſelf a Miſdemeanor at common Law. *ib.*

iii. What a lying in wait. - - § 5.

iv. With what Intent. - - - § 6.
It muſt be to maim or diſfigure. *ib.*
But if it were to murder, that is ſufficient. *ib.*

Principals and Acceſſaries. - - § 7.

Indictment and Appeal, Form thereof. - § 8.

Defences. To Mayhem at common Law. - § 9.
1. In defence of the Perſon; but not of Property againſt Treſpaſſer. 2. A Recovery in treſpaſs for the ſame Battery, &c. a Bar in appeal of Mayhem. 3. So Arbitrament, Accord and Satisfaction, Releaſe, Non-ſuit, &c. *ib.*
Defendant cannot plead in abatement to an Appeal, and alſo plead over to the Felony. *ib.*

Trial. By the Court on View, or Jury. - § 10.

Of

Of Mayhem or Maims.

Ch. VII. § 1.

§ 1. *Maims at common law.*

A Maim at common law is ſuch a bodily hurt as renders a man leſs able in fighting to defend himſelf or annoy his adverſary: but if the injury be ſuch as diſfigures him only, without diminiſhing his corporal abilities, it does not fall within the crime of mayhem. Upon this diſtinction, the cutting off, diſabling, or weakening a man's hand or finger, or ſtriking out an eye or foretooth, or caſtrating him, or, as Lord Coke adds, breaking his ſkull, are ſaid to be maims; but the cutting off his ear or noſe are not ſuch at common law. But in order to found an indictment or appeal of mayhem the act muſt be done maliciouſly; though it matters not how ſudden the occaſion.

1 MS. Sum. 221. Co. Lit. 126. b. 288. 3 Inſt. 62. 118. Staundf. 38. b. 1 Hawk. ch. 44. ſ. 1, 2. 2 Hawk. ch. 23. ſ. 16. 3 Blac. Com. 121. 4 Blac. Com. 205.

Puniſhment.

All maims are ſaid to be felony; becauſe anciently the offender had judgment of the loſs of the ſame member &c. which he had occaſioned to the ſufferer: but now the only judgment which remains at common law is of fine and impriſonment; from whence the offence ſeems to have been afterwards conſidered more in the nature of an aggravated treſpaſs. Lord Coke accordingly claſſes it as an offence "under all felonies deſerving death, and above all other inferior offences." But particular ſtatutes have extended both the crime and the puniſhment: theſe follow in order of time.

Co. Lit. 127. 1 Hawk. ch. 44. ſ. 3. 2 Hawk. ch. 23 ſ. 18. 4 Blac. Com. 205, 6.

§ 2. *By ſtatute.*

Cutting tongues or eyes.

By ſtat. 5 H. 4. c. 5. to remedy a miſchief which then prevailed of beating, wounding, impriſoning, or maiming perſons, and after purpoſely "cutting their tongues or putting out their eyes," to prevent them from giving evidence againſt the perpetrators, it is enacted, that "in ſuch caſe "the offenders that ſo cut tongues or put out the eyes of "any, and that duly proved and found that ſuch deed was "done of malice prepenſed, ſhall incur the pain of felony." That is, as Lord Coke explains it, if the act be done voluntarily and of ſet purpoſe, however ſudden the occaſion.

5 H. 4. c. 5. 3 Inſt. 62. Kel. 65.

Cutting off ears.

By ſtat. 37 H. 8. c. 6. If any perſon "maliciouſly, wil-"lingly, or unlawfully cut or cauſe to be cut off the ear or "ears of any ſubject, otherwiſe than by authority of law, "chance

37 H. 8. c. 6. ſ. 4.

Ch. VII. § 2. *By ſtatute.*

" chance medley, ſudden affray, or adventure, he ſhall not " only forfeit treble damages to the party grieved, to be " recovered by action of treſpaſs, but ſhall forfeit 10 l. to " the king for every ſuch offence, in the name of a fine."

22 & 23 Car. 2. c. 1. ſ. 7. *Coventry act.* 4 Blac. Com. 207.

But the principal and moſt ſevere ſtatute upon this ſubject is that of the 22 & 23 Car. 2. c. 1. commonly called the Coventry act, from the circumſtance of its having paſſed on occaſion of an aſſault made on Sir John Coventry in the ſtreet, and ſlitting his noſe, by perſons who lay in wait for him for that purpoſe, in revenge as was ſuppoſed for ſome obnoxious words uttered by him in parliament. It enacts " that if any perſon or perſons ſhall, on purpoſe and " of malice forethought, by laying in wait, unlawfully cut out " or diſable the tongue, put out an eye, ſlit the noſe, cut off " a noſe or lip, or cut off or diſable any limb or member of " any ſubject; with intention in ſo doing to maim or diſfigure " him in any the manners before mentioned; that then the " perſon or perſons ſo offending, their counſellors, aiders, " and abettors, knowing of and privy to the offence as afore- " ſaid, ſhall be declared to be felons, and ſuffer death as in " caſes of felony without benefit of clergy." But not to work corruption of blood, forfeiture of dower, or of the lands or goods of the offender."

§ 3. *Conſtruction of the Coventry act.* 1 MS. Sum. 122.

To bring an offender within the Coventry act there muſt be proof of a deliberate and premeditated deſign to do a perſonal injury of the ſort deſcribed to another; and it muſt appear that the miſchief was done in the manner deſcribed therein, that is, on purpoſe and of malice aforethought, and by lying in wait for that purpoſe. I ſhall conſider

1. What act of maiming or diſfiguring is within the ſtatute.
2. Againſt whom the offence in general may be committed.
3. What is a lying in wait.
4. With what intent.

Rex v. Carrol and King, O. B. July 1765. 1 MS. Sum. 224. Serjt. Forſt. MS. S. C. Leach. 53. new edit. 66.

1. It has been made a queſtion what ſhall be conſidered as a ſlitting of the noſe within this act. Barney Carrol, and William King were indicted, the one for ſlitting the noſe of Mr. Kerby, a gentleman at the bar, the other for being preſent, aiding, and abetting. The evidence was, that Mr. Kerby, about ten at night in the Strand, detected one Byfield a boy picking his pocket, ſeized him, and was carrying him along the ſtreet. Carrol who was lurking thereabouts came up to them, and after walking for ſome little time, ſometimes before ſometimes after them, ſtruck the proſecutor a violent blow acroſs the face with a large knife, ſaying, " Damn you Sir, let the boy go." The ſurgeon's deſcription of the wound was, " that a knife or ſharp in- " ſtrument had penetrated under the arch of the right eye " near the nerve that ſupports the eye-lid, and endangered " it: that the knife had paſſed *athwart the upper part* " *of the noſe, the fleſh of which was cut or ſlit, and the bone* " *laid bare*, the frontal blood veſſels of the forehead divided; " and that the wound paſſed from the noſe between the " brow and lid of the left eye, and terminated in the left " temple." It appeared from the evidence of ſeveral eminent ſurgeons that the word ſlit was an old ſurgical term, ſynonimous with fiſſure, inciſion, orgaſh. Byfield and Mathews, two boys, depoſed that the priſoners and they had agreed to go out to pick pockets together; the boys were to rob, and if detected or ſeized the priſoners were to ſtab or wound the perſon to reſcue them; and Carrol had agreed that he would either ſtab or cut off the noſe of the firſt man that moleſted them, and actually lay in wait and followed the boys for that purpoſe above two hours and an half before they met Mr. Kerby. This being a *tranſverſe* cut, it was objected on behalf of the priſoners, that this was not properly a *ſlitting* of the noſe; that the ſtat. of Elizabeth, which directs the ſlitting of the noſe by way of infamous puniſhment expreſsly directs that the *noſtrils* ſhall be *ſlit*. But Lord C. B. Parker, Gould, and Yates, juſtices, were of opinion that the ſlitting of the noſe was not confined to any particular form or direction; but that any diviſion of the fleſh or griſtle of the noſe, whether it were perpendicular or tranſverſe, came within the denomination of a ſlit, and was equally a diſfiguring of the party. That the ſtatute of Elizabeth was more confined than the Coventry act, which extends to the ſlitting of the noſe generally, and not to any particular part of it: that the latter was a general law, not to be explained away by nice criticiſms on words; but yet to be conſtrued with caution,

Ch. VII. § 3. *By the Coventry act.*

Slitting of the noſe within the act may be by a tranſverſe cut.

Ch. VII. § 3. *By the Coventry act.*

tion, ſo as not to be extended to caſes not within the intent of the legiſlature.

Rex v. Coke and Woodburn, 6 St. Tr. 212. 215. 223. Poſt. p. 400.

It is to be obſerved alſo that in the caſe of Coke and Woodburn the ſlitting of the noſe which brought them within the act was a cut *acroſs* the noſe which ſeparated the fleſh of it, and cut it quite through into the noſtril. And there it was objected that the noſe could not be ſaid to be *ſlit*, becauſe the edge of it was not cut through; but the Lord Chief Juſtice Pratt over-ruled the objection.

§ 4. *As to the perſon aimed at.*

2. *Againſt whom the offence in general may be committed.*

2 Hawk. ch. 23. ſ. 16.

It does not ſeem neceſſary that the malicious intention deſcribed ſhould be directed againſt any particular individual. If it be conceived againſt all perſons who may happen to fall within the ſcope of the perpetrator's deſign, the particular miſchief done to any one ſhall be connected with the general malignant intent, ſo as for the ſtatute to attach upon the offenders. This is neceſſarily to be inferred from Carrol's caſe before ſtated, who was an entire ſtranger to the gentleman whom he thus aſſaulted, and who could not have been perſonally in his contemplation till the occaſion occurred on the ſudden. So if a blow be intended to maim one, and by accident maim another, the party is equally liable to be indicted or appealed for ſuch maim. The ſtatutes of H. 4. H. 8. and Car. 2. are evidently directed to the maiming of others: but a perſon who even maims himſelf, or procures another to maim him, that he may have more colour to beg; or diſables himſelf to prevent being preſſed for a ſoldier; is ſubject to fine and impriſonment at common law; and ſo is the party by whom it was effected at the other's deſire.

Ante, p. 394

Wright's caſe, Leiceſter aſſizes, 11 Jac. 1. Co. Lit. 127. 3 Hale, 412.

§ 5. *Lying in wait.*

3. *What is a lying in wait.*

There muſt be proof of a deliberate deſign by lying in wait to commit the offence deſcribed in the act, in order to bring the caſe within it. In general what ſhall be conſidered as a lying in wait on purpoſe to maim or diſfigure muſt depend very much on the concomitant circumſtances of

Ch. VII. § 5. *By the Coventry act.*

of each caſe. In Mills's caſe, who was indicted on this ſtatute, the court ſaid, a perſon who intends to do this kind of miſchief to another, and by deliberately watching an opportunity carries that intention into execution, may be ſaid to lie in wait on purpoſe. It is not neceſſary that he ſhould plant himſelf in any particular concealment, and effect the miſchief by ruſhing from his lurking place, in order to bring the offence within the meaning of the ſtatute. If, having formed an intention to maim, he take a convenient opportunity of deliberately doing the injury, it is a lying in wait; although he do not take any particular length of time, or appear to uſe any extraordinary degree of preparation to perpetrate the miſchief. The circumſtances there were that the priſoner in conjunction with a large gang of thieves beſet the proſecutor as he was coming down Holborn Hill with his maſter's cart loaded with ſugar; and after aſſaulting him and giving him ſeveral ſevere wounds in different parts of his body, while he was endeavouring to eſcape into a neighbouring houſe, ſeveral of them cried out, "Damn you, where are your knives?" upon which the priſoner made a ſtroke at him with a large knife, and gave him a dreadful wound from ear to ear, which divided his noſe, and otherwiſe injured him. The cart, however, was not robbed, and no other motive could be aſſigned for this cruel outrage than that the proſecutor had detected and beat off ſome thieves who had attempted to rob his cart the preceding evening near the ſame place. Eyre, B. left it to the jury with the obſervations before mentioned, whether the fact were deliberately and intentionally done by lying in wait for that purpoſe, on the account ſuggeſted, or from any other malicious and deliberate motive; or whether it were a ſudden violent impulſe of rage, not in the previous contemplation of the parties; in which latter caſe it was not within the ſtatute: but he laid ſtreſs on the expreſſion uttered by ſome of the gang, "Where are your knives," as explanatory of a previous deſign to do ſuch a miſchief. The jury found the priſoner guilty. Upon the conference between the judges on Carrol's caſe, Willes, J. and Eyre, B. who leant moſt to a ſtrict conſtruction of the words "lying in wait for the purpoſe &c." yet were of opinion, that the circum-

Rex v. Mills, O. B. April 1783. cor. Eyre C. B. Leach, 172. 2da edit. 294.

Carrol's caſe, ante ſ. 3. MS. Gould J.

Ch. VII. § 5. *By the Coventry act.*

circumſtance of Carrol's paſſing before Mr. Kirby, and waiting till he came up, and then giving him the wound, was a lying in wait within the ſtatute. This inquiry is always ſtrictly connected with the enſuing one.

§ 6. *For what purpoſe.*

4. *As to the intent.*

Although a perſon be maimed or diſfigured maliciouſly, yet the caſe will not fall within the ſtatute unleſs the offender lie in wait for that purpoſe. In Carrol's caſe before mentioned expreſs evidence was given of ſuch an intent; though doubtleſs that cannot be neceſſary, but may be inferred from pregnant circumſtances, which I think exiſted in that caſe independent of that fact. For it appeared that the priſoner meditated perſonal violence of ſome ſort againſt any perſon who ſhould arreſt his confederates, and that he was armed with a knife for that purpoſe, with which he effected it.

Carrol's caſe, ante, f. 3.

But where the injury aroſe out a ſudden attack, unconnected with any premeditated deſign againſt the perſon, it was holden not to be within the ſtatute.

Rex v. Tickner, O. B. Feb. 1778. MS. Gould and Buller Js. S. C. Leach, 170. laſt edit 222.

Thomas Tickner was indicted on this act for maiming William Jacob. The proſecutor at 12 o'clock at night went to his maſter's field to ſee if any one were ſtealing turnips, his maſter having loſt many before, and found the priſoner in the very act of taking them (*a*). On his going up and ſpeaking to him, the priſoner immediately ſtruck him with an inſtrument partly wood and partly iron, the iron hanging looſe to the wood ſomething like a flail, and cut his noſe, and gave him ſeveral other wounds. Mr. Juſtice Gould left it to the jury, whether, conſidering the time of night and the weapon, they were ſatisfied that the priſoner was determined to maim or deſtroy any perſon who ſhould oppoſe him in his purpoſe of ſtealing turnips. The jury found him guilty: but afterwards all the judges [abſente De Grey, Ch. J.] held that there was not ſufficient evidence of a lying in wait within the act; and ſome of them conſidered that the having the inſtrument and uſing it was with intent to eſcape and not to murder or maim.

(*a*) This is made a miſdemeanor by 13 G. 3. c. 32.

And the ſame line of conſtruction has been adopted even where perſonal violence was intended, it being of a dif-

ferent and leſs atrocious ſort, and with a different view.

Ch. VII. § 6. *By the Coventry act.*

Alexander Mackey was indicted on the ſtatute for lying in wait and diſabling and maiming the left arm and two middle fingers of the left hand of William Fletcher, and Arrigoni for being preſent, aiding and abetting. It appeared that Fletcher, who was not bred to the ſea, and at that time kept a lottery-office, being in a public-houſe near his office, went out towards it on hearing that a preſs gang was about. Some of the preſs gang aſked him his buſineſs at the door, and on being informed let him paſs. Soon after Mackey, who appeared as the head of the gang, entered Fletcher's office with ſome of his men, and laid hold of him, and on being aſked if he knew him anſwered, "Yes, damn you, and I will be revenged." It appeared that a year and a half before, Mackey had been arreſted at the other's ſuit. Mackey and his men then dragged the proſecutor, who reſiſted being taken, into the ſtreet, where the former ſaid "to it boys" to his men. The proſecutor was brought to the ground by a bludgeon, and afterwards wounded by Mackey with his ſword in the manner deſcribed in the indictment, who bid his men cut away; but they cried ſtop; it is enough. The queſtion left to the jury as to Mackey, was whether the wounding were of malice forethought; on which they found him guilty: but nothing being proved againſt Arrigoni except that he was one of the preſs-gang preſent, he was acquitted by the direction of the court. And the queſtion being referred to the judges, whether there were any evidence of a lying in wait to bring Mackey within this act; they were of opinion at a conference on the 6th May 1773, that however criminal the aſſault was in other reſpects, yet it did not fall within the intent and purview of the ſtatute; there being no lying in wait within the ſtatute.

Rex v. Mackey and Arrigoni, Kingſton Sp. Aſſ. 1778. MS. Crown Caſ. Ref. and MS. Gould J.

The commander of a preſs-gang maiming a man whom he caſually met, and who reſiſted being impreſſed, (being in truth no mariner,) but againſt whom he appeared to have an antecedent grudge, is not a lying in wait within the ſtatute.

But though the ſtatute add, "with intention to maim or "diſfigure" the party, yet if the intent were of a higher and more atrocious nature, namely, to murder him, and in that attempt the offender do not kill but only maim him, it is an offence within the act: for thoſe additional words relating to the intent are merely auxiliary to the preceding words, "on

1 MS. Sum. 222. 1 Hawk. ch. 44. ſ. 6. 4 Bac. Abr. 487.

Ch. VII. § 6. *By the Coventry act.*

"on purpoſe and of malice forethought;" confining the crime to an intended violence. But if a corporal violence be intended, the more malignant the intention the more clearly it falls within the malice deſcribed by the act. Beſides, it is a known rule of law that if a man intend to commit one ſpecies of felony, and in the proſecution of that commit another, the law will connect his felonious intention with the felony actually committed, though different in ſpecie from that which he originally intended.

Rex v. Coke and Woodburne Suffolk, 8 G. 1. 6 St. Tr. 212, 219. 222. 228.

Coke and Woodburne lay in wait to kill Mr. Criſpe; and to effect the murder Woodburne gave him ſeveral blows on the head with a ſharp bill or hook; and when they thought him dead, left him weltering in his blood. Criſpe however recovered; and as one of the blows with the hook had happened to ſlit his noſe, the priſoners were indicted on the Coventry act. In their defence they inſiſted that their intent was to murder Criſpe, and not to maim him, and therefore that they were not within the ſtatute. But Lord King ſaid, that the intention was a matter of fact to be collected from all the circumſtances of the caſe, and as ſuch was proper to be left to the jury; and that if it were the intention of the priſoners to murder, it was to be conſidered whether the means made uſe of to accompliſh that end, and the conſequences of thoſe means were not likewiſe in their intention and deſign; and whether every blow and cut were not intended, as well as the object for which the priſoners inſiſted they were given; and the jury finding them guilty, they were executed. Upon this caſe Mr. Juſtice Yates has obſerved, that it ſeemed to him that the whole aim of this defence, allowing the intention to be what the priſoners contended, was inſufficient; and that an intention of violence more criminal and malignant could not excuſe them from one that was leſs ſo. Yet on the conference of the judges on Carrol's caſe, Willes J. and Eyre B. expreſſed ſome diſſatisfaction with this caſe, and thought at leaſt that the conſtruction ought not to be carried further.

MS. ut ſupra.

MS. Gould J.

§ 7. *Acceſſaries.* 1 Hale, 618. Tracy's MS. 215. b. 2 Hawk. ch. 29. ſ. 5. 19.

Lord Hale conſiders that there are no acceſſaries before in mayhem, for that they are in the ſame degree as principals; and if the nature and puniſhment of the offence at common law,

law, which was in effect only a treſpaſs, be conſidered, it favours that opinion. Hawkins however ſays, that there may be acceſſaries before; but that the appellant has his election to proceed againſt them either as principals or acceſſaries; and herewith agrees Staundford, to whom Lord Hale expreſsly refers. Yet I cannot help ſuſpecting, upon a more accurate inſpection of the authorities on which this laſt opinion is founded, that it is a miſtake, proceeding perhaps upon the old notion which prevailed till after the time of Ed. 3. that thoſe who were preſent aiding and abetting, but did not commit the fact, were *acceſſaries at the fact.* The authorities in ſupport of it are all reſolvable into 40 Aſſize 1. 9. and 41 Aſſize 16., and there it is ſaid that the ancient law was that each ſhould be appealed as principal; but that now the appellant may elect to make all principals, or elſe only the one who ſtruck principal, and the others acceſſaries. But Brook on one of theſe paſſages ſays, *quod nota; and it ſeems that the ancient law was the beſt; for it is only treſpaſs in effect.* And on the other he obſerves, quod mirum; *for in mayhem there are no acceſſaries.* And in the time of H. 6. it appears to have been conſidered that in mayhem all were principals; as well he who comforts and abets, as he who ſtrikes the ſtroke. And certainly it is againſt the received opinion at this day, that a perſon can be both acceſſary and principal in reſpect of the very ſame act.

Ch. VII. § 7. *Principals and acceſſaries.*

Staundf. lib 1. ch. 47. 22 Aſſize pl. 82. Fitz. Coron. 182, &c.

Fitz. Abr. Coron. 215. 221. Treſp. 199. Bro. Appeal, 71. 76.

Bro. Appeal, 72.

Bro. Appeal, 154. *vide* alſo 71.

21 H. 6. Fitz. Coron. 11. *Vide* pl. 60.

Vide Gordon's caſe, ante, f. 122. and tit. Principal and Acceſſary.

It no where however appears that there can be acceſſaries after the fact in mayhem.

The ſtat. 22 & 23 Car. 2. c. 1. expreſsly extends to counſellors, aiders, and abettors who know of and are privy to the offence; and therefore includes all acceſſaries before.

1 MS. Sum 223.

But where it appeared, as in Arrigoni's caſe, that a perſon, though preſent at the fact, and guilty of a treſpaſs and aſſault, was yet altogether ignorant of any intention to maim, &c. he was directed to be acquitted in the firſt inſtance, before the guilt or innocence of the perpetrator was aſcertained.

Arrigoni's caſe, ante, p. 399.

§ 8. *Appeal and Indictment.* 3 Inſt. 118. 2 Hawk. ch. 23. ſ. 15. 17, 18. 24. ch. 25, ſ. 55.

An appeal of mayhem (though now diſuſed) lies as well as an indictment, and the words "*feloniouſly*" and "*maimed*" are eſſential to both. The word *feloniouſly* was required, becauſe

Ch. VII. § 8. *Appeal and Indictment.*

becauſe anciently the party was ſubject to the loſs of member, though he is no longer ſo now.

2 Hawk. ch. 23. ſ. 20. 75.

If an appellant count of battery, the writ abates; becauſe it ſuppoſes no battery.

2 Hawk. ch. 25. ſ. 57. ch. 23. ſ. 79.

It is alſo neceſſary as in murder to ſet forth particularly in what manner the hurt was given; and the conſequences following it; concluding, that ſo the defendant felonioufly maimed, &c. but the omiſſion of the former is not helped by ſuch general concluſion.

1 MS. Sum. 222.

Where the indictment is formed upon the ſtatute of Car. 2. it muſt purſue the words of the ſtatute, and allege the offence to be *on purpoſe, of malice aforethought, and by lying in wait;* and that the act was done *with intent to maim and diſfigure.* The uſual form is that the priſoner, contriving and intending one A. B. being a ſubject, &c. to maim and diſfigure, with force and arms, &c. and on purpoſe and of his malice aforethought and by lying in wait, unlawfully and felonioufly did make an aſſault with a certain knife, &c. and did on purpoſe and of his malice aforethought, and by lying in wait, unlawfully and felonioufly ſlit the noſe of the ſaid A. B. with intention the ſaid A. B. in ſo doing in manner aforeſaid to maim and diſfigure &c. againſt the ſtat. &c.

Vide Crown Cir. Com. 323. and Carrol's caſe, 1 Leach, 66. laſt edit.

But as the words of the ſtatute are in the diſjunctive, an averment either that it was with intent *to maim,* or with intent *to diſfigure,* according to the ſubject matter, ſeems to be ſufficient.

§ 9. *Defences.*

1. It ſeems clear that ſon aſſault demeſne is a good defence either to an indictment, or an appeal of mayhem; but it muſt be ſpecially pleaded to the latter. Yet it is not every trifling aſſault that will juſtify a grievous and immediate mayhem, ſuch as cutting off a leg or hand, or biting off a joint of a man's finger, unleſs it happened accidentally, without any cruel and malignant intention, or after the blood was heated in the ſcuffle: but it muſt appear that the aſſault was in ſome degree porportionable to the mayhem (*a*).

2 Hawk. ch. 23. ſ. 23. 1 Ld. Raym. 177. 11 Mod. 43. Bull. N. P. 18. Poſt. 406.

2 Hawk. ch. 23. ſ. 23.

But a man cannot juſtify maiming another in defence of his poſſeſſions, but only in defence of his perſon. This reſtriction however cannot be intended to extend to caſes, where a man defends himſelf againſt a known felony threatened to be committed with violence againſt even his property.

