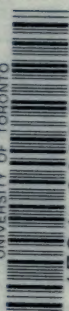
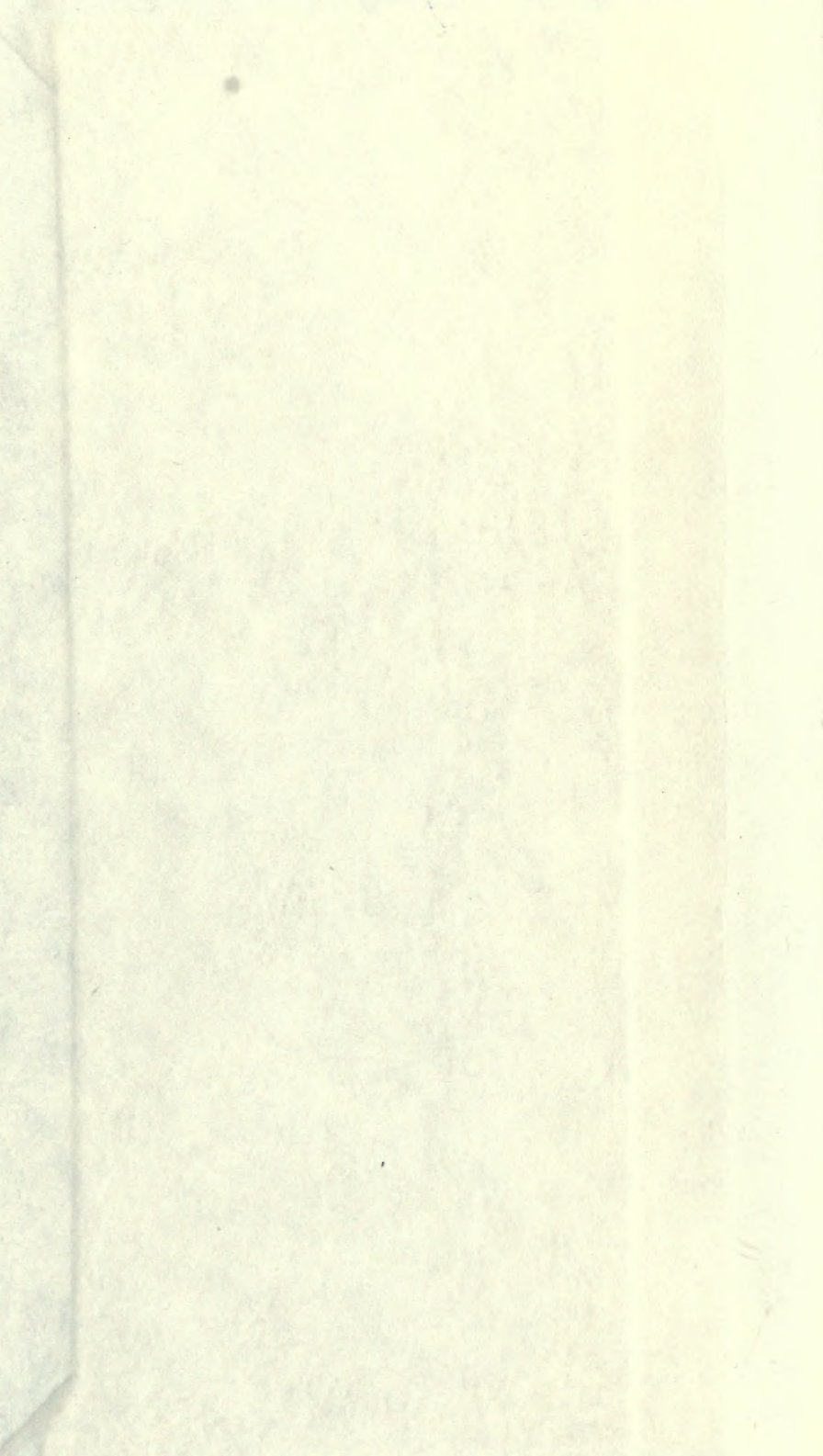


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A

TREATISE

OF THE

Pleas of the Crown.

By EDWARD HYDE EAST, Esq.

OF THE INNER TEMPLE.

*Quid tristes querimoniz,
Si non supplicio culpa reciditur.*

HORAT. Lib. 3. Ode 24.

VOL. I.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
FOR J. BUTTERWORTH, LAW-BOOKSELLER, FLEET-STREET,
AND J. COOKE, ORMOND-QUAY, DUBLIN.

1803.

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25.2.42

TO

THE HONOURABLE

SIR SOULEN LAWRENCE, KNIGHT,

ONE OF THE JUSTICES

OF HIS MAJESTY'S COURT OF KING'S BENCH

THIS TREATISE

IS

WITH GREAT RESPECT AND ESTEEM

DEDICATED

BY HIS MUCH OBLIGED

AND VERY FAITHFUL HUMBLE SERVANT,

EDWARD HYDE EAST.

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I should have considered it an unbecoming presumption, as well as an unnecessary labour, had I ventured without additional materials on a new arrangement and discussion of the subject of these volumes, already so ably and authoritatively treated of by Lord C. J. Hale and Mr. Serje Hawkins. But it is now near ninety years * since the last of these authors published his valuable work, and the accumulation of new matter, both by statutes and adjudged cases, is become so great, that a revision of this most interesting branch of our law would, I thought, be an acceptable offering to the members of my profession, however far the execution of it might fall short in point of ability of those models which they have been accustomed to contemplate.

It may be said, that much has already been done towards the completion of what I have proposed by the excellent discourses of Mr. Justice Foster, by the notes which have from time to time been added to the several editions of Serje Hawkins's work, and by a collection of cases on the crown law published within a few years past by Mr. Leach.

With respect to the first of these, it is greatly to be lamented, from the specimen which that learned Judge has given of his talent in this species of writing, that he did not take a more general view of the criminal law, which he seems at one time to have meditated. Had he extended the same attention to other parts of

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it as he has done to the subjects of High Treason and Homicide; this, or any other treatise of the like sort, would have been much less wanted. His searching and well-poised mind would have cleared many of the difficulties which have impeded my progress, and the authority of his opinion would have settled many doubts which I have only ventured to suggest, or at most to hint a solution of.

With regard to the additions made to the subsequent editions of Hawkins, however serviceable as notes and references, yet from the very nature of such materials they are for the most part little calculated to give that complete and satisfactory information, which is essentially requisite to be obtained without delay in criminal cases.

The publication of Mr. Leach's reports is of another description. About a twelvemonth or more before that made its appearance, I had begun to make a collection of Crown MSS. with a view to a work of this kind at some distant period, and had been furnished with many of the cases which are to be found in that book particularly by the late Mr. Justice Buller, who encouraged me to undertake the publication of them, provided I could obtain the consent of the other judges, without which he did not feel himself at liberty to do more than to furnish me with copies for my own information and amusement. While I was deliberating upon his proposal, Mr. Leach's book was first published, which removed part of the difficulty I had felt in making the desired application to the judges; and soon afterwards in the course of July 1789, Lord Kenyon, by the consent of the whole bench, gave me permission to take a copy of that collection of cases, of which as chief justice of the court of king's bench he was the depository, and which will hereafter be mentioned in the

list of MSS. referred to in the subsequent sheets. From several of the other judges I also received the most liberal communications of their own MSS. and particularly from Mr. Justice Gould, whose venerable years and indefatigable professional labours had given him more opportunity than any other of making a large collection of cases within his own time. These MSS, as coming from the most authentic sources, carry with them the greatest authority. If however my intention had been merely confined to publish a collection of crown cases, it is probable that Mr. Leach's book would have made me refrain, from a consideration, since justified by the event, that whatever inaccuracies first appeared in that volume, the principal at least would be soon corrected in the subsequent editions. But as my intention went further, and I had originally proposed to exhibit the modern decisions in the shape of notes to Lord Hale's Summary, taking that as the ground work of the arrangement, on account as well of its authenticity, as its brevity, the printing of many of those decisions, together with the accumulation of additional matter, stimulated me to enlarge my plan, and to take a more general view of the criminal law, in which I was further encouraged by the friendly communication of other MSS., as soon as my design was known, from many gentlemen, whose names I should be proud to connect with my own if I were at liberty so to do.

I was thus drawn on by degrees to engage in this very arduous undertaking before I was well aware of its magnitude. Let this be some alleviation of my presumption with the public; and the members of my own profession, who can alone justly estimate the extreme labour and difficulty as well as the painful anxiety accompanying an attempt of this nature, will, I trust, judge of it with their habitual candour and indulgence. I make no apology for the length of

time the work has been preparing for, and in the press: I am more afraid that the importunity of friends has led me to hasten the publication of it sooner than I ought in prudence to have done: but had I waited till I had satisfied myself with my own corrections of it, I know not when my mind would have been relieved from the burthen which has already broken in too much upon my private life.

Having been led to mention the name of my departed patron and friend, Mr. Justice Buller, to whose notice and regard I was recommended at my first outset in the profession of the Law by one whom we held in equal reverence and estimation, I trust it will not be thought too great a deviation from the purpose of this introduction, if strongly impressed by a sense of the obligations I owe to him, I shortly trace, and add my humble endeavour to continue the memory of his many amiable and excellent qualities. At a very early period of his life, having been advanced to the rank of one of his majesty's counsel, and being puisne judge of Chester, he was in the thirty third year of his age, on the death of Sir Richard Aston, which happened in the year 1778, placed upon the English bench at the instance of Lord Mansfield, who recommended him to that high station, from having discovered in him those talents and that knowledge, which pointed him out as the ablest assistant he could select from the bar of the court, in which he presided. If any man were arrogant enough at the time to question the judgment of Lord Mansfield upon that occasion, the very active and able part which Mr. Justice Buller sustained in the administration of justice for more than seventeen years during which time he sat in the court of king's bench, as well as the share which his declining health permitted him to take in public business during the six years he was a judge of the court of Common Pleas, would

most decidedly prove the discernment of that noble and enlightened magistrate, who left the public to regret as little as possible those infirmities, which prevented the continued exertion of his own splendid talents, when to the abilities of the other judges of his court he added the industry, sagacity, quickness, and intelligence, for which Mr. Justice Buller was most eminent. And perhaps the wisdom of Lord Mansfield's recommendation cannot be more strongly evinced, than by recollecting that the whole business of the sittings in Westminster and London, during the two or three last years of his being chief justice, was conducted solely before Mr. Justice Buller; in the course of which many great and important questions, extensively affecting the real and commercial interests of this country, were determined by him with a promptitude and justness of decision, which would alone place him very high in rank among those judges, whom this country has been used to regard with admiration and reverence. That the opinion which Lord Mansfield formed of him when raised to the bench was not altered, when he himself retired from office, is certain; for it is known, that if he had had the nomination, he would have named Mr. Justice Buller as his successor*. In regard to his administration of criminal law, it used to be said of him by those, who from their situation in life were most likely to form a true judgment of that part of his character, that no person if guilty would chuse to be tried by him, but that every one if innocent would prefer him for his judge:

* In mentioning this anecdote, I trust no one will suspect me of intending the slightest disrespect to the late Lord Kenyon, of whom it has been justly observed, that he possessed more juridical knowledge than any other intermediate successor of the learned Hale; my sole object is to record the testimony, which, after many years experience, Lord Mansfield bore to the fitness of Mr. Justice Buller to fill the highest judicial situation in the Courts of common law.

judge: than which nothing surely can describe more emphatically the general opinion of his great discernment and impartiality. In private life he united the most amiable temper with the most frank and conciliating manners, and, without regarding his own time or trouble, encouraged by the kindest attention and the most willing assistance the younger members of that profession of which he was himself a distinguished ornament.

I shall now proceed to make a few general remarks on the scope and conduct of the work, and then conclude with mentioning the several MSS. and publications which are referred to in it.

In drawing the outline of this treatise I have endeavoured as much as possible to class together kindred offences. This has led me to depart in some instances from the more usual arrangement; but the convenience in practice from bringing together approximating offences into one view and in the same volume, will, I trust, compensate for such deviation from the beaten path. For this purpose I have first classed together all offences against religion and the church establishment. Next, such as touch the person and majesty of the king and the allegiance due to him as the supreme magistrate of the state. This class of course includes several offences inferior to High Treason, though of the like tendency, which are noticed in the progress of the principal inquiry. Next are classed offences immediately against the *person*, amongst which I have ranged such as relate to forcible, clandestine, and illegal marriages for the reasons hereafter suggested. Then follow offences immediately against *property*, beginning with those the principal object of which is the gain of the offender, and which are said to be done *lucri causâ*, and ending with those instigated by mere malice, including such as are of a mixed nature. These conclude the two first volumes which are now

1

published

published. A third volume, which is in considerable forwardness will include the offences of which I have not already treated, and conclude with a general view of the practical progress of criminal proceedings from the arrest of the offender to the final consummation of the law.

I wished much to have brought this work into a narrower compass, which might have rendered it in some respects more convenient for common use, and would have saved me much time, labour, and expence; but these ends could not have been obtained without greatly lessening the utility and value of the materials. It is well known to every lawyer that in criminal matters an abbreviation of an adjudged case is very seldom satisfactory, and that of a statute is nearly useless, and can never be ultimately relied on. In many instances where the marginal abstract of a case will, I trust, be thought to give the full substance and effect of it, yet the case itself could not with any propriety have been omitted, without assuming to myself an authority which all might well dispute, who wished for more authentic information of the decision, and many would regret on account of losing the precise and formal precedent, which has its use. The importance and necessity indeed of having the most correct information at hand is sufficiently obvious to those who practise at the crown bar, where it is most usual, and always desirable for the ends of justice and the influence of example, as far as certainty can be reasonably obtained, that the trial which commences should without intermission be definitively concluded by judgment. Without losing sight of these most important objects, a faithful transcript of all the operative parts of the statutes in question, and an authentic

• The statutes when quoted verbatim are put within inverted commas; but these are omitted in some instances where the purpose was of a secondary nature, and sufficiently answered by setting forth the substance.

authentic statement of the adjudged cases, I have endeavoured to abbreviate all general matters which are of common notoriety, and are treated of in other well known books. Some heads which are grown almost obsolete I have very shortly touched upon, and having nothing new to add have contented myself with referring to other works where they are more fully discussed. And as the object of this treatise is confined to the description of such offences alone as are cognizable in the principal criminal courts of oyer and terminer and gaol delivery, I have only occasionally noticed such statutes as refer to the jurisdiction of inferior magistrates upon summary proceedings, where I thought they might explain or illustrate the principal matter: it was indeed the less necessary to swell this work to a still more inconvenient size by their introduction, as it is impossible to arrange those laws in a more convenient and judicious manner than that in which they are already to be found in the admirable volumes of Dr. Burn.

EDWARD HYDE EAST.

Adelphi Terrace,
May 1803.

*The following is an Account of the principal
MSS. referred to in this Work.*

1. A copy of a book, in which the crown cases reserved for the opinion of the Judges for many years back are entered. The original is in the custody of the Lord Ch. J. for the time being of the Court of King's Bench. The determinations are entered shortly, sometimes with the reasons, but generally without. This deficiency I have been enabled to supply for the most part by the assistance of the private MS. next after mentioned. This book is cited as MS. Crown cases reserved; abbreviated, MS. Crown cas. ref.
2. Copies of the reserved cases above referred to, which were delivered to the several Judges before they met to consider of them, with their memoranda or notes of the grounds of the determinations. I have been liberally favoured with communications of this kind from several of the Judges, which are quoted as MS. Jud. or MS. of the Judges. Part of these, I may now mention without breach of delicacy, as having been communicated to me by the late Mr. Justice Gould and Mr. Justice Buller, and which have the sanction of their names.
3. Lord Hale's Summary, interleaved with MS. corrections and additions. This MS. compilation, though began before, (probably by Mr. Stow a gentleman at the bar) was put into its present form by Mr. Justice Yates, whose son is now in possession of it. Copies of it were communicated to different Judges, who have contributed from time to time the fruits of their own experience. My own copy was taken from one in the possession of the late Mr. Justice Buller. The work was bound up in three volumes, according to which I have cited it by the description of 1. 2. and 3 MS. Sum. and I have added the page of the MS., because copies of it are now in the hands of many gentlemen of the profession. The greatest part of the work is a compilation from printed books, chiefly from Mr. Justice Foster's Treatise on the Crown Law, Lord Hale's and Hawkins' Pleas of the Crown.

4. One volume of MS. is cited by the name of MS. Tracy, by which Judge it was compiled as a comment on Lord Hale's Summary. A copy of this, which is occasionally referred to in Mr. Justice Foster's treatise, was communicated to me by Mr. Justice Lawrence.
5. A similar compilation by Mr. Justice Burnet. The original is part of a most valuable collection of law MSS. made by Lord Chancellor Hardwicke: a copy of which was furnished to me by his descendant, my worthy friend, the Right Honorable Charles Yorke. This is cited as Burnet's MS. Summary, or, MS. Burnet.
6. Lord Holt's MS. from the last-mentioned collection.
7. A MS. volume of Crown cases communicated by the late Lord Ashburton to Mr. Justice Heath, by whom I was favoured with a copy. These, which are cited as MS. Dunning, were taken by his Lordship when at the bar.
8. A MS. work of the late Mr. Serjeant Forster, being a Treatise of the Crown Law, and probably intended by him for publication had he lived to have given it the finishing revision: Mr. Bolton, whose property in it was derived immediately from the author, very liberally confided the custody of it to me, with liberty to make what extracts from it I pleased. But as I found that the author had been working upon materials similar for the most part to my own, the use I have made of his treatise has been very sparing, confined altogether to a few original cases which had chiefly fallen under his own notice, and which I have marked with his name.
9. MSS. of Mr. Masterman, sometime since Secondary of the Crown Office, for the use of which I am indebted to Mr. Barlow, the present Secondary, to whom they belong.
10. Two volumes of MS. cases, cited as Shapleigh's MS., the name of a gentleman formerly at the bar, who it was once suggested to me was probably the author. I have since however had reason to doubt the information. They were communicated to me by Charles Short, Esq. the Clerk of the Rules on the plea side of the court of K. B. who received them from a relation of his at the bar

long

long since deceased; but he knows not by whom they were taken. Mr. Justice Buller, who formerly inspected them, gave them the praise of accuracy.

11. A few MS. cases taken by myself, or communicated to me by friends, for whom I am gladly responsible. These are simply marked MS.

Of printed books with varying editions, it may be useful to remark those which I have used:

Crown Circuit Comp. 1738, in the first part of the work, and latterly the edition of 1799.

Dalton's Justice, fo. edit. 1727.

Leach's Crown Cases, 2d edit. in the first part and latterly the edition of 1800, in two volumes.

State Trials, Hargrave's edit.

Statutes, Runnington's edit.

With the following list of Errata and Addenda will be found a few cases which were not decided in time to be noticed in their proper places in the progress of the Work.

ERRATA ET ADDENDA.

Page

2. V. 9. dele "by persons holding places at court," and add "By barristers, &c. form of oaths and tender." §. 19.
107. line 17. for "confirmed" read "confined."
117. line 9. for "is" read "was."
270. line 17. for "were" read "was."
370. last line note, add "O. B. December 1775, vi. 1 Leach, 160. Captain Roche's case. A later instance was that of Governor Wall, tried and executed for the murder of Benjamin Armstrong a soldier, at Goree in Africa, O. B. January 1802."
383. add to Beaver's case in the margin "Hil. term 1785; and refer to *Rex v. Pickersgill* and others, Cald. 297."
396. line 9. for "Lord C. J. Pratt" read "Lord C. J. King."
416. line 3 and 5 from the bottom, for "prisoner" read "prosecutor." last line, for "and" read "as" (this is right in many copies).
427. at the end of title *assaults*, &c. add "stat. 33 Geo. 3. c. 67. assaults on seaman, keelman, cafter, or ship-carpenter, with intent to obstruct them in their business; a misdemeanor for the first offence, felony and transportation for the second offence."
549. after line 31. add "6. Advertising reward, &c. for stolen goods, a forfeiture of 50*l.* by stat. 25 Geo. 2. c. 36. §. 155*b.*"
579. S. 21. refer to "stat. 42 Geo. 3. c. 81. f. 1." passed since that part was printed.
582. Moore's case; refer to "stat. 42 Geo. 3. c. 81. f. 1." since passed.
589. stat. 13 Geo. 3. c. 32. refer to "stat. 42 Geo. 3. c. 81. f. 4." since passed.
603. f. 38. refer to the same statute.
605. refer from Thomas's case to "stat. 42 Geo. 3. c. 81. f. 3." since passed, which cures the difficulty.
609. as to *stealing deer*, refer to "stat. 42 Geo. 3. c. 107. since passed, which again makes the offence of *stealing deer* in inclosed grounds felony, and subjects to transportation for 7 years; in other grounds, to a penalty of 50*l.* for the first offence, and felony and 7 years' transportation for the second."
658. line 6. in the margin dele "at."
706. last line in the margin, for "Cro. Cir. Cowp." read "Crown Circ. Comp."
826. last line, add "13 Vin. Abr. 460."
845. add "xiii. Forging, &c. contracts, assignments, certificates, or receipts, respecting the redemption of the land-tax, a capital felony by stat. 42 Geo. 3. c. 116. f. 194." §. 31*b.*
864. At the head of the second note for (a) place (b).
872. in margin, for "8 Geo. 2." read "8 Geo. 1."

Addenda.

Benjamin Pooley was tried before Lawrence J. at the Old Bailey in 1801, and convicted on an indictment founded on the stat. 7 Geo. 3. c. 50. s. 2. charging him with stealing out of the post-office a letter sent to be delivered by the post. It appeared in evidence that the prisoner was employed in the Penny Post department as a charge-taker and as a letter-carrier; and that as charge-taker the letters arriving by the General Post, which were to be delivered by the carriers of the Penny Post of the eastern division, were delivered to him to be divided according to the different walks of the letter-carriers; and that he did not deliver the letter which was the subject of the indictment to the letter-carrier within whose walk the person lived to whom it was directed; but that he afterwards opened it, and took out of it a cheque or draft for 200*l.* on the Stratford Place bank, drawn on unstamped paper by a person living above 30 miles from Stratford Place. It was objected for the prisoner, that this draft being on unstamped paper could not be received in evidence as a medium to shew that the prisoner had stolen the letter: but the court over-ruled the objection, being of opinion that the draft, though unstamped, might be received in evidence for collateral purposes, though not for the purpose of recovering the money contained in it. But the Court entertained doubts whether the second section of that act applied to *servants* of the post-office, against whose misconduct the first section of the act was intended to guard; and from which it might be inferred that the Legislature did not conceive, that the embezzling a letter by those servants was a larceny: and Strutt's case, Leach 100. was referred to, where Nares and Willes Justices, and Glynn Serjeant Recorder were of that opinion. On the 23d of June 1802 all the Judges agreed that the conviction was wrong, being of opinion that the 2d section of the stat. 7 Geo. 3. c. 50. did not extend to the servants of the post-office; which opinion was founded on comparing that section with the 1st and 3d sections of the act. The prisoner was accordingly recommended for a pardon.

Pooley's case,
MS. Jud.
*The stat. 7 Geo.
3. c. 50. s. 2.
does not extend
to the servants of
the post-office:
and therefore a
conviction of one
of them for steal-
ing out of the
post-office a letter
sent to be deliver-
ed by the post,
held wrong.*
(Post. ch. 16.
s. 38.)

*Draft on un-
stamped paper
may be received
in evidence for
collateral pur-
poses as to prove
the offence of steal-
ing, &c.*

Harris's case,
MS. Jud.
Conviction on the
Black Act for
firing at one who
came to execute a
writ of possession
with a warrant,
in which the par-
ty's name was in-
serted after the
sealing by the
sheriff, but before
delivery out of
the office by the
under-sheriff,
held good.
(post. ch. 8.
§. 6.)

Vide Padfield v.
Cabell and
others, Willes'
Rep. 411.
which was re-
ferred to.

Martin's case,
MS. Jud.
Indictment charg-
ing that the pri-
soner on the 14th
of February, &c.
uttered base coin
to W. C. know-
ingly, &c. and
that on the said
14th of Febru-
ary, &c. he utter-
ed to J. L. &c. is
sufficient to war-
rant the higher
judgment required
by stat. 15 G. 2.
c. 28. s. 3. on
such as utter base
coin twice on the
same day: for the
day as laid is
material.
(*Vide* post. ch. 4.
§. 29.)