(*a*) S. P. Durnford v. Smith, Sarum, 12 G. 2. per Ld. C. B. Parker; and Oſborne v. Haddock, Middleſex, 1738, per Ld. C. J. Willes, MS. Burnet.

2. A

Ch. VII. § 9. *Defences.*

2. A recovery in an action of treſpaſs for an aſſault, battery, and wounding, may be pleaded in bar of an appeal of mayhem, appearing by proper averments to be brought for the ſame treſpaſs: for it ſhall be intended that the jury in giving damages for the wounding included the maim, and no man ſhall be liable to double vexation for the ſame thing. Yet may the appellant perhaps avoid ſuch plea by replying ſpecially, that the maim was occaſioned ſince the verdict in the action of treſpaſs by ſome ſubſequent mortification, dryneſs, or ſhrinking of the part by reaſon of the wound (*a*).

2 Hawk. ch. 23. ſ. 22.

(*a*) Q. May not the court in ſuch caſes increaſe the damages on view? *Vide* Bull. N. P. 21.

3. Such appeal may be barred either by arbitrament, or an accord with ſatisfaction executed, or even by a releaſe of all actions perſonal; becauſe at this day the appellant ſhall recover nothing but damages.

2 Hawk. ch. 23. ſ. 24, 25. 4 Bac. Abr. 487.

4. A nonſuit in an appeal of mayhem, after the plaintiff has appeared in it, may be pleaded in bar of any other; but not a nonſuit in an action of treſpaſs.

2 Hawk. ch. 23. ſ. 26.

5. It is to be obſerved, that in appeal of mayhem, though it be felonice, yet the defendant cannot plead in abatement, and plead over to the felony; as he may, in favorem vitæ, in caſe of felony in general.

Tracy's MS. 180. b. Noy, 36. Cro. Eliz. 495. Moor, 457. 2 Hawk. ch. 23. ſ. 128. Poſt. *Proſecution by appeal.*

§ 10. *Trial.*

If the defendant put in iſſue whether the plaintiff were maimed or not, *and pray that the part which was hurt be viewed by the court,* in order to have it adjudged on ſuch view whether there be any mayhem or not; the court may on view of the part determine the matter; or if in doubt may award a writ to the ſheriff to return ſome able phyſicians and ſurgeons for the better information of the court. But though the defendant pray their view, they are not bound to try it in that manner, but may order a trial by a jury; and may alſo direct that the jury ſhall have a view of the wound; and an adjudication by either on ſuch view is concluſive. It follows that the plaintiff muſt appear in proper perſon, and not by attorney.

2 Hawk. ch. 23. ſ. 27.

It ſeems alſo to be holden, that the defendant in an appeal of maim may in ſome caſes wage battle; but it does not appear to have been ever actually waged. The puniſhment at common law, and by ſtatute, has been reſpectively noticed.

2 Hawk ch. 23. ſ. 28.

CHAP. VIII.

Of felonious, malicious, and unlawful Aſſaults upon the Perſon, with Intent to kill, wound, or otherwiſe injure the Party, or to rob him, or obſtruct him in the Execution of his Duty.

Common Aſſault, and Battery. - - § 1.
Juſtification or Excuſe. *ib.*
Puniſhment. *ib.* Enhanced if the Intent were to commit Felony or high Miſdemeanor. *ib.*
Aſſaulting Privy Counſellors, capital Felony by ſtat. 9 Ann. c. 16. - - - § 2.
Aſſaulting Members of Parliament, a high Miſdemeanor, by ſtat. 11 H. 6. c. 11. *ib.*
Clergymen. ib.
Malicious ſtriking in the King's Palace, puniſhable by 33 H. 8. c. 12.; if Blood ſhed, by Loſs of Hand, Impriſonment for Life, and Forfeiture. § 3.
The ſame if a Blow be ſtruck *in Weſtminſter Hall,* or before Juſtices of Aſſize, &c. ſitting the Courts. *ib.*
How *Indictment* ſhould lay the Offence. *ib.*
Aſſaults in Churches and Church-Yards puniſhed by branding, &c. by ſtat. 5 & 6 Ed. 6. c. 4. § 4.
Aſſault with Intent to murder, &c. at common Law. § 5.
If the Homicide, had it enſued, would only have been Manſlaughter, it does not ſuſtain the Count. *ib.*
Shooting at another a capital Felony by ſtat. 9 G. 1. c. 22. - - - - § 6.
Though Offender not diſguiſed. *ib.*
Malice neceſſary to bring Offender within the Act. *ib.*
Muſt be with Inſtrument and in a Direction calculated to create Danger. *ib.*
There may be *Principals* in the ſecond Degree. § 7.
Indictment and Evidence. - - § 8.
The Offence muſt be laid to be done *wilfully and maliciouſly.* ib.

How

How far neceſſary to prove it in the ſame Perſon's Dwelling-houſe as laid. - - § 8.
Trial may be in any County. - - § 9.
Aſſault with Intent to rob. - - § 10.
Felony and Tranſportation by ſtat. 7 Geo. 2. c. 21. *ib.*
Breaking Gaol or returning from Tranſportation before Term expired, ouſted of Clergy. *ib.*
What a Demand of Money, &c. within the Statute, and how far neceſſary. - - § 11.
The Act is in the disjunctive, and *the Indictment* muſt either charge an unlawful and malicious Aſſault with an offenſive Weapon, with Intent to rob, &c. or that there was a Demand of Money, by Menaces or in a forcible or violent Manner, with the like Intent. § 12.
As to the Deſcription of the offenſive Weapon. § 13.
Aſſaults on Revenue Officers; vide Offences relating to the Cuſtoms and Exciſe. - - § 14.
Aſſaults on Perſons wrecked with Intent to kill, &c. Felony without Clergy by Stat. 26 Geo. 2. c. 19. § 15.
Aſſaulting Officers and others on account of their Endeavours to preſerve the Property, &c. Tranſportation for 7 Years. *ib.*
Aſſaults by Mariners againſt their Commander to obſtruct his Defence of his Ship, &c. Piracy and Felony by Stat. 22 & 23 Car. 2. c. 11. and 11 & 12 W. 3. c. 7. § 16.
Aſſault on account of Gaming. § 17.
By Stat. 9 Ann. c. 15. Forfeiture of perſonal Eſtate, and Impriſonment for two Years. *ib.*
The Offence muſt ariſe out of and during the Play. *ib.*
Aſſault with Intent to ſpoil Cloaths. - § 18.
Felony and Tranſportation for 7 Years, by Stat. 6 G. 1. c. 23. *ib.*
If Intent were to wound, though the Cloaths muſt be and were cut in ſo doing, not within the Statute. *ib.*
Aſſault with Intent to obſtruct the free Paſſage of Grain. § 19.
By Stat. 36 G. 3. c. 9. and 11 G. 2. c. 22. firſt Offence a Miſdemeanor cognizable by Juſtices of Peace. *ib.* Second Offence Felony and Tranſportation for 7 Years. *ib.* Returning before the Term expired ouſted of Clergy. *ib.*

Assault on Master Woolcombers, &c. to compel Observance of illegal By-Laws, &c. in the Trade, Felony and Transportation for 7 Years. - - § 20.

Of felonious, malicious, and unlawful Assaults upon the Person, with Intent to kill, wound, or otherwise injure the Party, or to rob him, or obstruct him in the Execution of his Duty.

§ 1. *Common assault.*

BEFORE I proceed to mention assaults of an aggravated kind, for which particular provision has been made by the law, it may be proper to advert to what are called common assaults and batteries, which I shall do very shortly, inasmuch as they are so fully discussed in other books treating of the civil remedy for such injuries to the party grieved.

Vid. Bull. N. P. 15.

1 Hawk. ch. 62. s. 1, 2.

An assault is any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness; as by striking at him, or even by holding up one's fist at him in a threatning or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability of using actual violence against his person; as by pointing a weapon at him within the reach of it. Where the injury is actually inflicted, it amounts to a battery, (which includes an assault;) and this, however small it may be; as by spitting in a man's face, or any way touching him in anger without any lawful occasion. But if the occasion were merely accidental and undesigned, or if it were lawful, and the party used no more force than was reasonably necessary to accomplish the purpose, as to defend himself against a prior assault, or to arrest the other, or make him desist from some wrongful act or endeavour, or the like; it is no assault or battery in the law, and the party may justify the force; and any matter in justification or excuse, such as son assault demesne, may upon an indictment be given in evidence under the general issue: and the defendant who is charged with an assault and battery, may be found guilty of the one and acquitted of the other. But son assault demesne is no excuse, if the retaliation by the defendant were excessive, and bore no proportion to the necessity, or the provocation received. These offences are punishable by fine and

Bull. N. P. 15.

Battery.

Justification or excuse.
1 Hawk. ch. 60. s. 23.

Ib. ch. 62. s. 3.

Bull. N. P. 15. & ante tit. *Mayhem*, p. 402.

Punishment.
4 Blac. Com. 217.

and imprisonment and finding sureties, or with other ignominious corporal penalties, such as the pillory, where they are committed with any very atrocious design; as in the case of assaults with intent to murder, ravish, or commit other felonies or high misdemeanors; which intent, to be collected from the circumstances of the case, is no doubt a very great aggravation of the offence.

Ch. VIII. § 1. *Common assault and battery.*

Assault with intent to commit felony, &c.

I proceed now to the consideration of various assaults of an aggravated nature, which have been made the subjects of legislative provision.

§ 2. *Assaulting privy councellors.*
9 Ann. c. 16.
Ante, p. 89.

The first species of felonious assault with intent to kill or otherwise hurt, whereof the legislature has enhanced the penalty, is one which has been already noticed. The stat. 9 Ann. c. 16. enacts, "that if any person or persons shall "unlawfully attempt to kill, or shall unlawfully assault and "strike or wound any person being a privy counsellor, when "in the execution of his office of a privy counsellor in "council or in any committee of council; the person or "persons so offending, being thereof convicted in due form "of law, shall be declared felons, and suffer death without "benefit of clergy."

Members of parliament, &c.
11 H. 6. c. 11.

By the prior stat. of the 11 H. 6. c. 11. (enforcing a similar provision in the stat. 5 H. 4. c. 6.) "If any assault or "affray be made to any lords spiritual or temporal, knight of "the shire, citizen, or burgess, come to the parliament, or "to other council of the king by his commandment, and "there being and attending at the parliament or council; "that then proclamation shall be made in the most open "place of the town by three several days, where the assault "or affray shall be made, that the party who made such "affray or assault yield himself before the king in his Bench "within a quarter of a year after the proclamation made if "it be in term, or otherwise at the next day in the term "following the said quarter: and if he do not, that he be "attainted of the said deed, and pay double damages to the "party grieved, to be taxed by the discretion of the justices "of the same Bench, or by inquest if needful, and make "fine and ransom at the king's will. And if he come, and "be found guilty by inquest, by examination, or otherwise,

Ch. VIII. § 2. *Common assault and battery.*

" of such affray or assault, then he shall pay to the party " grieved his double damages found by the inquest or to be " taxed by the discretion of the said justices, and make fine " and ransom at the king's will as above said."

Clergymen. 9 Ed. 2. c. 3.

Assaults on clergymen are inquirable before the king's courts by the stat. 9 Ed. 2. c. 3.

§ 3. *In the king's palace.* 33 H. 8. c. 12. 3 Inst. 140. 4 Blac. Com. 124.

By the stat. 33 H. 8. c. 12. " all malicious strikings, by " which blood is shed, against the king's peace, within any " of the king's palaces or houses, or any other house at such " time as the royal person shall happen to be then demur- " rant or abiding, shall be inquired of and tried before the " Lord Steward, &c. (in the manner therein stated). And " by s. 7. any person found guilty of the said offence shall " have judgment to have his right hand stricken off before " the said Lord Steward, &c. at such place or time as shall " be appointed, and also shall have judgment of imprison- " ment for life, and shall pay fine and ransom at the king's " pleasure." Certain cases are afterwards excepted.

In Westminster-hall, &c. 3 Inst 140. 4 Blac. Com. 125. 1 Hawk. ch. 21. s. 3, &c. Staundf. 38.

If any man in Westminster-hall or in any other place, sitting the courts of Chancery, Exchequer, K. B. and C. B., or before justices of assize or oyer and terminer, shall draw a weapon upon any judge or justice, though he strike not, this is a great misprision, for which he shall lose his right hand, suffer perpetual imprisonment, and forfeit his lands for life, and his goods and chattels. So it is if in Westminster-hall, or any other place, sitting the said courts there, or before justices of assize or oyer and terminer and within view of the same, a man strike a juror, or any other, with weapon, hand, shoulder, elbow, or foot, he shall have the like punishment; otherwise if he only make an assault, and strike not. Hence it seems, that in order to warrant the higher judgment for loss of member, &c. the indictment ought expressly to charge a stroke; though it do not appear whether any technical word be necessary to be used for this purpose.

Vide 1 Sid. 211.

Rex v. Lord Thanet & others, B. R. Trin. 39 Geo. 3. MS.

In a late case, the information set forth a special commission to several of the judges and others for the trial of Arthur O'Connor and others for high treason at Maidstone, &c.; and that pending the sessions, after the acquittal of O'Connor, and before any order or direction had been made by the court for

Ch. VIII. § 3. *In the courts of Westminster, &c.*

for his discharge, the defendants in open court, &c. made a great riot, and riotously attempted to rescue him out of the custody of the sheriff of Kent, to whose custody he had been assigned by the said justices and commissioners; and the better to effect such rescue and escape did at the said sessions, in open court, and in the presence of the said justices and commissioners, riotously, &c. make an assault on one J. R. and did then and there *beat, bruise, wound,* and ill-treat the said J. R., and thereby impede and obstruct the said justices, &c. This was the substance of the three first counts. The fourth count, after stating the holding of the said session before the justices and commissioners, barely charged that the defendants unlawfully and maliciously intending to break the peace, and hinder the due and peaceable holding of the said sessions, did with divers others in open court at and during the continuance of the said session, and in the presence of the said justices and commissioners, on &c. at &c. riotously &c. assemble together to break the peace and hinder the due and peaceable holding of the said sessions, and being so assembled did then and there with force and arms at the said sessions, in open court and in the presence aforesaid riotously, &c. make a great riot and disturbance, &c. and thereby for a long time interrupt and obstruct the said justices, &c. in the lawful and peaceable holding of the said session, to the hindrance of public justice. The 5th count was still more general. Two of the defendants were found guilty generally; and when they were brought up to receive judgment, Lord Kenyon intimated considerable doubt, whether the court were not bound to pass the judgment of amputation, &c. for the offence so laid in the three first counts; and the matter stood over for consideration. In the mean time the difficulty was avoided in the present instance by the gracious interposition of the crown, as appears by the entry on the roll; stating in substance, that before judgment was pronounced the Attorney General said, that he had received his Majesty's royal commands and warrant concerning the prisoners, and the aforesaid misdemeanor, &c. under the sign manual; wherein after reciting that such an information had been exhibited against the defendants, on which they had been found guilty, his Majesty thought fit to discharge them from such parts of the

Ch. VIII. § 3. *In the courts of Weſtminſter, &c.*

the ſaid information on which any doubt had ariſen or might ariſe whether the judgment thereon were diſcretionary in the court, and authoriſed the Attorney General to enter a noli proſequi as to ſuch parts, and to pray judgment only on ſuch charges as left the puniſhment in the diſcretion of the court. Accordingly a noli proſequi was entered on the three firſt counts; and on the 4th and 5th the court gave judgment, that Lord Thanet ſhould pay a fine of 1000l. and be impriſoned in the Tower for a year, and give ſecurity for ſeven years, himſelf in 10,000l. and two ſureties in 5000l. each; and that Mr. Ferguſon ſhould pay a fine of 100l., be impriſoned for a year, and find ſurety for ſeven years, himſelf in 500l. and two ſureties in 250l. each.

Cro. Eliz. 405. Cro. Car. 374. Cary's caſe, Owen, 120.

It is alſo ſaid, that in order to warrant the higher judgment the offence muſt be charged to have been committed in the preſence of the king or of the juſtices.

Vide authorities ante, p. 408. in margin.

But the reſcue of a priſoner in or before any of the ſaid courts, committed by any of the ſaid juſtices, is a great miſpriſion, for which the party and the priſoner aſſenting to it ſhall have the higher judgment, excepting the loſs of his hand, where no ſtroke or blow is given.

§ 4. *In churches and church yards.* 5 & 6 Ed. 6. c. 4.

By ſtat. 5 & 6 Ed. 6. c. 4. ſ. 2. "If any perſon or perſons ſhall ſmite or lay violent hands upon any other, either in any church or church-yard, that then ipſo facto every perſon ſo offending ſhall be deemed excommunicate." And by ſ. 3. "if any perſon ſhall maliciouſly ſtrike any perſon with any weapon in any church or church-yard; or ſhall draw any weapon in any church or church-yard to the intent to ſtrike another with the ſame weapon; every perſon ſo offending and thereof being convicted by verdict, or by his own confeſſion, or by two lawful witneſſes, before the juſtices of aſſize, of oyer and terminer, or juſtices of peace in their ſeſſions, by force of this act, ſhall be adjudged by the ſame juſtices before whom ſuch perſon ſhall be convicted to have one of his ears cut off; or if he have no ears, then he ſhall be marked and burned in the cheek with a hot iron, having the letter F therein, as a fray-maker and fighter, and further he ſhall ſtand ipſo facto excommunicated." This laſt part

1 Burr. 243.

of the puniſhment preſcribed is no part of the judgment to be pronounced by the common law courts: but follows upon the judgment being tranſmitted to the eccleſiaſtical court, on a proceeding inſtituted thereon.

Ch. VIII. § 4. *In churches and church-yards.*

Perchall's caſe, 2 Leon. 188. Cro. Eliz. 465. 2 Hale, 171.

The indictment muſt allege that the weapon was drawn with intent to ſtrike, &c.; barely charging that one drew his dagger againſt another is not ſufficient to bring the caſe within the ſtatute.

Of Aſſaults with Intent to murder, &c.

§ 5. *Aſſault with intent to murder, &c.* Staundf. 17. Bacon's caſe, 1 Lev. 146. 1 Sid. 230. 4 Blac. Com. 196.

In the earlieſt ages of our law it ſeems to have been conſidered that the bare attempt to commit murder was felony; but that idea was ſoon exploded; though ſtill the attempt is puniſhable as a high miſdemeanor at common law. In the 16 Car. 2. Mr. Bacon was indicted and convicted for lying in wait to kill Sir Harbottle Grimſtone, maſter of the rolls, and was ſentenced to fine and impriſonment, and to find ſurety for his good behaviour for life, and to acknowledge his offence at the bar of the court of Chancery. If in the attempt to kill the party he be actually maimed under the circumſtances deſcribed in the Coventry act before mentioned, the offender is guilty of a capital offence, although the intent, as in Coke and Woodburn's caſe, was to murder and not to maim. But where Mitton was charged in an indictment for an aſſault with intent to murder Mr. Creſpigny; and it appeared in evidence that the defendant, a ſoldier, in marching in file along the Strand, had wantonly joſtled the proſecutor off the pavement, who thereupon ſtruck him with a ſmall ſtick which he had in his hand; on which the defendant lowering his muſquet, had aimed a blow at the proſecutor with his bayonet fixed thereon, and thruſt him under the ear: Lord Kenyon C. J. being of opinion that if death had enſued, it would only have been manſlaughter, directed the jury to acquit the defendant upon the firſt count of the indictment, charging the aſſault to be with intent to murder. On the other hand where upon an indictment for an aſſault with intent to commit a rape, the proſecutrix proved a rape actually committed, Buller J. directed an acquittal, as the miſdemeanor was merged in the felony.

Vide the laſt chapter, p. 400.

Mitton's caſe, adjourned ſittings at Weſtminſter, October 1788, cor. Ld. Kenyon C. J. MS.

Harmwood's caſe, Winchester Spr. Aſſ. 1787. cor. Buller J. MS.

But

Ch. VIII. § 6.

§ 6. *Shooting at another.* 9 G. 1. c. 22. s. 1. *Made perpetual by* 31 G. 2. c. 42.

But the statute under which prosecutions of this sort are most frequently carried on is the stat. 9 Geo. 1. c. 22. (commonly called the Black Act), which enacts that "If "any person or persons shall wilfully and maliciously shoot "at any person in any dwelling-house or other place; or "shall forcibly rescue any person being lawfully in custody "of any officer or other person for such offence; or if any "person or persons shall by gift or promise of money or "other reward procure any subject to join him or them "in any such unlawful act; every person so offending, being "thereof lawfully convicted, shall be adjudged guilty of "felony, and suffer death without benefit of clergy." (*a*)

2 MS. Sum. 352. Rex v. Arnold, 1723, at Kingston, 8 St. Tr. 290. 313.

In the construction of this branch of the act it has been holden that the offence under consideration has no relation to the preceding part of the clause, confining the description of the offenders therein mentioned to "persons armed, &c. and having their faces blacked or being otherwise disguised." And Arnold was convicted thereon for shooting at Lord Onslow, though he had not his face blacked nor was otherwise disguised at the time; and this was approved of by all the judges.

Malice. 4 Blac. Com. 207. & *Vide* Gastineaux's case, O. B. May 1786, cor. Adair Serjt. Rec. Sess. Pap. p. 738. 748.

Malice is an essential ingredient in this offence; and in order to bring the case within the statute, it must be such a shooting at another, as if death had ensued the homicide would have been murder. It follows that neither an accidental shooting, which is neither wilful nor malicious, nor a shooting in the intemperance of passion, upon such a provocation as would in law reduce the homicide to manslaughter, are within the meaning of the statute.

Vide Harris's case, t. t. *Arrest.*

Shooting at. 4 Blac. Com. 207.

Though it be not necessary that any evil consequence should ensue, yet the *shooting* at must be with a gun or other instrument, so loaded as to create danger to the party aimed at, the probable consequence of which would be to kill or maim him; and it must be levelled *at* him. And therefore

Empson's case, O. B. 1781, cor. Adair Serjt. Recorder, Sess. Pap. p. 240.

where Cook a landlord had distrained for rent, and put a man in possession; and coming in the night to see the man, the prisoner his tenant attacked him and wounded him with

(*a*) See also the clauses touching the surrender of such offenders, on proclamation for that purpose, tit. *Larceny*, (*Degr.*)

a sword

Ch. VIII. § 6. *Shooting at another.*

a sword in revenge for the distress; and Cooke making his escape in the dark by a different way from what he had entered the premises, the prisoner finding he was gone, and not knowing where, fired a gun towards the place where Cooke had entered, which was in a different direction from the way he was then going; the court directed an acquittal.

§ 7. *Principals, accomplices, and accessaries.*

This statute at once creating a new felony and making it capital, it must be so with all its consequences, and therefore the rule of law attaches, that every person present, aiding and assisting, must be a principal in the second degree. John Granger and six other coal-heavers were indicted upon this statute, for that they with certain guns loaded, &c. feloniously did wilfully and maliciously shoot at one John Green, he then being in his dwelling-house, &c. Four of the prisoners fired at Green through the windows of his house: the other three were present when their companions fired, but used no fire-arms themselves. But all were assembled in a tumultuous manner before Green's house, which they attacked; he having rendered himself obnoxious to them by being concerned in carrying into execution an act of parliament for the regulation of the wages of coal-heavers. They were all found guilty and executed; the judges being of opinion, upon reference to them, that the above mentioned rule of law attached upon this case; that the offence was joint and several; and that one indictment was sufficient against all.

2 MS. Sum. 518. Rex v. Bear, Ld. Holt's MS. 32. Granger's case, (called the coal-heavers' case,) O. B 1768. cor. Ld. Ch. B. Parker, Gould, and Aston Js. Leach, 61. (last edit. 1 vol. 76.)

Per Gould J. MS. Buller J. 2 MS. Sum. 222.

Gibson and two others were indicted on the statute, for that they with a loaded pistol, &c. did wilfully, maliciously, and feloniously shoot at John Hardwood, &c. Gibson was found guilty, and the other two acquitted. It was objected that three could not be guilty of the same act of shooting, and that the indictment charging the act to have been done by three, one only could not be convicted. The judges did not determine this case, the prisoner having been convicted of another capital offence at the same time. But at the conference upon it in Easter term 1785, Gould J. mentioned the above case of the coal-heavers as in point: and Eyre B. said that several might be guilty of the same act of shoot-

Rex v. Gibson, Mutton and Wiggs, Kingston Lent Ass. 1785, MS. Gould and Buller Js. 2 MS. Sum. 522. Leach, 397. last edit. S. C.

Ch. VIII. § 7. *Shooting at another.*

ing, as if a ſtring were tied to the trigger and they all pulled it.

Wells' caſe, Kent Sp. Aſſ. 1786, MS. Buller and Gould Ja. & MS. Jud.

Finally in Wells' caſe the indictment charged that the priſoner and divers others unknown did with a loaded gun, &c. unlawfully, wilfully, maliciouſly, and felonioufly ſhoot at one James Paxton. And the ſecond count charged that a perſon unknown wilfully, &c. ſhot at J. P. and that the priſoner unlawfully, wilfully, maliciouſly, and felonioufly, was preſent, aiding, and abetting the aforeſaid perſon, &c. and concluded that ſo the priſoner, the felony laſt above mentioned, in manner and form laſt aforeſaid, unlawfully, &c. did do and commit, and each of them did do and commit, &c. It appeared that a center-bit, an iron crow, a dark lantern, and a brace of piſtols having been found hid in Mr. M'Ullock's cart-houſe at Charlton in Kent, Paxton with ſome others armed had been ſet to watch there. On the ſame night the priſoner and ſeveral others came to the ſpot, and being challenged to ſtop by thoſe who were ſet to watch, a conflict enſued, in the courſe of which ſeveral ſhots were fired, one of which was levelled at Paxton by one of the gang, though probably not by the priſoner himſelf, as he was ſeen coming over a fence near Paxton at the ſame time. The marks of bullets were afterwards ſeen in the boards of an adjoining outhouſe, in the direction in which the gun was fired at Paxton. Mr. Juſtice Aſhhurſt, before whom the priſoner was tried, told the jury that if they were of opinion that the priſoner and the other men were in a confederacy together to make an attack upon Mr. M'Ullock's houſe, and came armed with an intention to oppoſe all reſiſtance; and that in the proſecution of that purpoſe *the priſoner or any of his aſſociates* ſhot at the proſecutor, then they ſhould find the priſoner guilty; if not, they ſhould acquit him. The jury having found him guilty; upon reference to the judges, they were all of opinion that the direction was right and the conviction proper: and that the coal-heavers' caſe was good law.

Eaſter Term 1786.

§ 8. *Indictment and evidence.*

The indictment muſt purſue the words of the act, and charge the offence to have been done "*wilfully* and *maliciouſly*" as well as *felonioufly*. In Davies' caſe, it was laid to

Rex v. Davies, Hereford Sum. Aſſ. 1788, and laſt edit. S.C.

before all the judges in Hil. T. 1789. MS. Buller J. and MS. Jud. 2 Leach, 556.

Ch. VIII. § 8. *Shooting at another.*

to be done "unlawfully, maliciouſly, and felonioufly," omitting *wilfully*; and held ill by a majority of the judges; who conſidered the words "wilfully and maliciouſly" as in part deſcriptive of the offence created by the ſtatute; and that they were bound by former precedents (*a*) in analogous caſes, however the ſenſe and legal import of the words might be the ſame.

(*a*) Vi. Cro. Eliz. 147. Hetl. 12.

Duroure's caſe, O. B December 1784, cor. Hotham B. Seſſ. Pap. 229. 2 Leach, 390. S. C.

The ſtatute ſays "if any perſon ſhall ſhoot at any perſon *in any dwelling-houſe or other place.*" Count Duroure was indicted on the act for ſhooting at H. Sandon in the dwelling-houſe of *James Brewer* and *John Sandy*; and it appeared that the names of the owners were *John* Brewer and *James* Sandy. This was ruled to be a fatal variance; for though it was ſaid not to be neceſſary to ſtate the fact to have happened in any perſon's houſe, the words of the act being "in any dwelling-houſe *or other* place;" yet ſuch a fact having been averred, it muſt be proved as laid. However the ſame ſort of averment has ſince been ruled not to be immaterial in proſecutions for robbery, clergy being ouſted in all caſes. And in Harris' caſe, on an indictment on this act, an objection, that the priſoner having fired at the party within his own houſe, was not within the meaning of the act, was over-ruled.

Vide Pye's caſe, and Johnſtone's caſe, tit. *Larceny* and *Robbery*. (*Indictment*) Rex v. Harris, Salop Sp. Aſſ. 180-, and afterwards before all the judges. MS. Jud.

§ 9. *Trial.*

It is alſo enacted by the ſame ſtatute (ſ. 14.) that the offences therein deſcribed may be "tried and determined "in any county in England, in ſuch manner and form as "if the fact had been therein committed." But no attainder thereon ſhall work corruption of blood, loſs of dower, or forfeiture. This option has been ruled to extend to private proſecutors: but it behoves all ſuch to recollect that this right is not to be exerciſed for the purpoſes of injuſtice and oppreſſion, the words of the act being *for the better and more impartial trial, &c.*

9 Geo. 1. c. 22. ſ 14.

Rex v. Mortis, H. 11 G. 3. 2 Blac. R. 733.

Aſſault with intent to rob.

§ 10. *Aſſault with intent to rob.*

Another offence falling within the preſent claſs is that of aſſaulting another with intent to rob him, which at common law was only puniſhable as a miſdemeanor; though by ſome

Staundf. 27. b.

it

Ch. VIII. § 10. *With intent to rob.*

it had been considered as felony, upon the mistaken maxim that voluntas reputabatur pro facto. But now by the stat. 7 Geo. 2. c. 21. for the more effectually preventing such endeavours it is enacted, "That if any person or persons "shall, with any offensive (*a*) weapon or instrument, unlawfully and maliciously assault; or shall, by menaces, or "in or by any forcible or violent manner, demand any "money, goods, or chattels, of or from any other person "or persons; with a felonious intent to rob or commit robbery upon such person or persons; that then and in every "such case, all and every such person and persons so "offending, being thereof lawfully convicted, shall be "adjudged guilty of felony, and be liable to be transported, "as in cases of felony. And the courts by and before "whom he, she, or they shall be tried and convicted shall "have power of transporting such offenders for seven years, "upon the like terms and conditions, and by the same ways "and means, and in like manner as other felons may be "transported to any of the colonies in America by any law "now in being."

7 Geo. 2. c. 21.

By s. 2. "If any such offender break gaol, or escape be"fore such transportation, or shall return into any part of "Great Britain or Ireland before the expiration of the said "seven years, &c. contrary to the intent and meaning of the "act; every person so breaking gaol, escaping, or returning, "&c. being thereof lawfully convicted, shall suffer death as "felons without benefit of clergy."

§ 11. *What is a Demand, and how far necessary.* Parfait's case, O. B. Dec. 14, 1748. Serjt. Forster's MS. Leach, 19 (last edit. 23.) S. C.

As to what shall be considered as a sufficient demand of money, &c. and how far that is necessary: Peter Parfait was indicted on this statute for assaulting Thomas Wheston on the highway with a pistol, with intent to rob him. Upon evidence it appeared that the defendant did not make any demand, or motion or offer to demand the prisoner's money, but only held a pistol in his hand towards the prisoner, who was a coachman and on his box, and bid him stop. By Lord C. J. Willes; a man who is dumb may make a demand of money, as if he stop a person on the highway

(*a*) As to what shall be considered as an *offensive* weapon, *vide* tit. *Offences relating to the Customs and Excise.*

with

Ch. VIII. § 11. *Withintent to rob.*

with a pistol, and put his hat or hand into the carriage, or the like but in this case as the prisoner only held a pistol at the coachman, but said nothing to him but "stop;" that was no demand of his money as the act requires, and therefore it was not within the act: and Chappel J. according, the prisoner was acquitted by the direction of the court, without entering into his defence.

I cannot forbear observing upon the note of the above case, (the accuracy of which I much doubt,) that it may seem to countenance an opinion that it was not barely sufficient in order to bring an offender within the act that he should make an assault upon another with a felonious intent to rob him, but that he should also make a demand of his money, &c. though it was admitted that such demand need not be by words, but might be collected from the acts of the party. Now the words of the act are in the disjunctive, that if any person with any offensive weapon, &c. shall assault, or shall by menace in or by any forcible or violent manner demand any money, &c. of or from any other person, with *a felonious intent to rob, &c.* Upon this I conceive the jury are to decide with what intent the assault or demand was made; and if they find that the defendant assaulted the prosecutor with a felonious intent to rob him, it brings the case expressly within the words as well as spirit of the act. But even if it were otherwise, yet, with great deference to the opinion supposed to have been delivered in the above case, the fact of stopping another on the highway by presenting a pistol at his breast is, if unexplained by other circumstances, sufficient evidence of a demand of money to be left to the jury: the unfortunate sufferer understands the language but too well: and why must courts of justice be supposed ignorant of that which common experience makes notorious to all men. There is however another case in print, which, when the circumstances of it and the true point in judgment are considered, will perhaps serve to explain the former one. William Thomas was indicted on this statute before Mr. J. Asthurst, for maliciously and feloniously assaulting one John Lowe on the highway with a pistol, with a felonious intent to rob him. It appeared that as the prosecutor was travelling in a chaise in the evening, the prisoner

Post. 418.

Rex v. Thomas O. B. July 1754. cor. Asthurst Sess. Pap. v. 974. S. C. Leach, 271. last ed. 3/2

Ch. VIII. § 11. *With intent to rob.*

after following it some time presented a pistol at the post-boy and bid him stop, making use at the same time of many violent oaths, but not making any demand of money. The carriage was immediately stopped, and the prisoner turned towards it, but perceiving that he was pursued, he immediately rode away without doing or saying any thing to Mr. Lowe who was in the chaise, and he was soon after taken. Upon this indictment the court directed the jury that the evidence was not sufficient; for the charge was not for an assault with intent to rob the postilion, but for an assault on Mr. Lowe with intent to rob him; of which there was no evidence: he was therefore acquitted: and at the same sessions was tried upon another indictment for an assault on B. Dring the post-boy with intent to rob him. But the same evidence being given, the court observed that it was very clear that the prisoner did not mean to rob the post-boy; for when he presented the pistol to him and bid him stop, he made no demand on him, but went up to the person in the chaise. The true point therefore which is to be collected from these cases is, that it must appear that the assault was made upon the person against whom the felonious intent is directed; which perhaps may be agreeable to the strict construction of the statute, which has the word of reference *such*. The truth of the case to be collected from the circumstances appears to have been, that the actual assault was upon the post-boy, but the intent was to rob the person in the carriage; for as soon as the post-boy stopped, the prisoner turned from him towards the chaise. It does not appear whether he afterwards advanced towards Mr. Lowe in such a manner as to amount to an implied assault upon his person: it may rather be collected that he was interrupted before he had time to advance. These observations may serve to explain the opinion given in Parfait's case, where it may be remembered that the prosecutor was a *coachman*, and the charge was for assaulting *with intent to rob him*. But other cases which occurred soon after the last have put the construction of the act in this respect out of doubt. Trusty and Howard were indicted for a felonious assault on John Halse, with a certain offensive weapon called a pistol, with a felonious intent to rob him. On evidence it appeared that the prisoners

Sess. Pap. p. 1015. cor. the Dep. Rec.

The assault must be made upon the person intended to be robbed.

Ante, 416.

Rex v. Trusty and Howard, O. B. July 1783, Sess. Pap. 735.

Ch. VIII. § 11. *With intent to rob.*

prisoners rushed out of the hedge on the prosecutor, who was the driver of a returned chaise, as he was passing along the road; and one of them presenting a pistol to him bid him stop, which the boy did, but called out for assistance to some persons whom he had met just before. On this one of the prisoners threatened to blow his brains out if he called out any more; which the prosecutor nevertheless continued to do; and presently he obtained assistance and took the men, who had made no demand of money. They were convicted and transported. The following cases, which turned on the form of the indictment, underwent full consideration, and serve also to explain the true nature of the offences described in the act.

§ 12. *Form of indictment.*

The indictment in the case of Jackson and Randall charged that the prisoners unlawfully, maliciously, and feloniously made an assault on A. Gillespie, and him the said A. G. unlawfully and maliciously did menace, by menacing to blow his brains out, with a felonious intent the monies of the said A. G. from his person and against his will feloniously to steal, take, and carry away, against the statute, &c. The Recorder thought the indictment defective; for that it was necessary in the terms of the act either to charge that the assault was made with an offensive weapon, or that money, &c. was demanded; (neither of which were stated here;) though it was not necessary to charge both. The fact turned out to be, that the two prisoners and another man, in the night, suddenly laid hold of the prosecutor at the end of Craig's Court, and bid him not to say a word or they would blow his brains out; but while one of them was searching in his own pocket, (probably for an iron bar, which was soon after let drop by one of them,) but before any demand actually made or any weapon produced, the prosecutor made resistance, and by the help of a watchman secured two of them, and the other who ran away was afterwards taken. After conviction, the question was reserved for the opinion of the Judges, whether the indictment in describing the manner in which the offence was committed must not necessarily state either that the assault was made *with an offensive weapon* with a felonious intent to rob, &c. *or* that *by menaces*, or, *in or by a forcible*

Rex v. Jackson and Randall, O. B. April 1783, Sess. Pap. 477. S. C. Leach, 225. last edit. 303

Indictment must either charge that an assault was made with an offensive weapon with intent to rob, &c. or that there was a demand of money, &c with such intent.

Ch. VIII. § 12. *With intent to rob.*

a forcible or violent manner a demand of money, &c. was made *with a felonious intent, &c.*, the words of the act being throughout in the disjunctive. The opinion of the Judges was afterwards delivered, that the indictment was insufficient in not having stated that the assault was made with an offensive weapon, *or* that any demand was made, &c.

July Sess. 1785, Sess. Pap. 729.

Rex v. Remnant, Hi 35 G. 3 5 Term Rep. 169.

So in Remnant's case, where he was committed for that with force and arms he made an assault on the prosecutor with intent feloniously to steal, take, and carry away from his person, &c. This not being a charge of any offence within the statute, the court bailed him.

Pegge's case, Derby Ass. 1789, cor. Thomson B. MS. Buller J. & MS. Jud.

If the indictment only charge an assault, it must be laid to be unlawful and malicious as well as felonious: but that is not necessary if it also lay a felonious demand of goods in a forcible and violent manner.

In Pegge's case the indictment charged, that the prisoner with a certain offensive weapon or instrument called a stick in and upon J. R. feloniously did make an assault, and did then and there in a forcible and violent manner feloniously demand the goods, &c. of him the said J. R. with a felonious intent to rob him, &c. and his goods, &c. from his person and against his will feloniously to steal, take, and carry away, against the statute, &c. The fact was clearly proved, that the prisoner meeting the prosecutor in the highway held up a large club to him and bid him "stand and deliver;" but being resisted afterwards ran away. The prisoner was found guilty. But the words of the statute not being pursued in that part of the indictment which charged the prisoner with assaulting the prosecutor with an offensive weapon, the indictment, not laying it to be done *unlawfully and maliciously*, which according to a late determination of Davis's case on the Black Act seemed necessary, judgment was respited till the opinion of the Judges could be taken, which was done in Trin. term 1789, when the conviction was holden right; the act being in the disjunctive; and an offence within the statute being well laid in the latter part of the indictment, without the words unlawfully and maliciously. It seems therefore admitted in the above case, that where the assault is the only offence charged within the act, it must be laid to be done *unlawfully and maliciously* as well as feloniously.

Ante, f. 8.

Monteth's case, O. B. October 17[illegible] cor. Hotham B. and Heath J.

So the intent to rob must be alleged; and therefore where the indictment only charged that the prisoner with force and arms, i. e. with a certain offensive weapon, &c. unlawfully, maliciously,

maliciously, and feloniously made an assault on W. the prosecutor "with a felonious intent the goods, chattels, and monies of the said W. from the person and against the will of the said W. then and there feloniously to steal, take, and carry away;" the court held that this was not a sufficient description of the offence within the statute; namely, an attempt to rob, which always includes force and violence. Therefore the prisoner was discharged from this indictment, and a new one preferred against him, alleging the assault to be "with a felonious intent the monies of the said W. from the person and against the will of the said W. then and there feloniously and *violently* to steal, take, and carry away, &c." on which indictment he was convicted.

Ch. VIII. § 12. *With intent to rob.*

2 Leach, 809. *vide* Sess. Pap. p. 1300 and 1324.

How the intent to rob must be charged.

§ 13. *Description of weapon.*

As to the description of the weapon used, this follows the same rule as in the case of homicide. Sharwin was indicted for having, with force and arms, with a certain offensive weapon called a wooden staff, unlawfully, maliciously, and feloniously made an assault on J. Gough, with a felonious intent to rob him; against the statute, &c. It appeared that while Gough and one Jenkinson were riding together in the highway, Gough received a violent blow from a great stone which was thrown by the prisoner from the hedge. Going towards the spot from whence they saw the prisoner running across the field, and following him, Gough asked him how he could be such a villain as to throw the stone; on which the prisoner threatened Gough, and ran to and struck him violently with a staff, till at length he was overcome and secured. The prisoner's face was blacked, and he denied his name; but on being questioned afterwards as to his motive, he said he was very poor, and wanted half-a-guinea to pay his brewer. He did not ask for money or goods. After conviction the question was submitted to the Judges, whether this evidence were sufficient to maintain the charge in the indictment? In Michaelmas term following, (ten Judges being present,) all held the conviction proper: for here the weapon laid in the indictment and the weapon proved produce the same sort of mischief, namely, by blows and bruises; and this description would have been sufficient upon an indictment for murder.

Ante. p. 341. Sharwin's case, Oakham, July 8th 1785, cor. Gould J. MS. Buller J.

Ch. VIII. § 14. *With intent to rob.*

§ 14. *Assaults on revenue officers.*

With respect to assaults upon revenue officers in the execution of their duty, or on account thereof, the offence is so intimately blended with other "offences relating to the customs and excise," that it will be more conveniently considered under that head.

§ 15. *On persons wrecked.* 26 G. 2. c. 19. f. 1. See further tit. Malicious Mischief, and Larceny.

As to assaults on persons wrecked. By stat. 26 Geo. 2. c. 19. "If any person or persons shall beat, or wound, "with intent to kill or destroy, or shall otherwise wilfully "obstruct the escape of any person endeavouring to save his "or her life from such (viz. any ship or vessel of his ma"jesty's subjects or others, which shall be in distress, or "which shall be wrecked, lost, stranded, or cast on shore, "in any part of his majesty's dominions) ship or vessel, or "the wreck thereof; such person or persons so offending "shall be deemed guilty of felony, and being lawfully con"victed thereof shall suffer death without benefit of clergy."

By s. 11. of the same act, "If any sheriff or his deputy, "justice of the peace, mayor, or other magistrate, coroner, "lord of a manor, commissioner of the land-tax, chief or "petty constable, or other peace officer, or any custom-house "or excise officer, or other person lawfully authorised, shall "be assaulted beaten and wounded, for or on account of the "exercise of his or their duty, in or concerning the salvage "or preservation of any ship or vessel in distress, or of any "ship or vessel, goods or effects, stranded, wrecked, or cast "on shore, or lying under water, in any of his majesty's do"minions; then any person or persons so assaulting beating "and wounding, shall upon trial and conviction, by indict"ment at the assizes or general gaol delivery or at the quarter "sessions for the county, riding, or division, where such "offence shall be committed, be transported for seven years "to some of his majesty's colonies in America; and shall "be subject to such subsequent punishment in case of return "before that time as other persons under sentence of tran"sportation are by the law subjected unto."

§ 16. *By mariners.* 22 & 23 Car. 2. c. 11. and 11 & 12 W. 3. c. 7. See more under tit. Piracy.

By the stat. 22 & 23 Car. 2. c. 11. s. 9. for the suppression of piracy, it is enacted, that "if any mariner shall lay violent "hands on his commander, whereby to hinder him from "fighting

"fighting in defence of his ship and goods committed to "his trust; he shall suffer death as a felon." The stat. 11 and 12 W. 3. c. 7. s. 9. more fully enacts that "any per"son" guilty of that offence "shall be adjudged to be a "pirate felon and robber, and being convicted thereof, ac"cording to the directions of that act, shall suffer death, "and loss of lands goods and chattels as pirates," &c.

Ch. VIII. § 16. *By mariners, &c. on commanders.*

§ 17. *Assault on account of gaming, &c.*

By stat. 9 Ann. c. 15. s. 8. for preventing quarrels on account of gaming, "In case any person or persons what"soever shall assault and beat, or challenge or provoke to "fight any other person or persons whatsoever, upon ac"count of any money won by gaming playing or betting at "any of the games aforesaid, (i. e. by s. 1. at cards, dice, "tables, tennis, bowls, or other game or games whatsoever); "such person or persons assaulting, &c. or challenging, &c. "upon the account aforesaid shall, being thereof convicted "upon an indictment or information, forfeit all his goods "chattels and personal estate whatsoever, and be imprisoned "in the common gaol of the county where such conviction "shall be had for two years."

Rex v. Randal and others, Bristol Sum. Ass. 1787.

On an indictment against Randal and others upon this statute, for assaulting the prosecutor on account of money won at gaming, the latter proved that he had been gaming with the defendants, and having lost his money to them, they had proposed breaking up and going away, but that he objected to it and wanted them to play on, saying that they had won his money, and would give him no opportunity of recovering it back; upon which they had committed the assault. Buller J. was of opinion that the game being over before the assault began, the assault could not be said to have arisen out of the game, but from what the prosecutor had said to the defendants. And that it was necessary in order to bring a case within the statute, that the assault should arise out of the play and during the time of playing: but that here the play was over, and the dispute had arisen from the prosecutor's own words: and therefore he directed the jury to acquit them of the charge.

Ch. VIII. § 18. *With intent to ſpoil garments.*

§ 18. *Aſſault with intent to ſpoil garments.* 6 G. 1. c. 23. ſ. 11.

By ſt. 6 G. 1. "If any perſon or perſons ſhall at any time "wilfully and maliciouſly aſſault any perſon or perſons in the "public ſtreets or highways with an intent to tear, ſpoil, cut, "burn, or deface, and ſhall tear, ſpoil, cut, burn, or deface "the garments or cloaths of ſuch perſon or perſons; every "ſuch offender, being thereof lawfully convicted, ſhall be "adjudged guilty of felony and liable to the pains and penalties thereof; and the courts by and before whom he "ſhe or they ſhall be tried ſhall have power of tranſporting "ſuch felon and felons for ſeven years, on the like terms "and conditions as are mentioned in this act and the ſtat. "4 Geo. 1. c. 11."

Vide general head of Tranſportation.

4 Blac. Com. 245.

This ſtatute was occaſioned by the inſolence of certain weavers and others, who upon the introduction of ſome Indian faſhions prejudicial to their own manufactures made it a practice to deface them, either by open outrage, or by privily cutting or caſting aqua fortis in the ſtreets upon ſuch as wore them.

Rex v. Renwick Williams, O. B. July 1790, cor. Buller J. MS. Buller J. and Mr. Jud. Leach, 426. S. C. 1st edit. 597. (Abſent Lord C. B. Eyre and Wilſon J.)

The aſſault muſt be made with the intention deſcribed in the act: therefore where the direct intention of the party aſſaulting was to wound the wearer, although in ſo doing the cloaths muſt have been and were in fact cut, it is no offence within this ſtatute. This was ruled by a conſiderable majority of the Judges to whom the matter was referred, in Renwick Williams's caſe, who was convicted on this ſtatute; a caſe of the moſt brutal malignity; where the priſoner actuated by ſome horrible and indeſcribable motive, without the ſmalleſt provocation or even reſentment againſt the unhappy ſufferer, aſſaulted a lady of the name of Porter in the ſtreets of London, and gave her a violent blow over the hip with ſome ſharp inſtrument, which cut through her cloaths, making a rent of two feet and more, and wounded her very ſeverely. Buller J., who thought the caſe came within the ſtatute, relied on the authority of Coke and Woodburn's caſe. He conſidered that the intent of the priſoner was to wound the party by cutting through her cloaths; and therefore that he muſt have intended to cut her cloaths; and the jury, whoſe ſole province it was to find the intent, had expreſsly ſo found it. The majority who thought otherwiſe

If the intent were to wound, though the cloaths muſt be and were cut by the manner of executing ſuch intent, the caſe is not within the ſtatute.

Ante, p. 400.

Ch. VIII. § 18. *With intent to ſpoil garments.*

otherwiſe held that in order to bring a caſe within the act, the primary intention of the priſoner muſt be to tear or deface, &c. the cloaths. The judgment however in that caſe turned ultimately upon a defect in the form of the indictment, which charged, that the priſoner on the 18th January, 30 Geo. 3. at the pariſh of St. James, &c. wilfully, maliciouſly, and felonioufly did make an aſſault on A. P. with intent wilfully and maliciouſly to tear, ſpoil, cut and deface her garments, cloaths, &c. And that the ſaid priſoner *on the ſaid 18th January, &c.* at the pariſh aforeſaid, &c. did wilfully, &c. tear, &c. certain garments, &c. of the ſaid A. P., to wit, a ſilk gown, &c. which ſhe then had and wore on her perſon, againſt the form of the ſtatute, &c. All the Judges preſent agreed that the indictment was ill for want of an allegation that the cloaths were cut *at the ſame time* that the aſſault was made with intent to cut them; the words *then and there* not being added. It was not enough to charge that the cloaths were *cut* on *the ſame day* that the aſſault was made, which was all that the indictment aſſumed to do.