John Harris was tried before Rooke J. at Salop, March 1801, for wilfully shooting at Thomas Banks; and being convicted, received sentence; but execution was respited to take the opinion of the Judges on the following facts. Thomas Banks went with a warrant from the sheriff of Salop to execute a writ of possession on the prisoner's house. The warrant was addressed to three persons, the sheriff's bailiffs, and after it was sealed, but before it was sent out of the office, an interlineation was inserted by the under-sheriff in these words; "and to Jeremiah Powell and Thomas Banks, my "bailiffs on this occasion only." Powell and Banks went to the prisoner's house to execute the writ of possession, and desired admittance. The prisoner looked out of the window, and they shewed him their warrant. The prisoner said, that the first person who came in he would blow his brains out. Banks then went for more help, and returned with another man. They then burst open the door of the house, and the prisoner fired a blunderbuss at them, and wounded Banks very severely in the knee. It was objected by the prisoner's counsel at the trial, first, that the warrant gave no authority to Banks or Powell, their names being interlined after the seal was affixed to it. Secondly, that the prisoner having shot at Banks in his own house, this was not within the meaning of the statute. But the Judges held the conviction proper.

Robert Martin was tried before Graham B. at the Derby assizes, March 1801, upon an indictment on the stat. 15 Geo. 2. c. 28.; the first count of which charged, that the prisoner on the 14th of February, in the 41st year of the King, one piece of false and counterfeit money made to the likeness of a shilling, as and for current money of the realm, did utter to one William Coxen, well knowing the same to be counterfeit; and that the said Robert Martin on the said 14th of February one other piece of counterfeit money made to the likeness of a shilling, as and for current money of the realm, did utter to one John Longden, well knowing the same to be counterfeit, against the form of the statute. There was a second count for a single utterance to Wm. Coxen. The jury found a verdict on the first as well as second count, on evidence of knowingly uttering bad shillings twice on the 14th of February. But it was moved in arrest of judgment

judgment for the increased punishment, that the charge in the first count for the second utterance was uncertain, being laid on *the said 14th of February*, instead of following the words of the statute and laying it "on the same day;" inasmuch as evidence of an utterance at any time before the indictment found would (it was said) support the first part of the charge; and therefore that it did not necessarily appear on the face of the indictment that the utterings were both on the *same day*. The question was thereupon reserved for the Judges, Whether, as the case was proved, the charge of the second utterance in the first count were well laid?

At a conference on the 5th of June 1801, to which time the case was adjourned, the Judges were of opinion that the indictment was good; for that on the face of it the utterings appeared to be on the same day: and though when the day was not material, the fact might be proved on a day different from the day laid; yet where it was not indifferent the precise time laid must be proved: and that in this case it must be taken that it was proved that the defendant uttered counterfeit coin at two different times of the same day.

An indictment charged that heretofore, viz. at the general quarter sessions of the peace, &c. holden at Guilford, &c. on, &c. viz. the 15th of July, 40 Geo. 3. before, &c. justices of our Lord the King assigned to keep the peace, &c., the defendant, by the name and description of Michael Michael of, &c. was *in due form of law tried and convicted* by a certain jury of the county, duly taken and sworn between our said Lord the King and the said M. M. in that behalf, on a certain indictment then depending against him the said M. M.; for that the said M. M., on the 10th of July, 40 Geo. 3., with force and arms at, &c. one piece of false and counterfeit money made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and gold coin of this realm called an half guinea, as and for a piece of good, lawful, and current money and gold coin of this realm called an half guinea, unlawfully, unjustly, and deceitfully did utter to one Js. Senior; he the said M. M. at the time when he so uttered the said piece of false and counterfeit money then and there well knowing the same to be false and counterfeit: and that he the said M. M. at the time when he so uttered the said piece of false and

Vide Carlisle v. Trears, Cowp. 671. Johnson v. Pickett, E. 25 Geo. 3. Pope v. Foster, 4 Term Rep. 590.

Michael's case, O. B. Feb. 1802. MS. Jud. An indictment charging that the defendant was before that time indicted for uttering base coin, knowing it to be false and counterfeit, and having about him at the time in his custody and possession other base coin, on which he was in due form of law TRIED AND CONVICTED, and adjudged by the Court there to be imprisoned for a year and find sureties for two years more; and then averring that HAVING BEEN SO CONVICTED AS A COMMON UTTERER OF FALSE MONEY

be afterwards knowingly uttered other base money, is good; without averring that the Court before whom he was tried and convicted for the first offence adjudged him to be a common utterer of false money; though the stat. 15 & 16 G. 2. c. 28. says, that such a person as is described in the first indictment shall be deemed and taken to be a common utterer, &c. (Post. ch. 4. f. 29.)

counterfeit money as aforesaid, viz. on the said 10th of July, 40 Geo. 3. at, &c. had about him the said M. M., in the custody and possession of him the said M. M., one other piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called an half crown, he the said M. M. then and there well knowing the said last-mentioned piece of false and counterfeit money to be false and counterfeit; in contempt, &c. and against the form of the statute, &c. and against the peace, &c.; and thereupon it was considered and adjudged by the said court that the said M. M., for the misdemeanor and offence aforesaid in the indictment above specified, should be imprisoned in the common gaol of the county aforesaid for the space of one year, and until he found sureties for his good behaviour for two years, to commence from the expiration of the first year, himself to be bound in 40*l.* and two sureties to be bound in 20*l.* each; as by the record thereof doth more fully appear. And further, &c. that the said M. M. late of L., labourer, *having been so convicted as a common utterer of false money*, afterwards, viz. on, &c. with force and arms at, &c. one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and gold coin of this realm, called a seven shilling piece, as and for a piece of good, lawful, and current money and gold coin of this realm called a seven-shilling piece, unlawfully, unjustly, deceitfully, and feloniously did utter to one T. L., he the said M. M. at the time when he so uttered the said last-mentioned piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit, in contempt, &c. and against the form of the stat. &c. and against the peace, &c. There was a second count differing from the first, in charging the prisoner with *having been so convicted as aforesaid*, instead of the words, "*having been convicted as a common utterer of false money.*"

The prisoner being convicted on this indictment before Mr. Common Serjeant (Silvester), the following objection was taken in arrest of judgment, which was reserved for the opinion of the Judges. That in stating the original record and judgment of the court of quarter sessions, it is not stated that

that the Court did *adjudge* the defendant *to be a common utterer*; but only that they considered and adjudged the prisoner to be imprisoned twelve months, and to find surety for his good behaviour for two years more.

On the 5th of May 1802, the Judges on a conference held the conviction right; and that it was not necessary that the Court should *adjudge* the defendant *to be a common utterer*; though the stat. 15 & 16 Geo. 2. c. 28. says he shall be *deemed and taken to be a common utterer*; that being a conclusion of law: and it being sufficient for the Court, before whom a defendant is convicted of an offence within the statute, to adjudge him to suffer the punishment inflicted by law on the offence.

Vide Tandy's case, and Smith's case, post. ch. 4. f. 29.

John Jackson, and William Shipley, together with one John Morris, were charged with robbing W. S. in the dwelling-house of S. Rowe, in the parish of Gidling, in the county of Nottingham. The prosecutor proved that while he was threshing in his father's barn in the afternoon of the 8th of February, at Gidling, Shipley and Morris came and asked if W. S. lived there; being told by the prosecutor that he was the man, they asked him if he remembered being with two soldiers a-while back, and lying with them, and being answered in the affirmative, they told him that one of the soldiers named Jackson had said that he (the prosecutor) had *abused* him; that Jackson had come over to Carlton, and that if the prosecutor did not come and make it up with Jackson the latter would certainly follow the law; but that if he went there and made it up with him there would be no more of it. The prosecutor answered that he knew nothing of the sort, but that he would go and hear what Jackson had to say. Shipley and Morris then went away, and the prosecutor followed them to a public house kept by S. Rowe at Carlton, where he also found Jackson and another soldier. They there had some conversation in a private room, in which Jackson preferred the same charge against the prosecutor of his having unnaturally abused him, which the other positively denied; and at last Jackson told the prosecutor that if he would pay him the expences there should be no more of it. The prosecutor said he was willing to pay any thing in reason; and Jackson left it to Morris and Shipley to make up the account; when they set down in

Jackson, and Shipley's case, Nottingham Spring assizes, 1802, cor. Graham B. MS. Jud. To constitute robbery by taking money from another upon a threat to charge him with an unnatural crime, the money must be taken immediately upon the threat made, and not after the parties have separated, and time for the prosecutor to dilute and procure assistance, and especially after he had consulted a friend who was even present at the time when the money was paid: though the prosecutor parted with his money from fear of losing his character. (post. ch. 16. f. 130)

writing these articles, as mentioned by Jackson. "Doctor 1l. 11s. 6d. For abusing me 1l. 8s. Morris 10s. Shipley 5s. The other foldier 2s. 6d. (Cast up and making together) 3l. 17s." They asked however four guineas in all of the prosecutor, who said he had no such money, unless they would trust him. Morris said they must have the money with them. The prosecutor told them he had none unless he could get it of his parents, and he asked one of them to go out with him, and Shipley accordingly went with him. The prosecutor swore that he was much frightened and hurried, and did not know what best to do. He with Shipley went to his mother's, where under pretence that a foldier had been hurt he obtained from her four guineas; and in their way back to the public house, the prosecutor stopped at the house of one W. Shelton, whom he desired and finally prevailed upon to go along with him. Shelton inquired what was the matter, and being informed by Shipley of the nature of the charge against the prosecutor, declared his disbelief of it, and that if it were his case he would not pay the money. Shipley said, that if the prosecutor did not pay it, it would cost him 50l. or 100l., or perhaps his neck; that he himself was a constable and should go for a warrant the next morning. This language frightened the prosecutor very much. He returned to the public house, together with Shipley and Shelton, where he found Jackson, Morris, and the other foldier in the room where he left them. After seating himself a minute or two he laid the money, amounting to four guineas, on the table, and asked who would take it; they all said Jackson, but Shipley took it up; and amongst them they returned back six shillings to the prosecutor, half-a-crown of which was said to be for his friend's expences (meaning Shelton). The prosecutor asked for a receipt, but was told by Morris that his friend would do as well. Shelton inquired what doctor Jackson had applied to, but only received evasive answers. The prosecutor then swore to the falsehood of the charge; but said that he was scared at it, and that was the reason why he parted with his money. It appeared on the cross examination that Jackson had first made the charge on the 4th of February, the morning after the night they had lain together; but he did not repeat it then, and they continued eating and drinking together

for several hours after. That after this, the prosecutor had heard of his having repeated it in several companies, which had caused him much agitation of mind in the interval. Shelton confirmed the prosecutor's account as to what happened in his presence; and swore further, that as they were going into the public house he called the prosecutor back, and advised him not to pay the money. He added, that the prosecutor was quite scared out of his wits.

From the whole of the evidence it seemed highly probable that the charge was false, and had been fabricated by Jackson for the purpose of extorting money. Shipley's defence was, that he knew nothing of the matter but from Jackson, who had persuaded him of the truth of the charge. Graham B. in summing up the evidence observed, that the felonious and violent taking from the person money to any amount, by putting him in fear, constituted robbery; and that in law it amounted to such a taking if the party delivered his money under the pressure of great terror. And he pointed out to the jury the several circumstances of the case, which shewed that the prosecutor was strongly impressed not only with a fear of shame, but of a prosecution that might endanger his life.

After conviction, sentence was passed on the prisoner; but execution was respite on a doubt conceived by the learned Judge whether this case did not go somewhat further than others of the kind which had been decided, and was still further removed from the common acceptation of robbery; the principal circumstance of difference being the presence of the prosecutor's friend during the transaction.

In Easter term 1802 the Judges met to consider this case, and a majority of them were of opinion that it was not robbery; though the money were taken in the presence of the prosecutor, and the fear of losing his character were upon him at the time. Most of the majority thought that in order to constitute robbery the money must be parted with from an *immediate* apprehension of present danger *upon the charge being made*, and not as in this case after the parties had *separated*, and the prosecutor had time to deliberate upon it, and apply for assistance, and had applied to a friend, by whom he was advised not to pay it, and who was actually present

at the very time when it was paid: all which carried the appearance more of a composition of a prosecution than it did of a robbery; and seemed more like a calculation whether it were better to lose his money or risk his character. One of the Judges who agreed that it was not robbery went upon the ground that there was not a *continuing* fear, such as could operate in *constantem virum*, from the time when the money was demanded till it was paid; for in the interval he could have procured assistance, and had taken advice. The minority, who held the case to be robbery, thought the question concluded by the finding of the jury that the prosecutor had parted with his money through fear continuing at the time; which fell in with the definition of robbery long ago adopted and acted upon; and they said that it would be difficult to draw any other line. That this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled as in those cases by having the opportunity of applying to magistrates or others for assistance; for the money was given to prevent the public disclosure of the charge.

Qz. if this decision do not in a great measure over-rule Hickman's case, post, 728.

Hobson's case, Shrewsbury Lent Assizes, 1803, cor. Chambre J. MS. Jud.

Where a servant was intrusted by his master to receive money for him in the county of A., which he was to bring to him in the county of B. the same day, and after such receipt, instead of proceeding with the money directly, he loitered on the road till the day following, and when he got home denied his having received the money; held that such denial was evidence to shew that his original receipt in A. was with intent to secrete and embezzle,

John Hobson was tried upon an indictment on the stat. 39 Geo. 3. c. 85. for receiving money, by virtue of his employment as servant to one Thomas Heighway, on account of the said T. Heighway his master, and fraudulently secreting and embezzling, and so stealing it; the indictment stating the money to be the property of the master. After Chambre J. had summed up the evidence to the jury, the prisoner's counsel suggested an objection that there was no proof of any fact arising in the county of Salop sufficient to give jurisdiction for trial of the offence in that county. The proof (so far as relates to the objection) was, that the residence of the master was at Litchfield in Staffordshire, where the prisoner served him in his trade. That on the morning of Saturday the 22d of January they were both at Shrewsbury; and the master, having authorised one W. Beaumont to collect some debts for him at that place, returned home the same morning, leaving the prisoner at Shrewsbury to receive the money from Beaumont, and bring it to his master at Litchfield that night. The prisoner engaged to do so, and about noon received the money from Beaumont, and also a letter for his master, which had been left

left at Beaumont's, and did not relate to the money transaction. The prisoner left Shrewsbury soon after, but did not go on to Litchfield that night, having slept at a public house on the road; and he did not go to his master till the following evening. He then delivered the letter; and being asked about the money, he said he had not received any.

A few days after the master, in consequence of information he had received by letter, charged the prisoner with having received the money, and another servant who had been at Shrewsbury on the Saturday, being present, told the prisoner that he had seen him receive money, but the prisoner persisted in denying that he had received any. Sometime afterwards the master having received further intelligence, bid the prisoner go to Shrewsbury to clear himself. On the Saturday following the prisoner went to Beaumont at his house in Shrewsbury, and desired him to make a search on the left-hand side of the room in which they had been: but no search was made, Beaumont telling him it was of no use to search, as the prisoner had received the money from him. The learned Judge, thinking the objection proper for the consideration of the Judges, made no observations upon it to the jury; who found the prisoner guilty, and he received sentence. The prisoner's receipt of the money at Shrewsbury, his going thither afterwards to clear himself, and on that occasion desiring a search to be made for the money, as if he had left it there, being the only acts appearing to be done in Shropshire, these questions were made; first, Whether, under this statute, an indictment might not be found and tried in the county where the money or goods were received, although there were no evidence of any other fact locally arising within the same county? Secondly, Whether, if further local proof were necessary, the subsequent conduct of the prisoner at Shrewsbury were not sufficient to obviate the objection, as being an act in furtherance of the purpose of secreting or embezzling. In Easter term following the Judges, having met to consider this case, were of opinion that the trial was properly had at Shrewsbury. Most of them thought that as in the case of larceny at common law, so in this, where the statute declared the offence to be of the same kind, the subsequent conduct of the prisoner

and so to steal the money, within the stat. 39 Geo. 3. c. 85, and consequently that the trial might be had in A.

(Vide ch. 16. s. 18.)

soner, in not accounting to his master and denying the receipt of the money, was evidence to shew that the original taking was with intent to secrete and embezzle, and so to steal, within the meaning of the statute; and the more so, as the act of secreting was a negative act. And some considered that the offence was triable in either county, as referable to the original taking in the one, and the not accounting, but denying the receipt when called upon, in the other.

The case of
Easterby and
M^rFarlane,
MS. Jud.

*The Admiralty
have no jurisdic-
tion to try offend-
ers on the stat.*

11 Geo. 1. c. 29.
*for procuring the
destruction of a
ship of which
they were own-
ers, there being
no evidence of any
act of procurement
done upon the high
seas within the
Admiralty juris-
diction, but only
on shore within
the body of a
county.*

(Vide ch. 17.
§. 14.)

At an Admiralty Session holden before Sir W. Scott, Lord Ellenborough C. J. and Thomson B., at the Old Bailey on the 26th of October 1802, William Codling and John Reid mariners, and William Macfarlane and George Easterby of London, merchants, were indicted on the stat. 11 Geo. 1. c. 29. §. 6 & 7. The indictment stated that W. Codling and J. Reid on the 8th of August, 42 Geo. 3. upon the high seas within the jurisdiction of the admiralty of England, were on board a vessel called the Adventure, whereof Codling was the master and belonging to the same, and Reid an officer belonging to the same; which vessel was insured for 700l. by R. S. and certain other underwriters by name, who had before that time severally underwritten a policy of insurance on such vessel; and that Codling and Reid with force and arms on the high sea within the jurisdiction aforesaid, &c. wilfully and feloniously made divers holes in and through certain parts of the vessel, by means whereof the sea entered, filled, and sunk the said vessel: and that Codling and Reid, so respectively being such master and officer belonging to the said vessel, thereby wilfully and feloniously destroyed the said vessel, to which they, Codling and Reid, so respectively belonged, with a wicked and dishonest intent and design to prejudice the said R. S. &c. who had so underwritten the said policy of insurance on the said vessel, and were severally and respectively insurers on the said vessel; against the form of the stat., &c. And that W. Macfarlane and G. Easterby on the said 8th of August, *on the high sea, within the jurisdiction aforesaid*, were owners of, and each of them was an owner of the said vessel called the Adventure, and so being such owners, and each of them being such owner, with force and arms wilfully and feloniously procured the said W. Codling and the said J. Reid the felony aforesaid, in manner and form aforesaid,

to do and commit; they the said W. Macfarlane and G. Easterby at the time of the said felony so done and committed by the said W. Codling and J. Reid as aforesaid being owners, and each of them being an owner of the said vessel; with a wicked and dishonest intent and design to prejudice the said R. S. &c. who had underwritten the said policy of insurance on the said vessel, and were severally insurers on the said vessel; against the form of the statute, &c. There were other counts in substance the same as the first.

It appeared in evidence, that the vessel called the *Adventure*, having taken in part of her cargo in the port of London, sailed therewith to Yarmouth, where she took in other part thereof, and from thence to Deal. That a few days after sailing from Deal, and when she was on the high seas within the jurisdiction of the Admiralty, at the distance of a few miles from Brighton on the coast of Sussex, she was sunk by the means of boring several holes in the several parts of her bottom described in the indictment. These were proved to have been done by the orders, and in the presence, and with the assistance of the prisoner Codling, the master, for the purpose of thereby occasioning the sinking and destruction of the ship and her cargo. In respect to Easterby and Macfarlane it appeared that they were joint proprietors of the whole of the cargo which was shipped on board the *Adventure*; that they all along acted as, and declared and represented themselves to be joint proprietors of the ship as well as of the cargo: that they particularly acted as such in the hiring of persons to serve on board the ship, in giving orders to, and treating with the captain as joint owners, both before and after the vessel was destroyed; also in the giving orders for the effecting of an insurance upon the ship on their joint account for 700*l.*, and which was in fact underwritten by the several underwriters named in the indictment. That they also described themselves in an instrument in writing signed by each of them, (and whereby Reid was appointed the super-cargo), as "sole proprietors and owners of the brig *Adventure*." It appeared however by the production of the ship's register from the custom-house in London, that one A. Geddes was on the 12th of June 1802 the registered owner of the ship *Adventure* described therein as of the port of London; and that the same ship was afterwards

wards on the 16th of June 1802 (by indorsement on the ship's register) assigned by Geddes to the prisoner Macfarlane, from whom no subsequent assignment appeared to have been made. The cargo was on Tuesday the 10th of August 1802, being two days after the loss, abandoned to the underwriters thereupon by a joint notice of abandonment signed by both the prisoners Easterby and Macfarlane, and the ship was on the same day, by a like notice signed by the prisoner Macfarlane alone, abandoned to the underwriters thereupon. It was under these circumstances contended on the part of the prisoner Easterby, that he was not for want of a compliance with the requisites specified in the statutes 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. an owner of the ship *Adventure*, so as to be liable in that character to the penalties of the statute of the 11 Geo. 1. c. 29. s. 6. It appeared further by the evidence of one Storrow, who was originally retained by Easterby and Macfarlane to proceed as supercargo on board the ship, and who entered and continued on board till the ship arrived at Deal, that in a conversation between the witness and Easterby and Macfarlane at Easterby's house at Rotherhithe, about three weeks before the ship's sailing, and after the witness Storrow had been applied to by Easterby to join the ship, Easterby threw out that many ships had been sunk and might be so to take in the underwriters. That again afterwards, a few days before the ship sailed, in another conversation between the witness, Easterby, Macfarlane, and Codling, at Rotherhithe, Easterby said, "that they wished the ship to proceed from London to Yarmouth, and from Yarmouth to Gibraltar, there to sell the whole of the cargo by contract at public vendue. That after it was sold they thought an opportunity might be taken to sink the ship, and that the people on board might take the boat and get on shore; and that one half of the bills for the amount of the cargo might be remitted in private letters, and the other half in public letters, which latter might be shewn as the whole of the proceeds, and that the underwriters might be called on for the rest, as if left on board." To which Macfarlane and Codling assented. But though Easterby was afterwards seen at Deal, there was no evidence that either he or Macfarlane was ever personally present on board the ship *Adventure* on the high seas,

Vide Rolleston v. Hibbert, 3 Term Rep. 406. and *Hibbert v. Rolleston*, 3 Bro. Ch. Rep. 571. and *Rolleston v. Smith*, 4 Term Rep. 161. *Westerdale v. Dale*, 7 Term Rep. 306. and *Camden v. Anderson*, 5 Term Rep. 709.

seas. The intention of Easterby and Macfarlane that the ship should be destroyed with such cargo as should be on board her at the time of her being sunk was further proved by the circumstance of their having caused to be effected insurances upon the cargo to the amount in the whole of 10,250*l.*, whereas the goods found on board after the ship with her cargo was weighed up and brought to land at Brighthelmstone were proved to have been of the original value as between seller and buyer of 3231*l.* 1*s.* 6*d.* and no more; and by their having respectively withdrawn from the cargo, after the same had been originally shipped as part thereof, several articles, some being stores for the ship's use, a part of which were carried away by Easterby alone, and others put on board a ship called the William belonging to Easterby and Macfarlane, for the use of that ship; others being articles of considerable value packed up for exportation as merchandise, of which no less than 15 considerable packages were found in the house of Easterby; and other like goods which had been at Macfarlane's house were found at the house of a friend of Macfarlane, to which they had been removed for the purpose of concealment, upon Macfarlane's being taken into custody. It was also proved that Easterby two days after the loss of the vessel came down to Brighton, near which place the ship had been cast away, and that Easterby there in the presence of Macfarlane and Codling asked another witness (Cooper) where he had bored the hole, and what size it was, and whether it was about the size of the handle of a chissel which happened to be in the room where they were; and the witness having answered that it was thereabouts, Easterby bid him get the handle out of the chissel and sharpen one end of it in order therewith to plug up the hole in case the vessel should drive on shore. That Easterby afterwards abused Codling for not having taken the vessel to the coast of France, and there destroyed her. And that Macfarlane and Easterby then ordered Codling and Cooper to go to London together and secrete themselves for their safety, which they accordingly did.

It was objected on the part of the prisoners Easterby and Macfarlane, that assuming them to be owners of the ship, and that the evidence stated proved them to have been guilty of feloniously procuring the ship in question to be cast away or destroyed within the 6th sect. of the act 11 Geo. 1.

c. 29., yet that the same offence did not appear to have been committed by them *on the high seas*, so as to bring the same within the jurisdiction of the Court of Admiralty under the 7th section of the act. The Court reserved this question also as well as that which had been before made relative to the ownership of Easterby in the ship for the consideration of the twelve Judges. And subject to those questions left the fact of the wilful destruction of the ship by Codling and Reid, and of the wilful procurement of such destruction by Easterby and Macfarlane, with intent to prejudice the above underwriters, to the jury, who acquitted Reid (*a*), and found the other prisoners respectively guilty (*b*). The questions for the opinion of the Judges were, first, Whether Easterby was an owner of the ship *Adventure*, so as to be liable in that character to the penalties of the stat. 11 Geo. 1. c. 29. s. 6. ? Secondly, Whether the procurement of the destruction of the ship by Easterby and Macfarlane were an offence committed by them on the high seas within the jurisdiction of the Court of Admiralty under the 7th section of that statute ?