Vide Buckler's caſe, Dy. 68. R. v. Frances, Com. R. 478.

§ 19. *Aſſault with intent to obſtruct the free paſſage of grain.* See further tit. Malicious Miſchief. 36 G. 3. c. 9.

By ſtat. 36 Geo. 3. c. 9. "An act to prevent obſtructions to the free paſſage of grain within the kingdom." "If any perſon or perſons ſhall wilfully and maliciouſly "beat, wound, or uſe any other violence to or upon any "perſon or perſons, with intent to deter or hinder him or "them from buying of corn or grain in any market or "other place within this kingdom; or unlawfully beat or "wound the driver of any waggon, cart, or other carriage "or horſe, loaded with wheat, flour, meal, malt, or other "grain, with intent to ſtop ſuch wheat, &c. every and all "ſuch perſon or perſons being thereof lawfully convicted "before any two or more juſtices of the peace of the "county, &c. wherein ſuch offence ſhall be committed, "or before the juſtices of peace in open ſeſſions, ſhall be "ſent to the common gaol or houſe of correction, there to "continue and be kept to hard labour not leſs than one nor "exceeding three months. And every perſon ſo offending "a ſecond time, and being thereof lawfully convicted, ſhall "be adjudged guilty of felony, and be tranſported for ſeven "years, in like manner as other felons are directed to be "by

2d offence felony, and tranſportation for ſeven years.

Ch. VIII. § 19. *Obstructing passage of grain.*

" by law. And if any such offender, so transported, shall " return into this kingdom before the expiration of the " said seven years, he or she shall suffer death as a felon, " without benefit of clergy." Saving the corruption of blood and loss of dower.

11 G. 2. c. 22.

The same provisions were before enacted by the stat. 11 Geo. 2. c. 22. still in force; with this addition, that for the first offence the justices were also directed to adjudge the offender to be publicly whipped by the keeper of the gaol or house of correction in such city, market-town, or sea-port, in or near which the offence was committed, on the first convenient market-day, at the market-cross or place, between the hours of 11 and 2. In both the statutes there is a provision, " That no person punished for any " offence by virtue thereof shall be punished for the same " offence by virtue of any other law or statute." But by the stat. 36 Geo. 3. it is provided, " that nothing therein " contained shall be deemed to abridge or take away any " provision already made by law or any part thereof, for " the suppression or punishment of any offence mentioned " in the act."

§ 20. *On master woolcombers.* 12 G. 1. c. 34. f. 6.

By stat. 12 Geo. 1. c. 34. f. 6. " If any person or per- " sons shall assault or abuse any master woolcomber or " master weaver, or other person concerned in any of the " woollen manufactures of this kingdom, whereby any such " master or other person shall receive any bodily hurt for " not complying with, or not conforming, or not submit- " ting to any such illegal by-laws, ordinances, rules, or " orders aforesaid;" (that is, as appears by s. 1. all contracts, covenants, or agreements, and all by-laws, ordinances, rules, or orders, in unlawful clubs and societies, entered into by persons brought up in, professing, using, or exercising the art and mystery of a woolcomber or weaver, or journeyman woolcomber or journeyman weaver in this kingdom, for regulating the said trade or mystery, or for regulating or settling the price of goods, or for advancing their wages, or for lessening their usual hours of work;) " every " person so knowingly and wilfully offending in the premises, " being thereof lawfully convicted, upon any indictment " to

" to be found within twelve calendar months next after any " such offence committed, shall be adjudged guilty of " felony, and shall be transported for seven years to one of " the colonies or plantations in America, in such manner, " &c. and under such pains and penalties as felons in other " cases are by law to be transported." Ch. VIII. § 20. *On master woolcombers.*

By s. 8. the like provisions are extended to " combers of " jersey and wool, frame-work knitters, and weavers or " makers of stockings, and to all persons whatsoever em- " ployed or concerned in any of the said manufactures," &c.

For other offences of a similar nature, I must refer to the title of Malicious Mischief, &c.

CHAP. IX.

FALSE IMPRISONMENT AND KIDNAPPING.

1. *False Imprisonment* at Common Law. - § 1
Arrest of *Ambassadors*, &c. declared illegal by 7 Ann. c. 12.; inquirable before a particular tribunal. § 2
2. *Kidnapping*, or the stealing and carrying away of any Person, a great Misdemeanor at Common Law § 3
When done in the *Northern Counties* for the sake of Ransom or Plunder, made Felony without Clergy by stat. 43 Eliz. c. 13. *ib.*
Sending the Party abroad only a Misdemeanor at Common Law. - - - - § 4
Punishable by Habeas Corpus Act with 500 *l.* Damages, to be recovered, and by the Penalties of a Præmunire, and Incapacity to hold Office, or receive a Pardon for it. - - - *ib.*
Masters of Ships wilfully leaving Persons on Shore in foreign Countries shall suffer 3 Months Imprisonment by stat. 11 & 12 W. 3. c. 7. - § 5

False Imprisonment.

§ 1. *False imprisonment.*

WHAT has been said before respecting common assaults and batteries will suffice also to excuse the brevity of this chapter. The subject of false imprisonment is amply discussed in books treating of the civil redress of the party injured, which are in common use. In one of these it is described to be every restraint of a man's liberty under the custody of another, either in a gaol, house, stocks, or in the street, whenever it is done without a proper authority. Whatever is a legal justification of the imprisonment, may be given in evidence under the general issue, upon an indictment; as in the case of an assault: and the punishment for this offence is as in the case of other misdemeanors.

Bull. Ni. Pri. 22. *& vide* 6 Bac. Abr. 569.

There

Ch. IX. § 2. *Arrest of ambassadors, &c.*

There is one species of arrest by legal process, however regular in the frame of it, which on account of the high interest of the nation in the consequences, has been declared to be illegal, and consequently the parties concerned are guilty of false imprisonment; and that is the arrest of foreign ambassadors. The stat. 7 Ann. c. 12. declares, "that all writs and processes sued or prosecuted, whereby "the person of any ambassador or other public minister of "any foreign prince or state, authorized and received as "such by her majesty, &c. or the domestic or domestic "servant of any such ambassador or other public minister, "may be arrested or imprisoned, or his or their goods or "chattels seized, &c. shall be null and void to all intents "and purposes." And by s. 4. "In case any person or "persons sue forth or prosecute any such writ or process, "such person and persons, and all attornies and solicitors, "prosecuting and soliciting in such case, and all officers "executing any such writ or process, being thereof con-"victed by the confession of the party, or by the oath of "one or more credible witnesses, before the Lord Chan-"cellor, or Lord Keeper of the Great Seal, the chief "justices of B. R. and C. B., or any two of them, shall be "deemed violators of the laws of nations, and disturbers of "the public repose; and shall suffer such pains, penalties, "and corporal punishment as the said Lord Chancellor, &c. "or any two of them shall judge fit to be imposed and in-"flicted." Sect. 5. provides "that no merchant or other "trader within the bankrupt laws, who shall put himself "in the service of such ambassador, &c. shall take any "benefit by the act.; and that no person shall be proceeded "against as having arrested the servant of an ambassador or "public minister, by virtue of this act, unless the name of "such servant be first registered in the office of one of the "principal secretaries of state, and by him transmitted to "the sheriffs of London and Middlesex, &c. who shall "hang up the same in some public place in their offices, "whereto all persons may resort and take copies thereof "without fee or reward."

§ 2. *Vide* 1 Blac. Com. 255. 7 Ann. c. 12.

Kidnapping.

§ 3. Ld. Grey's case, T. Raym. 473. Comb. 10.

The most aggravated species of false imprisonment is the stealing and carrying away, or secreting of any person, sometimes called kidnapping, which is an offence at common law,

Ch. IX. § 3.

law, punishable by fine; imprisonment, and pillory. Of this nature is the offence pointed out by the stat. 43 Eliz. c. 13. which reciting that many subjects dwelling and inhabiting within the counties of Cumberland, Northumberland, Westmoreland, and the bishoprick of Durham, had been taken, some from their houses, others in travelling, or otherwise, and carried out of the same counties, or to some other place within the same, as prisoners, and cruelly treated till they have been redeemed by great ransoms, &c. enacts, "that whoever shall without good and lawful warrant and "authority, take any of the queen's subjects against his or "their will, and carry them out of the same counties, or "to any other place within any of the said counties, "or detain, force, or imprison him or them as prisoners, "or against his or their wills, to ransom them, or to make "a prey or spoil of his or their person or goods, upon "deadly feud, or otherwise: or whoever shall be privy, "consenting, aiding, or assisting unto any such taking, "detaining, or carrying away, or procure the taking, de-"taining, or carrying away of any such person or persons "prisoners as aforesaid; and shall be of any of the said "offences indicted and lawfully convicted, or shall stand "mute, or challenge peremptorily above 20 jurors before "the justices of assize, gaol delivery, oyer and terminer, "or of the peace, within any of the said counties, at some of "their general sessions, &c. shall be adjudged felons and "suffer death without benefit of clergy, and shall forfeit as "in case of felony."

In the northern counties.

43 Eliz. c. 13.

§ 4.

The forcible abduction or stealing and carrying away of any person is greatly aggravated by sending them away from their own country into another, properly called kidnapping; though the punishment at common law is no more than fine, imprisonment, and pillory. In every view it is an offence of primary magnitude, and might well have been substituted upon the roll of capital crimes in the place of many others which are there to be found. By the habeas corpus act (s. 12.) "for preventing illegal imprisonments in "prisons beyond seas," it is enacted, "That no subject of "this realm, who shall be an inhabitant or resiant of this "kingdom of England, dominion of Wales, or town of "Berwick upon Tweed, shall be sent prisoner into Scotland, "Ireland,

Kidnapping by sending to foreign countries.

4 Blac. Com. 219.

31 Car. 2. c. 2. s. 12.

Sending prisoners beyond sea.

Ch. IX. § 4.

"Ireland, Jersey, Guernsey, Tangier, or into ports, gar-"risons, islands, or places beyond the seas, which are or "at any time hereafter shall be within or without the do-"minions of his majesty, his heirs or successors; and that "every such imprisonment is hereby enacted and adjudged "to be illegal; and that if any of the said subjects shall be "so imprisoned, every such person and persons so imprisoned, "shall and may, for every such imprisonment maintain, by "virtue of this act, an action or actions of false imprison-"ment, in any of his majesty's courts of record, against "the person or persons by whom he or she shall be so com-"mitted, detained, imprisoned, sent prisoner, or transported, "contrary to the true meaning of this act, and against all "or any person or persons that shall frame, contrive, write, "seal, or countersign any warrant or writing for such com-"mitment, detainer, imprisonment, or transportation, or "shall be advising, aiding, or assisting in the same, or any of "them; and the plaintiff in every such action shall have "judgment to recover his treble costs, besides damages; "which damages so to be given shall not be less than 500l.; "in which action no delay, stay, or stop of proceeding by "rule, order, or command, nor no injunction, protection, "or privilege whatsoever, nor any more than one imparl-"ance, shall be allowed; excepting such rule of the court "wherein the action shall depend, made in open court, as "shall be thought in justice necessary, for special cause to "be expressed in the said rule. And the person or persons "who shall knowingly frame, contrive, write, seal, or coun-"tersign any warrant for such commitment, detainer, or "transportation, or shall so commit, detain, imprison, or "transport any person or persons contrary to this act, or be "any ways advising, aiding, or assisting therein, being law-"fully convicted thereof, shall be disabled from thenceforth "to bear any office of trust or profit within the said realm "of England, dominion of Wales, or town of Berwick-"upon-Tweed, or any of the islands, territories, or domini-"ons thereunto belonging; and shall incur and sustain the "pains, penalties, and forfeitures of a præmunire, and be "incapable of any pardon from the king, &c. of the said "forfeitures, losses, or disabilities, or any of them:" (with an exception, (amongst others,) of offenders sent to be tried where

Kidnapping by sending to foreign countries.

Ch. IX. § 5. *Kidnapping by sending to foreign countries.*

Limitation of time.

where their offences were committed, and where they ought to be tried). By ſ. 17. "No perſon ſhall be ſued or troubled for any offence againſt the act, unleſs within two "years after the offence committed, in caſe the party grieved "ſhall not be then in priſon; and if he ſhall be in priſon "then within two years after the deceaſe of the perſon im-"priſoned, or his or her delivery out of priſon, which ſhall "firſt happen."

§ 5. *Maſters of ſhips forcing or wilfully leaving perſons on ſhore in foreign countries.* 11 & 12 W. 3. c. 7. ſ. 18. made perpetual by 6 G. 1. c. 19.

Alſo by ſtat. 11 & 12 W. 3. c. 7. ſ. 18. "If any maſter "of a merchant ſhip or veſſel ſhall during his being abroad "force any man on ſhore, or wilfully leave him behind, in "any of his majeſty's plantations or elſewhere, or ſhall refuſe "to bring home with him again all ſuch of the men whom "he carried out with him, as are in a condition to return, "when he ſhall be ready to proceed in his homeward-bound "voyage; every ſuch maſter ſhall, being thereof legally "convicted, ſuffer three months impriſonment without bail "or mainprize."

CHAP. X.

RAPE,
AND THE UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN.

Rape.

The carnal Knowledge of a Woman by Force and againſt her Will. - - - § 1.
How puniſhable at common Law. *ib.*
How by Stat. 3 Ed. 1. c. 13. 13 Ed. 1. ſt. 1. c. 34. and 18 Eliz. c. 7. Felony without Clergy. *ib.*

Abuſe of Female Children under 10 *Years of Age, by carnal Knowledge,*

Felony without Clergy by Stat. 18 Eliz. c. 7. *ib.*
Conſent not material under that Statute. § 2.
If above 10 and under 12, carnal Knowledge with Conſent is a Miſdemeanor. *ib.*
Carnal Knowledge, how proved. - - § 3.
Attempt to raviſh, a Miſdemeanor. - - § 4.
Witneſs, where Party grieved is of tender Years. § 5.
Cannot be heard without Oath. *ib.*
Qu. Whether her Declarations recently after the Fact, confirmatory Evidence? *ib.*
A Wife is competent to give Evidence againſt her Huſband for aiding another. - - § 6.
What is proper *collateral or confirmatory Evidence.* § 7.
Principals and Acceſſaries. - - § 8.
A Boy under 14 preſumed incapable. *ib.*
So a Huſband cannot by Law be guilty of raviſhing his Wife. *ib.*
But either may be charged for aiding others. *ib.*
There may be Acceſſaries before and after. *ib.*
Indictment and Appeal. - - - § 9.
Appellant muſt make freſh Diſcovery and Purſuit. *ib.* Muſt proſecute ſpeedily. *ib.* Muſt not have conſented even after. *ib.* Such Conſent puniſhable by Stat. 6 Ric. 2. ſt. 1. c. 6. *ib.*

Appeal given by that Statute to Husband, Father, or next of Kin. - - - § 9.
Form of the Count. - - - § 10.
It must be *rapuit:* but qu. *carnaliter cognovit.* ib.
Appeal must be contra formam Statuti. *ib.*
Qu. as to Indictment for Rape. *ib.* But certainly in case of Indictments on Stat. 18 Eliz. *ib.*
Indictment on Stat. 18 Eliz. must pursue the Words of it. *ib.*
Husband must join in Appeal. *ib.* Ne unques accouplez, &c. a good Plea. *ib.*
Count by next of Kin must shew in what Manner he is so. *ib.*
Trial in proper County. - - - § 11.
Pardon must specify the Offence. *ib.*

Rape, and the unlawful carnal Knowledge of Female Children.

THESE offences of which I propose to treat are blended together in their nature, and are put on the same foot by statute: I shall therefore consider, 1. The statutes relating to the nature and punishment of these offences: and herein, as to the age of consent of female children. 2. What is carnal knowledge, or the evidentia facti. 3. Of the testimony of the party grieved when of tender years. 4. What collateral circumstances are material to be given in evidence. 5. Of principals and accessaries. 6. Of the indictment and appeal.

§ 1. *Definition of rape.* 1 Inst. f. 190. 2 Inst. 180. 433. 1 Hale, 627, 8. c. 31. 1 Hawk. ch. 41. f. 1. 7. 4 Blac. Com. 210—212. *How punishable at common law, and by statute.*

Rape is the unlawful carnal knowledge of a woman by force and against her will. It was anciently a felony and punished with death; in lieu of which William I substituted castration and the loss of eyes: but that was done away by the stat. of Westminster 1. (3 Ed. 1. c. 13.) which enacts, "that none do ravish nor take away by force any maiden "within age, (agreed on all hands to be twelve,) neither by "her own consent nor without, nor any wife or maiden of "full age, nor any other woman against her will: and if "any do, at his suit that will sue within forty days, the king "shall do common right: and if none commence his suit "within forty days, the king shall sue: and such as be "found

"found culpable shall have two years imprisonment, and "fine at the king's pleasure; and if they have not whereof, "they shall be punished by longer imprisonment, according "as the trespass requireth." Soon after by the stat. of Westminster 2. rape was again made felony. "It is pro- "vided, that if a man do ravish a woman, married, maid, "or other, where she did not consent neither before nor "after, he shall have judgment of life and of member. "And likewise where a man ravisheth a woman married, "lady, damsel, or other, with force (*a*), although she con- "sent after, he shall have such judgment as before said, "if he be attainted at the king's suit; and there the king "shall have the suit." Ch. X. § 1. *Definition of rape.* 13 Ed. 1. st. 1. c. 34.

By st. 18 Eliz. c. 7. "If any person or persons shall commit "or do any manner of felonious rape, and be found guilty by "verdict, or be outlawed, or upon arraignment shall confess "the same, they shall suffer death and forfeit as in cases of "felony without benefit of clergy. And by stat. 3 W. & M. c. 9. s. 2. clergy is also taken away from such as "stand mute, or will not answer directly to the felony, or "shall challenge peremptorily above twenty of the jury, or "shall be outlawed thereupon." These statutes oust clergy in all cases as well from the principals in rape in the first degree, namely, such as commit the fact, as from principals in the second degree, namely, those who are present, aiding and assisting. In the case indeed of challenging more than the proper number, the only consequence at this day is, that the challenge shall be over-ruled. But accessaries before and after in rape have their clergy. 18 Eliz. c. 7. *clergy.* 3 W. & M. c. 9. 2 Hale, 345. 1 Hale, 633.

Further, it having been doubted whether a rape could be committed upon a female child under ten years of age, the stat. 18 Eliz. c. 7. s. 4., "for a plain declaration of the "law," enacts, "that if any person shall unlawfully and "carnally know and abuse any woman child under the age "of ten years, every such unlawful and carnal knowledge *Rape of children.* 1 Hale, 630, 1. Dy. 303. b. M. 13 & 14 Eliz. st. 18 Eliz. c. 7. s. 4.

(*a*) This distinction between a rape and a rape *by force* appears to be founded on a difference which once prevailed between what (in the old French law) was called the *rape* and the *viol*. The first of these was only the seduction of a ward with intent to marry her, which was a misdemeanor. The *viol* was what is now understood by a *rape*, and was always a capital offence. Barrington on the Statutes, ch. 34. p. 239.

Ch. X. § 1. *Of children.*

" ſhall be felony; and the offender thereof being duly con-
" victed ſhall ſuffer as a felon, without benefit of clergy."

§ 2. *Conſent.* 2 MS. Sum. 334, 5. 1 Hawk. ch. 41. ſ. 5. 3 Inſt. 60. 1 Hale, 631.

This laſt-mentioned offence however is not properly ſpeaking a rape, which implies a carnal knowledge againſt the will of the party; but a felony created by this ſtatute, under which the conſent or non-conſent of the child, under the age of ten years, is immaterial. Lord Hale indeed thinks that if the child be above 10 and under 12, it is ſtill rape, though ſhe conſent; 12 being the age of conſent of a female; and becauſe the ſtat. of Weſtm. 1. c. 13. refers to that period, as Lord Coke agrees. But the contrary opinion has in general prevailed, and is even adopted by Lord Hale himſelf in his Summary. And with this the later practice accords. For it is now holden, that if the child be above 10, it is not a felonious rape unleſs it be againſt her will and conſent: and in that caſe it remains a rape, though ſhe afterwards conſented to the raviſher. The age of 12 in a woman is indeed the age of conſenting to a marriage, and the period to which the ſtat. of Weſtm. 1. c. 13. refers by the words, " within " age." But by that ſtatute the deflowering a child above 10 years old and under 12, if with her own conſent, is made only a miſdemeanor; for the ſtat. of Weſtm. 2., which reſtored rape to the crime of felony, does not extend to this caſe: and the ſtat. 18 Eliz. c. 7., which excludes rape from the benefit of clergy, makes no proviſion againſt the deflowering children with their own conſent, but only where the children ſo abuſed are under 10 years of age. As to thoſe who are above 10 and under 12, it leaves the offence as it ſtood before upon the ſtat. of Weſtm. 1. i. e. a miſdemeanor only, if done with the party's conſent.

2 Inſt. 180. 3 Inſt. 60. 4 Blac Com 212. 1 Hawk. ch. 41. ſ. 4. 7. Sum. 118.

2. *Evidentia Facti.*

§ 3. *Carnal knowledge or the evidentia facti.*

A very conſiderable doubt having ariſen as to what ſhall be conſidered ſufficient evidence of the actual commiſſion of this offence, it is neceſſary to enter into an inquiry which would otherwiſe be offenſive to decency. Conſidering the nature of the crime, that it is a brutal and violent attack upon the honour and chaſtity of the weaker ſex, it ſeems more natural and conſonant to thoſe ſentiments of laudable indignation which induced our ancient lawgivers to rank this offence among felonies, if all further inquiry were unneceſ-

Ch. X. § 1. *Evidentia facti.*

ſary after ſatisfactory proof of the violence having been perpetrated by actual penetration of the unhappy ſufferer's body. The quick ſenſe of honour, the pride of virtue, which nature, to render the ſex amiable, hath implanted in the female heart, as Mr. Juſtice Foſter has expreſſed himſelf, is already violated paſt redemption, and the injurious conſequences to ſociety are in every reſpect complete. Upon what principle and for what rational purpoſe any further inveſtigation came to be ſuppoſed neceſſary, the books which record the dicta to that effect do not furniſh a trace. Nothing further therefore remains than to detail the ſeveral authorities purſuant to the object of this treatiſe.

Foſt. 274.

Lord Coke, defining " *carnal knowledge*," ſays, there muſt be penetratio, that is, res in re; but the leaſt penetration maketh it carnal knowledge. Emiſſio ſeminis makes it not ſodomy, but is an evidence in that caſe of penetration: and ſo in rape, the words are alſo *carnaliter cognovit*, and therefore there muſt be penetration; and emiſſio ſeminis without penetration makes not rape. But in the 12 Rep. 37. the ſame author ſays, that there muſt be penetratio et emiſſio ſeminis to make rape or ſodomy: and Lord Hale's Summary and Hawkins are to the ſame purpoſe: to which the latter adds, that emiſſion is ſaid primâ facie to be an evidence of penetration. Theſe again are contradicted by Lord Hale himſelf in his more enlarged and correct work, who ſays, that to make rape there muſt be an actual penetration or res in re; and therefore emiſſio ſeminis is indeed an evidence of penetration, but ſimply of itſelf it makes neither rape nor ſodomy, but is only an attempt, &c. But the leaſt penetration makes it rape or ſodomy, although there be not emiſſio ſeminis; and therefore he ſuppoſes the caſe in 12 Co. 37., which ſays there muſt be both, is miſtaken; and that it contradicts what Lord Coke ſays in his Pleas of the Crown.

3 Inſt. 59, 60. Sum. 117. 1 Hawk. ch. 4. ſ. 2. ch. 41. ſ. 1. 1 Hale, 628.

In John Duffin's caſe for ſodomy, a ſpecial verdict found penetration, but the emiſſion out of the body. Pratt Ch. J., Blencowe, Tracy, Dormer, Forteſcue, and Page, held both to be neceſſary: e contra King Ch. J., the Chief Baron Powis, Price, Eyre, and Montague, thought that penetration was neceſſary, but not injectio ſeminis. Injection, they ſaid, cannot be proved in the caſe of a child, or of beſtiality, and

Duffin's caſe, O. B. 12th June 1722. (Qu. Dec. 1722.) Baron Price's MS.