Vide Keilw.

p. 67. 20 H. 7.

28 H. 8. c. 15.

2 & 3 Ed. 6.

c. 24. s. 4.

This case was argued before all the Judges in the Exchequer chamber on the 13th of November 1802, and afterwards at an adjourned meeting at Serjeants' Inn on the 30th of the same month. And at a subsequent meeting of the Judges on the 2d of February 1803 they were all of opinion, that whether the act of 11 Geo. 1. c. 29. were considered as making the persons who direct or procure the destroying of a ship—principals or accessaries; yet inasmuch as no act was done by the prisoners Easterby and Macfarlane within the jurisdiction of the Admiralty, they were not subject to that jurisdiction, and consequently that the trial was improperly had. It therefore became unnecessary to determine the other points raised in the argument of the case.

The prisoners afterwards received a free pardon.

(*a*) On this account the evidence which went to affect Reid is not stated.

(*b*) No question was reserved as to Codling, who afterwards suffered the punishment of the law.

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TREATISE

ON THE

PLEAS OF THE CROWN,

&c. &c. &c.

CHAP. I.

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I. Of Blasphemy, Contempt of the Established Religion, Religious Impostors, and Immorality in general.

ALL blasphemies against God, or the Christian Religion, or the Holy Scriptures, are indictable at common law, as well as upon the stat. 9 & 10 W. 3. c. 32. after mentioned. So are all impostors in religion; such as falsely pretend to extraordinary missions from God, or terrify or abuse the people with false denunciations of judgments. These last, if the act be done with intent to make any public disturbance, are by the stat. 5 Eliz. c. 15. punishable for the first offence by a fine of 10l. and one year's imprisonment; and for the second, by imprisonment for life, and a forfeiture of all the offender's goods and chattels; one moiety to the crown, and the other to any person who shall sue for the same. In like manner, all malicious revilings, in public derogation and contempt of the established religion, are punishable by the common law, inasmuch as they tend to a breach of the peace. Similar to these are all scandalous and open breaches of morality exhibited in the face of the people; such as was the conduct of one who exposed himself naked to the public view from a balcony in Covent-Garden.—Offences of this kind sap public morals, the necessary foundation of good government; and are therefore properly cognizable by the temporal magistrates, who may punish the offenders by fine, imprisonment, and such other corporal punishment as the circumstances may require.

§ 1.
Blasphemy.
1 Hawk. ch. 5.
3 Bac. Abr. 474.
4 Black. Com. 59.
62. Vide 9 &
10 W. 3. c. 32.
infra,
Religious Im-
postors.
5 Eliz. c. 15.
l. 2, 3.

Contempt of
the Established
Religion.

Open Immora-
lity.
Poph. 208.
Sir Charles Sed-ley's case, 1 S.
108. 2 Str. 790.

Ch. I. § 2.

II. Of Apostacy and Heresy.

§ 2.

1 Hawk. ch. 2.
 1 Hale 387.
 390. &c.
 4 Blac. Com.
 43—50.
 3 Bac. Abr. 471.
 5 Co. 58.
 1 Eliz. c. 1. f. 36.
 1 Ed. 6. c. 12.
 f. 3.
 29 Car. 2. c. 9.
Vide 1 Hale 410.

1 Hale 400, 7, 8.
 1 Hawk. ch. 2.
 f. 7.

9 & 10 W. 3.
 c. 32 and *vide*
 3 Jac. 1. c. 21.
to restrain pro-
faneness in
preyers.

Apostacy and Heresy; the one an entire falling off from the Christian Religion, the other, in its legal sense, the adoption of any erroneous tenet not warranted by the established church, are in their nature ecclesiastical offences, and properly inquirable and punishable by the spiritual court; the stat. 1 Eliz. c. 1. having repealed all former statutes relating to heresy, leaving it as at common law; and the stat. 29 Car. 2. c. 9. having taken away the writ de hæretico comburendo, by which the judgments of that court were sometimes enforced, as well as all capital punishments in pursuance of ecclesiastical censures. But still the common law courts will take cognizance incidentally whether or not a matter be heresy, notwithstanding the judgment of the ecclesiastical court; and will only give credence to their sentence so far as it concerns ecclesiastical censures. And by the stat. 9 & 10 W. 3. c. 32. "If any person, having been educated in, or at any time having made profession of, the Christian religion within this realm, shall upon indictment or information be convicted by the oath of two or more credible witnesses in any of the courts of Westminster, or at the assizes, of denying, by writing, printing, teaching, or advised speaking, any one of the persons in the Holy Trinity to be God, or of asserting or maintaining that there are more Gods than one, or of denying the truth of the Christian Religion, or the Divine authority of the Holy Scriptures, he shall for the first offence be adjudged incapable of any office or employment, ecclesiastical, civil, or military; and for the second shall be disabled to sue any action, &c. or to be a guardian, executor, or administrator, or to take by any legacy or deed of gift, or to bear any office civil or military, or benefice ecclesiastical, for ever, within this realm; and shall also be imprisoned for three years from the time of such conviction." But it is thereby provided (f. 3.), that a public recantation of the error in the same court where the party was convicted, within four months after the first conviction, shall discharge him for the first offence from all disabilities. And by f. 2. no person shall be prosecuted under the act for any words

words spoken, unless information thereof shall be given on or within four days after to some justice of peace, and the offence be prosecuted within three months after such information.

Ch. I. § 2.
Apostacy, Heresy.

This statute does not take away the common law proceeding against libellers of the Christian Religion, which was the course lately adopted against a most impious writer of this sort.

Rex v. T. Paine
at Guildhall.

III. *Reviling the Sacrament of the Lord's Supper, or profaning the Lord's Day.*

By the stat. 1 Ed. 6. c. 1. s. 1. "Whoever shall deprave, despise, or condemn the most blessed sacrament of the Lord's Supper, in contempt thereof, by any contemptuous words, or words of depraving, despising, or reviling; or shall advisedly in any otherwise condemn, despise, or revile the same, contrary to the effects and declaration abovesaid, (i. e. as set forth in the preamble,) shall suffer imprisonment, and make fine and ransom at the king's pleasure," (i. e. in the discretion of the court). By the same section the offence is to be inquired of and indicted before justices of the peace (three at least, and one of the quorum) in their quarter sessions. By s. 5. the indictment must be preferred within three months after the offence committed.

§ 3.
1 Ed. 6. c. 1.
s. 1. repeated by
1 Mar. c. 2.
and revised by
1 Eliz. c. 1. s. 14.
Vide 3 Bac. Abr.
477.

(1 Hale 375.)

The profanation of the Lord's-day or Sunday, is by a variety of statutes punishable in particular instances by summary process before magistrates; but it is also said to be indictable at common law; and there is a precedent of such an indictment against a butcher, in which he is charged to be a common Sabbath-breaker and profaner of the Lord's-day, and for having within certain times mentioned kept public and open shop, and exposed meat to sale to divers persons unknown.

*Profaning the
Lord's-day.*

Cr. Cir. Com.
155. 1 Hawk.
ch. 6. s. 1. 2. 3.

IV. *Pretending to Witchcraft.*

The better sense of modern times has properly transferred the punishment from the actual commission of this supposed offence to the impostors who now make pretence to it. For the stat. 9 Geo. 2. c. 5. s. 3 & 4. enacts, that "No prosecution, suit, or proceeding shall be had against any

§ 4.
Vide 1 Hawk.
ch. 3. 4 Blac.
Com. 60.
9 Geo. 2. c. 5.
repealing the stat
1 Jac. 1. c. 12.

Ch. I. § 4.
Witchcraft.

person for witchcraft, sorcery, enchantment, or conjuration, or for charging another with any such offence, in any court in Great Britain: and that if any person shall pretend to exercise or use any kind of witchcraft, &c. or shall undertake to tell fortunes, or pretend by their skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found; every such offender, being thereof lawfully convicted on indictment or information, shall be imprisoned for one year; and once in every quarter of the said year, in some market town of the proper county, upon the market day there, shall stand openly on the pillory for one hour, and also shall (if the court think fit) give sureties for good behaviour in such sum and for such time as the court judge proper, and in such case be further imprisoned until such sureties be given." Also by the vagrant act

17 Geo. 2. c. 5. 17 Geo. 2. c. 5. s. 2. all jugglers, fortune tellers, and gypsies pretending to skill in physiognomy, palmistry, or the like crafty science, or pretending to tell fortunes, &c. shall be deemed rogues and vagabonds, and suffer as the act directs.

V. *Offences more peculiarly relating to the Church Establishment and Discipline.*

I. Conformity required by Law.

§ 5. A multitude of statutes have been passed from time to time for the protection of the established church, and to promote conformity thereto; particularly in opposition to the popish religion and superstitions. It is useless at this day to inquire into the history of all these laws, many of which would only form a catalogue of human woes. Doubtless most of these provisions were found necessary in times of fraud and violence, and while the church, as by law now established, was in its infancy: they were passed, to use the words of Lord Bacon, upon the spur of the occasion. But the ameliorated state of the civilized world, and a juster sense of the true principles of christian charity, as well as of sound policy, have tended to soften their rigour; and, though still retained on the statute book, they are mostly fallen into disuse. Those
 respecting

respecting protestant dissenters are nearly in a state of perpetual suspension by the annual act of indemnity, which is passed for the protection of those who may have incurred penalties by breach of the corporation and test acts. The particular examination of all these laws, creating offences cognizable by the superior jurisdictions, would naturally fall within the scope of this treatise; yet, by reason of their disuse, and because I have nothing new to add to what is already in print upon these subjects, I shall content myself with mentioning the principal heads, incidentally and briefly noticing some regulations of less general operation, and referring for the rest to those treatises where this whole code of laws is very perspicuously detailed. And I am the more induced to adopt this method with respect to such laws as are principally levelled at dissenters from the established church, whether protestants or papists, since their operation is very materially mitigated, and in some instances wholly done away, by the two principal acts of toleration under-mentioned.

By the stat. 1 W. & M. c. 18. f. 2. emphatically called the Toleration Act, "all persons dissenting from the established church (except papists and those who shall in preaching or writing deny the doctrines of the Trinity) are exempted from all penal laws relating to religion, except the stat. 25 Car. 2. c. 2. (by which all officers of trust are bound to receive the sacrament according to the usage of the church of England, and also to take the oaths of allegiance and supremacy, and the test,—or, being Quakers, make by 8 Geo. 1. c. 6. a similar affirmation); and also, except the stat. 30 Car. 2. f. 2. c. 1. (amended and in part repealed by 2 Geo. 2. c. 31. by which the members of both houses of parliament are bound to make a declaration against transubstantiation, and the invocation of saints, and the sacrifice of the mass): provided such dissenters take the oath of allegiance and supremacy, and make the abovementioned declaration, and come to some congregation for religious worship, in some place registered either in the bishop's court, or at the county sessions, the doors whereof shall not be locked, barred, or bolted."

Also by the stat. 31 Geo. 3. c. 32. "Persons professing the popish religion, taking the oath of allegiance and abjuration, and making the declaration therein mentioned, shall be relieved

Ch. I. § 5.
*Offences against
Church
Establishment.*

*Vide 4 Blac Com.
ch. 4. & Hawk.
ch. 6. sec. 5. & ch. 18.
f. 21. & ch. 19.*

*Exception by
toleration acts.*

*Protestant
Dissenters.*

1 W. & M. c. 18.
f. 2. & *vide*
19 Geo. 3. c. 44.
4 Blac. Com. 53.

*Toleration of
Papists.*

31 Geo. 3. c. 32.

Ch. I. § 5.
Offences against
Church
Establishment.

relieved from the penalties and disabilities of the several acts (a) against non-conformists, which are the subject-matter of most of the remainder of this chapter. This new oath and declaration may be taken in any of the courts of Westminster, or at the general quarter sessions of the place where the party shall reside, and shall be subscribed by him with his name at length, or his mark, (the name, &c. in the latter case to be written by the officer of the court,) and his title, addition, and place of abode; and it shall remain in such court of record. And the proper officer of the court shall give the party a certificate of such declaration and oath having been duly made, &c. (for which 2s. and no more shall be paid); and such certificate, on proof of the certifier's hand, and that he acted as such officer, shall be sufficient evidence of the fact, unless falsified. With a proviso (f. 9.) that all laws made for frequenting divine service on Sundays shall be still in force against offenders, unless such persons shall come to some congregation permitted by this act, or by the abovementioned act of the 1 W. & M. c. 18.

- * The above statutes, founded on the beneficent, wise, and just principles of toleration, were intended for the protection

(a) The acts, or parts of acts, enumerated as conditionally repealed, are the 1 Eliz. c. 2.—23 Eliz. c. 1.—29 Eliz. c. 6.—35 Eliz. c. 2.—2 (vulgo 1) Jac. 1. c. 4.—3 Jac. 1. c. 4. & 5.—7 Jac. 1. c. 6. in respect of not resorting to the parish church, or for keeping any servant or other person, being a papist, who shall not resort to: also 23 Eliz. c. 1.—27 Eliz. c. 2.—35 Eliz. c. 2.—2 (vulgo 1) Jac. 1. c. 4.—3 Jac. 1. c. 5.—3 Car. 1. c. 2.—25 Car. 2. c. 2. in respect of being a papist or reputed papist, or professing or being educated in the popish religion, or hearing or saying mass, or being a priest or deacon, or entering or belonging to any ecclesiastical order or community of the church of Rome, or being present at or performing any rite, &c. of the popish religion, or maintaining or assisting others therein, or teaching or instructing youth, not being in either university, &c. or not taking the child of any protestant father, &c.: also the 1 W. & M. stat. 1. c. 9. as to removing papists from London and Westminster; and 30 Car. 2. c. 5. as to papists advisedly coming into the king's presence, &c.

The acts, or parts of acts, absolutely repealed, are the 1 Eliz. c. 1.—3 Jac. 1. c. 4.—1 W. & M. stat. 1. c. 8.—1 Geo. 1. stat. 2. c. 13. and 25 Car. 2. c. 2. touching the tender of the oath of supremacy and obedience therein referred to, and of the declaration against transubstantiation, and the penalties thereby inflicted upon persons refusing or neglecting, upon such tender, to take the oath, and make the said declaration: also the acts of the 1 Geo. 1. stat. 2. c. 55. requiring papists to register their names and real estates; and 3 Geo. 1. c. 18. and other subsequent acts, disabling them from taking by any deed or will, unless registered within a certain time; and the 7 & 8 W. 3. c. 4. and 1 Geo. 1. stat. 2. c. 13. disabling them from being barristers, attornies, &c. provided they take and subscribe the new oath and declaration prescribed by the statute 31 Geo. 3. c. 32.

of conscientious persons, who are bonâ fide members of the respective congregations so registered. But neither will the mere act of registry protect persons resorting to such meeting houses and chapels, unless they otherwise bring themselves within the protection of one or other of these statutes. Nor will a professed churchman, who has occasionally attended such meetings, be excused on that account from the penalties of not attending his own church.

Toleration, however, like other good things, has its boundaries, and is not to be pushed to the length of giving public encouragement to dissent from the national establishment. In the spirit of caution, therefore, the stat. 5 Geo. 1. c. 4. has enacted, "That if any mayor, bailiff, or other magistrate in England, Wales, Berwick-upon-Tweed, or the isles of Jersey or Guernsey, shall knowingly or wilfully resort to or be present at any public meeting for religious worship, other than the church of England, in the gown or other peculiar habit, or attended with the ensigns belonging to his office, he shall be disabled to hold such office, and adjudged incapable to bear any public office or employment whatsoever within England, Wales," &c.

Ch. I. § 5.
*Offences against
Church
Establishment.*

Rex v. the Justices of Derbyshire, 1 Blac. Rep. 606.
Britton v. Standish, 6 Mod. 190.

5 Geo. 1. c. 4.
*Dissenters not to
attend meeting
with public
ensigns.*

2. Derogating from the Book of Common Prayer.

The book of Common Prayer was established by the stat. 2 & 3 Ed. 6. c. 1. and 5 & 6 Ed. 6. c. 1. which being repealed by the stat. 1 M. c. 2. was again revived by stat. 1 Eliz. c. 2.; and by the latter statute s. 4, 5, 6. "If any parson, vicar, or other minister who ought to say the said common prayer, &c. (this includes clergymen who have no cure as well as those who have), shall refuse to use it in such church, &c. or other place where he should use to minister the same, or wilfully or obstinately standing in the same use any other form, or speak any thing in derogation of the said book or any thing therein contained, he shall on conviction forfeit for the first offence one year's profit of all his spiritual promotions, and shall suffer six months imprisonment; and for the second offence shall suffer one year's imprisonment, and be deprived, &c. and for the third offence be deprived, &c. and imprisoned for life." And by s. 7 & 8. if such offender have no spiritual promotion, he shall for the first offence be imprisoned a year, and for the second

§ 6.

1 Eliz. c. 2.
Vide 1 Hale
328. &c.
1 Hawk. ch. 7.
s. 3.
3 Bac. Abr. 478.
By ministers.

Ch. I. § 6.
*Offences against
 Church
 Establishment.*

1 Hawk. ch. 7.
 s. 4.

*By persons in
 general.*

second be imprisoned for life. The jurisdiction of the ecclesiastical court being saved, and the statute being only in the affirmative, it does not prevent that court from proceeding against such offenders in its own way, even for the first offence.

By s. 9. &c. of the same statute, "If any person shall in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book or any part thereof; or by open fact compel or otherwise procure or maintain any minister to say any common prayer openly, &c. in other form; or shall by any of the said means unlawfully interrupt or let any minister to say the said common prayer in manner and form required, he shall forfeit 100 marks for the first offence, and 400 for the second, &c. (which if he pay not within six weeks after conviction, he shall suffer six months imprisonment for the first offence, and twelve months for the second); and for the third offence shall forfeit all his goods and chattels, and shall suffer imprisonment for life."

3. Not attending Church and Sacrament.

§ 7.
Statutes.
 1 Eliz. c. 2.
 s. 14.
*All persons shall
 resort to their pa-
 rish church, &c.*

In treating of these offences I shall first refer to the several statutes relative to the same. The stat. 1 Eliz. c. 2. s. 14. enacts, "That all persons inhabiting within this realm, or any other the queen's dominions, shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof to some usual place where common prayer and such service of God shall be used in such time of let, upon every Sunday and other days ordained and used to be kept as holidays, and then and there to abide orderly and soberly during the time of the common prayer, preaching, or other service of God there to be used and ministered; upon pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence 12d. to be levied by the churchwardens of the parish where such offence shall be done, to the use of the poor of the same parish, of the goods, lands, and tenements of such offender, by way of distress." S. 17. gives authority to justices of oyer and terminer or of assize to inquire, hear,

Jurisdiction.

and

and determine the offences : and by f. 20. offenders must be indicted at the next general sessions holden before such justices next after the offences committed. And by f. 24. Punishment by the ordinary for any such offence is a bar to a prosecution before the justices for the same.

The stat. 23 Eliz. c. 1. f. 5. enacts, That every person above the age of 16 years, who shall not repair to some church, chapel, or usual place of common prayer, but forbear the same, contrary to the former statute of 1 Eliz. being thereof lawfully convicted, shall forfeit to the queen for every month he or she shall so forbear 20l. (a); and that over and besides the said forfeitures, every person so forbearing for 12 months as aforesaid shall, for their obstinacy, after certificate thereof in writing made into B. R. by the ordinary of the diocese, a justice of assize and gaol delivery, or a justice of peace of the county where such offender shall dwell or be, be bound with two sufficient sureties in 200 l. at least to the good behaviour, and so to continue bound until they conform themselves and come to the church, according to the true meaning of the statute 1 Eliz. c. 2.

By f. 8. Justices of the peace, as well as other justices named, may inquire of offences within this and the former statute, within one year and a day after such offences committed. And by f. 9. Justices of oyer and terminer, of assize, and of gaol delivery, have power to inquire, hear, and determine offences within this act.

By f. 11. Any person who shall forfeit any sums of money by virtue of this act, and shall fail to pay the same within three months after judgment, shall be committed to prison till he have paid the said sums, or shall conform himself, or go to church, and there do as is aforesaid.

And by f. 10. Every person guilty of any offence against this statute, who shall before he be thereof indicted, or at his arraignment or trial before judgment, submit and conform

Ch. I. § 7.

Offences against Church Establishment.

Limitation.

23 Eliz. c. 1. f. 5.
Vide 1 Hawk.
ch. 10. f. 33.

Forfeiture of 20l. per month, &c.

Recognizance with sureties for good behaviour.

Jurisdiction.

Imprisonment on failure of paying forfeiture.

Causes of discharge or acquittal.

(a) By f. 11. One-third to the queen for her own use, one-third to the queen for the use of the poor (1) of the parish where the offence is committed, and one-third to whoever shall sue for the same. (Vide 1 Hawk. ch. 10. f. 32. &c. as to the division of these forfeitures.)

(1) The 29 Eliz. c. 6. f. 7. enables the lord treasurer, &c. to make a further distribution of this third,

himself

Ch. I. § 7.
*Offences against
 Church
 Establishment.*

himself before the bishop of the diocese where he shall be resident, or before the justices where he shall be indicted, arraigned, or tried, (having not before made like submission at any his trial, being indicted for his first like offence,) shall upon his recognition of such submission in open assizes or sessions of the county where such person shall be resident, be discharged of all and every the said offences against this act, and of all pains and forfeitures for the same: And s. 12. provides, that every person who usually on the Sunday shall have in their house the divine service established by law, and be thereat usually or most commonly present, and shall not obstinately refuse to come to church and there do as is afore-said; and shall also four times in the year at least be present at divine service in the church of the parish where they reside, or in some other open common church or such chapel of ease, shall not incur any pain or penalty limited by this act for not repairing to church.

Jurisdiction.
 29 Eliz. c. 6.
 3 Jac. I. c. 4.
 s. 8. to the like
 purpose.

The 28 (vulgo 29) Eliz. c. 6. s. 2. enacts, That every conviction for any offence before mentioned, (i. e. contrary to the statute of the 23 Eliz. c. 1.) shall be in B. R. or at the assizes or general gaol delivery, and not elsewhere. Sect. 4. enacts, That every such offender in not repairing to divine service, but forbearing the same, contrary to the said statute, being thereof once convicted, shall in such of the terms of Easter or Michaelmas as shall be next after such conviction pay into the Exchequer after the rate of 20 l. for every month which shall be contained in the indictment whereupon such conviction shall be; and shall also for every month after such conviction, without any other indictment or conviction, pay into the Exchequer at two times in the year, viz. in every Easter and Michaelmas term, as much as then shall remain unpaid, after the rate of 20 l. for every month after such conviction; and in default of payment, process to issue out of the Exchequer, &c. to take all the goods and two parts of the lands, tenements, hereditaments, leases, and farms of such offender, towards satisfaction of the penalties. This payment for every month after the conviction, is by s. 6. to be till the party makes submission, and conforms according to the true meaning of the statute 23 Eliz. c. 1. But by stat. 3 Jac. I. c. 4. s. 11. the king has an option to wave the monthly forfeiture, and to take two-thirds

Penalties.

Vide infra.

3 Jac. I. c. 4.
 s. 11.

thirds of the offender's lands, till the said party, being indicted for not coming to church contrary to former laws, shall conform himself and come to church, according to the meaning of the statute in that behalf made.

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Church
Establishment.*

SECT. 5. for the more speedy conviction of such offender in not repairing to divine service, but forbearing the same, contrary to the said statute, (23 Eliz. c. 1.) enacts, That the indictment mentioning the not coming of such offender to the church of the parish where such person at any time before such indictment was, or did keep house or residence, nor to any other church, chapel, or usual place of common prayer, shall be sufficient in law; and that it shall not be needful to mention in every such indictment, that the offender was or is inhabiting within England or other the queen's dominions. But if such offender were then not within the realm, &c. he shall be relieved by plea in that behalf, and not otherwise. And that upon the indictment of such offender, a proclamation shall be made at the same assizes or gaol delivery in which the indictment shall be taken, (if the same be taken at any assizes or gaol delivery,) by which it shall be commanded that the body of such offender shall be rendered to the sheriff before the next assizes or gaol delivery in the same county; and if at the said next assizes or gaol delivery the same offender so proclaimed shall not make appearance of record (a), then upon such default recorded the same shall be as sufficient a conviction (b) in law of the said offence whereof the party so stands indicted, as aforesaid, as if upon the same indictment a trial by verdict thereupon had proceeded and been recorded.

Indictment.

*Proclamation to
surrender.*

(a) The party must enter his appearance on the record, 1 Hawk. ch. 10. s. 25.
(b) Such conviction, if insufficient, shall be removed upon a judgment.

into the Exchequer, and there quashed; but no writ of error can be brought upon it, as 1 Hawk. ch. 10. s. 23.

SECT. 6. provides, That when such offender shall make submission and become conformable, according to the statute 23 Eliz. or shall die, then no forfeiture of 20 l. for any month, or seizure of lands from and after such submission and conformity, or death, and full satisfaction of all arrearages of 20 l. monthly, before such seizure due or payable, shall ensue or be continued against such offender, so long as he shall continue in coming to divine service according to the intent of the said statute.

Offender conforming.

Besides

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Establishment.*

Besides the above provisions, which are of a general nature, extending to all descriptions of persons, there are also other statutes, principally directed against popish recusants, which incidentally notice the offence of not attending church, and make regulations in respect of the same: these I shall refer to as the subject hereafter requires. For the present I shall only advert to some clauses which contain further general provisions touching the offence in question.

3 Jac. 1. c. 4.
1. 7.*Jurisdiction.*

The stat. 3 Jac. 1. c. 4. s. 7. enacts, "That the justices of assize and gaol delivery at their assizes, and the justices of peace at any of their general or quarter sessions, shall, by virtue of this act, inquire, hear, and determine of all recusants and offences, as well for not receiving the sacrament aforesaid, &c. as for not repairing to church according to the meaning of former laws, in such manner and form as the said justices of assize and gaol delivery may now do by former laws in the case of recusancy for not repairing to church; and also shall have power at their said assizes and gaol delivery, and at the sessions (in which any indictment against any person for not repairing to church according to former laws, &c. shall be taken) to make proclamation, by which it shall be commanded, that the body of every such offender shall be rendered to the sheriff of the same county, or bailiff, or other keeper of the gaol of the liberty, before the next assizes and general gaol delivery, or before the next general or quarter sessions respectively to be holden for the said shire, limit, division, or liberty: and if at the said next assizes, &c. the offender so proclaimed shall not make appearance of record, then, on such default recorded, the same shall be as sufficient a conviction in law of the said offence whereof the party stands indicted as aforesaid, as if upon the same indictment a trial by verdict thereupon had proceeded and been found against such offender, and recorded."

Proclamation.

Secl. 8. enacts, "That every offender in not repairing to divine service, but forbearing the same, contrary to the statutes in that behalf made, who shall be thereof once convicted, shall, in such of the terms of Easter and Michaelmas as shall be next after such conviction, pay into the Exchequer after the rate of 20l. for every month which shall be contained in the indictment whereupon such conviction shall be; and shall also, for every month after such conviction,

Penalties.

without any other indictment or conviction, forfeit 20l. and pay into the Exchequer at two times in the year, viz. in every Easter and Michaelmas term, as much as then shall remain unpaid, after the rate of 20l. for every month after such conviction; except in such cases where the king shall and may, by force of this act, refuse the same, and take two parts of the lands, tenements, hereditaments, leases, and farms of such offender, till the said party, being indicted for not coming to church, contrary to former laws, shall conform himself and come to church, according to the meaning of the statute in this behalf made." And by s. 9. "Every conviction recorded for any offence before mentioned shall be certified into the court of Exchequer before the end of the term following such conviction, which shall thereupon award process for the seizure of the lands and goods of every such offender, as the case shall require: and if default shall be made in any part of the payment aforesaid, contrary to the form hereinbefore limited, then, and so often, the king shall and may, by process out of the said Exchequer, take, seize, and enjoy all the goods, and two parts as well of all the lands, tenements, and hereditaments, leases and farms of such offender, as of all other the lands, tenements, and hereditaments liable to such seizure, or to the penalties aforesaid," &c.

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Church
Establishment.

Vide a similar
clause in 29 Eliz.
c. 6. s. 4.

By s. 16. no indictment against any person for not repairing to some church or chapel, or usual place of common prayer, but absenting himself for one month, contrary to the laws and statutes in that behalf provided, or for not receiving the said sacrament, contrary to this law, nor any proclamation, outlawry, or other proceeding thereupon, shall be avoided, discharged, or reversed, for any default in form or other defect whatsoever, (other than by direct traverse to the point of not coming to church or not receiving the said sacrament whereof such person shall be indicted,) but the same indictment shall stand in force and be proceeded upon, any such default of form, or other defect whatsoever, notwithstanding.

Indictment.

SECT. 17. provides, That if any person so indicted shall submit and conform himself, and become obedient to the laws of the church of England, and repair to the parish church of his most abiding, and if there be no such, then to the church next adjoining his such dwelling, and there hear divine service

Indictment re-
versed by defend-
ant's conforming.

Ch. I. § 7.
*Offences against
 Church
 Establishment.*

*Summary pro-
 ceeding before
 Justices.*

service according to the true meaning of the statute in that behalf made, and there publicly receive the sacrament according to law; then every such person so indicted shall be admitted and allowed to avoid, discharge, and reverse the said indictment and all proceedings thereon, in such manner as if this act had not been made, &c.

SECT. 27. enacts, That if any subject shall not resort every Sunday to some church, chapel, or other usual place appointed for common prayer, and there hear divine service according to the stat. 1 Eliz. c. 2. it shall and may be lawful for any justice of the peace of that division, &c. wherein the said party shall dwell, on proof of such default by confession, or oath of witness, to summon the said party; and if he shall not make due proof of a sufficient excuse, it shall be lawful for the said justice to give a warrant to the churchwarden of the parish where the party dwells, under his hand and seal, to levy 12 d. for every such default, by distress and sale of the offender's goods, or in default of such distress to commit such offender to prison within the shire, &c., where he shall be inhabiting until payment of the sum forfeited: the forfeiture to be for the use of the poor of the parish where the offender resided at the time of the offence. SECT. 28. provides that nobody shall be impeached upon the above clause unless within one month after such default made. And by s. 29. No man punished upon this branch shall for the same offence be punished by the forfeiture of 12 d. on the stat. 1 Eliz. c. 2.

Limitation.

25 Car. 2. c. 2.
 s. 2.

Sacrament.

By stat. 25 Car. 2. c. 2. s. 2. All persons admitted into any civil or military office, or receiving any pay, &c. by patent or grant from his majesty, or having any command or place of trust under him, shall take the sacrament according to the usage of the church of England, within three months after such admittance, in some public church, on a Sunday; and by s. 3. shall obtain a certificate thereof, to be put on record in the court where he takes the oaths of allegiance and supremacy by the same act required. And by s. 4. Any person refusing or neglecting to take such sacrament, at the place and within the time mentioned, shall ipso facto be adjudged incapable and disabled in law to have the said office or employment, and the same is thereby adjudged void; and such person being afterwards convicted

Punishment.

of

of executing the same, upon any information, presentment, or indictment in any of the courts of Westminster, or at the assizes, shall be disabled to sue; or to be guardian, or executor, or administrator; or to be capable of any legacy or deed of gift; or to bear any office in England, Wales, or Berwick-upon-Tweed; and shall also forfeit 500l. to be recovered by any informer.

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Establishment.

25 Car. 2. c. 2.

The following considerations are to be extracted from these acts:

As to the particular Offences described therein.

§ 8.

The stat. 1 Eliz. c. 2. f. 14. requires all persons having no lawful excuse for absenting themselves, to repair to church, there to abide orderly during the service. The statutes 23 Eliz. c. 1. f. 5. 29 Eliz. c. 6. f. 2. and 3 Jac. 1. c. 4. f. 8. though not so fully worded as the stat. 1 Eliz. yet may reasonably be taken to embrace the whole tenor of that statute, to which they have general reference. One who misbehaves himself at church, or goes away without reasonable excuse before the service is ended, is as much within the law as one who wholly absents himself. The last mentioned statute, as well as the stat. 25 Car. 2. c. 2. further extends to persons not receiving the sacrament.

Offences described
in the above sta-
tutes.

1 Hawk. ch. 10.
f. 4.

As to the Jurisdictions before which these Offences are examinable.

§ 9.

Offences within the stat. 1 Eliz. c. 2. are by f. 17. inquirable by justices of oyer and terminer, and of assize. The stat. 23 Eliz. c. 1. f. 8. extends the jurisdiction to justices of the peace to inquire of offences within that and the former act: and by f. 9. justices of oyer and terminer, of assize, and of gaol delivery, have power to hear and determine offences within that act. The stat. 29 Eliz. c. 6. f. 2. confined the cognizance of offences within the stat. 23 Eliz. c. 1. to B. R., or the assizes, or general gaol delivery. But the stat. 3 Jac. 1. c. 4. f. 7. again gives jurisdiction over all these offences, not only to the justices of assize and gaol delivery, but to justices of the peace or sessions, in such manner and form as justices of assize and gaol delivery might do by former laws. And by f. 2. of that statute the penalty of 12 d. given by the stat. 1 Eliz.

Jurisdiction.

1 Hawk. ch. 10
f. 21.

Ch. I. § 9.
Offences against
Church
Establishment.

Vide 1 Hawk.
ch. 10. s. 2. &
1. 19.

§ 10.

Limitation.

may on conviction before one justice be levied by his warrant to the churchwardens of the parish where the party dwells, provided it be within one month after the offence: but there are no negative words to take away the remedy by indictment.

The Limitation of Time for Prosecutions.

By stat. 1 Eliz. c. 2. s. 20. offenders must be indicted at the next general sessions of the justices, therein mentioned, after the offence committed; but by the statute 23 Eliz. c. 1. the offences against that and the former statutes of the 1st, 5th, and 13th years of the Queen are inquirable within a year and a day after they are committed: The stat. 29 Eliz. c. 6., which is in *pari materia*, will perhaps be governed by the same limitation; and the subsequent statute 3 Jac. 1. c. 4. s. 7. giving jurisdiction to the justices therein named, refers to the mode of proceeding in former laws.

§ 11.

As to the Form of Indictment, or other Mode of convicting Offenders.

Form of Indictment.

3 Bac. Abr. 479.
1 Hawk. ch. 10.
s. 2. 24. &c.

The stat. 29 Eliz. c. 6. s. 5. gives a general and concise form of indictment, which is also sufficient in an indictment on the stat. 1 Eliz.; and the indictment need not shew that the defendant had no reasonable excuse for his absence; but he must shew that in his own defence. In default of the defendant's appearing, the same stat. and also the stat. 3 Jac. 1. c. 4. s. 7. give a summary mode of conviction, upon proclamation by the sheriff for his appearing at the next assizes, &c., in case he shall not then appear, and such his default be recorded; in which proceeding the statutes must be strictly pursued. The stat. 3 Jac. 1. c. 4. s. 16. provides, that no indictment for not repairing to church according to the laws in force, or for not receiving the sacrament contrary to that law, nor any proclamation, outlawry, or other proceeding thereupon, shall be reversed for any defect of form, other than by direct traverse to the point of not coming to church, or not receiving the sacrament. But the party is only restrained from taking advantage of defects in the record itself; for he may plead any collateral matter, such as pardon, &c.; and judgment may be reversed even for any defect in the record tending to prejudice the king,

1 Hawk. ch. 10.
s. 28.

king, such as the omission of a capiatur, &c.; and so an outlawry may be reversed for a common defect, on putting in bail, and traversing the indictment as to the point of not coming to church. The offence need not be alleged in the county where the party was at the time, being a mere non-seizance, and, properly speaking, not committed any where. But proof of absence from the party's own parish church, it is said, is sufficient to throw the onus upon him of proving where he went to church. Yet this appears to be a strong construction to make on a penal statute, unless he were also proved to be resident within his parish at the time.

Ch. I. § 11.
*Offence against
Church
Establishment.*

1 Hawk. ch. 10.
f. 9.
3 Bac. Abr. 473.
1 And. 139.
(See *vide* Hob.
251.)
1 Hawk. ch. 10.
f. 4. 5.
*and the authorities
there cited.*

What Bars or Excuses may be alleged by Defendants.

§ 12.

By f. 24. of the stat. 1 Eliz. c. 2. punishment by the ordinary is a bar to a prosecution before the justices for the same offence. The stat. 23 Eliz. c. 1. f. 5. attaches the offence only on those above 16 years of age; and by f. 10. conformity before the bishop or the justices, before judgment for the first offence, shall be a discharge from all pains and forfeitures incurred under that act. In like manner conformity after the summary conviction given by the stat. 29 Eliz. c. 6. shall by f. 6. do away subsequent forfeitures of 20 l. per month, or seizure of lands consequent thereon, on payment of all arrearages, so long as such conformity shall continue. So, an indictment for any offence within the stat. 3 Jac. 1. c. 4. may by f. 17. be avoided by the party's conformity, and receiving the sacrament. And by the same stat. f. 27, 28, 29. a conviction by one justice of peace of offenders within the stat. 1 Eliz. c. 2., for not resorting to church, shall operate in bar to the forfeiture given by the stat. 1 Eliz. c. 2. And by all these statutes the defendant shall be discharged on shewing a reasonable excuse for not attending divine service; such as absence out of the realm by stat. 29 Eliz. c. 6. f. 5. And f. 12. of the stat. 23 Eliz. c. 1. specifies what degree of attendance at church within the year shall excuse a party from the pains and penalties of that act. It is said that sickness for part of the time contained in an information shall be no excuse, if it be proved that the defendant was a recusant both before and after; because it shall be presumed that he obstinately forbore during that time. This is another instance of a harsh construction made

*Bars and Ex-
cuses.*

3 Bac. Abr 479.

Cro Jac. 529.
1 Hawk. ch. 10.
f. 10.

Ch I. § 12.
*Offences against
 Church
 Establishment.*

1 Jac. 1. c. 4.
 Okeden v. Key-
 nel, T. Ray. 391.
 463.
 1 Hawk. ch. 10.
 f. 53, 54.

on a penal law; more especially as by stat. 1 Jac. 1. c. 4. f. 2. a recusant conforming himself according to the meaning of the above mentioned statutes of Eliz. shall during such conformity be discharged of all penalties which he might otherwise incur by reason of his recusancy. Such conformity may be pleaded after verdict in an action by a common informer, and even after judgment at the suit of the king, if before execution awarded. But after award of execution, or the king has actually taken the profits of the offender's lands, his only remedy is by petition to the king.

By Toleration Act.

Also certain descriptions of persons have been altogether taken out of the generality of these laws by two principal statutes; namely, protestant dissenters by the stat. 1 W. & M. c. 18., and papists by the stat. 31 G. 3. c. 32. before referred to, upon the conditions therein specified.

Ante, p. 7.

§ 13. *As to the Punishment; and where it is determinable by Conformity.*

Punishment.
 1 Hawk. ch. 10.
 f. 7, 8, 11.
 3 Bac. Abr. 480.
Penalties.

By the stat. 1 Eliz. c. 2. f. 14. a forfeiture of 12 d. is inflicted, after conviction and judgment, for each particular day's omission in attending church. The stat. 23 Eliz. c. 1. f. 5. adds 20 l. per month (i. e. lunar month), which is accumulative to the forfeiture by the former statute. Besides which, by the stat. 23 Eliz. any such offender not attending for 12 months, shall, after certificate thereof in writing made into B. R., either by the ordinary, or by a justice of assize, gaol delivery, or of the peace, of the county where the offender lives, be bound to good behaviour, with two sufficient sureties in 200 l. at least, until conformity. By f. 11., on default of paying within three months after judgment the forfeitures incurred by this act, the offender shall be committed till payment or conformity. By stat. 29 Eliz. c. 6. f. 4. and 3 Jac. 1. c. 4. f. 8, 9. the forfeiture of 20 l. per month shall be for every month contained in the indictment, and also for every month after the conviction (i. e. till the party conforms), except when the king shall take the offender's goods and two thirds of his lands, in default of his paying the 20 l. per month, or where the king shall elect to take possession of two parts of the offender's lands, in lieu of the said penalty (i. e. upon inquisition found of what lands the party was seised). And these penalties

*For the recovery
 of these penalties
 by action, vide
 st. 35 Eliz. c. 1.
 f. 10.*

1 Hawk. ch. 10.
 f. 43, 45.

are to be paid into the Exchequer by the party convicted at stated periods. There is a similar provision in the stat. 3 Jac. 1. c. 4. f. 8. whereby the party shall forfeit 20l. for every month contained in the indictment on that statute, and at the rate of 20l. for every month after conviction; except when the king shall elect to take two parts of the offender's lands. And by f. 10 & 11. the same election is given to the crown in cases of conviction on the stat. 23 Eliz. c. 1. f. 5. And by f. 9. of stat. 3 Jac. 1. c. 4. in default of payment before the end of the term after conviction recorded, process shall issue from the Exchequer to seize the lands and goods of the offender in the manner therein specified. By f. 5. of the same statute, where the king takes the defendant's lands on default of his paying the 20l. a month, the profits of them shall go towards the satisfaction of the penalty. Recusants of a certain standing are also liable to be bound to their good behaviour in the manner pointed out by the stat. 2 Eliz. c. 1. f. 5.

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Offences against
Church
Establishment.

Recognizance.

It is further enacted by stat. 3 Jac. 1. c. 5. f. 8. that no recusant convict shall practise the common or civil law, or physic, or use the trade of an apothecary, or be judge, minister, clerk, or steward in any court, or keep any court, or be registrar or town clerk, or other minister or officer in any court, or shall bear any office or charge in camp, troop, or company of soldiers, or in any ship or fortress; but shall be utterly disabled for the same, and forfeit for every such offence 100l., one moiety to the king, and the other to him who will sue. And by f. 22. such recusants convicted at the death of any testator, or at the time of granting administration, shall be disabled to be executors or administrators; and no such person shall be guardian to any children.

3 Jac. 1. c. 5.
f. 8.
Vide 1 Hawk.
ch. 12. f. 1. &c.
Disabilities.

In addition to the above, popish recusants are put by several statutes under these further disabilities: 1. by stat. 3 James 1. c. 5. f. 11, 12. that of bringing actions, like persons excommunicated; 2. that of presenting to a church by stats. 1 W. & M. c. 26. f. 4. and 12 Ann. c. 2.; 3. that of bearing any public office or charge by stat. 3 James 1. c. 5. f. 9.; 4. by the same stat. f. 10. that of claiming any part of a husband's personal estate; 5. by the same stat. f. 13. that of claiming an estate by curtesy or dower after a marriage against law. They are also put under these restraints by stats. 35 Eliz. c. 2. and 3 James 1.

Vide 1 Hawk.
c. 12. per tot.

Restraints.

Ch. I. § 13.
*Offences against
 Church
 Establishment.*

Forfeitures.

Commitment.

c. 5. f. 67. from going above five miles from home unless by licence, or by virtue of process; 2. by stats. 3 Jac. 1. c. 5. f. 2. and 30 Car. 2. ft. 2. f. 5 & 6. from going to court; 3. by stats. 3 Jac. 1. c. 5. f. 27, 28, 29. and 1 W. & M. c. 15. from keeping arms; 4. from going within 10 miles of London by stats. 3 Jac. 1. c. 5. f. 4, 5. and 1 W. & M. c. 9. They are also liable to these forfeitures: 1. by stat. 3 Jac. 1. c. 5. f. 10. that of two parts of a jointure or dower; 2. by stat. 3 Jac. 1. c. 4. f. 2, 3. that of 20l. for not receiving the sacrament yearly after conformity; 3. by stat. 3 Jac. 1. c. 5. f. 13. that of 100l. for an unlawful marriage; 4. by the same stat. f. 14. that of an 100l. for an omission of lawful baptism; 5. by f. 15. that of 20l. for an unlawful burial; lastly, by stat. 3 Jac. 1. c. 5. f. 26. their houses may be searched for relicks; and by f. 28. if they are married women they are liable to be committed after conviction, &c.

14.

4. The next Offence relating to the Church Establishment is that of

Maintaining others who shall not repair to Church.

3 Jac. 1. c. 4.
 f. 32, 33, 34.
*Keeping, &c.
 others who ab-
 sent themselves
 from Church.*

The stat. 3 Jac. 1. c. 4. f. 32, 33, 34. enacts, "that whosoever shall retain or keep in his service, fee, or livery, or shall willingly maintain, retain, relieve, keep, or harbour in his house any servant, sojourner, or stranger, (except a father or mother wanting, without fraud or covin, other habitation or sufficient maintenance, and also except a ward or person committed to the custody of another by authority,) who shall not go to some church or chapel or usual place of common prayer, to hear divine service, but shall forbear the same for the space of one month, &c. shall for every month that he shall keep such servant, &c. forfeit 10l." This is repealed, as to dissenting protestants, by such as bring themselves within the toleration act; and as to papists, by those who bring themselves within the stat. 31 G. 3. c. 32. f. 3. The above regulation is also enforced, with respect to teachers of youth, by the statutes after mentioned.

5. Offences touching Non-conforming Teachers of Schools.

Ch. I. § 15.
Offences against
Church
Establishment.

By stat. 23 Eliz. c. 1. f. 6 & 7. "If any person or persons, body politic or corporate, shall keep or maintain any schoolmaster who shall not repair to church according to the form of the said statute, or be allowed by the bishop or ordinary of the diocese (who shall not take any thing for the said allowance), they shall forfeit for every month 10 l. And such schoolmaster presuming to teach contrary to the said act, and being thereof convicted, shall be disabled to be a teacher of youth, and shall suffer imprisonment for one year."

§ 15.
Non-conforming
Teachers.

23 Eliz. c. 1.
f. 6, 7.
Vide 11 & 12
W. 3. c. 4. f. 3.
continually re-
pealed by
18 Geo. 3. c. 60.

The offence is by f. 8. inquirable before the same justices as are before mentioned. Ante, p. 17.

Also by the stat. 1 Jac. 1. c. 4. f. 9. "No person shall keep any school or be a schoolmaster, out of the universities or colleges of this realm, except it be in some public or free grammar school, or in the house of one not a recusant, or where such schoolmaster shall be specially licensed thereunto by the archbishop, bishop, or guardian of the spiritualities of that diocese; upon pain, that as well the schoolmaster, as also the party who shall retain or maintain him contrary to the meaning of the said statute, shall forfeit each of them, for every day so wittingly offending, 40 s., one moiety to the king, the other to him who will sue for it."

1 Jac. 1. c. 4.
f. 9.

These statutes are still in force as to persons not within the toleration act (a); but, as to such persons as are within the latter act, they seem to be impliedly repealed by it. And the stat. 12 Ann. c. 7. which obliged schoolmasters to subscribe the declaration concerning the liturgy, and to have a licence from the bishop, is repealed by stat. 5 G. 1. c. 4.

3 Bac Abr 479.
1 Hawk. ch. 9.
f. 3.
(a) 1 W. & M.
c. 18. enlarged
by 19 G. 3. c. 44.

Also by the stat. 31 G. 3. c. 32. f. 13. "No ecclesiastic or other person professing the Roman Catholic religion, who shall take and subscribe the oath of allegiance, abjuration, and declaration therein mentioned, shall be prosecuted in any court whatsoever for teaching and instructing youth as a tutor or schoolmaster. Provided (f. 14.) that no person professing the Roman Catholic religion shall obtain or hold the mastership of any college or school of royal foundation, or of any other endowed college or school, or

31 Geo. 3. c. 32.
f. 13.

Ch. I. § 15.
*Offences against
 Church
 Establishment.*

shall keep a school in either of the universities of Oxford and Cambridge; or (s. 15.) shall receive into his school for education the child of any protestant father. And provided (by s. 16.) that no such person shall keep such school until his or her name or description, as a Roman Catholic school-master or mistress, shall have been recorded at the quarter or general session of the peace for the county, &c. where such school shall be situated, by the clerk of the peace, who shall give a certificate thereof to such person as shall at any time demand the same."

The stat. 11 & 12 W. 3. c. 4. s. 3. which subjected to perpetual imprisonment papists convicted of keeping school, is repealed by stat. 18 G. 3. c. 60. as to persons taking and subscribing the oath therein recited before arrest or prosecution. And also generally by stat. 31 G. 3. c. 32. s. 13. as to persons making and subscribing the oath or declaration thereby required.

§ 16.

6. *By giving or receiving foreign Popish Education.*

*Giving or receiving foreign
 Popish Education.*

1 Jac. 1. c. 4.
 s. 6, 7.

By stat. 1 Jac. 1. c. 4. s. 6, 7. "If any person under the king's obedience shall go, or send, or cause to be sent, any child or any other person under their or any of their government, beyond the seas, out of the king's obedience, to the intent to enter into, or reside in, or repair to any college, seminary, or house of jesuits, priests, or any other popish order, profession or calling, to be instructed, persuaded, or strengthened in the popish religion, or in any sort to profess the same, every such person so sending such child, &c. shall forfeit 100 l., and the parties also incur certain disabilities."

3 Jac. 1. c. 5.
 s. 16.

And by stat. 3 Jac. 1. c. 5. s. 16. "If the children of any subject within the realm, (the said children not being soldiers, mariners, merchants, or their apprentices or factors,) shall be sent or go beyond sea, to prevent their good education in England, or for any other cause, without the licence therein required, the party sending such child &c. shall forfeit 100 l., and the child incurs certain disabilities in the mean time."