Ch. X. § 3. *Evidentia facti.*

penetration may be evidence of emiſſion; and Stafford's caſe Co. Entr. takes no notice of emiſſion; and there is a difference between 3 Inſt. 58. and 12 Co. 37. which was a poſthumous work. The Judges being divided, it was propoſed to diſcharge the ſpecial verdict, and indict the party for a miſdemeanor.

(352.)

Cave's caſe, O.B. Oct. 1747, Serjt. Foſter's MS.

MS. ſupra.

Mathew Cave was indicted for a rape on Martha Flanders, and penetration was proved; but for want of the other proof Willes C. J. directed him to be acquitted. Of this caſe Mr. Juſtice Foſter was informed at the Old Bailey, where he ſat upon a like offence; but he held it otherwiſe, and ſaid he always ſhould do ſo, agreeably to Lord Hale. And

R. v. Blomfield, Thetford, March 1758, MS. ſup.

Clive J. did the ſame upon an indictment againſt Blomfield for a rape on Elizabeth Reynolds.

Rex v. Sheridan, O. B. 8 G. 3. 2 MS. Sum. 333.

At the ſeſſions before Eaſter term 8 Geo. 3. Sheridan was indicted for a rape on M. Brickenſhaw. The proſecutrix could not prove any emiſſion; but Mr. Juſtice Bathurſt who tried the priſoner left it to the jury to find the caſe ſpecially, if they had any doubts: but if they believed that the defendant had his will of her, and did not leave her till he choſe it himſelf, then he directed them to find him guilty, though an emiſſion were not proved. The jury convicted him. Mr. Juſtice Bathurſt afterwards ſaid, that it was always his opinion that it was not neceſſary to prove emiſſion; and Baron Smythe who was preſent at the trial was clearly of the ſame opinion.

R. v. Ruſſen, O.B Oct. 1777. Serjt. Foſter's MS.

Benjamin Ruſſen was maſter of a charity-ſchool, and was charged with two forceable rapes on Ann Mayne, one of the girls of the ſaid ſchool; the firſt fact being juſt before, the other juſt after ſhe attained her age of 10 years. The child ſwore to a full proof in both reſpects, and her teſtimony was corroborated by marks obſerved on her linen at the time, but ſhe was deterred by the priſoner's threats from making any diſcovery till three or four months after the time. For the priſoner it was proved by two ſurgeons, whoſe teſtimony was corroborated by four others who had examined the child, that the paſſage of the parts was ſo narrow that a finger could not be introduced; and that the membrane called the Hymen which croſſes the Vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken; ſo that ſhe could never have been completely known by man.

But

Ch. X. § 3. *Evidentia facti.*

But as this membrane was admitted to be in ſome ſubjects an inch, in others an inch and an half beyond the orifice of the vagina, Aſhhurſt J. who tried the priſoner left it to the jury whether any penetration were proved; for if there were any, however ſmall, the rape was complete in law. The jury found him guilty, and he received judgment of death. But before the time of execution, the matter being much diſcuſſed, the learned Judge reported the caſe to the other judges for their opinions, whether his direction were proper. And upon a conference it was unanimouſly agreed by all aſſembled, (in the abſence of De Grey Ch. J. and Eyre B.) that the direction of the Judge was perfectly right. They held, that in ſuch caſes the leaſt degree of penetration is ſufficient, though it may not be attended with the deprivation of the marks of virginity. It was therefore properly left to the jury by the Judge, and accordingly the priſoner was executed.

Vide Earl's caſe, O.B. Dec. 1770.

At this period the weight of authorities was ſuppoſed to be much againſt the neceſſity of the two proofs.

Samuel Hill's caſe, Tr. term 1781, MS. Gould and Buller Js.

But in Hill's caſe, who was tried before Buller J. at the ſpring aſſizes at Lincoln 1781, for a rape on Mary Portas, a caſe was reſerved for the opinion of the judges, ſtating, that the fact of penetration was poſitively ſworn to, but there was no direct evidence of emiſſion, and from interruption it appeared probable that it was not effected. The learned Judge told the jury, that if they were ſatisfied there was an actual penetration, though there were no emiſſion, they ought to find the priſoner guilty: but he deſired they would conſider the two facts ſeparately, and give their opinions diſtinctly upon each. The jury found the priſoner guilty, but ſaid they did not find the emiſſion; whereupon ſentence was reſpited till the next aſſizes. In Trinity term Lord Loughborough, Buller, and Heath, Js. held that the offence was complete by penetration only. Lord Ch. B. Skynner, Gould, Willes, Aſhhurſt, and Nares, Js. and Eyre and Hotham, Bs. held both were neceſſary, but thought that the fact ſhould be left to the jury. Perryn B. was abſent; and Lord Mansfield only ſaid, that a great majority ſeemed to be of opinion that both were neceſſary. The majority there went on the ground that carnal knowledge (which they conſidered could not exiſt without emiſſion) was neceſſary to the conſummation of the offence. The others denied that definition; and alſo obſerved

Ch. X. § 3. *Evidentia facti.*

that carnal knowledge was not neceſſary to be laid in the indictment, but only that the defendant raviſhed the party (*a*).

As to what may be conſidered as proof of emiſſion, ſuppoſing it to be neceſſary, it ſeems from what was ſaid by the judges in the laſtmentioned caſe, and from Mr. Juſtice Bathurſt's opinion in Sheridan's caſe, that the fact of penetration is primâ facie evidence of it, unleſs the contrary appear probable from the circumſtances: and Hawkins is expreſs to that purpoſe. So where upon an indictment for an aſſault with intent to raviſh the proſecutrix, ſhe ſwore that the defendant had had his will with her, and had remained on her body as long as he pleaſed; though ſhe could not ſpeak as to emiſſion; Buller J. ſaid, this was ſufficient evidence to be left to a jury of an actual rape; and therefore ordered the defendant to be acquitted upon the preſent charge. He ſaid, that he recollected a caſe where a man had been indicted for a rape, and the woman had ſworn that ſhe did not perceive any thing come from him; but ſhe had had many children, and was never in her life ſenſible of emiſſion from a man: and that was ruled not to invalidate the evidence which ſhe gave of a rape having been committed upon her.

Ante, p. 438.

1 Hawk. ch. 4. ſ. 2. Harmwood's caſe, Wincheſter Sp. Aſſ. 1787, MS.

In the caſe of Flemming and Windham, the depoſition of the party injured (who had died in the mean time) taken before a magiſtrate on oath in the uſual courſe upon the examination of the priſoners, was read in evidence againſt them, containing a general allegation of the charge; and this being corroborated by other evidence of the actual force and penetration, was holden ſufficient to warrant a conviction; though, as it is ſtated, there was no direct evidence of emiſſion.

Rex v. Flemming and Windham, before the judges in Trin. term 1799. 2 Leach, 996.

§ 4. *Indictment for an attempt to raviſh.*

But though in ſome caſes there may be a defect of evidence as to the completion of the offence in reſpect of one of the circumſtances above alluded to, yet if in all other reſpects the injury be ſatisfactorily proved, it muſt in any real eſtimate of guilt be conſidered to be full as aggravated an offence as that which in the ſtricteſt notion of law is denominated rape; and though the puniſhment of it as a miſdemeanor for the attempt to commit a rape be not ſo highly penal as under

(*a*) *Vide* ante, 437. and poſt. p. 448. Lord Coke and Lord Hale, though they hold it neceſſary to lay *carnal knowledge* in the indictment, conſider penetration alone as ſufficient to conſtitute it.

the

Ch. X. § 4. *Attempt to raviſh.*

the before-mentioned ſtatutes, which reach the offender's life, yet ſome inſtances of this ſort have been puniſhed in an exemplary manner by fine, impriſonment, and pillory, and finding ſureties for good behaviour for life. Though this latter part of the ſentence is not conſonant to the practice of our preſent conſtitution, in the apportionment of diſcretionary puniſhment, as tending to an impriſonment for life.

Page's caſe, Cro. Car. 332.

3. *As to the Teſtimony of the Party grieved.*

§ 5. *Witneſſes.*

If the rape be charged to be committed on an infant under 12 years of age, ſhe may ſtill be ſworn if ſhe have ſenſe enough to know the nature and obligation of an oath. But if it be an infant of ſuch tender age that in point of diſcretion the court fees it unfit to ſwear her, yet Lord Hale was of opinion that ſhe ought to be heard without oath to give the court information; though ſingly of itſelf it ought not to move the jury to convict the offender; nor was in itſelf ſufficient teſtimony, becauſe not upon oath, without the concurrence of other proofs that might render the thing probable. And his reaſons for the hearing of ſuch an infant, though not upon oath, are, firſt, the nature of the offence, which is for the moſt part ſecret; and no other teſtimony can be had of the fact itſelf, though there may be other concurrent proofs. Next, becauſe if the child complain preſently of the wrong done to her to the mother or other relations, their evidence upon oath ſhall be taken; yet it is but a narrative of what the child told them without oath, and there is much more reaſon for the court to hear the relation of the child herſelf, than to receive it at ſecond hand from thoſe who ſwear they heard her ſay ſo; for ſuch a relation may be falſified or repreſented otherwiſe at ſecond hand than when it was firſt delivered. And indeed, adds Mr. Juſtice Blackſtone, it ſeems now to be ſettled that in theſe caſes infants of any age are to be heard; and if they have any idea of an oath, to be alſo ſworn. But both authors agree, that in any of theſe caſes, whether the child be ſworn or not, it is to be wiſhed in order to render her evidence credible, that there ſhould be ſome concurrent teſtimony of time, place, and circumſtances, in order to make out the fact; and that the conviction ſhould not be grounded ſingly on the unſupported accuſation of an infant under years of diſcretion.

1 Hale, 302. 634. 2 Hale, 279. 284.

4 Blac. Com. 214.

A child

Ch. X. § 5. *Witneſs.*

A child of ſeven years old was admitted to give evidence of a rape, and on her evidence and that of ſurgeons and midwives, the defendant was convicted and hanged. But ſuch evidence was refuſed by Parker C. B. on an indictment for a rape on Grace Howel (*a*).

Dy. 303. b. in margin.
(*a*) R. v. Termont, O. B. 1740, Serjt. Forſter's MS. 182.
(*b*) O. B. Mich. 1705, MS. Denton.
(*c*) Young v. Slaughterford, Trin 1709.
Rex v. Travers, 2 Stra. 700.

One about nine (*b*) was admitted to prove a rape on herſelf by Holt Ch. J. Another of 10 years and 11 months by Holt C. J. and Tracy, April 1704. And another (*c*) under 12 was admitted in B. R. upon an appeal.

In Travers's caſe at Kingſton ſummer aſſizes 1726, Lord Ch. B. Gilbert refuſed the teſtimony of a child little more than ſix years old againſt the defendant for a rape on her, becauſe ſhe was too young to diſtinguiſh between right and wrong. At the next aſſizes the defendant was indicted for the aſſault with intent to raviſh: and it was urged for the admiſſion of the child's evidence, that though it might be refuſed in a capital caſe, yet in a miſdemeanor it might be admitted. But Raymond Ch. J. held there was no difference between capital and leſſer offences; and ſaid, that no perſon had ever been admitted as a witneſs under nine years, and very ſeldom under ten. That this point was thoroughly debated at the Old Bailey in 1704, in the caſe of one Stewart, upon two indictments for rapes upon children: the firſt was upon a child of ten years and ten months; yet even that child was not admitted till after other evidence had been given of ſtrong circumſtances againſt the priſoner, and after the child had given a good account of an oath; and it was merely upon the authority of Lord Hale, who ſays, that a child of ten years old may be a witneſs, that this child was admitted at all. The ſecond indictment was attempted to be proved by a child only between ſix and ſeven years old; but this was unanimouſly rejected without inquiring into any circumſtances to give it credit. Lord Raymond therefore refuſed in the caſe before him to receive the child's evidence, and the defendant was acquitted.

Rex v. Dunnel, Norwich aſſizes, 29th July 1771, Serjt. Forſter's MS.

The defendant was indicted for a rape on Iſabella Kedmunds, alias Hadman, a child of eight years old. At the trial ſhe was called, being then nine years and four months, to prove the priſoner's behaviour to her. On being objected to, De Grey C. J. ſaid, the univerſal practice now was, that a child under nine years of age could not be examined as a witneſs

Ch X. § 5. *Witneſs.*

witneſs either upon or without oath in a capital caſe, a miſdemeanor, or any caſe whatever. And that if a child were between nine and fourteen, it was diſcretionary in the court to admit the evidence of ſuch child or not according to the child's underſtanding, but not unleſs the child could give a good account of an oath; but thoſe above fourteen were examined of courſe. In this caſe the child being very ſenſible was examined; but the defendant was upon full evidence acquitted. He was afterwards indicted for an aſſault with intent to raviſh, and acquitted alſo of that.

Brazier's caſe, Reading Sp. Aſſ. 1779, MS. Gould and Buller Js. *vide* S.C. 1 Leach, 237. amended from the former edition.
Rex v Powell, cor. Gould J. at York 1775, 1 Leach, 128. S. P.

The laſt caſe which has occurred on this doubtful ſubject is that of William Brazier, who was tried for aſſaulting Mary Harris, an infant of five years old, with intent to raviſh her. The caſe on the part of the proſecution was proved *by the mother of the child and another woman* who lodged with her, to whom the child immediately on her coming home told all the circumſtances of the injury done to her, and deſcribed the priſoner, who was a ſoldier, as the perſon who had committed it; but ſhe did not know his name. The next day the priſoner was called from the guard by the ſerjeant, and ſhewn to the child, who immediately ſaid that was the man. Two other ſoldiers had been before ſhewn to her, of whom ſhe at once denied any knowledge. There was no fact or circumſtance to confirm the account given by the girl that the priſoner was the man who committed the offence, except that he lodged where ſhe deſcribed. That ſhe had received ſome hurt was proved by a ſurgeon as well as by the two women. The child was coming from ſchool when the priſoner attacked her. The ſchool did not break up till four o'clock, and ſhe was at home before five, and had no converſation or communication with the mother before ſhe had told all that had paſſed. The priſoner was convicted. But Mr. Juſtice Buller reſerved the above ſtatement of facts for the opinion of the judges, whether this evidence ought to have been received, or was ſufficient in point of law to be left to the jury. On the firſt day of Eaſter term 1779 the judges met on this ſubject, when all of them except Gould and Willes Js. held that this evidence of the information of the child ought not to have been received, as ſhe herſelf was not heard on oath: as to which ſome, particularly Blackſtone, Nares, Eyre, and Buller Js. thought that if ſhe had appeared

Ch. X. § 5. *Witneſs.*

peared on examination to have been capable of diſtinguiſhing between good and evil, ſhe might have been ſworn. But as to that, others, particularly Gould and Willes Js. held that the preſumption of law of want of diſcretion under the age of ſeven is concluſive; ſo as not to admit an infant under that age to be ſworn on any examination as to her capacity. And as to the information or narration from the child, Gould and Willes Js. held that it being recently after the fact, ſo that it excluded a poſſibility of practiſing on her, it was a part of the fact or tranſaction itſelf, and therefore admiſſible: and Buller J. held the ſame, if by law the child could not be examined on oath. But as to what happened the next day, Gould J. thought it not admiſſible, by reaſon of the danger of her being influenced in the interval. But on the 29th April all the judges being aſſembled, they unanimouſly agreed that a child of any age, if ſhe were capable of diſtinguiſhing between good and evil, might be examined on oath; and conſequently that evidence of what ſhe had ſaid ought not to have been received. And that a child of whatever age cannot be examined unleſs ſworn. The priſoner was pardoned.

It does not however appear to have been denied by any in the above caſe, that the fact of the child's having complained of the injury recently after it was received is confirmatory evidence.

§ 6. *Wife againſt huſband.* Ld. Caſtlehaven's caſe, 1 Hale, 629. 12 Mod. 340. 454. *vide* general title Witneſs. Ld. Audley's caſe, Hutt. 116. 1 St. Tr. 387. 1 Sid. 633.

The party grieved is ſo much conſidered as a witneſs of neceſſity in this as in other perſonal injuries, that in Lord Caſtlehaven's caſe, who aſſiſted another man in raviſhing his own wife, ſhe was admitted as a witneſs againſt him. The ſame teſtimony was received in Lord Audley's caſe.

4. *As to what collateral Facts are material to be given in Evidence.*

§ 7. *Collateral evidence in confirmation or otherwiſe.* 1 Hale, 628. 631. 1 Hawk. ch. 41. ſ. 2. 4 Blac. Com. 213. 2 MS Sum. 333. Cro. Car. 485.

It is no mitigation of this offence that the woman at laſt yielded to the violence, if ſuch her conſent were forced by fear of death or by dureſs. Nor is it any excuſe for the party indicted that the woman conſented after the fact; nor that ſhe was a common ſtrumpet; for ſhe is ſtill under the protection of the law, and may not be forced: nor that ſhe was firſt taken with her own conſent, if ſhe were afterwards forced

forced againſt her will; nor that ſhe was a concubine to the raviſher; for a woman may forſake her unlawful courſe of life, and the law will not preſume her incapable of amendment. All theſe latter circumſtances, however, are material to be left to the jury in favour of the party accuſed, more eſpecially in doubtful caſes, and where the woman's teſtimony is not corroborated by other evidence.

Ch. X. § 7. *Confirmatory evidence.*

It was formerly ſuppoſed that if a woman conceived it was no rape, becauſe that ſhewed her conſent; but it is now admitted on all hands that ſuch an opinion has no ſort of foundation either in reaſon or law. 1 Hawk. ch. 41. ſ. 2. 1 Hale, 631. 2 MS. Sum. 334.

Upon the trial of this offence, the caution of a great and very experienced judge is ever to be kept in mind. It is true, ſays Ld. Hale, rape is a moſt deteſtable crime, and therefore ought ſeverely and impartially to be puniſhed with death: but it muſt be remembered that it is an accuſation eaſily to be made, and hard to be proved; and harder to be defended by the party accuſed, though ever ſo innocent. And therefore, ſays he, though the party raviſhed be in law a competent witneſs, yet the credibility of her teſtimony muſt be left to the jury upon the circumſtances of fact that concur with that teſtimony. And theſe rules have been laid down as ſome guides to the diſcovery of the truth; for inſtance, if the witneſs be of good fame; if ſhe preſently diſcovered the offence, and made purſuit after the offender; if ſhe ſhewed circumſtances and ſigns of the injury, whereof many are of that nature that only women are proper examiners; if the place where the fact was done were remote from inhabitants or paſſengers; if the offender fled for it; theſe and the like are concurring circumſtances which give greater probability to her evidence. On the other hand, if ſhe be of evil fame and ſtand unſupported by other evidence; if ſhe concealed the injury for any conſiderable time after ſhe had opportunity to complain; not, as in Ruſſen's caſe, where the girl had continued for three or four months under the priſoner's immediate control without complaining, through fear of him: again, if the place where the fact was ſuppoſed to be committed were near to perſons by whom it was probable ſhe might have been heard, and yet ſhe made no outcry; if ſhe gave wrong deſcriptions of the place; if ſhe fixed on a place where it was improbable for the man to have had acceſs to her by his being in a different place

1 Hale, 635.

1 Hale, 633. 4 Blac. Com. 213. 1 Hawk. ch. 41. ſ. 3. 2 MS. Sum. 335. Staundf. 22.

Ante, p. 438.

Ch. X. § 7 *Confirmatory evidence.*

place or company about that time: theſe and the like circumſtances afford a ſtrong, though not concluſive preſumption that her teſtimony is feigned.

5. *Of Principals and Acceſſaries.*

§ 8. *Principals and acceſſaries.* 1 Hale, 628, 9, 630. 1 Hawk. ch. 41. ſ. 6. 4 Blac. Com. 212. Plowd. 99, 100. Bro. Appeal, 32.

All who are preſent and aſſiſt a man to commit a rape may be indicted as principals in the ſecond degree, as well women as men. So, though a boy under fourteen years of age is preſumed to be incapable of committing this offence; and though a huſband cannot by law be guilty of raviſhing his wife, on account of the matrimonial conſent which ſhe cannot retract; yet if they aſſiſt others to commit it; as in the inſtances of Lord Caſtlehaven and Lord Audley who aſſiſted others to raviſh their own wives, they are equally guilty with the principal actors; the aſſent of the huſband being no excuſe to another. But in the caſe of an infant it muſt appear, as in other felonies, that he had a miſchievous diſcretion. So where a marriage was compelled, and carnal knowledge had by force; till ſuch marriage were legally diſſolved, though only a marriage de facto, the huſband could not be appealed of the rape. But after ſuch marriage is avoided ab initio by ſentence, the offender is puniſhable the ſame as if there had been no marriage at all. However, the ſtat. 3 H. 7. c. 2. providing a ſpecial remedy for this grievance, it is leſs material to be conſidered here.

ante, ſ. 6.

1 Hale, 629. Pull's caſe.

Vide poſt. ch. 11.

There may be acceſſaries before and after in rape, though, as Lord Hale obſerves, the felony be created by act of parliament which ſpeaks only of thoſe who commit the offence; for this is incident to the nature of felony.

1 Hale, 632, 3.

Ante, ſ. 1.

The puniſhment of theſe offenders has been before conſidered.

6. *Of the Indictment and Appeal.*

§ 9. *Indictment and appeal.* 1 Hale, 631-3. 2 Hawk. ch. 23. ſ. 58. 72. 4 Blac. Com. 211.

An indictment for rape may be proſecuted at any time, and notwithſtanding any ſubſequent aſſent of the party grieved. An appeal alſo lies at the ſuit of the ſame party; but there are ſeveral requiſites to the bringing of ſuch appeal: 1. That the party grieved make freſh diſcovery of the offence and purſuit of the offender, (though it be not neceſſary to raiſe hue and cry); otherwiſe it carries a preſumption that her ſuit is malicious and feigned. 2. That

(2 Hawk. ch. 23. ſ. 51.)

Ch. X. § 9. *Indictment and appeal.*

the appeal be ſpeedily proſecuted; for according to ſome opinions a year and a day is not allowed in this appeal, but ſome ſhort time. Such time however is no where defined, but is ſaid to lie in the diſcretion of the court and jury upon the circumſtances of the fact; the ſtat. however of Weſtm. 1. c. 13. which made it a miſdemeanor, allowed but forty days; and though that ſtatute be ſo far virtually repealed by the ſtatute of Weſtm. 2. c. 34. as that the offence is again made felony, and a new appeal of rape is thereby given; yet no other time being therein limited, the former period may at leaſt be taken as a meaſure to govern the diſcretion of the court, in ordinary caſes. 3. That the woman (if 12 years of age at leaſt) never once conſented to the raviſher after the fact, except by dureſs; otherwiſe her appeal is barred by the ſtat. of Weſt. 2., and in that caſe both ſhe and the raviſher are by the ſtat. 6 Ric. 2. ſt. 1. c. 6. "diſabled to challenge all inheritance, dower, or joint feoffment after the death of their huſbands and anceſtors:" but it ſhall go over to the perſon next entitled. Alſo by the laſtmentioned ſtatute "the huſband of the party injured, "if ſhe have any, or if not, then the father or other next "of her blood, ſhall have the ſuit to purſue againſt the "raviſhers, and to have them thereof convict of life and "member; although the woman after ſuch rape conſented "to the raviſhers." And the defendant ſhall not in this caſe wage battle. If a woman who has neither huſband nor father be raviſhed by her next of kin, and ſo conſent to him, the next of kin after him ſhall have the appeal.

Supra, and 3 MS. Sum. 10. ante, p. 434.

Ante, p. 435.

6 Ric. 2. ſt. 1. c. 6. 1 Hale, 631.

§ 10. *Form of the count.* 1 Inſt. ſ. 390. 2 Inſt. 180. 1 Hale, 628. 2 Hale, 184. Bro. Abr. Indictment, pl. 7. 9 Ed. 4. 26. Staundf. 96. Pult. de pace, 126.

The indictment and appeal muſt ſtate that the defendant feloniouſly *raviſhed*, &c.; nor can that word be ſupplied by an averment that he *carnally knew*, &c. And theſe latter words have been holden not to be neceſſary in appeals (*a*), becauſe (as the reaſon is given in the original caſe in the year-book,) if the defendant raviſhed and had not carnal knowledge (1), it would not be felony, but treſpaſs; a reaſon which ſeems to be grounded as much upon the word felonice as rapuit (2); and upon which Staundford citing the ſame caſe obſerves that it is an inſtance in felony of a count holden good by implication. If this be ſufficient in an ap-

(*a*) 11 H. 4. 13. cited in Bro. Appeal, 32. Fitz. Coron. pl. 86. 2 Hawk. ch. 23. ſ. 79 Sum. 187. & Staundf. 81.

(1) *Vide* ante, p. 435.