3 Car. 1. c. 2.

Also by stat. 3 Car. 1. c. 2. "If any person under the king's obedience shall go, or shall convey or send, or cause to be sent or conveyed, out of the king's dominions, any person into any parts beyond the seas, out of the king's obedience, to the intent

intent to enter into, or be resident, or trained up in any priory, abbey, nunnery, popish university, college, or school, or house of jesuits, priests, or in a private popish family, and shall be there by any popish person instructed, persuaded, or strengthened in the popish religion in any sort to profess the same, or shall convey or send, or cause to be conveyed or sent, any thing towards the maintenance of any person so going or sent, and trained and instructed as aforesaid, or under colour of any charity towards the relief of any priory, &c. or religious house whatsoever, every person so sending, &c. any such person or thing, and every person passing or sent, being thereof convicted, &c. shall forfeit all his goods and chattels, and also all his hereditaments offices and estates of freehold during his life;" besides incurring certain other disabilities. And the contributing to the maintenance of any jesuit, seminary priest, &c. or of any popish seminary out of the realm, is made a præmunire by stat. 27 Eliz. c. 2. s. 6. And by s. 5. of the same stat. "If any subject, not being an ecclesiastic, and brought up in any popish seminary beyond seas, shall not, within six months after a proclamation to that purpose in London, under the Great Seal, return into this realm, and within two days after submit, &c. and take the oath required, he shall be guilty of high treason whenever he shall otherwise return."

Ch. I. § 16.
*Offences against
Church
Establishment.*

25 Car. 2. c. 2.
s. 8.

By stat. 25 Car. 2. c. 2. s. 8. "If any persons not bred by their parents from their infancy in the popish religion, and professing themselves to be popish recusants, shall instruct or educate, or suffer to be instructed or educated, their children in the popish religion; every such person on conviction shall be disabled from bearing any office or place of trust or profit in church or state; and such children shall also be thus disabled until they conform, and take the oaths of supremacy and allegiance, and receive the sacrament after the usage of the church of England, and obtain a certificate thereof under the hands of two or more justices of the peace: and (by s. 9.) shall make and subscribe the declaration against transubstantiation."

Persons professing the popish religion are also laid under many disabilities by various statutes, most of which have been before alluded to, and which being fully explained in other treatises are not necessary to be here detailed; especially as such persons are now protected by bringing themselves within the act of the 31 Geo. 3. c. 32.

Vide 1 Hawk.
ch. 15. and
4 Blackst. Com.
ante, p. 21, 22.

Ch. I. § 17.
Offences against
Church
Establishment.

7. Another Offence against the Established Church, by encouraging the Popish Religion, is

The issuing of Popish Books, Relicks, and the like.

§ 17.

Issuing Popish
Books, &c.
 3 & 4 Ed. 6.
 c. 10.

As to which, by stat. 3 & 4 Ed. 6. c. 10. all primers (and other popish books enumerated), or other books or writings whatsoever theretofore used for the service of the church, other than such as shall be set forth by the king, are abolished and forbidden to be used or kept in this realm or elsewhere within any the king's dominions. And by f. 2. all persons are forbidden to have such books in their custody; and every person shall, for every such book willingly retained in his custody within any of the king's dominions, forfeit on conviction for the first offence 20s., for the second offence 4l., and for the third offence suffer imprisonment at the king's will. And by f. 4. justices of assize and of the peace have authority to hear and determine these offences. And by f. 3. half the forfeitures are to go to the crown, and half to whoever will sue for the same.

17 Eliz. c. 2.
 f. 7.

By stat. 13 Eliz. c. 2. f. 7. "if any person shall bring into this realm or any the dominions of the same any thing called agnus Dei, or any crosses, pictures, beads, or such like superstitious things, from the bishop or see of Rome, or from any person claiming authority from the same to consecrate such things; and if any person so bringing in such things shall deliver, or cause, or offer the same to be delivered to any subject to be worn or used, as well the person doing as the person receiving the same, to the intent to use or wear the same, on conviction and attainder shall incur a præmunire. Any person to whom such things are offered may, (by f. 8.) indemnify himself by apprehending the party offering the same, or within three days after the offer made disclosing his name and place of abode to a justice of peace, or delivering up the thing received within one day. And by (f. 10.) If any justice of peace to whom the said offences shall be declared do not within fourteen days after signify the same to some privy counsellor, he shall incur a præmunire."

3 Jac. 1. c. 5.
 f. 25.

By stat. 3 Jac. 1. c. 5. f. 25. "no person shall bring from beyond the seas, nor shall print, buy, or sell any popish primer, ladies' pсалters, manuals, rosaries, popish catechisms, missals, breviaries, postals, legends, and lives of saints, containing
 superstitious

superstitious matter, printed or written in any language whatsoever, nor any other superstitious books printed or written in English, on pain of forfeiting 40s. for every such book, one-third to the king, one to the informer, and one to the poor of the parish; and the books to be burnt."

Ch. I. § 17.
*Offence against
Church
Establishment.*

8. Another Offence of the same Description is

§ 18.

The saying or hearing Mass or other Popish Service.

By stat. 23 Eliz. c. 1. § 4. "Every person who shall say or sing mass, being thereof lawfully convicted, shall forfeit 200 marks, and be committed to the next gaol for one year, and till payment: and every person who shall willingly hear mass shall forfeit 100 marks, and suffer a year's imprisonment." But conformity will remit the punishment in the manner already described.

*Saying or
hearing Popish
service.*
23 Eliz. c. 1. § 4.

Ante, p. 19.

And by stat. 3 Jac. 1. c. 5. § 1. "Any person discovering to a justice of peace the saying of a mass, and any of the persons who were present at it, within three days afterwards, by reason whereof any offender is convicted or attainted, shall be indemnified, and have a third of the forfeiture, or 50l. if the forfeiture exceed 150l."

3 Jac. 1. c. 5.
§ 1.
*Indemnity to Per-
sons discovering.*

By stat. 11 & 12 W. 3. c. 4. § 3. "Every popish bishop, priest, or jesuit prosecuted to conviction for exercising any part of his function, (except (f. 5.) he be a foreigner entered in the secretary of state's office, and officiate only in the house of a foreign minister,) shall be adjudged to perpetual imprisonment in such place as the king in council shall appoint." But this severity is now in effect done away by the acts of the 18 Geo. 3. c. 60. and 31 Geo. 3. c. 32. § 4., in respect to persons of this persuasion taking the oaths, and subscribing the declarations therein respectively contained.

11 & 12 W. 3.
c. 4.
*Popish Priests
convict.*

9. Another and very principal Offence against the Church Establishment, connected also with the State, is

§ 19.

The not taking the Oaths of Allegiance and Supremacy, and making the Declaration against Popery.

By the act of the 1 Eliz. c. 1. all ancient ecclesiastical jurisdictions were restored and united to the crown, and its supremacy in such matters was finally asserted and established; and an oath to that effect appointed to be taken by

*Not taking the
Oaths, &c.*
1 Eliz. c. 1.

f. 12.

Ch. 1. § 19.
*Offences against
 Church
 Establishment.*

f. 20, 21.

by all officers and ministers ecclesiastical and civil, on pain, in case of refusal, of the party forfeiting for life every promotion benefice and office, spiritual and temporal, which he had at the time of such refusal, and being disabled from taking any such preferment to which he was then promoted. This oath was abrogated by the stat. 1 W. & M. c. 8., and another appointed to be taken in lieu of it under the same penalties. By f. 37. of the said stat. of Eliz. the offence must be proved by two witnesses at least.

5 Eliz. c. 1. f. 5.
 Vide 1 Hawk.
 ch. 19. f. 28. &c.

All persons required by the stat. 1 Eliz. c. 1. to take the said oath, and all schoolmasters and public and private teachers, barristers, benchers, readers, ancients in any house of court, &c. attornies, sheriffs, and officers belonging to the common or any other law, or to the crown, or to any court whatever, shall, by stat. 5 Eliz. c. 1. f. 5., take the said oath in open court before they shall be admitted to any such vocation or office, &c.; and if they belong not to any court, then they shall take the same before such person as shall admit them to such vocation, &c. or before commissioners appointed under the great seal, &c.

f. 6.

By f. 6. any bishop may tender the said oath to any spiritual person within his diocese, as well in places exempt as others; and by f. 7. commissioners may be appointed by the Lord Chancellor to tender the same to such persons as by their commission they shall be authorized to do. And by f. 8. if any person compellable by either of the said acts, or appointed by such commissioners to take the said oath, shall refuse to take it on a tender thereof, he shall incur a præmunire. And by f. 9. such refusal shall be certified within 40 days if in term, or otherwise at the first day of the full term next following the 40 days, into B. R. by the persons having authority to tender such oath, under the penalty of 100l.; and the sheriff of the county where the court sit may impanel a jury to inquire of such refusal, in such manner as if it had happened in the same county; which jury may, upon such certificate and other evidence, indict the offender in such sort as if the offence had been done in the same county. But though such a jury may find the indictment, still it is said, that the *trial* must be by a jury of that county wherein the oaths were refused.

7 Hawk. ch. 19
 f. 35. Dy. 234.

30 Car. 2 f. 2.
 c. 1. & 1 Geo. 1.
 f. 2. c. 1.

By stat. 30 Car. 2. stat. 2. c. 1. and 1 Geo. 1. stat. 2. c. 1. f. 16, 17. & 22. "No peer or member of the House of Peers

Peers shall vote, or make his proxy, or sit there during any debate; and no member of the House of Commons shall vote or sit there during any debate, after the speaker is chosen; until such peer or member shall take the oaths of allegiance and supremacy, and make a declaration (therein specified) of his belief that there is no transubstantiation in the sacrament of the Lord's Supper, and that the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous, &c. on pain that every such offender shall be adjudged a popish recusant convict, and disabled to hold or execute any office, &c. or from thenceforth to sit or vote in either house of parliament, or to sue in law or equity, or to be guardian, executor, or administrator, or capable of any legacy or deed of gift, and shall forfeit for every such wilful offence 500 l."

The 9th, 12th, and 13th clauses of the same statute, which require that "Every sworn servant to the king shall take the said oaths, and make and subscribe the said declaration," are repealed by the stat. 2 Geo. 2. c. 31. f. 9.

By stat. 1 W. & M. c. 9. "Every justice of peace in London and Westminster, and within ten miles thereof, shall cause to be arrested and brought before him all reputed papists, (except foreigners, being merchants or menial servants to some ambassador or public agent, &c.) and shall tender the above-mentioned declaration to every such person; and every such person refusing the same, and afterwards remaining within the above limits, or being certified by justices out of those limits to B. R. or the quarter sessions for such refusal, and neglecting to make the said declaration in such court, shall suffer as a popish recusant convict." Supposed papists, required by two justices of peace to make the said declaration, and neglecting so to do, are, by stat. 1 W. & M. c. 15., restricted in the privilege of keeping arms, ammunition, and horses at their pleasure; And by stat. 1 W. & M. c. 26. from presenting to any benefice. And by the land-tax acts papists in general are liable to pay double land-tax if they do not conform. But now, by 31 Geo. 3. c. 32. f. 18., no papist making and subscribing the oath and declaration therein contained shall be prosecuted on the former statutes.

Ch. I. § 19.

Offences against
Church
Establishment.

By members of
parliament.

Repealed as to
such papists who
bring themselves
within the

31 G. 3. c. 32.
f. 20.

By Persons holding
places at court.

By persons living
within ten miles
of London.

1 W. & M. c. 9.

31 G. 3. c. 32.
f. 19. protects
those who bring
themselves with-
in that stat.

Vide supra.

Also

Ch. I. § 19.

*Offences against
Church
Establishment.*

7 & 8 W. 3.

c. 24.

By Barristers, &c.

Also by stat. 7 & 8 W. 3. c. 24. any serjeant or counsellor at law, barrister, advocate, attorney, solicitor, proctor, clerk, or notary, practising as such in any court whatsoever, not having before taken, in the court of Chancery, or King's Bench, or quarter sessions of the county wherein he lives, the oaths required by the stat. 1 W. & M. c. 8., and made and subscribed the declaration appointed by the stat. 25 Car. 2. c. 2. (to prevent danger from popish recusants) shall incur a præmunire. This, so far as respects Roman Catholics, is repealed by stat. 31 Geo. 3. c. 32. f. 22., as to such as bring themselves within the same.

c. 27.

Tender of Oaths.

By stat. 7 & 8 W. 3. c. 27. any person refusing to take the said oaths of allegiance and supremacy when tendered, or refusing or neglecting to appear, when lawfully summoned, in order to have the said oaths tendered to him, shall, until he shall have taken the same, incur all the pains and penalties of popish recusants convict: and the person so tendering the said oaths shall, on every such refusal or default, record and enter in parchment the christian and surname and place of abode of the party, together with the time of tender and refusal or default, and shall certify the said record or entry to the justices of assize, oyer and terminer or gaol delivery at their next session, who shall estreat and certify the same into the court of Exchequer, who may award such process against the lands and goods of the party as in the case of a popish recusant convict. By f. 12. quakers, who scruple to take an oath, may make a declaration of fidelity to the same effect.

1 Geo. 1. st. 2.

c. 13.

*Form of Oath of
Allegiance and
Abjuration.*

The stat. 1 Geo. 1. st. 2. c. 13. gives the form of the oaths of allegiance and abjuration required to be taken by all officers civil and military, and all ecclesiastical persons, and members of colleges (being of the age of eighteen years), and by all teachers or readers in any university or elsewhere, and by all schoolmasters and ushers, and all teachers and preachers of separate congregations, all constables, serjeants at law, counsellors, barristers, advocates, attornies, solicitors, proctors, clerks, or notaries, practising in any court; which oaths are to be taken within three (by 9 Geo. 2. c. 26. f. 4. *six*) months after they have been admitted into or entered upon any such preferment, benefice, office, or place, or come into such capacity, or taken upon themselves such em-

ployment, practice, or business in one of the courts at Westminster, or at the quarter sessions of the county where they reside, under pain of disability to hold or exercise the said offices, &c. upon neglect or refusal to take the said oaths. And persons convicted in any of the courts at Westminster, or at the assizes, of exercising such offices or employments without taking the oaths within the time specified, shall be disabled to sue, or to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to be in any office within Great Britain, or to vote for members of parliament; and shall forfeit 500l., to be recovered by any informer. And by s. 10. two justices, or other persons specially commissioned, may tender the said oaths to any person whom they suspect to be dangerous or disaffected to his majesty or his government, and on their neglect or refusal to take the said oaths, may certify the same to the next quarter sessions; which being there recorded, shall be from thence certified by the clerk of the peace into the courts of Chancery or King's Bench; and every person so neglecting or refusing to take the said oaths shall, from the time of his neglect or refusal, be adjudged a popish recusant convict, and as such to forfeit and be proceeded against. The same punishment is denounced by s. 11. against such as, being lawfully summoned to appear and take the oaths, neglect or refuse to do so. These provisions, so far as they respect the summoning persons to take the oaths of supremacy and make the declaration against transubstantiation, required by the stat. 25 Car. 2. c. 2., are repealed by stat. 31 Geo. 3. c. 32. s. 18.

By s. 16 & 17 of the same stat. of Geo. 1. no peer of this realm, or member of the House of Peers shall vote, or make his proxy, or sit there during any debate, and no member of the House of Commons shall vote or sit there during any debate, after the speaker is chosen, until such peer or member shall have taken the abjuration oath thereby required, together with the oaths of allegiance and supremacy, and the declaration against transubstantiation; on pain of being disabled to sue, or be a guardian, or executor, or administrator, or capable of any legacy, or deed, or gift, or to be in any office within Great Britain, or to vote at any election for members to serve in parliament, and of forfeiting 500l., to be recovered by any informer. By s. 20. this disability

Ch. I. § 19.
*Officers against
Church
Establishment.*

s. 7.
s. 8.

*Tender of Oath to
suspected persons.*

*Peers and mem-
bers of parlia-
ment.*

Ch. I. § 19. *Offences against Church Establishment.* disability is not to extend to the offices of tithingman, headborough, overseer of the poor, churchwarden, surveyor of the highways, or any like inferior civil office, or to any office of forester, or keeper of any park, or other inferior or private officers therein mentioned. By f. 22. persons obliged by any law to receive the sacrament, or make the declaration against transubstantiation, shall continue bound to do so.

§ 20. 10. *Extolling or maintaining the Authority of the Pope or the See of Rome.*

Maintaining the Pope's authority.
5 Eliz. c. 1.
f. 2. 10.
Vide 1 Hawk.
ch. 17. f. 72,
73, 74.

By stat. 5 Eliz. c. 1. if any person within the queen's dominions shall, by writing, cyphering, printing, preaching, or teaching, deed or act, advisedly and wittingly hold or stand with, to extol, set forth, maintain, or defend the jurisdiction or power of the bishop or see of Rome, heretofore claimed, used, or usurped in this realm, or any dominion or country under the queen's obedience; or by any speech, open deed or act, wittingly and advisedly attribute any such jurisdiction, authority, or pre-eminence to the said see or bishop of Rome within this realm, or in any of the queen's dominions, he, his abettors, procurers, aiders, assisters, and comforters therein shall be guilty of a præmunire for the first offence, and of high treason for the second; but without corruption of blood or loss of dower. The first prosecution must be commenced within one year after the offence committed.

§ 21. 11. *Putting in Ure Popish Bulls, Process, &c.*

Using Popish Bulls, &c.
13 Eliz. c. 2.
f. 2, 3.

By stat. 13 Eliz. c. 2. f. 2, 3. "if any person shall put in ure, within this realm or any the queen's dominions, any bull or instrument of absolution or reconciliation, obtained from the bishop or see of Rome, or any person claiming authority therefrom, or shall take upon him, by colour of such bull, &c. to absolve or reconcile any person, or to grant or promise to any person within this realm, or other the queen's dominions, any absolution or reconciliation, by any speech, preaching, teaching, writing, or any other open deed, or shall willingly receive any such absolution or reconciliation, or shall obtain from the bishop or see of Rome any bull or writing whatsoever, containing any thing, matter,

ter, or cause whatsoever, or publish or any ways put the same in ure, he, his procurers, abettors, and counsellors to the fact shall be guilty of high treason." By f. 4. accessaries after the offence incur a præmunire; and by f. 5, 6. such as do not, within six weeks, disclose an offer of such bulls, &c. to some privy counsellors, &c. are guilty of a misprision of treason.

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Offences against
Church
Establishment.

There are many other obsolete laws against papal provisions, instruments, and processs, as applicable to particular cases, which subject the offenders only to the penalties of a præmunire.

Vide 1 Hawk.
ch. 19. f. 12. &c

12. *Perverting others or being perverted to Popery.*

By stat. 23 Eliz. c. 1. f. 2. and 3 Jac. 1. c. 4. f. 22, 23. "If any one shall pretend to have power, or shall put in practice to absolve, persuade, or withdraw a subject from his natural obedience to the queen, or to withdraw him *for that intent* to the Romish religion, or to move him to promise any obedience to any pretended authority of the see of Rome or any other state, &c. to be used within the dominions of the queen, or to do any overt act to that intent; and if any person shall, by any means, be willingly absolved or withdrawn, or willingly be reconciled or promise such obedience as aforesaid, he, his procurers and counsellors, shall be guilty of high treason. By f. 3. accessaries after, not disclosing their principals within 20 days, shall be guilty of misprision of treason. But by the latter statute (f. 24.) if any person who is reconciled to the see of Rome, beyond the seas, return into the realm and submit himself, &c. and take the oaths within six days after his return, he is excused.

§ 22.
Conversion to
Popery.
23 Eliz. c. 1.
3 Jac. 1. c. 4.
Vide 1 Hawk.
ch. 17. f. 76,
77, 78.
and post. tit.
High Treason,
§ 53.

13. *Natural born Subjects ordained or professed by Popish Authority, being in the Realm, without submitting themselves.*

By stat. 27 Eliz. c. 2. f. 3. "If any ecclesiastic, born in the queen's dominions, and made, ordained, or professed by popish authority, shall come into, be, or remain in the queen's dominions, and not submit to some bishop or justice of the peace, within three days, and take the oaths, &c. he shall be guilty of high treason. By f. 13. if any subject

§ 23.
Popish Priests
abiding here.
27 Eliz. c. 2.
Vide 1 Hawk.
ch. 17. f. 82, 34

Ch. I. § 23.
*Offences against
 Church
 Establishment.*

shall know that any such priest is within the realm, and not discover him to some justice of peace, &c. within 12 days, he shall be fined and imprisoned at the queen's will; and if any justice of peace, &c. to whom such matters shall be discovered, shall not give information to some of the privy council, &c. within 28 days after, he shall forfeit 200 marks.

This statute seems to be provisionally repealed by the 4th sect. of the stat. 31 Geo. 3. c. 32. in respect of such as take the oath of allegiance, abjuration, and declaration therein mentioned.

14. *Relieving Popish Priests.*

§ 24.
*Relieving Popish
 Priests.*
 27 Eliz. c. 2.
 f. 4.
Vide 1 Hale, 621.

By stat. 27 Eliz. c. 2. f. 4. "Whoever shall wittingly and willingly receive, relieve, comfort, aid, or maintain any jesuit, seminary or other popish priest, &c. being at liberty or out of hold, knowing him to be a jesuit, &c. shall be adjudged a felon, without benefit of clergy."

15. *Refusing to elect or consecrate the Person nominated by the King to a Bishoprick.*

§ 25.
*Rejecting the
 Nomination of
 the Crown to a
 Bishopric.*

This offence, not likely to be now committed, against our church establishment and discipline is one which grew out of the Reformation; before the supremacy of the crown in spiritual concerns had become as rooted in conscience as in law.

25 H. 8. c. 20.
 f. 7.

By stat. 25 H. 8. c. 20. f. 7. "If any dean and chapter refuse to elect the person named in the king's letter for a bishoprick, and to signify such election to the king within 20 days after the licence to elect shall come to their hands; or if any archbishop or bishop, after such election, or nomination by the king in default thereof, signified unto him by the king, shall refuse, within 20 days, to confirm and consecrate the person so signified to him, he shall incur a præmunire.

16. *Appointing Aliens to Church Preferment.*

§ 26.
*Preferring Aliens
 in the Church.*
 7 Ric. 2. c. 12.

The stat. 7 Ric. 2. c. 12. reciting, that by the stat. 27 Ed. 3. no person shall take or receive procuracy, letter of attorney, nor any other administration, by indenture or in any other manner, of any person, concerning any benefice of

of holy church within the realm, but only of the king's subjects of the same realm, without the king's licence, under the pains therein mentioned, confirms the same; and enacts, that if any alien shall purchase any benefice of holy church, dignity, or other thing, and take possession of the same, whether for his own or another's use, without such licence, he shall be comprised in the said stat., and also incur the pains and penalties of the stat. 25 Ed. 3. ft. 5. c. 22.

Ch. I. § 26.
Offences against
Church
Establishment.

17. *Exercising the Jurisdiction of Suffragan without due Appointment.*

By stat. 26 H. 8. c. 14. No suffragan shall use any jurisdiction, ordinary or episcopal power, otherwise nor for longer time than shall be limited by the commission granted by the archbishop or bishop of the diocese, under the authority of that act, under the penalty of a præmunire.

§ 27.
Acting as Suffra-
gan without
Authority.
26 H. 8. c. 14.
f. 6.

18. *Simony.*

No offence under this title was known to the common law; and yet the corrupt presentation to a benefice is said to have been such an offence, whereof the law would take notice even before the stat. 31 Eliz. c. 6.; and this is confirmed by what is said in the stat. 1 W. & M. ft. 1. c. 16. which provides, that no innocent incumbent or patron shall be prejudiced under pretence of lapse by virtue of the simoniacal presentation of the former incumbent, "unless the person simoniacally presented, or his patron, were convicted of such offence at the common law, or some ecclesiastical court, in the lifetime of the person simoniacally promoted." The ground of such an offence at common law must be the abuse of a great public trust from corrupt motives.

§ 28.
Simony.
The Bishop of
St. David v.
Lucy, 1 Ld.
Raym. 449.
Barret v. Glubb,
2 Blac R. 1054.
Oldbury v. Gre-
gory, Moor, 564.
6 Bac. Abr. 185.
Mackeller v.
Tadderick,
Cro. Car. 361.

The stat. 31 Eliz. c. 6. for avoiding simony and corruption in presentations to benefices and other ecclesiastical promotions, enacts, f. 5. That if any person, bodies politic and corporate, shall, for any money, reward, gift, profit, or benefit, directly or indirectly, or by reason of any promise, agreement, bond, or other assurances for any money, &c. directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for any such corrupt cause or consideration; then every such presentation, &c. thereupon

31 Eliz. c. 6.
f. 5.

Ch. I. § 28.
Offences against
Civ. b
Establishment.

shall be utterly void; and it shall be lawful for the crown to present, collate unto, or bestow every such benefice, &c. for that one turn only. And that every person, bodies politic and corporate, that shall give or take any such sum of money, reward, &c. directly or indirectly, or that shall make or take any such promise, bond, &c. or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, &c.; and the person so corruptly taking, procuring, seeking, or accepting any such benefice, &c. shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical.