(2) *Vide* 2 Hale, 172.

peal,

Ch. X. § 10. *Indictment and appeal.*

peal, there is no reaſon why it ſhould not be equally good in an indictment; and accordingly Hawkins (*b*), upon the authority of the ſame caſe, ſays, that in an indictment as well as in an appeal of rape the fact ſeems to be ſufficiently aſcertained by the words felonice rapuit, without adding carnaliter cognovit; or, as he adds, by firſt ſetting forth the ſpecial manner of the terror or violence, and then concluding that the defendant *ſic felonice rapuit*. But notwithſtanding theſe authorities it may not perhaps be ſafe to omit the averment of carnal knowledge in the indictment. For the authority for ſuch omiſſion reſts ſolely upon the caſe in the year-book 11 H. 4. 13., to which all the other books refer; and the reaſon there given is not a very ſatisfactory one, on the account before ſuggeſted by Staundford; nor is it ſupported by the current of precedents, which, as far as I have obſerved, contain that averment. On the contrary, both Lord Hale and Lord Coke ſay, that the indictment ought to be *rapuit, et carnaliter cognovit*; though the latter ſays in another place (*a*) that *rapere* legally ſignifies as much as *carnaliter cognoſcere*; which, if that were admitted, would ſhew that the latter allegation was unneceſſary, being in effect a repetition of the other. The appeal of rape muſt conclude contrà formam ſtatuti; and Lord Hale ſays the ſame of the indictment; founded upon the 6 H 7. 5.: but that caſe, which is in other reſpects queſtionable, proceeds on the miſtaken notion that rape was only a treſpaſs at common law, and was firſt made felony by the ſtat. of Weſtm. 2. But inaſmuch as that ſtatute did not create the offence, but only enhanced the penalty; or to ſpeak more correctly, by repealing in effect the ſtat. of Weſtm. 1. which reduced the offence to a miſdemeanor, thereby reſtored the common law; ſuch a concluſion ſeems to be unneceſſary: however, the uſual form of indictment is ſo to conclude. But if the indictment be upon the ſtat. 18 Eliz. for deflowering a child under ten years of age, with her conſent, it ſeems neceſſary to conclude againſt the form of the ſtatute; becauſe the crime as well as the puniſhment is created by that ſtatute. And on the ſame account it is neceſſary for the indictment to purſue the words of the act, and charge that the defendant felonioufly, unlawfully, and carnally knew and abuſed the party, being under the age of ten years, without adding the word *raviſhed*, for the reaſon before ſtated.

(*b*) 2 Hawk. ch. 25. ſ. 56.

2 Hale, 632. 8, 9. Sum. 117.

3 Inſt. 60. et *vide* Co. Lit. 137.

2 MS. Sum. 336. accord.

(*a*) 2 Inſt. 180.

2 Hawk. ch. 23. ſ. 6.

2 MS. Sum. 336.

3 MS. Sum. 334—6.

Ante, ſ. 2.

Neither

Neither at common law nor by ſtatute can a married woman bring an appeal of rape without her huſband; but it has been holden a good plea on the ſtatute of Ric. 2. that he was not lawful huſband, which is triable by the biſhop's certificate. Alſo in an appeal by the next of kin, the count muſt ſtate ſpecially in what manner he is ſo. And it ſeems neceſſary either to rehearſe the ſtatute, or at leaſt to allege that the woman conſented to the raviſher afterwards, and conclude that the rape was againſt the form of the ſtatute.

Ch. X. § 10. *Appeal.*

2 Hawk. ch. 23. ſ. 58. 62, 3. 67. 70.

The trial muſt be in the county where the fact was committed: and by ſtat. 13 Ric. 2. ſt. 2. c. 1. no charter of pardon ſhall be allowed for rape, unleſs it be therein ſpecified.

§ 11. *Trial.*

Ib. ſ. 71. *Pardon.*

CHAP. XI.

OF FORCIBLE, OR FRAUDULENT ABDUCTION, MARRIAGE, OR DEFILEMENT.

1. *Of forcible Abduction, Marriage, or Defilement of Women of Subſtance.* - §1.

Stat. 3 H. 7. c. 2. makes the Miſdoers, Procurers, and Receivers of the Woman principal Felons. *ib.*

Stat. 39 Eliz. c. 9. ouſts Clergy from *Principals and Acceſſaries before.* ib.

Who ſhall be deemed ſuch within the Stat. of Eliz. §2.

Semble, Receivers of the Woman not ouſted of Clergy. *ib.*

Trial, where. - - - - §3.

Indictment and Proof. - - - §4.

Muſt ſhew what Subſtance the Woman had. *ib.*

That the *taking* was againſt her Will, and for Lucre. *ib.*

That ſhe was married or defiled. *ib.*

No *Appeal* lies. *ib.*

No Defence, that the Huſband did not authoriſe the original Force; or that the Woman conſented to it, if ſhe were afterwards forced; or that after a forcible taking ſhe conſented to Marriage or Defilement. *ib.*

Witneſs, the Party injured. - - §5.

2. *Of fraudulently alluring away Female Children, under the Age of Sixteen, from their Parents, &c.* - - - - §6.

Stat. 4 & 5 Ph. & Mary, c. 8. prohibits generally the taking away of any Woman Child, unmarried, under the Age of 16, from the Poſſeſſion, &c. and againſt the Will of the Father or deputed Guardian; though the Title and Preamble be reſtricted to Maidens Inheritors, &c. and to taking by Sleight or Force. *ib.*

Perſons above the Age of 14, ſo taking any Woman Child, puniſhable by two Years Impriſonment or Fine. *ib.*

Any Perſons ſo taking away ſuch Woman Child and deflowering her, or againſt the Will of the Father or Mother, by ſecret Letters, &c. contracting Matrimony with her, ſhall be impriſoned 5 Years or pay Fine, &c. - - - §6.

Trial, before whom. *ib.*

A Baſtard is within the Act. - - §7.

Qu. as to Aſſent of the Father once given, but afterwards retracted. *ib.*

Object of the Act to prevent Seduction, or ſecret Marriage, to the Diſparagement of the Party. *ib.*

Qu. as to Conſent of Perſons having a temporary and ſpecial Cuſtody. *ib.*

What is a ſufficient Cuſtody. *ib.*

B. R. has a general Juriſdiction to inquire either at common Law or on the Stat. - - §8.

3. *Of forcible or fraudulent Procurement of Marriage.* - - - - - §9.

At common Law, how far indictable. *ib.*

Semble, unlawful Means muſt be uſed, ſuch as Violence, Deceit, Conſpiracy, or other corrupt Practices. *ib.*

Otherwiſe bare Act of Marriage without Conſent of Parents, &c. no Offence. *ib.*

But Indictment lies generally in Caſes coming within the prohibitory Clauſe of the Stat. 4 & 5 Ph. & M. c. 8. *ib.*

The Puniſhment by Impriſonment for Raviſhment of Ward, by Stat. 13 Ed. 1. c. 35. obſolete §10.

But Indictment at common Law for Conſpiracy to entice one to leave her Father, and live in Fornication, ſuſtained by Proof that ſhe was carried off ſecretly by her own Conſent after Solicitation to defile. *ib.*

Conſpiracy to marry Paupers. - - - §11.

There muſt be Force, Threat, Fraud, or other corrupt Practice; otherwiſe no Miſdemeanor. *ib.* No Offence if the Parties voluntarily conſent, though Money be given by Way of Inducement. *ib.*

Indictment how to be framed. *ib.*

Ch. XI. § 1.

1. *Of the forcible Abduction, Marriage, or Defilement of Women of Subſtance.*

§ 1. *Forcible abduction of women, &c.* 3 Hen. 7. c. 2.

THE ſtat. 3 H. 7. c. 2. reciting that "where women, "as well maidens as widows and wives, having ſub- "ſtances, ſome in goods moveable, and ſome in lands and "tenements, and ſome being heirs apparent unto their an- "ceſtors, for the lucre of ſuch ſubſtances be oftentimes "taken by miſdoers, contrary to their will, and after mar- "ried to ſuch miſdoers, or to other by their aſſent, or de- "filed," enacts, "that whatever perſon or perſons from "henceforth taketh any woman, ſo againſt her will, unlaw- "fully, that is to ſay, maid, widow, or wife; ſuch taking "procuring and abetting to the ſame, and alſo receiving "wittingly the ſame woman ſo taken againſt her will, and "knowing the ſame, be felony: and that ſuch miſdoers, "takers, and procurators to the ſame, and receitors, know- "ing the ſaid offence in form aforeſaid, be adjudged prin- "cipal felons: Provided that this act extend not to any "perſon taking any woman, only claiming her as his ward "or bond-woman."

39 Eliz. c. 9. *aufts clergy.*

The ſtat. 39 Eliz. c. 9. reciting the offences deſcribed in the recital of the laſt-mentioned ſtatute, and that thoſe offences had been made felony by that ſtatute, proceeds to enact, "that all and every ſuch perſon and perſons as ſhall be "convicted or attainted of any offence made felony by the "ſaid act, or who ſhall be indicted and arraigned of any "ſuch offence, and ſtand mute, or make no direct anſwer, "or ſhall challenge peremptorily above twenty, ſhall in every "ſuch caſe ſuffer death without benefit of clergy." "Pro- "vided (ſ. 2.) that nothing therein contained ſhall extend "to take away the benefit of clergy, but only from ſuch "perſon and perſons as ſhall be principals, or procurers, or "acceſſaries before."

§ 2. *Principals and acceſſaries.* 1 Hale, 661. 3 Inſt 61, 2. 1 Hawk. ch. 42. ſ. 7, 8. 2 Hawk. ch. 29. ſ. 12. Sum. 115. 12 Co. 20. 100.

Not only the miſdoers themſelves, but the procurers and any who wittingly receive the woman ſo taken away are made principals by this ſtatute. But he who only receives the offender himſelf knowingly is only an acceſſary after by the rule of the common law. And though the ſtatute of Elizabeth has taken away clergy from all who ſhall be con- victed of any offence made felony by the ſtat. of Hen. 7., it ſeems doubtful, whether thoſe who receive the woman after the fact done are ouſted of clergy. Lord Hale indeed ſays, that being made principal felons by the one law, they are ouſted of clergy by the other; but he immediately adds a quære, whether they were intended to be ouſted. And by the proviſo at the end of the ſtat. of Eliz. it ſeems to be the intention of the legiſlature to ſave them from being ouſted of clergy. For though the ſtat. of Hen. 7. makes ſuch re- ceivers principals; yet the ſtat. of Eliz. diſtinguiſhing between principals and acceſſaries before, (all of whom were made principals by the former law,) muſt be taken to mean ſuch principals as were deemed ſuch at common law. And the receiver of the woman comes more properly under the notion of an acceſſary after the fact; and as ſuch would be plainly entitled to clergy. Thoſe who are only privy to the marri- age, and not to the forcible taking away, nor conſenting thereto; (which muſt at leaſt be underſtood where the woman is not under any conſtraint at the time of the marriage;) are not within the ſtatute.

Ch. XI. § 2. *Principals and acceſſaries.*

2 MS. Sum. 333. a.

Fulwood's caſe, Cro. Car. 489. 493.

Vide poſt. 454.

§ 3. *Trial—county.* Fulwood's caſe, Cro. Car. 485, 8. 1 Hale, 660. 1 Hawk. ch. 42. ſ. 9. Hob. 182. 2 MS. Sum. 332.

If a woman be forcibly taken in one county, and after- wards go voluntarily into another county, and be there married or defiled with her own conſent, the fact is not in- dictable in either: for the offence, which conſiſts in the forcible taking and ſubſequent marriage or defilement, is not complete in either. But if the force continued upon her at all in the other county into which ſhe was ſo taken, the offender may be indicted there; although the actual marriage or defilement afterwards took place with her own conſent.

§ 4. *Indictment and proof.* 1 Hawk. ch. 42. ſ. 3, 4. 3 Inſt. 61. 1 Hale, 660. 1 And. 115. Hob. 182. Fulwood's caſe, Cro Car. 482, 5. 1 Ventr. 244. 12 Co. 20. 100. Hutt. 2. 4 Blac. Com. 208. 2 MS. Sum. 332.

The indictment muſt expreſsly ſet forth that the woman taken had lands, or tenements, or goods, or was heir appa- rent; and that the taking was againſt her will, and for lucre; and that ſhe was either married to the miſdoer or to ſome other by his aſſent; or that ſhe was defiled, i. e. car- nally known: and the proof muſt agree therewith. But it need not allege that the taking was with intent to marry or defile her; for neither the words of the ſtatute require ſuch intent, nor does the want of it leſſen the injury: though Lord Hale obſerves that it is uſual and ſafeſt to add ſuch an averment.

Ch. XI. § 4. *Indictment and proof*

No appeal lies on this ſtatute (*a*).

It is no excuſe (*b*) that the party marrying was not the author of the original force, or that the woman was firſt taken with her own conſent, if ſhe afterwards refuſed to continue with the offender, and were forced againſt her will; for from that time ſhe may properly be ſaid to be taken againſt her will. As little material is it, whether a woman ſo taken were at laſt married or defiled with or without her own conſent, if ſhe were under the force at the time of the taking; for it is equally within the words and meaning of the ſtatute, which was to protect the weaker ſex from force and fraud. And though if the marriage be againſt her will it is voidable, yet a marriage de facto is within the ſtatute.

(*a*) Hutt. 3. (*b*) 1 Hawk. ch. 42. ſ. 5, 6. 1 Hale, 660. 4 Blac. Com. 208. 2 MS. Sum. 332. a. Cro. Car 485. 495. Haagen Swendſen's caſe, 5 St Tr. 450. 464. 473. 4.

§ 5. *Witneſs.*

A woman ſo taken away and married may without doubt be a witneſs againſt the offender, if the force were continuing upon her till the marriage; becauſe then he is no huſband de jure; and ſhe herſelf may prove ſuch continuing force: accordingly it was ſo done in Fullwood's caſe, M. 13 Car. 1., in Brown's caſe, Tr. 25 Car. 2., and in Haagen Swendſen's caſe, M. 1 Ann. Upon the ſecond of theſe Lord Hale obſerves, that there were other witneſſes who proved the taking by force, though none but the child herſelf proved the marriage to be forcible. And moſt, he adds, were of opinion that if ſhe had lived with him any conſiderable time, and aſſented to the marriage by any free cohabitation, ſhe could not have been admitted as a witneſs. This reaſoning ſeems to imply, that if the woman after her forcible abduction give her conſent to the marriage, her teſtimony could not be received: yet Mr. Juſtice Blackſtone on a review of the ſeveral authorities thinks that it ſhould even be allowed where the marriage is good by the previous conſent of the inveigled woman after her forcible abduction; adverting to the abſurdity of otherwiſe permitting the offender thus to take advantage of his own wrong. And ſurely there can be no doubt of her competency where the marriage was againſt her will at the time, notwithſtanding her ſubſequent aſſent; for if ſhe were a competent witneſs at any time after the crime committed, I know not by what rule of law her ſubſequent aſſent to the crime can incapacitate her; much leſs how by any lapſe of time ſhe can be incapacitated: however theſe circumſtances may and ought to weigh with the jury who

1 Hale, 301. 660, 1. Fullwood's caſe, Cro Car. 488. Brown's caſe, 2 Ventr. 243. Haagen Swendſen's caſe, 5 St. Tr. 456.

4 Blac. Com. 209.

who are to decide upon the credit of her teſtimony. But further, I conceive it to be now ſettled that in all caſes of perſonal injuries committed by the huſband or wife againſt each other, the injured party is an admiſſible witneſs againſt the other.

Ch. XI. § 5. *Forcible abduction of women of ſubſtance.*

Jagger's caſe, Mich. 1756, MS Buller J. *vide* tit. Witneſs.

2. *Of fraudulently alluring away female Children under the Age of ſixteen from their Parents, &c.*

§ 6. *Alluring away women.* 4 & 5 Ph. & M. c. 8.

The ſtat. 4 & 5 Ph. & M. c. 8. intitled, "An act for the "puniſhment of ſuch as ſhall take away maidens that be "inheritors, being within the age of ſixteen years, or that "marry them without the conſent of their parents;" reciting, that "maidens and women children, as well ſuch as "be heirs apparent to their anceſtors, as others, having left "unto them by their father or other anceſtor and friends "lands, &c. or other great ſubſtances in goods and chattels, "for their advancement in marriage, be oftentimes unawares "to their friends and kinsfolks by flattery, trifling gifts, and "fair promiſes of unthrifty and light perſons, and thereto "by the intreaty of perſons of lewd demeanor, and others "that for rewards buy and ſell the ſaid maidens and children, ſecretly allured and won to contract matrimony "with the ſaid unthrifty and light perſons, and thereupon "either with ſleight or force oftentimes be taken and conveyed away from their ſaid parents, friends, or kinsfolks, "which for lack of wholeſome laws to the redreſs thereof "remains a great and common miſchief," enacts (ſ. 2.) "that it ſhall not be lawful to any perſon or perſons to take "or convey away, or cauſe to be taken or conveyed away "*any maid or woman child unmarried, being under the age of* "16 *years*, out of or from the poſſeſſion cuſtody or governance, and againſt the will, of the father of ſuch maid or "woman child, or of ſuch perſon or perſons to whom the "father by his laſt will and teſtament or by any other act in "his lifetime hath or ſhall appoint, &c. the order keeping "education or governance of ſuch maid or woman child; "except ſuch taking and conveying away as ſhall be done "by or for ſuch perſon or perſons as without fraud or covin "be or then ſhall be the maſter or miſtreſs, or the guardian "in focage, &c. of ſuch maid or woman child."

By ſ. 3. "If any perſon or perſons above the age of 14 "years ſhall unlawfully take or convey, or cauſe to be taken

Ch. XI. § 6. *Taking or fraudulently alluring away of female infants.*

" or conveyed any maid or woman child unmarried, being " within the age of 16 years, out of or from the poſſeſſion " and againſt the will of the father or mother (*a*) of ſuch " child, or out of or from the poſſeſſion and againſt the will " of ſuch perſon or perſons as then ſhall happen to have, by " any lawful ways or means, the order keeping education " or governance of any ſuch maiden or woman child; every " ſuch perſon and perſons ſo offending, being thereof law- " fully attainted or convicted, (other than ſuch of whom " ſuch perſon taken away ſhall hold any lands or tenements " by knight ſervice,) ſhall ſuffer impriſonment for two years, " or elſe ſhall pay ſuch fine as ſhall be aſſeſſed by the court " of Starchamber."

(*a*) i. e. moth r after the death of the father, according to the ſubſequent clauſe 3 Co 39. Ratcliffe's caſe. Poſt. 458.

By ſ. 4. " If any perſon or perſons ſhall ſo take or cauſe " to be taken away as is aforeſaid, and deflower any ſuch " maid or woman child as aforeſaid; or ſhall againſt the " will or unknowing of or to the father, if alive, or againſt " the will or unknowing of the mother of any ſuch maid or " woman child (having the cuſtody or governance of ſuch " child if the father be dead) by ſecret letters, meſſages, or " otherwiſe, contract matrimony with any ſuch maiden or " woman child; (except ſuch contracts of matrimony as " ſhall be made by the conſent of ſuch perſon or perſons as " by the title of wardſhip (*a*) ſhall then have or be entitled " to have the marriage of ſuch maid or woman child;) every " ſuch perſon or perſons ſo offending, being thereof lawfully " convicted as aforeſaid, ſhall ſuffer impriſonment for five " years, or elſe ſhall pay ſuch fine as ſhall be aſſeſſed by the " Starchamber, a moiety to the crown, and the other moiety " to the parties grieved."

By ſ. 5. juſtices of aſſize, by inquiſition or indictment, may hear and determine the ſaid offences. By ſ. 6. if any woman above 12 and under 16 years of age conſent to ſuch contract of marriage, contrary to the form of the ſtatute, the next of kin ſhall inherit her lands, &c. during her life.

Vide 4 Blac. Com. 209, 210. Poſt. ch. 13.

It is firſt to be obſerved, that the ſtat. 26 Geo. 2. c. 33. abſolutely avoids all ſuch marriages as are alluded to in the above-recited act; and therefore ſome part of the temptation

(*a*) By ſtat. 12 Car. 2. c. 24. ſ. 1. ſuch wardſhips are aboliſhed. And by ſ. 8. the fathers of minors, or thoſe whom they ſhall appoint by deed or will, ſhall have the cuſtody and guardianſhip of ſuch minors, and may maintain actions of raviſhment of ward or treſpaſs againſt thoſe who wrongfully take or detain them.

to

Ch. XI. § 6. *Taking or fraudulently alluring away of female infants.*

to ſuch offences is taken away: but this I apprehend has made no difference in the offences themſelves, which are oftentimes attended with circumſtances and conſequences peculiarly aggravating.

§ 7. *Conſtruction.* R. v. Cornforth, 2 Stra. 1162. & MS. R. v. Sweeting, 1766. S. P. MS.

It has been determined, that a baſtard under the care of her putative father is within the act of Philip and Mary; and it has been ſaid, that there muſt be a continued refuſal of the father, &c.; for if he once agreed, though he afterwards diſſented, yet it is an aſſent within this ſtatute (*a*). But this does not appear to have been the point in judgment, and ſeems to want further confirmation. However in Hicks v. Gore, where the mother who was guardian had placed her daughter under 16 years of age with Lady Gore for ſafe cuſtody, who cauſed her own ſon to marry the girl without having obtained her mother's conſent; Lord C. J. Herbert obſerved, that the ſtatute was made to prevent children from being ſeduced from their parents or guardians by flattering or enticing words, promiſes, or gifts, and married in a ſecret way to their diſparagement; but that no ſuch thing appeared in that caſe, the marriage being openly ſolemnized in church in a canonical hour, in the preſence of many perſons: and the plaintiff was nonſuited. In that caſe it is to be noted, that the mother had placed the child under the care of Lady Gore, by whoſe procurance the marriage was effected; but nothing is ſtated in the report to ſhew that the Chief Juſtice laid any ſtreſs on this circumſtance. And in truth it deſerves good conſideration before it is decided that an offender acting in colluſion with one who has the temporary cuſtody of another's child, for a ſpecial purpoſe, and knowing that the parent or proper guardian did not conſent, is yet not within the ſtatute. For then every ſchool-miſtreſs might diſpoſe in the ſame manner of the children committed to her care: though ſuch delegation of the cuſtody of a child for a particular purpoſe be no delegation of the power of diſpoſing of her in marriage; but the governance of the child in that reſpect may ſtill be ſaid to remain in the parent. And if the principal offender in ſuch caſe were within the act, it muſt follow that all who combine with him for the ſame purpoſe are equally guilty. In Ratcliffe's caſe it was holden, that the mother, notwithſtanding a ſubſequent marriage, retained

(*a*) Calthrop v. Axtel, 3 Mod. 169. Hicks v. Gore, 3 Mod. 84.

Ratcliffe's caſe, 3 Co. 39. b.

the

Ch. XI. § 7. *Taking or fraudulently alluring away female infants.*

the guardianſhip of her daughter by her former huſband; and that the aſſent of her ſecond huſband to the taking and marrying of the ward by another was not material; and that the mother had in law the cuſtody of her child within the ſtatute at the time of the contract of marriage, although the latter had departed from the houſe ſix hours before. And there too it was found that ſuch departure of the daughter was voluntary and of her own accord. It was alſo ruled there, that the third branch (4th clauſe) of the act extends only to the cuſtody of the father or to that of the mother, where the father has not diſpoſed of the cuſtody of the child to others.

§ 8. *Juriſdiction.* Moor's caſe, 2 Mod. 128. *Vide* Cro. Car. 465. 4 Mod. 145.

It is certain that an information will lie in B. R. upon this ſtatute; and that the court may fine as well as impriſon; although the ſtatute expreſsly gives this juriſdiction to the Starchamber; there being no negative words to ouſt the juriſdiction of the ſuperior criminal court; and as it is ſaid in Moor's caſe, this being an offence at common law, and as ſuch puniſhable by fine and impriſonment. How far this latter obſervation is well founded I proceed now to inquire.

3. *Of forcible or fraudulent procurement of marriage.*

§ 9. *At common law.* 3 MS. Sum. 53. *Vide* R. v. Marriot, 4 Mod. 145.