Cro. Jac. 533. In the case of Booth v. Potter it was holden, that the party so simoniacally promoted could never be presented to the same benefice again.

Other provisions are made and penalties given by the same act in furtherance of the like purpose.

12 Ann. c. 12. This provision has been followed up by the stat. 12 Ann. c. 12. s. 2. whereby, "if any person shall, for any money, reward, or advantage, &c. directly or indirectly, or by reason of any promise, agreement, bond, &c. or other assurance for any money, &c. directly or indirectly, in his own or any other person's name, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon, every such presentation or collation, &c. shall be void, and such agreement be deemed a simoniacal contract, and the crown may present or collate for that turn; and the person so corruptly taking, procuring, or accepting any such benefice, &c. shall thereupon and from thenceforth be adjudged a disabled person in law to have the same benefice, &c."

By both statutes the offenders shall also be liable to be punished by the ecclesiastical laws.

CHAP. II. OF HIGH TREASON;

AND OTHER INCIDENTAL OFFENCES

Immediately against the Allegiance due to the King.

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unless the Party arraigned, in open Court, confess the same. § 63. At Common Law one Witness sufficient. § 64. By the said Statutes two necessary in all Treasons except those relating to the Coin (as well created by Statutes subsequent as prior) and Seals, and Sign Manual, and also except the particular Treasons against the Life or Person of the King included in the stat. 40 Geo. 3. c. 93. § 64.

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Of High Treason, and other incidental Offences immediately against the Allegiance due to the King.

§ 1.

Definition.

1 MS. Sum. 10.

2 Blac. Com. 75.

1 Hale, 86.

Folt. 195.

Sum. 11.

3 Inst. 15.

Distinguishable from Sedition.

1 Hale, 77.

HIGH treason, which by the very term denotes treachery or breach of faith, is a violation of the allegiance which is due from the subject to the king, as sovereign lord and supreme magistrate of the state. It is, as Lord Hale says, the greatest crime against faith, duty, and human society, and brings with it the most fatal dangers to the government, peace, and happiness of the nation: The life of the king, who is the head of the body politic, and the cement of the social bond, cannot, in the ordinary course of things, be taken away by treasonable practices without involving the whole nation in blood and confusion; and consequently every stroke levelled at his person is levelled at the public tranquillity. This offence, therefore, which includes felony, is the highest known to the law, and subjects offenders to the greatest ignominy and punishment. It is distinguishable from sedition, which is now understood in a more general sense, and extends to other offences, not capital, of like tendency, but without any actual design against the king in contemplation; such as contempts of the king and his government, riotous assemblies for political purposes, and the like: and therefore a charge of exciting sedition, or doing any thing seditiously, does not amount to a charge of high treason. But all such contempts, though not amount-

ing

1 Hawk. ch. 23.

ing to high treason, as not being connected with any actual design on foot against the safety of the king, are yet highly criminal, and punishable with fine, imprisonment; and sometimes with the pillory. Some of these offences I shall have occasion to consider in treating of libels, others will be mentioned incidentally in the course of the present inquiry. In general, it is sufficient to observe, that all contemptuous, indecent, or malicious observations upon his person or government, whether by writing or speaking, or by tokens, calculated to lessen him in the esteem of his subjects, or weaken his government, or to raise jealousies of him amongst the people, will fall under the notion of seditious acts, as well as all direct or indirect acts or threats calculated to overawe his measures or disturb the course of his government, not amounting to overt acts of high treason, or otherwise punishable by particular statutes. A second offence of this sort was, by a late temporary act, 36 Geo. 3. c. 7. s. 2., made punishable with transportation: but that is now spent.

Ch. II. § 1.
Definition.

*Vide chapter of
Unlawful Assem-
blies, &c.*

There are besides some other offences which, though not amounting to high treason, yet being direct violations of the duty which the subject owes immediately to his sovereign, have been made capital or simple felonies, or subjected to the penalties of a præmunire, according to their several degrees. These I shall have occasion to mention, as they occur in consideration of the principal subject with which they are connected, and which seems properly divisible into the four following heads of inquiry:

1. What is Allegiance.
2. From whom it is required:
3. To whom it is due.
4. What are the Breaches of it which amount to High Treason or other less Offence.

1. What is Allegiance.

Allegiance is that obedience and fidelity which every person, under the protection of the laws and government, owes, in return for that protection, to the person of the king, as the supreme head of the state, and dispenser of those laws

§ 2.

Allegiance.

1 Hale, 59. 67.

Foist. 184.

4 Blac. Com. 74

E

and

Ch. 11. § 2.
What is Allegiance.

See the Oath of Allegiance.
1 Hawk. ch. 22.
§. 2. 4.

and that government. It is the tie which binds every subject to be true and faithful to his sovereign liege lord the king, and truth and faith to bear of life and limb and earthly honour; and not to know or hear of any ill intended him without defending him therefrom. This duty of allegiance also binds all persons to serve the king faithfully and diligently in their several stations; to assist him with their advice when called upon; and to serve him in their persons, if able, in defence of the realm against rebels and foreign invaders: and they are indictable as for a high misdemeanor for the wilful neglect or refusal of any of these their bounden duties. The same duty binds every subject beyond sea to return upon the king's letters for that purpose, or to refrain from going abroad, upon the king's pleasure so expressed either by the writ of ne exeat regnum, or under the great or privy seal or signet, or by proclamation; for the contempt of which he is indictable at common law, and his lands may be seized till his return. And inasmuch as the duties and obligations of the king towards his subjects arise from the moment that he is invested with the regal character, and antecedent to his coronation oath, which is only a more solemn recognition of those inherent obligations; so there is an original, implied, and virtual allegiance which the subject owes to the sovereign antecedent to any express oath or engagement to that effect; for the breach of which, at an age of discretion, he is amenable to justice.

Allegiance is distinguished into *natural* and *local*, which leads to the second head of inquiry.

§ 3.

2. From whom Allegiance is required.

From whom allegiance (natural) is due.

Folt. 183, 4.
1 MS. Sum. 10.

Folt. 60.
1 Hale, 68. 96.
3 Inst. 11.
1 Hawk. ch. 17.
§. 7.

Natural allegiance is that which is due from every man who is born a member of the society. His birth in the state entitles him to peculiar privileges, which are, with great propriety, called his birth-right; and this being indefeasible the allegiance arising out of it is equally unalienable: it is due from him at all times and in all places. Hence the maxim *nemo potest exuere patriam*. It is not in the power of any subject to shake off his allegiance, or transfer it to any foreign prince: nor can any foreign prince, by employing a British subject, dissolve the bond of allegiance between that subject and the crown. Dr. Storie, an Englishman, having

having passed into Spain, and there sworn allegiance to that crown, afterwards returned to England in the character of a public minister from the Spanish King; and entering into treasonable practices against Queen Elizabeth, was condemned and executed for high treason. In Townley's case his counsel offered to shew that at the time of the rebellion, in which he bore a part, he was in the service and pay of the French King; and so entitled, as they insisted, to the benefit of the cartel for the exchange of prisoners. But the court declared that such proof was inadmissible. In truth it was, if possible, a great aggravation of his offence. They farther insisted on what was improperly called the Capitulation at the surrender of Carlisle to the king's forces. In this also the court over-ruled them; it being no sort of defence in a court of law: though to prevent misconstruction it was proved that the rebels were expressly reserved to be dealt with according to the king's pleasure. The same doctrine prevailed in the case of *Æneas Macdonald*, who, though a native of Great Britain, had resided and been educated in France from his early infancy, and acted in the rebellion of 1745, under a commission from the French King. The hardship of his case was much pressed; but the court said, that it could not be doubted but that it amounted to high treason. Lord C. J. Lee, in directing the jury, told them, that as to the question, Whether or not the prisoner were a native of Great Britain? the presumption in all such cases was against the prisoner; and that where he put his defence on that issue, the proof of his birth out of the king's dominions lay upon him.

The rights of natural born subjects are extended by the stat. 4 Geo. 2. c. 21. to children born out of the king's allegiance of natural born fathers; and by the stat. 13 G. 3. c. 21. to the children of such children.

Allegiance is due as well from the husband of a queen regnant to her as from a queen consort to the king.

It is a high contempt at common law to refuse taking the oath of allegiance, which all laymen above the age of 12 years are bound to take at the torn or court leet.

By stat. 1 W. & M. c. 8. s. 3. Archbishops, bishops, and all persons of or above the degree of a baron, are required

Ch. II. § 3.
From whom Allegiance is due.

Dr. Storie's case,
1 Hale, 96.
Dy. 298. a.
pl. 29. 300. b.
pl. 38.
Townley's case,
1745.
Fort. 7.

Æneas M'Donald's case before the Special Commissioners in Surrey, 1747.
Fost. 59.

§ Int. 3.
1 Hale, 100.
Fost. 1. 5.

Oaths of Allegiance and Supremacy.
1 Hawk. ch. 24.
s. 3.
1 W. & M. s. 1.
c. 3.

Ch. II. § 3.
From whom Al-
legiance is due.

to take the oaths of allegiance and supremacy, and make the declaration against transubstantiation, at the times and places mentioned. And for omission or refusal thereof, these, and all persons taking any office, ecclesiastical or civil, are subjected to the same penalties, forfeitures, and disabilities, as they were before the act, (by stat. 1 Eliz. c. 1. and 3 Jac. 1. c. 4. amounting in some cases to præmunire, in others to forfeiture of the office and disability to hold any); and by f. 9. all other persons, other than those specifically mentioned, refusing the said oaths of allegiance and supremacy, on tender to them by proper magistrates, shall be committed by such magistrates for three months, unless they pay such sum, not exceeding 40s., as shall be required by the same: and if they refuse again at the end of three months, they shall be imprisoned six months, or pay a sum not above 10l. or under 5l., and also find sureties for their good behaviour and appearance at the next assizes; where, if they refuse the said oath, they shall be incapable of any office, and continue bound to their good behaviour until they take the oaths. The oaths are also required to be taken by land and sea officers, on pain of disability to hold their employments.

30 Car. 2. ft. 2.
c. 1.
Oaths by Mem-
bers of Parlia-
ment.

By the stat. 30 Car. 2. ft. 2. c. 1. No peer or member of the House of Peers shall vote or make his proxy, or sit there during any debate, and no member of the House of Commons shall vote or sit there during any debate, after the speaker is chosen, until such peer or member shall take the oaths of allegiance and supremacy, and make the declaration against popery in the manner before described, under the penalties there mentioned.

Ante, chap. 1.
f. 19.

Vide ch. 1. f. 19.

And by various acts persons entering upon certain offices or public trusts are required, under high pains and penalties, to take the said oaths.

§ 4.
Local Alle-
giance; from
whom due.

1 MS. Sum. 10.
Fost 183, 5.
2 Hale, 59, 60.
62. 92.
3 Inst. 4.
2 Inst. 58.
1 Hawk. ch. 17.
f. 5.

Local allegiance is that which is due from a foreigner during his residence here; and is founded in the protection he enjoys for his own person, his family, and effects, during the time of that residence. This allegiance ceases whenever he withdraws with his family and effects; for his temporary protection being then at an end, the duty arising from it also determines. But if he only go abroad himself, leaving his family and effects here under the same protection, the duty

duty still continues; and if he commit treason, he may be punished as a traitor: and this whether his own sovereign be at enmity or at peace with ours. Therefore if he aid even his own countrymen in acts or purposes of hostility, while he is resident here, he may be dealt with in the same manner. The above rule was laid down by all the judges assembled, at the queen's command, on the 12th January 1707. It has indeed been observed, that the judges, in that resolution, laid considerable stress on the queen's declaration of war against France and Spain, in which she expressly took under her protection the persons and estates of the subjects of those crowns residing here and demeaning themselves dutifully, and not corresponding with the enemy: for by that declaration, say they, those aliens were put upon the foot of aliens coming here by licence or safe conduct, and were enabled to acquire chattels, and maintain actions for the recovery and protection of their personal rights as fully as aliens amy. Yet I cannot think that this circumstance essentially altered the case; for the mere fact of being domiciled here does in itself imply an allegiance and an engagement to be true and faithful to the government by which such domicile is protected; and at any rate that the party shall not take advantage of this indulgence to prejudice the state more easily and effectually. This latter I take to be the true ground upon which an alien enemy, domiciled in this country, may, in sound reason and justice, be dealt with as a traitor for aiding or advising his own countrymen in acts of hostility. The case of an ambassador residing here is not meant to be included in the foregoing observations: the exception, if any, is grounded on principles of policy and not of justice. But an alien enemy, not domiciled here, taken in avowed hostilities against the king or his government is no traitor, though leagued with rebels; for he violates no trust or allegiance.

Ch. II. § 4.
Local Allegiance.

Delamotte's case,
O. B. July 1781.
S. P.

Fost. 185.

(Wells v. Williams, Saik. 46.
1 L. Raym. 282.)

See chap. of persons capable of committing crimes,

Ld. Herise's case,
3 Inst. 11.
1 Hale, 59. 94.
7 Co. 6. b.
Dalis, 23.
1 Hawk. ch. 17.
f. 6.

Kel. 38.

On the trial of several quakers for their third offence upon the stat. 16 Car. 2. an act for suppressing seditious conventicles, one of them pleaded that he was an alien born in France, and so not within the penalty of the act, which is levelled against every person, &c. "*being a subject of this realm;*" but this was over-ruled, because as long as he lived here under the king's protection, he is a *subject* of the realm, and punishable

Ch. II. § 4.
Local Allegiance

punishable for transgressing its laws: but it was admitted, that if the statute had said, being a *natural born* subject, &c. it would not have extended to him.

§ 5.

3. To whom Allegiance is due.

To whom allegiance is due.

Fost. 188.

1 Hale, 101, 6.

1 Hawk. ch. 17.

f. 19, 20.

4 Blac. Com. 76.

Vide 1 Mar.

ft. 3. c. 1.

3 Inst. 7, 8.

Ante, f. 3.

A prince or princess succeeding to the crown by descent or by the previous designation of parliament, is, from the moment their title accrues, a king to all intents and purposes within the statute of treasons (25 Ed. 3. ft. 52. after-mentioned) antecedent to the coronation, which does not confer but pre-supposes a right. But a titular king, as the husband of a queen regnant, is clearly not within that law, but does himself owe allegiance to the queen.

Fost. 188. 379.

397, 398.

11 H. 7. c. 1.

1 Hale, 60. 101.

104. 272, &c.

Sum. 12.

1 Hawk. c. 17.

f. 14. &c.

It is also agreed that a king *de facto*, in the full and sole possession of the crown, is a king within the same statute of Edward 3.; and that any other person out of possession is no such king, be his pretensions what they may. Mr. Justice Blackstone, indeed, seems to insinuate, that "the possession of the crown" is a term of too loose and indistinct a signification; but Hawkins refers it to the king in whose name the laws are administered, by virtue of which, liberty, life, property, and all other advantages of government are secured to the subject; which is, in truth, the legitimate and solid foundation of allegiance. A possession of this sort does at least imply a general acquiescence on the part of the nation, and not a mere forcible possession of the external symbols of royalty, *flagrante bello*. But when Sir Henry Vane, to an indictment for levying war against King Ch. 2., justified that all that he had done was by authority of parliament, and that the king was then out of possession of the kingdom, and the parliament the only power regnant; it was resolved, that though King Charles 2d. was in fact kept from the exercise of his royal authority by rebels, yet he was king both *de facto* and *de jure*, and that all the acts done to keep him out were high treason. The latter part of this resolution furnishes the true ground of the judgment. Sir H. Vane was actively instrumental in preventing the king from assuming his authority. But it is a misapplication of terms to say that that prince was king *de facto* before the period of the restoration. Shortly after the stat. 13 Car. 2.

4 Blac. Com. 77.

1 Hawk. ch. 17.

f. 14.

See 1 Hale, 273.

the case of the

Lady Jane Gray.

Sir H. Vane's

case, Kel. 14, 15.

ft. 2. c. 1. was passed, declaring it a præmunire for any person to assert maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king. It is indeed happy for those who live in the present times, under a known order of regal succession, settled by the controlling authority of parliament, which has put all these questions out of countenance. By the stat. 1 W. & M. ft. 2. c. 2. every person holding communion with the church of Rome, or professing popery, or marrying a papist, is thereby disabled from inheriting or possessing the crown of this realm: and in all such cases the subjects are absolved from their allegiance. And by the act of settlement the crown is limited to the heirs of the body of the Princess Sophia, Electress and Duchess Dowager of Hanover, being protestants. These acts have been followed by others tending to secure this succession, which will be noticed in their place.

Ch. II. § 5.
Legal Allegiance.

1 W. & M. ft. 2.
c. 2. f. 9.
*Papists disabled
from possessing the
crown.*

12 & 13 W. 3.
c. 2.
Act of settlement.

Post. f. 32.

I now proceed to consider

4. *What Acts in Breach of Allegiance amount to High Treason or other less Offence;*

§ 6.

which will lead me to the consideration of the several acts of parliament declaratory or enactive of high treason, or other offences of the same nature.

*What acts amount
to a breach of
allegiance.*

The first and principal of these is the stat. 25 Ed. 3. ft. 5. c. 2., emphatically called the Statute of Treasons, because it reduced and settled all treasons which were before very indefinite, and often stretched by arbitrary constructions, to certain specific heads therein declared. This statute being the standard of high treason, I will begin by setting it out at large:—It is thereby declared to be high treason,

*Statute of Treasons, 25 Ed. 3.
ft. 5. c. 2.
Vide 1 Hale, 82.
87, 9. 262.
4 Blac. Com. 76.*

“ When a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir; or if a man do violate the king’s companion, or the king’s eldest daughter unmarried, or the wife of the king’s eldest son and heir; or if a man do levy war against our lord the king in his realm; or be adherent to the king’s enemies in his realm, giving to them aid and comfort in the realm or elsewhere; and thereof be proveably (*i. e.* upon sufficient proof) attainted of open deed by the people of their condition; and if a man counterfeits the king’s great or

25 Ed. 3. ft. 5.
c. 2.

(Post. 193.)

Ch. II. § 6.
*What a Breach
 of Allegiance.*

privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called Luthburgh, or other like to the said money of England, knowing the money to be false, to merchandize or make payment, in deceit of our lord the king and his people; and if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices."

The statute afterwards proceeds to give this salutary caution, "That because many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason till the cause be shewed and declared before the king and his parliament, whether it ought to be judged treason or other felony."

7 Hale, 308.

1 Hawk. ch. 17.

f. 2.

4 Blac. Com. 86.

87.

1 Mar. ft. 1. c. 1.

1 Ed. 6. c. 12.

f. 2.

This statute was re-enforced and again made the only standard of treason by the stat. 1 Mar. ft. 1. c. 1., which abrogated all intermediate acts creating new treasons or misprisions of treason: since which time, however, other treasons have been added by various statutes; of these it is only necessary to set forth the last in this place, reserving the rest for incidental mention, as the subject matters of them occur.

36 Geo. 3. c. 7.

By stat. 36 Geo. 3. c. 7. "If any person, after the passing of this act, during the natural life of the king, and until the end of the next session of parliament after a demise of the crown, shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of the king, his heirs or successors, or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any other of his majesty's dominions or countries; or to levy war against his majesty, his heirs or successors within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, both or either houses of parliament;

parliament; or to move or stir any foreigner or stranger with force to invade this realm, or any other his majesty's dominions, or countries, under the obeisance of his majesty, his heirs and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed; being legally convicted thereof, upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law, then every such offender shall be deemed, declared, and adjudged to be a traitor." By s. 5. the benefit of the acts of the 7 W. 3. c. 3. and 7 Ann. c. 11. as to the trial is reserved.

Ch. 11. § 6.
*What a Breach
of Allegiance.*

By the act of union with Scotland, high treason or misprision of treason in England, and none else, shall be high treason or misprision of treason in Scotland. Such a provision was not necessary in the case of Ireland, which had the same general laws as Great Britain before its union with it; and therefore the 8th article of the union with Ireland only provides that all the laws in force, at the time of the union, in either country respectively shall remain, unless afterwards altered.

Scotland.
7 Ann. c. 21.

Ireland.
40 Geo. 3.

Keeping the leading statute of the 25 Ed. 3. principally in view, that and the rest furnish altogether the following distinct heads of offence :

1. *The Compassing or imagining the Death of the King.*
2. *Compassing or imagining the Death of the Queen, or the eldest Son and Heir of the King and Queen.*
3. *Violating the King's Wife, or eldest Daughter unmarried, or the Wife of his eldest Son and Heir.*
4. *Lewying War against the King in his Realm.*
5. *Adhering to the King's Enemies.*

*Division of the
Subjects.*

[*And herein of the inferior Offence of enlisting into foreign Service, done without any treasonable Design.*]

6. *Counterfeiting the King's Seals.*
7. *Killing his Officers.*
8. *Concerning the Coin.*
9. *Concerning Papists and the King's Supremacy.*
10. *Concerning the Succession to the Crown.*

Ch. II. § 7.
Compassing or
imagining the
King's Death.

11. *Seducing or attempting to seduce others from their Allegiance.*

[To these I shall add, as an Offence of an analogous Nature]

12. *Desertion from the King's Forces.*

I. The first kind of high treason declared by the st. 25 Ed. 3. is

§ 7.

"Where a Man doth compass or imagine the Death of our Lord the King."

1 MS. Sum. 13.
Folt. 193, 4, 5.
Kel. 8.
1 Hale, 107, 8.
2 Hawk. ch. 17.
f. 8.
4 Blac. Com. 79.

In this species of treason the old rule, which prevailed in all cases of homicide, *quod voluntas reputabatur pro facto*, applies in its full extent. A mere imagination of the heart, if any open or overt act be done towards effectuating the design, (without which it cannot possibly fall under any judicial cognizance,) is deemed the same degree of guilt as if carried into actual execution. But still *the compassing and imagining the death* is the substantive treason; and the indictment must charge in the strict words of the statute, that the defendant did traiterously *compass and imagine, &c.*, and then charge the several overt acts as the means and evidence by which the traitorous intention was manifested.

1 MS. Sum. 11.

*Evidence of the
Compassing, &c.
Actual killing.*
Kel. 8.
Folt. 194.
1 Hawk. ch. 17.
f. 8.

1 Hale, 41. 107.
1 Hawk. ch. 17.
f. 10.

It remains then to be shewn what are sufficient overt acts or legal evidence of such an intention. The first set of acts is where the king's life is immediately aimed at. In the case of the regicides the beheading of King Charles I. was laid as an overt act of compassing his death; and the person supposed to have given the stroke was convicted on the same indictment. Though if a man should, by mere mischance or without any evil design, involuntarily hurt or even kill the king, it would not be treason: as when Walter Tyrrel, aiming at a deer, killed William Rufus by the glancing of the arrow from a tree.

*Preparing means
of death.*

1 MS. Sum. 13.
1 Hale, 109. 119.
4 Blac. Com. 79.
Charnock's case,
1 St. Tr. 130.
4 St. Tr. 562. Salk. 631.

So the providing weapons, ammunition, or any other means of accomplishing or procuring his death, in order to effectuate that intent, or the sending letters, or assembling for that purpose, is evidence of high treason under this branch of the statute.

Consultation.

1 MS. Sum. 13.
Folt. 195.

A bare consulting with others how to kill the king, though nothing else be done, and though the conspirators

do

do not then determine upon any scheme for that purpose, or do not agree in their resolution, is an overt act of the same treason. If a person be present at only one such consultation and conceal it, having had a previous knowledge of the design of the meeting, it is evidence to be left to a jury of his assent to the design, though he neither did nor said any thing at such consultation: but if he had no such previous knowledge, as if he fell into the company by accident or upon some indifferent occasion, a bare concealment without an express assent is only misprision of treason. But if he be present at more than one such consultation, and do not dissent or make a discovery, it is strong evidence of assent. And an assent to any overtures for that purpose is a plain overt act of compassing the king's death, in like manner as any advice, persuasion, or command, to incite, encourage, or procure others to make an attempt against his person.

wood's case, 4 St. Tr. 690, 2. MS. Tracy, 22. Kel. 12:

Ch. II. §7.
*Compassing, &c.
the King's Death.
Consultation.*

Walcot's case,
Show. P.C. 128.
4 Mod. 395.
MS. Tracy, 14.
Kel. 15. 17. 21.
4 Blac. Com. 79.
120.
Rookwood's
case, 4 St. Tr.
680.
Somerville's
case, 1 And. 106.
1 Hawk. ch. 20.
f. 2, 3.
Vide post. Mispr.
of Treason.
Sir E. Digby's
case, per Holt,
C. J. in Rook.