Beſides the offences which fall under the abovementioned acts the common law has in ſome reſpects at leaſt guarded againſt malpractices of the like nature. It has been ſaid indeed upon good conſideration, that if a man marry a woman under age without the conſent of her father or guardian, that alone will not render it indictable at common law; for that marriage being lawful in itſelf, though reſtraints may be laid on it by poſitive laws, yet where no ſuch law is enacted or tranſgreſſed, the bare act of ſuch a marriage cannot be puniſhed as a crime, however grievous it may be to a parent: and I cannot find any caſe where an indictment has been maintained for ſuch an act without other circumſtances. There are, it is true, dicta to be found in the books, which may ſeem to countenance ſuch an opinion; but the caſes, when examined, do not warrant it to ſo general an extent. In Twiſleton's caſe, upon which moſt ſtreſs has been laid, the information, which was againſt ſeveral, charged not only a conſpiracy, but a deceitful and riotous taking away; though the latter did not appear to have been proved:

Moor's caſe, 2 Mod. 130. R. v. Blacket and others, 7 Mod. 39. R. v. Twiſleton and others, 1 Lev. 257. 1 Sid. 387. 2 Keb. 432, 8. R. v Thorp and others, Carth. 384. 5 Mod. 221. Com. 27. 12 Mod. 516.

and

Ch. XI. § 9. *By unlawful means at common law.*

and after objection taken, and before final judgment, the defendants were bailed by conſent. But however this may be, if children be taken from their parents or guardians, or others entruſted with the care of them, by any ſiniſter means; either by violence, deceit, conſpiracy, or any corrupt or improper practices, as by intoxication, for the purpoſe of marrying them; though the parties themſelves may be conſenting to the marriage; ſuch criminal means will render the act an offence at common law: for marriage ought to be free and voluntary, without any compulſive or ſiniſter procurement. It is alſo agreed (*a*) that an indictment lies by the rule of the common law upon the general prohibitory clauſe (ſ. 2.) of the abovementioned ſtatute of Ph. & Mary, which makes it unlawful to take or convey away any woman child unmarried, being under the age of 16 years, out of the poſſeſſion, cuſtody, or governance, and againſt the will of her father or deputed guardian. For where a thing is prohibited to be done by ſtatute, and a penalty annexed to it by a ſeparate ſubſtantive clauſe; the proſecutor is not bound to purſue the latter, but may indict on the prior general clauſe as for a miſdemeanor. And the prohibition being general, the want of a corrupt motive is no anſwer to the criminal charge.

R. v. Pierſon and others, Andr. 310. R. v. Story, 3 Keb. 101. R. v. Ld. Oſſulſton and others, 2 Stra 1107. R. v. Ward, Blac. R. 386. R. v. Furas, B. R. temp. W. & M. MS. Tracy. (*a*) Moor's caſe, 2 Moc. 130.

R. v. Harris, 4 Term R. 202.

R. v. Sainſbury, 4 Term R. 457.

§ 10. 2 Inſt. 440. 2 P. Wms. 110

By the ancient law the marriage of a ward without the conſent of the guardian was a raviſhment of the ward. And by the ſtat. of Weſtm. 2. (13 Ed. 1. c. 35.), "concerning children male or female (whoſe marriage belongeth to another) taken and carried away; if the raviſher have no right in the marriage, though after he reſtore the child unmarried, or elſe pay for the marriage, he ſhall nevertheleſs be puniſhed for his offence by two years impriſonment; and if he do not reſtore or do marry the child after the years of conſent, and be not able to ſatisfy for the marriage, he ſhall abjure the realm, or have perpetual impriſonment; and thereupon the plaintiff ſhall have ſuch a writ" as is therein ſet forth. But the ſtat. 12 Car. 2. c. 24. which aboliſhed wardſhips, ſeems to have ſuperſeded the above proviſion; and the 8th ſection, which enables fathers to diſpoſe of the guardianſhip of their children under age, though it give an action of raviſhment of ward or treſpaſs againſt ſuch as wrongfully take away or

detain

Ch. XI. § 10. *By unlawful means at common law.*

detain ſuch children, for the recovery of them, and for damages for their uſe and benefit; yet is ſilent as to any corporal puniſhment of the raviſhers.

R. v. Ld. Grey and others, trial at bar, Mich. 34 Car. 2. 3 St. Tr. 519. *Conſpiracy to entice a young woman under age to leave her father's houſe and live in fornication with one of the defendants, and concerting meaſures with her own approbation to carry her off and conceal her for that purpoſe.*

In the caſe of the Lord Grey and others, the information, which was at common law, charged that they unlawfully and wickedly, &c. by unlawful and impure ways and means, conſpiring, practiſing, and intending the ruin and deſtruction of the lady Henrietta Berkeley, then a virgin unmarried within the age of 18 years, one of the daughters of George Earl of Berkeley, (the ſaid lady H. B. then and there being under the cuſtody, government, and education of the ſaid Earl,) unlawfully, to perfect and bring to effect their wicked intentions aforeſaid, the ſaid lady H. B. to deſert the ſaid Earl her father, and to commit whoredom, fornication, and adultery, and in whoredom, &c. to live with the ſaid Lord Grey, then and before being the huſband of Lady Mary, another daughter of the ſaid Earl and ſiſter of the ſaid Lady H., againſt all laws divine and human, impiouſly, wickedly, impurely, and ſcandalouſly to live and cohabit, did tempt, invite, and ſolicit: and that the defendants, with force and arms, &c. unlawfully, unjuſtly, and without the leave and againſt the will of the ſaid Earl B. in proſecution of ſuch conſpiracy the ſaid Lady H. B. then and there, about 12 at night, &c. out of the dwelling-houſe of the ſaid Earl, and out of his cuſtody and government did take, carry, and lead away: And the ſaid Lady H. B. from, &c. until, &c. in divers ſecret places with the ſaid Lord Grey unlawfully, &c. to live, cohabit, and remain, did procure and cauſe; to the ruin of the ſaid Lady H. B. and to the evil example, &c. There was no proof of any force at the trial; for the lady was deſirous to leave her father's houſe; and all the meaſures that were taken for her departure, and afterwards for her concealment, were plainly concerted with herſelf. The other perſons concerned beſides Lord Grey were his own ſervants, or perſons acting by his command and under his control. Neither was there proof of any artifice uſed to prevail on her to depart from her father's houſe; but only, as Lord C. J. Pemberton expreſſed himſelf to the jury, a ſolicitation and enticement of her to unlawful luſt by Lord Grey. Indeed ſhe herſelf, who was examined as a witneſs for the defendants, diſclaimed all other motives than her own

Ch. XI. § 10. *By unlawful means at common law.*

own free will in the tranſaction. None of the judges expreſſed any doubt of the law; and the jury, with the approbation of the court, found all the defendants guilty but one, againſt whom there was no evidence. But no judgment was ever given, as the matter was afterwards compromiſed.

§ 11. *Conſpiracy to marry paupers.* 3 MS. Sum. 56. R. v. Tarrant, 4 Burr. 2106. R. v. Herbert and others, Mic. 32 G. 2. MS. Dunning. R. v. Compton and others, Cald. 246.

Of a ſimilar nature is the offence of conſpiring or contriving by ſiniſter means to marry a pauper of one pariſh to a ſettled inhabitant of another, in order to bring a charge upon it. Informations for conſpiracies of this kind were granted in the caſes of the King v. Tarrant, and the King v. Herbert and others. Though where the parties are in low circumſtances an indictment is preferable. Conſidering the offence as a proſtitution of the ſacred rites of marriage for corrupt and mercenary purpoſes, and that by artful and ſiniſter means perſons are ſeduced into a connection for life without any inclination of their own, and contrary to that freedom of choice which is peculiarly required in forming ſo cloſe an union, and on which the happineſs of them both ſo entirely depends; and this for the ſake of ſome gain or ſaving to others who bring about ſuch a marriage; in this light it ſeems a fit ground for criminal cognizance; not only as being a great oppreſſion upon the parties themſelves more immediately intereſted, but as an offence againſt ſociety in general; being an abuſe of that inſtitution by which ſociety is beſt continued, and legal deſcents preſerved, and a perverſion of the purpoſes for which it was ordained. Yet where it appeared upon an indictment for this offence againſt pariſh officers that a man of one pariſh had gotten a woman with child belonging to another, and the defendants had agreed with the man, (who was of the age of 29,) with the approbation of his father, to give him two guineas if he would marry the woman, which he afterwards did on that condition, and received the money from the defendants immediately after the marriage: and both he and the woman ſwore at the trial that they were willing to marry at the time; Buller J. directed an acquittal, notwithſtanding the proof of the money having been given to procure ſuch conſent; and this after the putative father had been taken up under a magiſtrate's warrant, and was in cuſtody of the overſeers. For he held it neceſſary in ſupport of ſuch an indictment to ſhew that

R. v. Fowler and others, Taunton, Sp. Aſſ. 1788, cor. Buller J. MS.

Ch. XI. § 11. *Conſpiracy to marry paupers.*

that the defendants had made uſe of ſome violence, threat, or contrivance, or uſed ſome ſiniſter means to procure the marriage, without the voluntary conſent or inclination of the parties themſelves. But here there was an expreſs conſent ſhewn by both parties to be married. That the act of marriage being in itſelf lawful, a conſpiracy to procure it could only amount to a crime by the practice of ſome undue means: and this he ſaid had been ſeveral times ruled by

Cald. 247. different judges. The circumſtance of the woman being with child by the perſon to whom ſhe was afterwards married has always weighed with the court in refuſing to interfere by way of information in theſe caſes. But where the indict-

Indictment. Rex v. Parkhouſe and Fremlet, Exeter, Sum. Aſſ. 1792, cor. Buller J. MS. ment ſtated the marriage to have been procured by threats and menaces againſt the peace, &c., it was holden ſufficient, without averring it in terms to have been againſt the will or conſent of the parties; though that muſt be proved.

R. v. Edwards and others, 8 Mod. 320. Upon an indictment for conſpiring together and giving the huſband money to marry a poor helpleſs woman who was an *inhabitant* of B. in order to ſettle her in the pariſh of A., where the huſband was ſettled, judgment was arreſted, becauſe it was not averred that ſhe was laſt legally ſettled in B.: and yet it ſeems to be perfectly immaterial where the woman's ſettlement was if it were not in A.; provided that fact

Vide Crown Circ. Aſſiſt. 182. diſtinctly appeared. However it is uſual to aver the ſettlements of the parties in their reſpective pariſhes; and alſo that the woman was chargeable to her own pariſh at the time: though this latter has never been adjudged to be neceſſary; nor does it ſeem to be required according to the general rules which govern the offence of conſpiracy, for which an indictment lies wherever either the conſpiracy is entered into for a corrupt or illegal purpoſe, or for the uſe of unlawful means to effect a legal purpoſe, although ſuch purpoſe be not effected. And it cannot be denied that not only the purpoſe is unlawful whether the woman were chargeable or not at the time, (being to diſcharge one pariſh of a liability to bear a burthen, and impoſe ſuch liability on another,) but the means propoſed, if of the kind before deſcribed, are alſo unlawful. Offenders of this deſcription are puniſhable as in other caſes of miſdemeanor.

CHAP. XII.

OF POLYGAMY OR BIGAMY.

Nature of Offence, and how puniſhable. - § 1.
Originally of eccleſiaſtical Cognizance. *ib.*
Clergy taken away by Stat. 4 Ed. 1. c. 5. but reſtored by Stat. 1 Ed. 6. c. 12. ſ. 16. *ib.* Made Felony by Stat. 1 Jac. 1. c. 11. if any marry, the former Conſort living. *ib.*
By Stat. 18 Eliz. c. 7. Offender may be burned in the Hand and impriſoned; or in lieu of burning may be fined or whipped, by Stat. 19 Geo. 3. c. 74. *ib.*; or in lieu of burning and whipping may be tranſported for 7 Years by Stat. 35 Geo. 3. c. 67. *ib.* Clergy ouſted on returning before the Period from Tranſportation. *ib.*
What Marriages within the Stat. 1 *Jac. c.* 11. § 2.
Qu. if the ſecond Marriage be abroad. *ib.*
Exceptions. - - - - § 3.
1. Abſence beyond Sea for 7 Years, whether with or without Notice. *ib.*
2. Abſence within the Kingdom for 7 Years, without Knowledge. - - - § 4.
3 & 4. Sentences of Divorce, of what Sort. § 5.
5. Being within Age. - - § 6.
Trial. - - - - - § 7.
May be in County where apprehended, (i. e. where impriſoned,) by ſtat. 1 Jac. 1. c. 11. But this only accumulative: It may alſo be in County where ſecond Marriage had. *ib.* Offenders, returning from Tranſportation before their Term expired, triable where taken or where convicted. *ib.*
Indictment, Form of. - - - § 8.
Witneſs. - - - - § 9.
The ſecond Conſort, after Proof of firſt Marriage. *ib.*
Evidence of Marriage. - - - § 10.
Qu. by a Roman Catholic Prieſt here. *ib.*
Qu. whether Cohabitation and Acknowledgment as Man and Wife ſufficient per ſe. *ib.* Certainly ſo when

when backed by confirmatory Evidence of authentic Documents. *ib.*

Regiſter of Marriage required by the Marriage Act 26 G. 2. c. 33. ſ. 14. - - § 11.

Not neceſſary to be proved by ſubſcribing Witneſs; but Copy of the Regiſter ſufficient, or Proof by one preſent at the Ceremony. *ib.*

Polygamy, or Bigamy.

§ 1. *Nature of offence.* 3 Inſt. 88. 4 Blac. Com. 163. Cro. Eliz. 94. 2 Inſt. 273.

POLYGAMY, or as it is more frequently, though improperly, called Bigamy, (which only means having two wives in ſucceſſion,) conſiſts in having a plurality of wives at the ſame time, and was originally conſidered as of eccleſiaſtical cognizance only: though ſo early as the ſtat. 4 Ed. 1. c. 5. de Bigamis, it was treated as a capital offence, and ouſted of clergy by that ſtatute. The benefit of clergy was however reſtored by the ſtat. 1 Ed. 6. c. 12. ſ. 16. And the crime itſelf being as it ſeems left of doubtful temporal cognizance, the ſtat. 1 Jac. 1. c. 11. enacts, "that if any "perſon or perſons within England and Wales, being mar- "ried, or who hereafter ſhall marry, do marry any perſon or "perſons, the former huſband or wife being alive; every "ſuch offence ſhall be felony; and the perſon and perſons "ſo offending ſhall ſuffer death as in caſes of felony." Clergy however is not thereby taken away; but by the ſtat. 18 Eliz. c. 7. ſ. 2, 3. the offender beſides being burned in the hand may be impriſoned not exceeding one year: and by ſtat. 19 Geo. 3. c. 74. ſ. 3. a moderate fine or whipping, in the manner therein ſpecified, may be ſubſtituted in lieu of burning; but not to abridge the power of the court to impriſon under any former act. And now by the ſtat. 35 Geo. 3. c. 67. "If any perſon or perſons within Eng- "land and Wales being married do at any time from and "after the paſſing of this act marry any perſon or perſons, "the former huſband or wife being alive, and ſhall be in "due manner convicted under the ſaid act (of Jac. 1.) they "ſhall be ſubject to the ſame puniſhments, pains, and penal- "ties as by the laws now in force perſons are ſubject to "who are convicted of grand or petit larceny." This by the ſtat. 4 Geo. 1. c. 11. may be tranſportation for ſeven years in lieu of burning or whipping. But though the ſtat. 35 Geo. 3. merely re-enacts the enacting part of the ſtat. of

2 (vulgo 1) Jac. 1. c. 11. *Felony.*

Clergy, puniſhment, burning, impriſonment.

Fine or whipping.

Tranſportation for 7 years. 35 G. 3. c. 67.

4 G. 1. c. 11. & 6 G. 2. c. 23.

James, yet it alſo virtually includes all the exceptions contained therein, and after mentioned; for the title of the act is, "for rendering more effectual the ſtat. 1 Jac. 1.;" and it begins by reciting that "whereas the *puniſhment* of perſons "convicted of felony under the ſtat. 1 Jac. 1. has not "proved effectual to deter wicked perſons from the *offence* "*therein deſcribed*, be it enacted," &c.; and it afterwards attaches the increaſed puniſhment upon ſuch as are convicted of the offence ſpecified *under the ſaid act*.

Ch. XII. § 1. *Nature of offence.*

By ſ. 2. "If any perſon ordered to be tranſported by this "act ſhall be afterwards at large within Great Britain with- "out ſome lawful cauſe before the expiration of the term, "&c., every ſuch perſon being thereof lawfully convicted "ſhall be guilty of felony, and ſuffer death without benefit "of clergy."

Returning from tranſportation.

By ſ. 4. of 1 Jac. 1. c. 11. no attainder for any felony by that act ſhall work corruption of blood, loſs of dower, or diſheriſon of heirs.

§ 2. *What marriage is an offence within the ſtat. 1 Jac. 1. c. 11.* 1 Hale, 692. 1 Hawk. ch. 43. ſ. 7. Kel. 79. 80. 1 Sid. 171.

In regard to the enacting part of the ſtat. of James above ſet forth, it ſeems that where the firſt marriage was abroad and the ſecond in England or Wales, the offender is indictable; but if the firſt marriage were in England and the ſecond abroad, though in Ireland, the general opinion ſeems to be that it is not within the act: for the ſecond marriage, which alone conſtitutes the offence, is a fact done within another juriſdiction; and though inquirable here for ſome purpoſes like all tranſitory acts, is not cognizable as a crime by the rule of the common law. Both Kelyng and Hawkins however ſubjoin a quære to this opinion; the latter founding it upon another part of the ſtatute which directs the trial, &c. of ſuch offenders to be in the county where they ſhall be apprehended, *as if the offence had been committed in ſuch county*. Yet I cannot think that this proviſion which is to be found in other ſtatutes is ſufficient to take this caſe out of the general rule. The queſtion muſt ſtill be whether, without a poſitive enactment for that purpoſe, any act be cognizable as an offence againſt the law of England which was committed out of the juriſdiction of that law. Beſides that the very words of the enacting clauſe in grammatical conſtruction confine the operation of it to perſons who, being married, ſhall *within England and Wales* marry any other.

Vide Black Act, and 10 & 11 W. 3. c. 25. for trial in any county here of murder, &c. committed in Newfoundland.

Ch. XII. § 2. *What marriage is an offence within the ſtatute* 1 *Jac* 1 *c.* 11.

A. married B. in Holland, and afterwards in the ſame country married C. in B.'s lifetime; B. died, and then, living C., A. married D. in England. This was holden not to be within the act; becauſe the marriage with C. was ſimply void. But if B. had been living it would have been felony to have married D. in England.

Lady Madiſon's caſe, O. B. 1648. 1 Hale, 693. 3 Inſt. 88.

But though the firſt marriage be voidable, as by reaſon of conſanguinity or the like; yet being a marriage in judgment of law and ſubſiſting in fact at the time, till it be avoided a ſecond marriage would be within the act: ſuch ſecond marriage however is merely void.

§ 3. *Exceptions in ſtat.* 1 *Jac.* 1. *c.* 11.

The ſtatute itſelf of Jac. 1. contains a proviſo with the five following exceptions:

7 years abſence beyond ſea. Vide poſt, 467.

1. "That it ſhall not extend to any perſon or perſons "whoſe huſband or wife ſhall be continually remaining "beyond the ſeas by the ſpace of ſeven years to-"gether."

1 Hale, 693. 3 Inſt. 88. 4 Blac. Com. 164. 2 MS. Sum. 330.

Upon this branch the conſtruction has been, that where either of the parties is beyond the ſeas for ſeven years, though the party in England have notice that the other is living, it is no felony to marry again; although the ſecond marriage be void.

The terms of this proviſo, eſpecially as they are contraſted with the wording of the next, which adverts to ſuch a notice, do certainly warrant the conſtruction which has been put upon them; otherwiſe it might have been worthy of conſideration, that unleſs the legiſlature had gone the length of avoiding the firſt marriage by an abſence of either of the parties beyond ſea for ſeven years, it would have been a more reaſonable proviſion to have made ſuch an abſence in itſelf only primâ facie evidence of the death of the party. For it ſeems a moſt extraordinary enactment which enables a perſon with impunity wilfully to draw an innocent perſon into a connexion attended with all the miſchiefs which the body of the act was intended to prevent.

§ 4. *2d Exception, abſence within the kingdom for 7 years without knowledge.* 3 Inſt 88. 2 MS. Sum 330.

The ſecond exception of the ſtat. 1 Jac. 1. exempts any perſon "whoſe huſband or wife ſhall abſent him or herſelf "the one from the other by the ſpace of ſeven years toge-"ther in any parts within his majeſty's dominions, the one "of

"of them not knowing the other to be living within that "time." Here the want of ſuch knowledge is important to excuſe the ſecond marriage. Whether the party be not bound to uſe reaſonable diligence to inform himſelf of the fact; and ſtill more, whether if he neglect or refuſe to avail himſelf of palpable means of acquiring ſuch information, he will ſtand excuſed? are queſtions which I do not find any where touched upon; but which ſeem worthy of mature conſideration.

Ch. XII. § 4. *Exceptions, &c. Abſence within the king's dominions.*

Then it is important to inquire how far the expreſſion "within the king's dominions" extends: and whether it were intended to be taken as a boundary altogether diſtinct from the line drawn in the firſt exception of "beyond the "ſeas." Lord Hale puts the caſe of Ireland, which he obſerves is within the firſt exception, as being *beyond the ſeas*; and yet being *within the king's dominions* is not aided by the words of the ſecond, unleſs without notice. And therefore, he adds, that in order to make both clauſes conſiſtent, the words *within the king's dominions* muſt in favorem vitæ be intended within *England, Wales, and Scotland.*

1 Hale, 693.

§ 5. *3d and 4th Exceptions, ſentences of divorce.* 1 Jac. 1. c. 11. ſ. 3.

The third and fourth exceptions provide (ſ. 3.) "That "nothing in the act ſhall extend to any perſon or perſons "that are or ſhall be at the time of ſuch marriage divorced "by any ſentence had in the eccleſiaſtical court; or to any "perſon or perſons where the former marriage hath been by "ſentence in the eccleſiaſtical court declared to be void and "of no effect." The firſt of theſe exceptions has been holden to extend even to a divorce a menſâ et thoro. Though certainly ſuch a conſtruction muſt be admitted to be entirely beſide the reaſon and juſtice of the exception; letting in the very miſchief intended to be provided againſt by the ſtatute. In Porter's caſe this point was much doubted; and the wife who was divorced by ſuch a ſentence propter ſævitiam was adviſed to obtain a pardon: yet other authorities are poſitive to its falling within the exception. And at the O. B. 14 Car. 2. Thomas Middleton being indicted on this ſtatute, and producing a divorce from his firſt wife under ſeal cauſâ adulterii, (which is only a divorce a menſâ et thoro,) it was agreed that he was not within the ſtature. It is alſo agreed that a ſecond marriage, pending an appeal from a divorce a vinculo matrimonii, is aided by this exception; though the appeal ſuſpends and poſſibly may repeal

1 Hale, 699. 2 MS. Sum 330.

Porter's caſe, Cro. Car. 461.

3 Inſt 89. 1 Hawk. ch 43. ſ. 5. Sum. 122. 4 Blac Com 164. Middleton's caſe, O B. 14 Car. 2. Kel. 27.

1 Hale, 694. 3 Inſt. 89.

Ch. XII. § 5. *Exceptions, &c. divorce by ſentence.*

the ſentence; in which caſe the ſecond marriage would of courſe be invalid.

Duchefs of Kingſton's caſe, Dom. Proc. 16 G. 3. 11 St. Tr. 262.

In the caſe of the Ducheſs of Kingſton, who was tried for polygamy, a ſentence in the eccleſiaſtical court againſt the validity of a former marriage in a ſuit of jactitation of marriage was produced in evidence on her behalf, and contended to be concluſive, being unappealed from. But firſt it was holden not to be concluſive in itſelf; the ſentence having decided on the invalidity of the marriage only collaterally, and not directly. But further, admitting it in general to be concluſive, yet the effect of it might be avoided by ſhewing that it had been obtained by fraud or colluſion: and ſhe was declared guilty.

§ 6. *5th Exception, within age.* 1 Jac. 1. c 11. ſ. 3. 3 Inſt. 89. 1 Hale, 17. 694. 2 MS. Sum. 330 1 Hawk. ch. 43. ſ. 6.

Laſtly, it is provided that the act ſhall not extend "to "any perſon or perſons for or by reaſon of any former mar- "riage had or made within age of conſent."

Holt v Ward, Tr. 5 G. 2.

If either party be within the age of conſent, which in the man is 14, and in the woman 12, the 5th exception extends to both; for the power of diſſent to the former marriage muſt be reciprocal. And yet in a civil light a promiſe of marriage by an adult to one under age will ſubject the adult to an action for a breach of ſuch promiſe. But if both are above thoſe reſpective ages at the time of the firſt marriage, though under 21, a ſecond marriage would be felony. And 1 Hale, 694. 4 Blac. Com. 165. though either were under the age of conſent when the firſt marriage was contracted, if they agreed to it when both had attained ſuch age, by which the marriage is completed; it ſeems that a ſecond marriage would be within the reaſon and penalties of the act.

Trial.

§ 7. *Trial.* 1 Jac. 1. c. 11. ſ. 1.