The next head of overt acts of the same species of treason relates to deposing or taking possession of the king's person, which the common experience of all times and nations has shewn to be the most probable prelude to his death. And therefore it is laid down by our writers that the construction of this species of treason extends to every wilful and deliberate act or attempt whereby the king's person may probably be endangered, or such as cannot be executed without the apparent peril thereof. Accordingly, entering into measures for deposing or imprisoning him, or for forcibly taking his person into the power of the conspirators, or to compel him by force to yield to certain demands, or to remove evil counsellors, and all such other like notorious acts done or conspired to be done against his person or regal government, may be alleged as overt acts of compassing his death: they have a manifest tendency to that fatal issue.

The Earl of Essex intending to go to the court, where the queen was, and take her into his power, and to remove some of her council, and having for that end assembled a multitude of people, it was deemed an overt act of compassing the queen's death; although, as the case is reported in Moor, he did not intend any corporal hurt to her. And this being rebellion in Essex, the adherence of the Earl of Southampton to him in that act was also adjudged treason; though the

latter

§ 8.
*Deposing or taking
possession of the
king or govern-
ment.*

1 MS. Sum. 13.
Fott 195.
1 Hawk. ch. 17.
f. 2. 30.
3 Inst. 12.
4 Blac. Com. 79.
1 Hale, 69, 110,
111. 121, 122.
Lord Essex's case,
Kel. 20, 21.
Sum. 11.
Parkins' case,
4 St. Tr. 651.
Case of the Rebel
Lords in 1715,
6 St. Tr. 1. &c.
Harting's case,
2 Ventr. 315.

Case of the Lords
Essex and South-
ampton, Hil.
43 Eliz. 3 Inst.
12.
1 Hale, 120, 138.
Kel. 76.
Moor, 621.

Ch. II. § 3.
*Compassing, &c.
 the King's Death.*

*Overawing and
 subverting par-
 liament.
 Cases of Hardy,
 Horne Tooke,
 and others, O. B.
 1794, MS.*

latter did not know of any other purpose than a private quarrel which Essex had with some of the queen's servants. So it is said that those also were traitors who went with Essex to London, whether or not they knew of his intent, and though they departed upon the proclamation.

The indictment in the cases of Hardy, Horne Tooke, and others, charged as overt acts of compassing the king's death; that the several prisoners, together with others, conspired to procure a convention to be assembled, with intent that the persons assembled thereat should, without the authority of parliament, subvert and alter the legislature and government of the country, and depose the king. That the conspirators wrote and published pamphlets, letters, resolutions, and addresses, containing incitements to induce the king's subjects to send delegates to constitute such convention. That they met and consulted concerning the assembling of such convention, and the means by which the king's subjects might be induced to send delegates to constitute the same. That they caused arms and other weapons to be provided for the purpose of arming the king's subjects, to the intent that they might oppose the king in the due exercise of his lawful power and authority in the execution of the laws, and might subvert and alter, without, and in defiance of the authority, and against the will of the parliament, the legislature and government, and depose and assist in deposing the king. The Lord C. J. Eyre, in summing up to the jury on Tooke's trial, said, that it could not be denied that he who meant to depose the king compassed and imagined his death. It was a presumption of fact, arising from finding an intention to depose, so undeniable, that the law had adopted it and made it a presumption of law. It had been so settled for centuries. That if the prisoner had been concerned in a plan to establish a convention to usurp the powers of government and depose the king, it did not signify to what extent the powers of government were to be usurped. All the danger to the person of the king would follow, he being bound to support the government and resist the usurpation at all hazards. That there was a great distinction between a resistance to the execution of the laws and an assumption of the powers of government. The material consideration,

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ation, therefore, for the jury was, for what purpose the convention was to be holden, in the design of calling which the prisoner had participated; and that was a matter of fact. That the avowed intention of it being to obtain a reform in the representation of the commons' house of parliament, it lay upon the prosecutor to prove that that was not so; and the prosecutor had undertaken to prove that that was a mere pretext, and that the real object and tendency of it was that charged in the indictment, which was for the jury to determine.

Ch. II. § 8.
*Compassing, &c.
the King's Death.*

Several publications having been given in evidence on the trial, on the part of the crown, containing republican doctrines and opinions, which had been patronised, and the distribution of them promoted, by the prisoners, during the period assigned in the indictment for the existence of the conspiracy; and such evidence having been relied on, to shew that the notion of a reform in parliament, which the prisoners were expected to set up in their defence, was a mere pretext to cover a revolution of the government and a deposition of the king: to rebut such conclusions on the part of the prisoner, Mr. Tooke, a book written by him, intitled a letter to Mr. Dunning (the late Lord Ashburton,) on the subject of parliamentary reform, and expressive of his veneration for the king and constitution, was offered in evidence. To this the Attorney-general objected; contending that what the prisoner had written, said, or published, at any time antecedent to the period of the conspiracy with which he was charged, was not evidence. That the book had no relation to the particular transaction: and as well might any writer on the crown law give in evidence that he had written against robbery, if he were indicted for that crime: and that whatever the prisoner's opinions were then, he might have afterwards altered them. The counsel for the prisoner insisted on its being evidence to shew the mind of the prisoner, and that he could not have in view what was imputed to him by the indictment. That, as a book written by him in favour of a republic would be evidence against him, this must *è converso* be evidence for him. That in case of murder it was competent to prove the defendant a man of humanity, and in crimes of another sort to prove him a man of a chaste and virtuous life. That in Lord Russell's case, Dr. Tillotson gave evidence of his moral and religious habits.

S. C.

Ch. II. § 8.
*Compassing, &c.
 the King's Death.*

habits. Lord C. J. Fyfe said, he doubted if the book could be received in evidence on the ground of general character; that it was a particular act; and it was not competent in giving evidence of character to prove particular instances, but only the general result of them; such as had been given in evidence in Hardy's case, of loyalty and attachment to the king. That the question was not whether this book had a reference to the conspiracy charged, but whether it had not reference to the proof given in support of the charge; and he thought it evidence to rebut the idea that the reform of parliament was a pretence made by the prisoner, and that his real object was to overturn the government. The book was accordingly received in evidence by the court. It was printed in 1782; and refuted the idea that every man was entitled to an equal share in the government of the country; and was in commendation of the regal and aristocratic parts of the constitution.

36 Geo. 3. c. 7.
*Compassing to levy
 war.*

Ante, p. 56.

By the stat. 36 G. 3. c. 7. before mentioned, the compassing to levy war against the king, in order to put any force or constraint upon, or to intimidate or overawe both or either house of parliament, is made a substantive treason during the king's life.

§ 9.

*Levying and con-
 sulting to levy
 war.*

1 MS. Sum. 13.
 Foist. 196, 197.
 211. 3 Inst. 14.
 1 Hawk. ch. 17.
 s. 31. MS. Bur-
 net.

1 Hale, 120, 1, 2.
 131. 144, 5. 148.
 Dr. Storie's case,
 Dy. 298. b.
 Harding's case,
 2 Ventr. 315.
 Friend's case,
 4 St. Tr. 599.
 Loyer's case,
 6 St. Tr. 328.
 Kel. 20, 1.
 Sum. 13.

1 MS. Sum. 13.
 Foist. 197. 211.
 213.
 post.

An offence, though it fall under one branch of the stat. of Ed. 3. as a specific treason, may also come within the construction and be deemed an overt act of another; though Lord Coke thought otherwise. Thus the levying war against the king may be laid as an overt act of compassing his death; and so is a treasonable correspondence with the enemy; or raising troops for his service; though such acts more naturally fall within the clause of adhering to the king's enemies. But further, the bare consulting or conspiring to levy war, though not within the latter branch at all, is an overt act of compassing the king's death; for such acts have a tendency, though not so immediate, to the same end. Lord Hale indeed in his summary, speaking of this head of treason, says, "conspiring to levy war is no overt act, unless levied, because it relates to a distinct treason." This doctrine is true, if confined to a constructive levying of war, such as to pull down inclosures, to lower the markets, or the like; but the reason assigned is a bad one; for the levying war against the king is not in all cases a distinct treason. If a war be levied against his person, it will equally fall within this

this branch of treason as an overt act of compassing his death. And Lord Hale himself appears to have altered his opinion. The same distinction appears to have been taken by Lord Holt in Sir John Friend's case, which he said had been holden to be law at all times; that, if the design be to kill, depose, or imprison the king, and as the means to effect this the conspirators agree to levy war, this is treason, though no war be levied; for the consultation for any such purpose is an overt act proving the compassing the king's death. But, under the act of the 36 Geo. 3., the mere compassing to levy war, in order to constrain the king, is a substantive treason. So the entering into measures, in concert with foreigners and others, for invading the kingdom, a treason of signal enormity; or going into a foreign country, or even purposing to go there to that end, and taking any steps in order thereto, will fall under the same construction. And, indeed, unless the powers so incited happen then to be actually at war with us, the offence will not fall within any other branch of the statute of treasons than that of compassing the king's death; though this is also provided for by the stat. 36 Geo. 3. during the king's life. For by that act the compassing, &c. "to move or stir any foreigner or stranger with force to invade this realm, or any other his majesty's dominions or countries under his obedience, is made a substantive treason." Lord Preston, with some others, were indicted upon this branch of the statute of Ed. 3., as well as on that of adhering to the king's enemies; and the composing, procuring, and secreting treasonable papers; and taking boat, in order to go on board the vessel which was to carry them to France; and carrying the papers with them, in order to be used there for the treasonable purposes charged in the indictment, were proved as overt acts of both species of treason. The like course was taken in Stone's case upon a trial at bar.

Ch II. § 9.
*Compassing, &c.
the King's Death.*

1 Hale, 119.
122, 3.
MS. Tracy, 14.
Friend's case,
4 St. Tr. 625, 6.

Ante, p. 56.

Dr. Storie's case,
ante, p. 51.
Parkyn's case,
4 St. Tr. 651.
Lord Preston's
case, infra.
Fost. 197.
post. f. 20.

Ante, p. 56.

Lord Preston's
case, 4 St. Tr.
409, &c. 448.

Stone's case, post.

Lord Hale, speaking of a constructive levying of war, says, that such may in process of time rise into a direct war against the king; as if the king send his forces to suppress them, and they fight the king's forces; and then it may be an overt act to prove the compassing of the king's death.

*By constructive
levying of War.*
1 Hale, 123.
post. f. 17.

I do not know that this point, that a mere constructive levying of war is evidence of compassing the king's death, has ever come directly in judgment. It was not so considered

Ch. II. § 9.
*Compassing, &c.
 the King's Death.*

Cotton's case,
 Kel. 73.
 Case of Damaree
 and Purchase,
 8 St. Tr 218.
 268. 247. 285.
 290.
 Foist. 213.
 1 Hale, 148.

dered by any of the judges in Cotton's case; and the point could not arise on the trials of Damaree and Purchase, who were severally convicted upon a constructive charge of levying war only; there being no count for compassing the queen's death. It must, however, be admitted, that the object of a great riot or insurrection, comparatively trivial in its origin, may so far vary by its success, continuance, or other circumstances, as to assume a decided tone of resistance to the person of the king and his government, and so become an overt act of compassing his death. For it is a kind of natural or necessary consequence, Lord Hale observes, that he who attempts to subdue the king cannot intend less than his death; and such, he adds, has always been the miserable consequence of such a conquest.

§ 10.

II. It is further declared to be high treason by stat. 25 Ed. 3.

"When a Man doth compass or imagine the Death of our Lady, his (the King's) Queen, or of their eldest Son and Heir."

*Compassing the
 Death of the
 Queen or eldest
 Son and Heir.*
 25 Ed. 3. st. 5.
 c. 2.
 1 Hale, 124.
 3 Inst. 8.
 1 MS. Sum.
 9. 12.

"The queen" means the queen consort or wife of the king, and extends to a wife de facto during the coverture, and until a divorce. But after a divorce, though it be only a *mensâ et thoro*, she is not within the statute; although Lord Hale does not extend the exclusion further than a divorce a vinculo matrimonii. But certainly a queen dowager, namely, a queen after the death of her husband, is not within the act.

1 Hale, 125, 6. 9.
 3 Inst. 8, 9.
 Sum. 12.

"Their eldest son and heir" extends to a second born son, after the death of the elder, and the like of the rest; and notwithstanding the king should have married a second wife, and so the son should not be *their* eldest son, but only the king's son. In like manner the eldest son of a queen regnant is within the act. Lord Hale also inclines to think that the description may extend to a grandson (being heir apparent after the death of his father), though he concludes that it is most fit to be first decided by parliament, according to the caution given in the statute of the 25 Ed. 3. But a collateral heir apparent is certainly not within the act; nor an eldest daughter and heir apparent; because a son may be born after; and temporary provisions have been made by the legislature in such cases.

Ante, p. 56.

As to what shall be said to be an overt act of compassing their death; it must be such as shews an unlawful intent against their *persons*, and not merely against their *state and dignity*. Therefore much of what has been already said concerning overt acts of compassing the death of the king, which are specifically appropriate to him and his sovereign power and royal dignity, does not apply to the queen or prince. Thus a compassing to imprison or otherwise punish them by due course of law is not within the statute; but a compassing to wound them is.

Ch. II. § 10.
Compassing, &c.
the Queen's or
Prince's Death.

What a Com-
passing.
Burnet's MS.
Sum. 12.

1 Hale, 127, 8.

III. The next treason declared by the stat. 25 Ed. 3. is,

"If a Man do violate the King's Companion, or the King's eldest Daughter unmarried, or the Wife of the King's eldest Son and Heir."

§ 11.

By the king's companion is meant his wife, that is, the queen consort, during the marriage. And as the reason of the law was to guard the succession of the crown from any suspicion of bastardy, when the reason ceases, the law ceases with it. Therefore to violate a queen dowager or princess dowager is no treason. On the same principle the law extends to a second daughter, the eldest being dead during the father's life; and this whether there be any sons or not. It seems, however, to be understood, that by the words of the statute, "*nient marry*" (unmarried), is meant *before marriage*, and therefore not applicable to the eldest daughter afterwards, though a widow. And yet, for the reason before suggested, the law might with more propriety have been applied to the eldest daughter under coverture, when by law her issue might lay claim to the crown. Again, "the wife of the king's eldest son and heir" means the princess consort during the coverture. And the eldest son and daughter of a queen regnant are equally within the meaning of the statute. In either case mentioned by the statute, by "violation" is intended carnal knowledge, as well without force as with it; and this is high treason in both parties, if both be consenting.

Violating King's
Wife, Daugbter,
&c.

25 Ed. 3. ff. 5.
c. 2.
4 Blac. Com. 81.
1 Hale, 124.
127, 8.
3 Inst. 8.
1 Hawk. ch. 17.
f. 22.

4 Blac Com 81.
1 Hale, 128.
3 Inst. 9.

Ch. II. § 12.
Levying War.

§ 12.

25 Ed. 3. ft. 5.
c. 2.

1 Hale, 130.

348, 9.

ante, f. 9.

Kel. 20.

post. f. 19.

1 Hale, 152.

*Evidence of the
fact.*

1 MS. Sum. 13,

14.

1 Hale, 122. 131.

146. 149. 152.

Fost. 210, 211.

1 Hawk. ch. 17.

f. 23.

4 Blac. Com. 81.

Ld. Effex's case,
ante, f. 8.

Fost. 219.

1 Hale, 146.

1 Hale, 131.

135. 140. 260.

IV. The fourth treason declared by the stat. 25 Ed. 3. is,

*"If a Man do levy War against our Lord the
King in his Realm."*

Under this branch there must be an actual levying of war, and not barely a consultation so to do; but the latter is made a distinct treason by the stat. 36 Geo. 3. c. 7. during the king's life. Such war must also be levied against the king; and it must be in his realm.

The levying war is either express and direct, or constructive.

1. Of the first sort are all insurrections against the person of the king, whether they be to dethrone, imprison, or force him to alter his measures of government, or to remove evil counsellors from about him. In Effex's case, though the indictment was upon the clause of compassing the queen's death, yet, says Lord Hale, his riding armed into London, and soliciting the citizens to go with him to court to remove the queen's ministers, and his fortifying his house against the queen's officers, were in truth overt acts of levying war. So the attacking the king's forces, in opposition to his authority, upon a march or in quarters, is levying war against the king. But if, upon a sudden quarrel, from some affront given or taken, and not as a cover for any traitorous design, the neighbourhood should rise and drive the king's forces out of their quarters; though it would be a great misdemeanor, and, if death ensued, might be felony in the assailants; yet it will not be a treason; there being no intention against the king's person or government. Thus it often happened formerly between the lords marchers, that upon private quarrels they collected their dependants in battle array, and levied war upon each other; but these acts were never holden to be treason, though doubtless deserving of the most condign punishment. The intention in these cases is of the essence of the offence. So the carrying off or destroying the king's stores, provided for the defence of the kingdom, if done in conjunction with or in aid of rebels or enemies, will amount to treason within this and the next branch; but otherwise, if done only for lucre, or some private malicious motive; and this being usually the case, I shall refer the consideration of such offences to the more appropriate heads of larceny and malicious mischief.

It must in general be difficult in the inception of intestine troubles to fix the period when opposition to the established government

*What an incep-
tion of levying
war.*

government

government shall be said to wear the formidable appearance of insurrection, and to constitute what in the terms of the act is called a levying of war against the king.

It is strictly, therefore, a question of fact to be tried by the jury under all the circumstances. Any assembly of persons, met for a treasonable purpose, armed and arrayed in a warlike manner, is *bellum levatum*, though not *percussum*. Enlisting and marching are sufficient overt acts, without coming to an actual engagement; in the same manner as cruising under an enemy's commission, though no act of express hostility be proved, is an adherence to the king's enemies.

Ch. II. § 12.
Levying War.

1 Hale, 130, 1.
149.
1 MS. Sum. 13.
Fost. 218.
1 Hale, 131.
144. 152.
Vaughan's case,
5 St. Tr. 37.
Salk. 635. post.
p. 80.

But though, in the case of levying war, the indictment generally charges, that the defendants were armed and arrayed in a warlike manner, and, where the case admits of it, with swords, guns, drums, colours, &c.; yet Mr. Justice Foster observes, that in none of the cases, not even in *Benstead's*, did the question turn singly on any of these circumstances; but the true criterion has been, *Quo animo* did the parties assemble? Whether for a private and particular or for a public and general purpose? And he observes, that in the cases of *Damaree* and *Purchase*, which turned on a constructive levying of war, no evidence was given of the usual pageantry of war, nor of any regular consultation previous to the rising; and yet the objection weighed nothing with the court. Numbers will often supply the want of military weapons and discipline, as experience has often evinced; and such was the opinion of five of the judges in the *weavers' case* in 1675. Lord Hale states it as a question worthy of consideration; and goes no further than to observe, that the actual assembling of many rioters in great numbers, to do unlawful acts, if it be not *modo guerrino* or in specie belli, as if they have no military arms, nor march or continue together in the posture of war, though they make a great riot, yet does not *always* amount to a levying of war. It depends, as he states before, upon many circumstances difficult to enumerate or define, and is in truth a question of fact; and how difficult a fact it is to define in terms, may be collected from an expression made use of by the same author in another place, where he says, that the actual marching in a body *modo guerrino et modo insurrectionis*, might be a levying of war. It seems to me, however, that Lord Hale did not mean to push the observations above

§ 13.
Warlike Array.
Fost. 208.

Post. p. 73.

Post. p. 74.

1 Hale, 131. 144.

1 Hale, 144.

1 Hale, 149—
152.

Ch. II. § 13.
Levying War.

mentioned further than concerned cases of constructive levying of war, as one among other clues to distinguish between an insurrection and a great riot. Because, says he, when an assembly of persons thus arm themselves, (namely, in a military posture,) it is a plain evidence that they mean to defend themselves, and make good their attempts by a military force, and to resist and subdue all power that shall be used to suppress them. In this view of the subject, any appearance of martialing or making military preparation seems to be a very strong feature in the merits of the case. But every insurrection, which in judgment of law is intended against the person of the king, as for the purposes first mentioned, amount to a levying of war within the statute, whether or not attended with the pomp and circumstances of open war; for they cannot be effected by numbers and open force without manifest danger to his person.

Vide 1 Hale, 153.
Fost. 210, 211.
1 Hale, 151.
ante, p. 67.

§ 14.

*Holding a Fort,
&c. against the
King.*

Fost. 219.
1 Hale, 146.
168. 296. 325, 6.

Holding a castle or fort against the king or his troops, if actual force be used in order to keep possession, is levying war; but a bare detainer, as suppose by shutting the gates against the king or his troops, without any other force from within, Lord Hale *conceiveth*, (says Mr. Justice Foster,) will not amount to treason. The last-mentioned judge has not told us what degree of approbation he gives to this instance of a detainer, which, as he says, Lord Hale *conceives* not to be within the statute.

1 Hale, 146.

It may be fairly questioned, Whether there be not many instances of constructive levying of war far short of the real guilt and consequences of such an act, and much less within the true meaning of the stat. 25 Ed. 3.? Lord Hale prefaces the passage in question thus; "If B. either fortify his own house, or the house of another, with weapons defensive or invasive, purposely to make head against the king, and to secure himself against the king's regal army or forces, then that is a levying of war against the king." He then proceeds: "But the bare detaining of the king's castles or ships seems no levying of war within this statute." And his lordship refers to a subsequent part of his work, where he grounds his reasoning solely on the stat. 14 Eliz. c. 1. (a), having enacted the same thing during the queen's life. This, if it stood alone, would not be a conclusive argument, as might be proved by many passages, as well as by the express declaration of the same author. Besides which, that statute

1 Hale, 325.
14 by mistake
called 13) Eliz.
c. 1.

(a) Lord Hale
(p. 296.) makes
the same observa-
tion on the stat.
5 & 6 Ed. 6.

c 11. *Vide* 1 Hale, 261. Fost. 224. Post. 6, 56.

was

was certainly creative of new treason; for it makes the wilful and malicious burning of the queen's ships treason, without any further qualification. But, most of all, I find it difficult to reconcile this opinion with the preceding part of the passage which I have referred to; for, supposing a treasonable intent to exist, What solid distinction can there be between a man's fortifying his own or another's house, purposely to make head against the king, and to secure himself against the regal forces, (which is admitted to be an overt act of levying war,) and the case of one who detains the possession of the king's own fortress against himself, with the same intent? for the manner of putting the first case supposes that no resistance has been actually made. On the contrary, is not the latter case, put by Lord Hale, as much at least within the reason and contemplation of the stat. 25 Ed. 3. as the former one? Is not the act of fortifying a private house, which may happen from caprice, of a more equivocal nature in itself than that of a governor of a fortress refusing to deliver it up to the king upon his summons, and shutting the gates against him. Admitting that this latter is not conclusive evidence of a traiterous intent any more than the other; yet surely it seems sufficient to leave to a jury. It is *holding a castle against the king*, which is as much an act of hostility, and a throwing off of the allegiance due to him, as any of the ordinary preparations of war are admitted to fall within the description of levying war, though no act of force has been in fact exerted. In the case of the Earl of Essex, it is even said, that keeping armed men against the king's command is a levying of war against him (a), which is a far less decisive act of opposition than the other. And Lord Hale himself, speaking in another place of the stat. 26 H. 8. c. 13. says, that that part of it whereby the rebellious detaining of the king's castles, after summons by proclamation, is made high treason, seems to be treason within the stat. 25 Ed. 3.; and both Lord Hale and Foster, J. agree, that if the bare detainer be done in confederacy with enemies or rebels, that circumstance will make it treason; in the one case under the clause of adhering to the king's enemies, in the other under that of levying war. The same rule applies to the delivery up of a castle to rebels or enemies, by trea-

Ch. II. § 14.
Levying War.

Vide 1 Hale, 275.

1 Hawk. ch. 17.
f. 24.
3 Inst. 10.

Ante, f. 12.

Ld. Essex's case,
Moor, 621.

1 Hale, 275.

Supra, at the
beginning of this
section.

(a) But this must be understood, that the purpose for which they were armed was treasonable.

Ch. II. § 14.
Levying War.

chery and in combination with them; but not if it happened through cowardice or imprudence.

§ 15.

Joining and continuing with rebels.

Fott. 216.
ante, f. 8.
Moor, 621.
Kel. 76.
Fott. f. 17.
8 St. Tr. 247.
290.
1 Hawk. ch. 17.
f. 26.
Rex v. Green
and Bedell, O. B.
20 Car. 2.
Kel. 70. 79.
Vide 2 Ld. Ray.
3585.

Burnet's MS. 14.
Moor, 621.
1 Hawk. ch. 17.
f. 26.