Offenders within the ſtatute of James are directed to "receive ſuch and the like proceeding, trial, and execution, "in ſuch county where they ſhall be apprehended, as if the "offence had been committed in the ſame county where "ſuch perſon or perſons ſhall be taken or apprehended." 1 d Digby's caſe, Hutt. 131. This, according to the reſolution in Lord Digby's caſe, may be in the place where the party is impriſoned. And it is only an accumulative proviſion; for the offender may ſtill be indicted where the ſecond marriage was, though he be never apprehended; and ſo may be outlawed. 1 Hale, 694.

35 G. 3. c. 67.

By ſ. 3. of the ſtat. 35 Geo. 3. "ſuch perſon and perſons "ſo ordered to be tranſported as aforeſaid, and afterwards

"found at large within Great Britain may be tried for ſuch "offence either in the county where ſuch perſon or perſons "was or were ſo convicted and ordered to be tranſported as "aforeſaid, or in ſuch county where they ſhall be apprehend- "ed and taken, (ſuch county being within England or "Wales); and in ſuch latter caſe the clerk, or other perſon "having the cuſtody of the records of the court by which "ſuch perſon or perſons was or were ordered to be tran- "ſported, ſhall certify a tranſcript briefly containing the "tenor and effect of the record of the indictment, verdict, "and judgment againſt them; which certificate, being pro- "duced to the court before whom ſuch perſon or perſons "ſhall ſtand on their trial, ſhall be deemed ſufficient evi- "dence of the indictment, verdict, and judgment con- "tained in ſuch record." Ch. XII. § 7. *Trial.*

Indictment.

§ 8. *Indictment.* Ducheſs of Kingſton's caſe, 11 St. Tr. 200. Crown Cr. Aſſ. 19. Porter's caſe, Cro. Car. 461. Crown Cir. Comp. 271.

The indictment muſt ſtate the two marriages, and aver that the former conſort was alive at the time of the ſecond marriage. In the Ducheſs of Kingſton's caſe the firſt count ſtated generally that the defendant on ſuch a day, &c. being then married and then the wife of A. J. H., with force and arms at, &c. did feloniouſly marry E. P. &c. the ſaid A. J. H. being then alive, &c. The ſecond count ſtated the time and place of the firſt as well as the ſecond marriage. When the trial is in the county where the party was apprehended, there is an additional averment of that fact.

Witneſs.

§ 9. 1 Hale, 693. 2 MS Sum. 331. Ann Cheney's caſe, O. B. May 1730, Serj't. Forſter's MS.

The firſt and true wife cannot be a witneſs againſt her huſband, nor vice verſâ; but the ſecond may certainly be admitted to prove the ſecond marriage; for the firſt marriage being proved, ſhe is not ſo much as wife de facto; but that muſt be firſt duly eſtabliſhed.

Evidence of Marriage.

§ 10. *Evidence.*

In reſpect of the manner of proving the two marriages, the firſt muſt be duly eſtabliſhed according to the rites and cuſtom of the country in which it was celebrated.

Lyon's caſe, O. B. Dec 1738, Serjt. Forſter's MS.

Where the firſt marriage, which was with a Roman catholic woman, was by a Romiſh prieſt in England, not according to the ritual of the church of England, and the ceremony was performed in Latin, which the witneſſes not underſtanding

Ch. XII. § 10. *Evidence of marriage.*

ſtanding could not ſwear even that the ceremony of marriage according to the church of Rome was read, the defendant was directed to be acquitted *. But Ld. Ch. J. Willes who tried him ſeemed to be of opinion that a marriage by a prieſt of the church of Rome was a good marriage (*a*), could the ceremony according to that church be proved, namely, the words of the contracting part of it.

* The ſecond marriage was by a clergyman of the church of England.

Mary Norwood's caſe, ante, 335.

In Mary Norwood's caſe confeſſion, cohabitation, and the like were admitted as evidence to prove the relation of huſband and wife in petit treaſon. But in Morris v. Miller, in an action for criminal converſation, it was ſaid that theſe were not ſufficient in that caſe, nor in proſecutions for bigamy, but that a marriage in fact muſt be proved. However, what was there ſaid obiter, ſo far at leaſt as it relates to this offence, ſeems to have been ſhaken in a ſubſequent caſe.

Morris v. Miller, 4 Burr. 2059.

Truman's caſe, Nottingham Sp. Aſſ. 1795, MS. Jud

Proof of the priſoner's cohabiting with and acknowledging himſelf married to a former wife then living, backed by production of a copy of a proceeding in a Scotch court againſt them for having contracted ſuch marriage improperly; (the marriage, however, being ſtill good according to that law,) is ſufficient evidence of the firſt marriage on an indictment for polygamy.

Joſeph Truman was indicted, for that he having married Mary Ruſſell, ſpinſter, at Ruglen in Scotland, afterwards on, &c. at, &c. married Jane Caſs, the ſaid Mary Ruſſell his former wife being then living. A witneſs proved that he knew the priſoner; that Mary Ruſſell, who was ſtill alive, lived with him, and he acknowledged that he had been married to her in Scotland; and once ſhewed the witneſs a paper, which he ſaid was a certificate of the marriage. The priſoner not having produced this paper purſuant to notice, a copy of it was proved, and the priſoner's acknowledgment of his own hand-writing to the original. The writing in queſtion purported to be a proceeding before a court in Scotland, wherein "the proſecutor fiſcal of the court complained upon Joſeph Truman and Mary Ruſſell his wife, that by act of Car. 2. parl. 1. ſeſſ. 1. c. 34. it is enacted, that whoever marries in a clandeſtine unorderly manner, or by perſons not authorized by the kirk, ſhall be impriſoned for three months and pay 100 marks, &c.; and the perſons ſo married are obliged when required to declare the names of the celebrator and witneſs, &c.; yet nevertheleſs true it is, that J. T. and M. R. were married within three months laſt paſt by ſome perſon not authorized by the kirk, and without proclamation of banns; and therefore ſhould be fined in the terms of the act to deter others from committing the like."

(*a*) *Quære*; This muſt at leaſt be underſtood of the marriage of perſons of that communion.

"At

Ch. XII. § 10. *Evidence of marriage.*

"At Ruglen, 15th of January 1793, a perſonal warning was verified againſt the defendants, who appeared and acknowledged that they were married at the time mentioned in the complaint; but declare that they cannot declare the names of the celebrator and witneſs. Signed Joſ. Truman and Mary Ruſſell," and indorſed by two witneſſes. "Having conſidered the complaint with the above acknowledgment of the defendants, the complaint proven by ſaid acknowledgment; and in reſpect thereof fines them in 100 marks to be applied," &c. Upon this evidence, together with due proof of the ſecond marriage, the priſoner was convicted; and the queſtion was reſerved for the opinion of the Judges, whether the firſt marriage were legally proved? In Eaſter term 1795 all the Judges (abſent Perryn B. and Buller J.) held the conviction proper. It was obſerved by two of the Judges that this did not reſt upon cohabitation and bare acknowledgment; for the defendant had backed his aſſertion by the production of a copy of a proceeding againſt him for having improperly contracted his firſt marriage. But ſome thought that the acknowledgment alone would have been ſufficient, and that the paper produced in evidence was only a confirmation of ſuch acknowledgment; and one of them obſerved upon the caſe of Morris v. Miller, that there was a diſtinction between an action for criminal converſation and an indictment for this offence: that in the former the acknowledgment and cohabitation of the plaintiff could not prove his marriage as againſt the defendant; and the acknowledgment of the defendant in ſuch an action of the plaintiff's marriage might be of a fact not within his own knowledge; as it muſt be if a defendant in bigamy admitted his own marriage.

Ante, 470.

With reſpect to ſuch evidence of a bare acknowledgment in this caſe, it may be difficult to ſay that it is not evidence to go to the jury, like the acknowledgment of any other matter in pais where it is made by a party to his own prejudice at the time. But it muſt be admitted that it may under circumſtances be entitled to little or no weight; for ſuch acknowledgments made without conſideration of the conſequences and palpably for other purpoſes at the time, are ſcarcely deſerving of that name in the ſenſe in which acknowledgments are received as evidence; more eſpecially if made before the ſecond marriage, or upon occaſions, when

Ch. XII. § 10. *Evidence of marriage.*

in truth they cannot be ſaid to be to the party's own prejudice, nor ſo conceived by him at the time.

§ 11. *Regiſter of marriage.*

The marriage act 26 Geo. 2. c. 33. ſ. 14. for preventing undue entries and abuſes in regiſters of marriages, directs the churchwardens, &c. to provide proper books in which all marriages and banns of marriage there publiſhed or ſolemnized ſhall be regiſtered in the manner therein ſtated; and that the ſame ſhall be ſigned by the parſon, vicar, miniſter, or curate, or by ſome other perſon in his preſence and by his direction; and that all ſuch books ſhall belong to every ſuch pariſh, &c. and be kept for public uſe. Then by ſ. 15. "In order to preſerve the evidence of marriages, and "to make the proof thereof more certain and eaſy, and for "the direction of miniſters in the celebration of marriages "and regiſtering thereof, it is enacted, that all marriages "ſhall be ſolemnized in the preſence of two or more credi-"ble witneſſes beſides the miniſter who ſhall celebrate the "ſame; and that immediately after the celebration of every "marriage an entry thereof ſhall be made in ſuch regiſter "to be kept as aforeſaid; in which entry or regiſter it ſhall "be expreſſed that the ſaid marriage was celebrated by "banns or licence; and if both or either of the parties "married by licence be under age, with conſent of the pa-"rents or guardians, as the caſe ſhall be; and ſhall be ſigned "by the miniſter with his proper addition, and alſo by the "parties married, and atteſted by ſuch two witneſſes;" according to the form or effect therein ſet forth.

Birt v. Barlow, B. R. M. 1779, Bull. N P. 27.

In an action for criminal converſation (wherein the proof is in this reſpect at leaſt as ſtrict as in caſes of bigamy (*a*),) it was ruled not to be neceſſary to call one of the ſubſcribing witneſſes to the regiſter to prove the identity of the perſons married; for that a copy of the regiſter was ſufficient evidence of the marriage in fact between perſons of the deſcription there mentioned; and any evidence which ſatisfied a jury as to the identity of the parties was ſufficient; as if their hand-writing to the regiſter be proved; or that bell-ringers were paid by them for ringing for the wedding, or the like: and ſuch marriage in fact may, it is ſaid, be proved as well by the teſtimony of one who was preſent at the ceremony as by the copy of the regiſter.

(*a*) Per Lord Mansfield C. J. in Morris v. Miller, 4 Burr. 2059.

Bull. N. P. 27.

CHAP. XIII.

OF OFFENCES TOUCHING CLANDESTINE AND ILLEGAL MARRIAGES.

1. *By the Marriage Act*, 26 Geo. 2. c. 33. § 2.

Banns to be publiſhed in ſome Pariſh Church or public Chapel where uſually before done. *ib.*

Previous Notice to be given to the Miniſter of the Names and Places of Abode of the Parties. *ib.*

Notice to be given of Diſſent of Parents or Guardians of Minors. *ib.*

Licence how to be granted. *ib.*

Solemnizing Marriages other than as allowed, Felony and Tranſportation for 14 Years. *ib.*

After Marriage, Proof of Non-reſidence of Parties not allowed. - - - - § 3.

But Marriage of Minors by Licence without Conſent of Parents, &c. void. *ib.*

Regiſter of Banns and Marriages to be kept, and ſigned by the Miniſter. - - - § 4.

Witneſſes to attend and atteſt Marriage. *ib.*

Forging, deſtroying, or making falſe Entries in Regiſters, Felony without Clergy. *ib.*

Exception as to Marriages of Royal Family, Jews and Quakers, and thoſe beyond Sea. - § 5.

Marriages before had in newly-conſecrated Churches made valid by Stat. 21 Geo. 3. c. 53. - § 6.

2. *Prohibited Marriages of the Royal Family.* § 7.

Perſons ſolemnizing or aſſiſting thereat incur a Præmunire. *ib.*

Clandeſtine Marriages.

§ 1. THERE are other offences beſides thoſe treated of in the two laſt chapters, touching illegal marriages, which though perhaps they may with more propriety be claſſed, as an excellent writer has done, under the head of offences againſt the public police and economy, yet for the ſake of bringing the ſame kind of ſubject as much into one view as poſſible, they are here exhibited, together with other offences more immediately againſt the perſon, to which they bear analogy in the ſubject matter. This arrangement may be thought more allowable, when it is conſidered that one of the moſt obvious principles of thoſe ſtatutes out of which the offences in queſtion are derived was, while puniſhment was inflicted for the commiſſion of them as detrimental to the public good, to protect the perſons of thoſe who were moſt expoſed to the ruinous conſequences intended to be prevented.

Mr. Juſtice Blackſtone.

§ 2. *By the marriage act.* 26 G. 2. c. 33. *Where banns to be publiſhed.*

By the ſtat. 26 Geo. 2. c. 33. "for the better preventing "of clandeſtine marriages," it is enacted, "that all banns "of matrimony ſhall be publiſhed in an audible manner in "the pariſh-church, or in ſome public chapel in which "banns have been uſually publiſhed, of or belonging to "ſuch pariſh or chapelry wherein the perſons to be married "ſhall dwell, according to the form of words preſcribed by "the rubrick prefixed to the office of matrimony in the "book of common prayer, upon three Sundays preceding "the ſolemnization of marriage, during the time of morning "ſervice, or of evening ſervice, (if there be no morning "ſervice in ſuch church, &c. upon any of thoſe Sundays,) "immediately after the ſecond leſſon. And where the "perſons to be married dwell in divers pariſhes, &c. the "banns ſhall in like manner be publiſhed in each, &c. "And where both, or either, dwell in any extra-parochial "place (having no church or chapel wherein banns have "been uſually publiſhed), then the banns ſhall in like man-"ner be publiſhed in ſome adjoining pariſh church or "chapel; in which latter caſe, the miniſter, &c. publiſhing "ſuch

"ſuch banns, ſhall certify the publication thereof in ſuch "manner as if either of the parties dwelt in ſuch adjoining "pariſh, &c. And in all caſes the marriage ſhall be ſo-"lemnized in one of the pariſh churches or chapels where "ſuch banns have been publiſhed, and in no other place "whatſoever." By ſ. 2. No miniſter, &c. ſhall be obliged to publiſh the banns unleſs the parties ſhall ſeven days before the firſt intended publication deliver to him notice in writing of their true Chriſtian and ſurnames, and of their reſpective abodes within ſuch pariſh, chapelry, or extra-parochial place, and of the time during which they have inhabited there. By ſ. 3. no miniſter, &c. ſolemnizing marriage between perſons, both or one of whom ſhall be under the age of 21 years after banns publiſhed, ſhall be puniſhed by eccleſiaſtical cenſures for ſo doing without conſent of parents or guardians required by law, unleſs ſuch miniſter, &c. ſhall have notice of their diſſent: and in caſe ſuch parents or guardians ſhall publicly declare or cauſe to be declared in the church or chapel where and at the time the banns are ſo publiſhed, their diſſent to ſuch marriage, ſuch publication of banns ſhall be abſolutely void. By ſ. . "no licence of "marriage ſhall be granted by any archbiſhop, &c. to "ſolemnize any marriage in any other church or chapel "than in the pariſh church or public chapel of or belonging "to the pariſh or chapelry, within which the uſual place "of abode of one of the perſons to be married ſhall have "been for four weeks immediately before the granting of "ſuch licence, or where both or either of the parties ſhall "dwell in any extra-parochial place, having no church or "chapel wherein banns have been uſually publiſhed, then "in the pariſh church, &c. belonging to ſome adjoining "pariſh, &c. and in no other place whatſoever." "Pro-"vided (ſ. 5.) that all pariſhes where there ſhall be no pariſh "church or chapel belonging thereto, or none wherein "divine ſervice ſhall be uſually celebrated every Sunday, "may be deemed extra-parochial places for the purpoſes of "this act." With another proviſo (ſ. 6.) ſaving the archbiſhop of Canterbury's right to grant "ſpecial licences to "marry at any convenient time or place."

Ch. XIII. § 2. Marriage act.

Notice of names and places of abode.

Notice of diſſent of parents, &c. of perſons under age to be given.

Licence.

Then by ſ. 8. "If any perſon ſhall ſolemnize matrimony "in any other place than a church or public chapel, where "banns

Solemnizing marriage other than as above, felony, and tranſportation for 14 years.

Ch. XIII. § 2. *By the marriage act.*

" banns have been uſually publiſhed, unleſs by ſpecial " licence from the archbiſhop of Canterbury; or ſhall " ſolemnize matrimony without publication of banns, unleſs " licence of marriage be firſt obtained from ſome perſon " having authority to grant the ſame; every perſon know- " ingly and wilfully ſo offending, and being lawfully con- " victed thereof, ſhall be guilty of felony and tranſported " to ſome of his Majeſty's plantations in America for 14 " years, according to the laws in force for tranſportation of " felons; and all ſuch marriages ſhall be null and void."

By ſ. 9. " All proſecutions for ſuch felony to be com- " menced within 3 years after the offence committed."

§ 3. *After marriage no proof allowed of non-reſidence of parties, &c. before.*

By ſ. 10. " After the ſolemnization of any marriage by banns, it ſhall not be neceſſary in ſupport of ſuch marriage to give any proof of the actual dwelling of the parties in the reſpective pariſhes, &c. where the banns were publiſhed; (nor the like where the marriage is by licence:) nor ſhall any evidence be received to prove the contrary in any ſuit touching the validity of ſuch marriage." By ſ. 11. marriages by licence, where either of the parties, not being a widow or widower, ſhall be under 21 years of age, had without the previous conſent of the father or lawful guardians, or one of them; or if no guardian, then of the mother, if living and unmarried; or if none ſuch, then of a guardian appointed by the court of Chancery, ſhall be null and void. S. 12. ſpecifies certain caſes where application may be made to the Lord Chancellor, &c. to conſent to the marriages of minors.

Marriage by Licenſe without conſent of parents, &c. of minors void.

§ 4. *Regiſter of banns and marriages to be kept,*

Then " for preventing undue entries and abuſes in regiſ- " ters of marriage," ſ. 14. enacts, " that the church and " chapel wardens of every pariſh or chapelry, ſhall provide " proper books, in which all marriages and banns of mar- " riage reſpectively there publiſhed or ſolemnized ſhall " be regiſtered, (every page of which is to be regularly " numbered and lined at proper diſtances, in the manner " therein mentioned,) and ſhall reſpectively be ſigned by " the parſon, vicar, miniſter, or curate, or by ſome other " perſon in his preſence and by his direction. And all " ſuch books ſhall belong to every ſuch pariſh or chapel, " and

and ſigned by the miniſter, &c.

" and be kept for public uſe." By ſ. 15. " In order to " preſerve the evidence of marriages, and to make the " proof thereof more certain and eaſy, and for the direction " of miniſters in the celebration and regiſtering of mar- " riages;" " all marriages ſhall be ſolemnized in the pre- " ſence of two or more credible witneſſes beſides the miniſter; " and immediately after ſuch celebration an entry thereof " ſhall be made in ſuch regiſter; in which it ſhall be ex- " preſſed that the marriage was by banns or licence; and " if both or either of the parties married by licence be " under age, with conſent of the parents or guardians, as " the caſe may be; and ſhall be ſigned by the miniſter with " his proper addition, and alſo by the parties married, and " atteſted by ſuch two witneſſes;" which entry is directed to be in the form or to the effect therein ſet forth.

Ch. XIII. § 4. *Regiſter of banns and marriages to be kept.*

in the preſence of two witneſſes, and atteſted by them.

Then by ſ. 16. " If any perſon ſhall with intent to elude " the force of this act, knowingly and wilfully inſert or " cauſe to be inſerted in the regiſter book of ſuch pariſh or " chapelry as aforeſaid any falſe entry of any matter or " thing relating to any marriage; or falſely make, alter, " forge, or counterfeit, or cauſe, &c. or act or aſſiſt in " falſely making, &c. any ſuch entry in ſuch regiſter; or " any ſuch licence of marriage as aforeſaid; or utter or " publiſh as true any ſuch falſe, altered, forged, or counter- " feited regiſter as aforeſaid, or a copy thereof, or any ſuch " falſe &c. licence, knowing ſuch regiſter or licence of " marriage reſpectively to be falſe, &c.; or if any perſon " ſhall wilfully deſtroy or cauſe or procure to be deſtroyed " any regiſter-book of marriages, or any part thereof, with " intent to avoid any marriage, or to ſubject any perſon to " any of the penalties of this act, every perſon ſo offend- " ing, being thereof lawfully convicted, ſhall be guilty of " felony, without benefit of clergy."

Forging or making falſe entries in regiſter, &c. felony without clergy. Vide Dudley's caſe, 2 Sid. 71. *Miſdemeanors at common law.*

Sect. 17. provides that nothing in the act " ſhall extend " to the marriages of any of the royal family;" " nor " (by ſ. 18.) to Scotland; nor to any marriages amongſt " Quakers or Jews, where both the parties to any ſuch " marriage ſhall be Quakers or Jews; nor to any marriages " ſolemnized beyond the ſeas."

§ 5. *Exceptions as to the royal family; Jews and Quakers; Scotland, or places beyond ſeas.*

By

Ch. XIII. § 6. *Marriages in parish churches.*

§ 6. 21 G. 3. c. 53.

By ſtat. 21 Geo. 3. c. 53. ſ. 1. "all marriages then "ſolemnized or to be ſolemnized before the 1ſt of Auguſt "1781, in any church or public chapel in England, Wales, "and Berwick-upon-Tweed, erected ſince the making of "the (laſt-mentioned) act, and conſecrated, ſhall be as valid "in law as if they had been ſolemnized in pariſh churches, "&c. wherein banns had been uſually publiſhed before or "at the time of paſſing the ſaid act." This proviſion was rendered neceſſary by the determination of the court of King's Bench in Rex v. The Inhabitants of Northfield, in Eaſter term 1781, declaring ſuch marriages to be void by the marriage act; but its operation is not proſpective.

R. v. Northfield, Dougl. 659.

Vide 15 Vin. Abr. 258.

Some of the offences puniſhable by the marriage act were before prohibited by the canons of the church, and ſome were ſubjected to pecuniary forfeitures by the ſtatutes 6 & 7 W. 3. c. 6. ſ. 52., and 7 & 8 W. 3. c. 35. ſ. 2., and 10 Ann. c. 19. ſ. 176. which are now merged in felony.

2. *Of prohibited Marriages of the Royal Family.*

§ 7. *Marriages of the royal family.* 11 St. Tr. 295.

By a reſolution of the Judges in Hilary term 1717, upon a queſtion referred to them by command of the king, the prerogative of the crown to ſuperintend and approve of the marriages of the royal family was fully recognized. This prerogative, which is founded in the ſoundeſt national policy as well as in due decorum, is further confirmed by the expreſs enactment of the legiſlature in the ſtat. 12 Geo. 3. c. 11. "That no deſcendant male or female of the body of "his late Majeſty King George the ſecond, (other than the "iſſue of princeſſes who have married or may hereafter "marry into foreign families,) ſhall be capable of contract- "ing matrimony, without the previous conſent of his ma- "jeſty, his heirs or ſucceſſors, ſignified under the great ſeal "and declared in council; (which conſent, to preſerve the "memory thereof, is hereby directed to be ſet out in the "licence and regiſter of marriage, and to be entered in the "books of the privy council;) and that every marriage or "matrimonial contract of any ſuch deſcendant, without "ſuch conſent firſt had and obtained, ſhall be null and void "to all intents and purpoſes whatſoever." With a proviſo, (ſ. 2.) "that in caſe any ſuch deſcendant, being above 25 "years of age, ſhall perſiſt in their reſolution to contract a "marriage

12 G. 3. c. 11.

"marriage ſo diſapproved of; then ſuch deſcendant on "giving notice to the privy-council (to be entered in the "books thereof) may, at any time from the expiration of "12 calendar months after ſuch notice, contract ſuch mar- "riage with the perſon before propoſed and rejected, (and "ſuch marriage ſhall be valid without the previous conſent "of the crown), unleſs both Houſes of Parliament ſhall "before the expiration of the ſaid 12 months expreſsly de- "clare their diſapprobation of the ſame."

Ch. XIII. § 7. *Of the royal family.*

Then by ſ. 3. "Every perſon who ſhall knowingly or "wilfully preſume to ſolemnize, or to aſſiſt, or to be preſent "at, the celebration of any marriage with any ſuch de- "ſcendant, or at his or her making any matrimonial con- "tract, without ſuch conſent as aforeſaid firſt had and "obtained, except in the caſe abovementioned, ſhall, being "duly convicted thereof, incur and ſuffer the pains and "penalties of the ſtatute of proviſion and præmunire, "16 Ric. 2."

Perſons ſolemnizing or aſſiſting at ſuch marriages incur a præmunire.