Joining from fear.

1 MS. Sum. 14.
Fott. 216.
1 Hale, 49. 56,
57. 139.
1 Hawk. ch. 17.
f. 24.

1 Hale, 50.

Joining with rebels, freely and voluntarily, in any act of rebellion, is levying war against the king; and this too though the party was not privy to their intent. This was holden in the case of the Earl of Southampton, and again in Purchase's case in 1710. But yet it seems necessary in this case, either that the party joining with rebels and ignorant of their intent at the time, should do some deliberate act towards the execution of their design, or else should be found to have aided and assisted those who did. Therefore, in the cases of Green and Bedell, who with others were indicted for levying war and pulling down bawdy houses and opening prisons, it being only found that they were present, and not finding any particular act of force committed by them, or that they were aiding or assisting to the rest, which is a fact that must be found by the jury, and cannot be implied, they were discharged. And if the act of those who suddenly join an insurrection, being ignorant of their design, appear to be more inconsiderate than wilful or mischievous, such as throwing up their hats, or hallooing with the mob, this will fall under the same lenient consideration.

But if the joining with rebels be from fear of present death, and while the party is under actual force, such fear and compulsion will excuse him. It is incumbent, however, on the party setting up this defence to give satisfactory proof that the compulsion continued during all the time that he staid with the rebels. It may perhaps be impossible to account for every day, week, or month; and therefore it may be sufficient to excuse him if he can prove an original force upon him, that he in earnest attempted to escape and was prevented, or that he was so narrowly watched, or the passes so guarded, that an attempt to escape or to refuse his assistance would have been attended with great difficulty and danger; and, if the circumstance will admit of it, that he quitted the service as soon as he could: so that upon the whole he may fairly be presumed to have continued amongst them against his will, though not constantly under an actual force or fear of immediate death. This is agreeable to the rule in Oldcastle's case; where those who were charged as his accomplices in rebellion were acquitted by the judgment

of

of the court, because the acts were found to be done pro timore mortis, et quod recefferunt quam cito potuerunt.

In this respect there is no distinction between serving as an officer or private man, further than the accepting a command in a rebel army is a stronger evidence of willingness than the other. But an apprehension, though ever so well grounded, of having property wasted or destroyed, or of suffering any other mischief, not endangering the person of the party, will be no excuse for joining or continuing with rebels; otherwise it would be in the power of any leader of a rebellion to indemnify all his followers. It was so ruled

in the case of M'Growther, and of many of the Scotch prisoners, on the special commission, in Surry, in 1746. In M'Growther's case, besides the threat of burning his property, it appeared that he and twelve other tenants of the Duke of Perth, being summoned to meet him, appeared on the third summons, on the 28th of August, when the Duke proposed to them to take arms and follow him into the rebellion; that they all refused to go; whereupon they were told that they should be forced, and cords were brought by the Duke's party (about 20) in order to bind them; and that then the prisoner and about ten more went off, surrounded by the Duke's party. Lord C. J. Lee observed to the jury, that the only force pretended to by the prisoner was on the 28th of August, and that he continued with the rebels, and bore a commission in their army, till the 30th of December following. He was convicted, but not executed. In all the like cases of the Scotch rebels, the matter of fact, whether force or no force, and how long that force continued, with every circumstance tending to shew the practicability or impracticability of an escape, was left to the jury on the whole evidence.

Axtell, one of the regicides who commanded the guards at the king's trial and murder, justified that what he did was as a foldier, by command of his superior officer, whom it was death not to obey; but this was ruled to be no defence. In truth there was no colour for imputing any compulsion on him to be in that situation.

Such compulsion or fear, however, is no excuse for any other sort of treason than that of joining with rebels or enemies.

Ch. II. § 15.
Levyng War.

Gordon's case,
23d Oct. 1746,
at St. Margaret's
Hill. cor. Lee,
C. J. Wright,
Reynolds, and
Foster, Justices,
Serjeant Foster's
MS. 43.
1 MS. Sum. 14.
Folt. 13, 14.

Alex. M'Grow-
ther's case,
Folt. 13, 14.
9 St. Tr. 566.

Axtell's case, one
of the regicides,
Kel. 13.

1 MS. Sum. 14.
*Vide ch. of per-
sons capable of
crimes, tit.
Compulsion.*

Ch. II. § 16:
Levying War.

§ 16.

*Giving assistance
or intelligence.*

Fost. 217.

1 MS. Sum. 14.

1 Hale, 51 56. 58.

Sir J. Wedder-

burn's case, Nov.

4th, 1746,

Fost. 22.

So sending money, arms, ammunition, or other necessaries to rebels, will *primâ facie* make a man a traitor, though they should be intercepted. In Sir John Wedderburn's case it was proved as evidence of levying war, in order to depose the king and set the pretender on the throne, that the prisoner was appointed by the pretender's son collector of the excise, and that by virtue of that appointment he did actually collect the excise in several places where the rebel army lay, for their use. Yet paying contribution to rebels to prevent the plunder of the country, or making submission to them when resistance would be dangerous and in all probability unavailing, is excusable; for in times of open hostilities the *jus belli* is the only practicable law. But if it appear that the party wanted the will rather than the power to deny his assistance, and there appear any marks of consciousness that he might if he pleased have withheld it, he is inexcusable if upon a pretence of fear or doubt of compulsion he gives such assistance. It seems much more difficult to frame a case where the act of sending intelligence to rebels can be palliated upon the plea of necessity. It partakes more purely of the will than almost any other act of this kind; and though it should happen to fail of the effect intended, by not reaching the place of its destination, still the treason is complete; for the party did all in his power.

Gregg's case,
MS. Tracy,
Dod, Price, and
Denton, 10 St.
Tr. App. 77.
Dr. Henley's
case, B. R. Tr.

31 G. 2. 1 Burr. 644. 646.

§ 17.

*Constructive levy-
ing of war.*

Ante, f. 12.

1 MS. Sum. 13,

74.

Fost. 211. 213.

1 Hale, 132, 3.

146. 148.

3 Inst. 9.

3 Hawk. ch 17.

f 15.

Burnet's MS. 14.

Kel. 75, 76.

Poph. 122.

2 And. 4, 5.

1 Vent. 241.

2 Will. 360.

Ld. George Gor-

don's case,

Lough. 599.

2. Constructive levying of war is in truth more directed against the government than the person of the king; though in legal construction it is a levying of war against the king himself. This is when an insurrection is raised to reform some national grievance, to alter the established law or religion, to punish magistrates, to introduce innovation of a public concern, to obstruct the execution of some general law by an armed force, or for any other purpose which usurps the government in matters of a public and general nature. On the trial of Lord George Gordon the court of King's Bench declared their unanimous opinion that an attempt, by intimidation and violence to force the repeal of a law, was a levying war against the king. The statute in question was the 18 Geo. 3. c. 60. for relieving Roman catholics from certain penalties; and the treasonable acts given in evidence against the prisoner was the assembling a great

great multitude of people, and encouraging them to surround the two houses of parliament and commit different acts of violence there and elsewhere, with a view to intimidate them to a repeal of the statute. Insurrections of this nature, though not levelled directly against the person of the king, are yet an attack upon his regal office, and tend to dissolve all government, society, and order. The king is bound in duty to enforce the acts of the legislature and uphold their authority: any resistance, therefore, to these, must, in its consequences, extend to the endangering of his person and government, by involving the state in a general distraction; on which account this species of treason falls properly within the clause of levying war against the king. Upon this principle the Yorkshire and Northumberland rioters, who opposed the militia laws, were convicted of high treason; and several of them were executed. But under this branch a bare conspiracy to levy such a war is not treason, unless the war be actually levied; in which case the conspirators, as well as the actors, would be all equally guilty.

Of the same nature is an assembling together for the purpose of destroying all meeting houses or all bawdy houses, under colour of reforming a public grievance; or an insurrection to reduce by force the general price of victuals, to enhance the common rate of wages, to level all inclosures, to expel all foreigners, to release all prisoners, or to reform by numbers or an armed force any real or imaginary grievance, of a public and general nature, in which the insurgents have no peculiar interest. Against such insurrections magistrates, sheriffs, and indeed all private persons, may use force to suppress them without any special commission, in the same manner as they may oppose foreign enemies coming hostilely into the kingdom.

It was adjudged in Benstead's case, that going in a warlike manner to Lambeth House to surprise the Archbishop of Canterbury, who was a privy counsellor, it being with drums and a multitude of 300 persons, was treason. The true ground of this resolution Mr. Justice Foster considers to have been, that the attempt was made on account of measures which the king had taken or was then pursuing, at the instigation, as the rabble imagined, of the archbishop; in consequence of which they had deliberately, and upon a public invitation, attempted by numbers and open force

Ch. II. § 17.
Levying War.

MS. Yates, J.
cor. Loyd and
Bathurst, Jus-
tices.
Ante, f. 9.
Fost. 211.
Friend's case,
4 St. Tr. 599.
Kel. 19.

1 MS. Sum. 14.
Fost. 211.
1 Hale, 132.
145, 146. 157.
Kel. 70. 75, 6.
Popp. 122.
Cro. Car. 583.
2 And. 4, 5.
1 Vent. 251.
2 Will. 365.
1 Hawk. ch. 17.
f. 25.

'Benstead's case,
16 Car. 2.
Cro. Car. 583.
1 Hale, 141. 152.
Fost. 211, 212.

Ch. II. § 17.
Levying War.

to revenge themselves upon the privy counsellor for the acts of the sovereign. Perhaps it would be stating it more correctly to say that it was an attack upon the king and his government in the person of his privy counsellor: but without the help of some such supposition the same learned judge thought there was nothing in the case as reported which amounted to high treason.

Cases of Damaree and Purchase.
Folt. 213.

MS. Tracy, 16.
17. post. S. C.
8 St. Tr. 218.
247. 268. 285.
290.

Damaree and Purchase were indicted severally, for that they, with a multitude of people, to the number of 500, armed and arrayed in a warlike manner, &c. did traiterously levy war, &c. It appeared, that during Dr. Sacheverell's trial in 1709 the rabble, who had attended him from Westminster to his lodgings in the Temple, continued there together for a short time, crying, among other cries of the day, "*down with the presbyterians.*" At length a person unknown proposed to pull down the meeting houses; and thereupon the cry became general, "*down with the meeting houses;*" and some thousands immediately moved towards a meeting house of Mr. Burges, a protestant dissenting minister; the defendant Damaree, a waterman, putting himself at the head of them, and crying, "*come on, boys; I'll lead you; down with the meeting houses.*" They soon burnt Mr. Burges's; after which they agreed to proceed to *the rest of the meeting houses*: and hearing that the guards were coming to disperse them, they agreed for the greater dispatch to divide into several bodies, and to attack different houses at the same time; many of which were that night in part demolished, and the materials burnt in the streets. Damaree put himself at the head of one of these parties, and demolished a meeting house in Drury Lane, still crying that "*they would pull them all down that night.*" While the materials of this house were burning in the street, Purchase, who had not, for aught appeared, taken part in any prior outrage, came up to the fire very drunk, and with a drawn sword in his hand encouraged the rabble, and incited them to resist the guards, who just then came up to disperse them; he himself assaulting the commanding officer and others with his weapon; and calling to the rabble, "*come on boys, I'll lose my life in the cause; I will fight the best of them.*" All the judges present agreed that Damaree was guilty of the treason charged; for there was a rising

with an avowed intention to demolish all meeting houses in general, which was carried into execution as far as they were able. It was a declaration by the rabble against the act of toleration, and an attempt to render it ineffectual by numbers and open force. Damaree was accordingly convicted. In regard to the case of Purchase, there was some diversity of opinion among the judges present at the trial; because it did not appear that he had any concern in the original rising, or was present at or active in any of the outrages of that night, except his behaviour at the bonfire in Drury Lane, whither he came by mere accident for aught appeared to the contrary. The jury therefore, by direction of the court, found a special verdict to the effect already mentioned. All the judges, on consideration, agreed in the guilt of Damaree; and all but three held the same opinion in respect to Purchase; because the rabble were traiterously assembled and in the very act of levying war when he joined them, and encouraged them to proceed, and assaulted the guards who were sent to suppress them. All this being done in defence and support of persons engaged in the very act of rebellion involved him in the guilt of that treason in which the others were engaged. The ground of the opinion of the three dissenting judges was, because it was not directly found that he aided and assisted the traitors; though they agreed that the mob were continuing their act of treason when Purchase joined them. But from what I have before stated this does not seem necessary, if the party be found to have done any act towards the execution of the traitorous design. For whoever joins deliberately in the execution of any unlawful act must abide the consequences at his peril.

Ch. II. § 17.
Levying War.

Trevor, C. J.
Powell, J. and
Price, B.

MS. Tracy, 17.

Ante, §. 15.

But where the object of the insurrection is a matter of a private or local nature, affecting or supposed to affect only the parties assembled, or confined to particular persons or districts, it will not amount to high treason, although attended with the circumstances of military parade usually alleged in indictments on this branch of treason. As if the rising be only against a particular market, or to destroy particular inclosures, to remove a local nuisance, to release a particular prisoner, unless imprisoned for high treason, or even to oppose the execution of an act of parliament, if it

only

§ 18.

Insurrections of a private or local nature.

1 MS. Sum. 14.
Folt. 209, 210.
Burnet's MS. 14.
1 Hale, 133, 4.
140. 9.
1 Hawk, ch. 17.
§. 25, and other
authorities under
the former sec-
tion.

Ch. II. § 13.
Levying War.

Fost. 210.

1 Hale, 143—

146.

only affect the district of the insurgents; as in the case of a turnpike act.

Upon the same principle, and within the same equitable construction of the statute of treasons, Mr. Justice Foster says it was rightly holden by five of the judges, that a rising of the weavers in and about London, to destroy all engine looms, machines which enabled those of the trade who made use of them to undersell the rest, did not amount to a levying war; though they assembled for several days together in considerable bodies, at different places, armed with clubs, and such other weapons as they could get, and committed violent outrages; breaking into houses and burning the looms, not only in London but in the adjacent counties, and resisting and affronting the magistrates and peace officers. For those judges considered the whole affair merely as a private quarrel between men of the same trade about a particular engine, which those concerned in the rising thought detrimental to them in particular; and in which they had, in truth, a special interest: and though five other judges seemed to think it treason, yet finally the defendants were only prosecuted for a riot.

Riot Act,

1 Geo. 1. st. 2.

c. 5.

Vide Poph. 122.

I cannot take leave of this subject without noticing a modern act of parliament, I mean the riot act, which certainly cannot be deemed to have altered the law of treason in the respect above mentioned; but must be understood as confined to those private and particular causes of risings which do not fall within the clause of levying war, according to the construction which has been given of that law. And this I conceive to be consonant to the opinion delivered by eleven judges against Lord Hale, in Cotton's case, upon the application of a similar act of the 1 M. c. 12. For though the preamble of the riot act notices that many *rebellious* riots and tumults had then of late taken place, yet, in the enacting part, it only attaches upon persons *unlawfully, riotously, and tumultuously* assembled.

Cotton's case,
Kel. 75.

§ 19.

Within the realm.

Ante, f. 12.

1 Hale, 154—

148.

Vide post. ch. 4.

Offences relating

to the Coin. 1. 6.

& Co. Litt. 261.

2. The clause of levying war is confined to the realm. The words of the stat. 25 Ed. 3. are "in his realm." So the act of the 36 Geo. 3. c. 7. is confined to a compassing to levy war "within this realm."

The realm of England comprehends the narrow seas; and, therefore, if a subject attack the king's ships upon those seas,

feas, it is a levying of war within his realm. It also extends to Wales. But Ireland (a) and the isles of Man, Jersey, Guernsey, Sark, and Alderney, though parcels of the dominions of the crown of England, are not within the realm. The same might be said of Scotland, as to which provision is made by stat. 4 Jac. 1. c. 1. and 7 Jac. c. 1. for treasons committed there.

It was ruled in Harding's case, that enlisting men to send over sea to assist the king's enemies, is not within this clause of the 25 Ed. 3. It would have fallen most properly within the clause of adhering, but was also admitted as an overt act to prove the compassing of the king's death.

But to relieve a rebel out of the realm is no treason.

V. "*If a Man be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm or elsewhere,*"

he is also declared guilty of high treason by the stat. 25 Ed. 3.

And it is further provided by stat. 2 & 3 Ann. c. 20. f. 34. that if any officer or soldier shall, out of England or upon the sea, correspond with any rebel or enemy, or give them advice or intelligence, by letters, messages, signs, tokens, or otherwise, or shall treat or enter into any condition with them, without authority so to do, he shall be guilty of high treason. And, by the general mutiny acts, for these and other like offences, the offender shall suffer death, or such other punishment as a court martial shall award.

I shall first enquire who is an enemy; next, what is an adherence; and then I shall consider the analogous offence of serving foreign states without licence from the crown.

1. By the term enemy is always to be understood a foreign power owing no allegiance to the crown, and in a state of open hostility with us; though perhaps war may not have been regularly declared between the respective countries: and therefore, in an indictment on this clause, it is sufficient to aver, that the prince or state adhered to *was an enemy*. And the question, Whether there be war or not between such power and our king is purely a question of fact, triable by the jury; and public notoriety is sufficient evidence of it.

Also,

Ch. II. § 19.
Levying War.

(a) But see now the late act of union with Ireland, 40 Geo. 3. See also the acts of union with Scotland.

Harding's case,
2 Ventr. 316.
Post. p. 78.

Post. 197.

1 Hawk. ch. 17.
f. 28. Sum. 15.
4 Blac. Com. 83.

§ 20.
Adhering to the King's Enemies.

25 Ed. 3. st. 5.
c. 2.
2 & 3 Ann. c. 20.
Soldiers corresponding with Enemies.

Who an Enemy.
4 Blac. Com. 83.
1 Hale, 159.
162, 163, 4.
ante, f. 4.
Fost. 219, 220.
1 MS. Sum. 15.
24.
2 Ventr. 316.

(Vide Wells v. Williams, 1 Ld. Raym. 283.)

Ch. II. § 20.
*Adhering to the
King's Enemies.*

Foist. 196.
1 Hale, 169.

Ante, f. 9.

Also, if the subject of a foreign state in amity with us acts in a hostile manner against us, without commission from his sovereign, or under commission from a state at enmity with us, he is so far an enemy, that a subject of England adhering to him is a traitor. But inciting foreigners, not actually at war with us, to invade the kingdom, does not, for the reason given, fall within this branch of the statute, but under that of compassing the king's death. Yet, perhaps, if it could be shewn that a war was commenced upon such an incitement, it would fall as much within the true construction of this clause, as one who counsels the levying of war is guilty of that offence, if the war be actually levied.

§ 21.

What an adherence.

Ante, f. 16.
1 Hale, 56.
Vide 4 Blac.
Com. 183.
Vaughan's case,
5 St. Tr. 37.
Foist. 216, 217.
1 Hawk. ch. 17.
f. 28.

1 Hawk. ch. 17.
f. 28.
Vaughan's case,
5 St. Tr. 36.
Vide 2 Ventri.
316.
Ante, f. 12.
Foist. 218.

Harding's case,
2 Ventri. 315.
Foist. 197.
Ante, p. 77.

Lord Preston's
case, 4 St. Tr.
49, &c.
Foist. 197.

Foist. 217.

2. In considering what shall be deemed an adherence to the king's enemies, much of what has been already said under the head of levying war is equally applicable. Thus, every species of aid or comfort, in the words of the statute, which, when given to a rebel within the realm, would make the subject guilty of levying war; if given to an enemy, whether within or without the realm, will make the party guilty of adhering to the king's enemies; though in the case of giving aid to enemies within the realm, a subject might in some instances be brought within both branches of the act. It is necessary in an indictment on this branch of the statute to aver that the persons adhered to were the king's enemies, as well as that the defendant adhered to them; but it is not necessary to allege expressly that such adherence was against the king, that being apparent; nor is it more necessary under this, than under the former clause, that the parties should come to an action; but the special manner of adhering must be set forth.

Harding having raised men in England with intent to dethrone the king, and sent them abroad to join the French, then at open war with us, for that purpose, was held guilty of adhering to the king's enemies, and of compassing his death. In Lord Preston's case, the composing, procuring, and secreting treasonable papers, and taking them with him in a boat, to go on board a vessel bound to France, where they were to be used for treasonable purposes, were laid as overt acts of both those species of treason. Indeed all treasonable correspondence with an enemy falls within the clause

of

of adhering, as it has been shewn to do within the clause of compassing the king's death. At a meeting of the judges upon the case of Gregg, one of the clerks of Mr. Secretary Harley's office, who sent intelligence by letters to Monsieur Chamillard, secretary of state in France, which letters were intercepted at the post office here; the sending such letters was resolved to be an overt act of both species of treason, as it was laid in the indictment, though the letters never came to the enemy's hands. And in Hensley's case, under the same circumstances, the court cited that opinion with approbation, and adopted it.

In like manner in Stone's case, the indictment charged as an overt act of adhering and of compassing, that the prisoner conspired with J. Harford Stone, W. Jackson, and others unknown, to collect intelligence within England and Ireland of the disposition of the king's subjects in case of an invasion of either country, and to communicate such intelligence to the enemy, for their assistance and direction in their conduct and prosecution of the war. Some part of the written intelligence applicable thereto, which was given in evidence, was found in the hands of Jackson, one of the conspirators. The tendency of parts of the papers was to advise the enemy against an invasion of England, by representing the improbability of its being attended with any success, from the general disposition of the people; and this was relied on by the prisoner's counsel, as shewing that they were sent with a good intent, in order to avert the danger of so great a calamity. But all the court said, that the jury were to judge from all the circumstances, whether the intelligence had been sent with that view. For however beneficial the effect of such intelligence might be, yet, if it were sent in order to assist an enemy in their counsels, and to enable them the better to shape their defence or attacks, it was undoubtedly high treason under both the clause of adhering and of compassing.

It is also an adherence to the king's enemies in a subject of England making war on the king's allies, engaged with him against the common enemy, though no act of hostility be committed against the king or his forces; for by this the enemy is strengthened and the king weakened.

Ch. II. § 21.
*Adhering to the
King's Enemies.*

Ante, f. 9.
12th Jan. 1707,
Gregg's case,
MS. Tracy, 16.
MS. Price, Dod,
and Denton.
1 MS. Sum. 14.
Fost. 218.
10 St. Tr. App.
77.
Dr. Hensley's
case, 1 Burr. 646.

Rex v. Wm.
Stone, at the bar
of the Court in
Hil. 36 Geo. 3.
MS. & 6 Term
Rep. 527. 529.
Vide post. S. C.

(*Vide* Rex v.
Hensley, *supra*.)

Vaughan's case,
5 St. Tr. 37.
Fost. 220.

Ch. II. § 27.
Adhering to the
King's Enemies.

Evans' case,
M. 23 Geo. 3.
MS. Gould, J.
Vide S. C. chap.
Piracy.

In Joseph Evans' case it became a question, How far the overt act laid under this branch of treason shewed a traitorous intent against the king, or was only a piratical attempt against the subject? He was convicted at an admiralty sessions holden by virtue of 18 Geo. 2., whereby treasons on the high seas, in time of war, by adhering to the king's enemies, are to be tried in like manner as piracies. The indictment, after setting forth that there was a war between the English and French, charged that the prisoner did adhere to the king's enemies, and in prosecution of such adherence did, in a certain armed vessel called the *Escamateur*, with certain persons unknown, hostilely go a cruising, with intent in maritime places to seize and take the ships, &c. of our sovereign lord the king and his subjects. Upon a conference among the judges, on some doubts in the case, a difficulty occurred at first, whether the overt act was sufficiently charged; for it was said that it stood in an equivocal light, whether the intent might not be to commit acts of piracy. But it being observed, that it was laid, that the prisoner went a cruising to take the ships of the king as well as of the subjects, it made it clear that it was an adherence to the enemy; in which opinion all concurred. In this respect it was compared to laying as an overt act of compassing the king's death, that they conspired or agreed to seize his guards. But this and any other species of adherence on the high seas may, by the provisions of the stat. 11 & 12 W. 3. c. 7. and 18 Geo. 2. c. 30., be tried as piracy under the admiralty commission, holden by virtue of the stat. 28 H. 8. c. 15.

Vide title Piracy.

Ante, s. 15.

It may also be observed, that the same excuses of compulsion and necessity, which may be made for one who has joined or given aid to rebels or enemies within the realm, will also apply in the cases above alluded to.

§ 22.

Refusal to serve
against Enemies.
1 Hawk. ch 22.
s. 2.
4 Blac. Com. 122.

But the mere act of refusing personal assistance to the king, either against rebels or an invading enemy, amounts not to an adherence within the statute, though undoubtedly it is a high misdemeanor, and punishable by fine and imprisonment.

Refusal to return
home.

1 Hale, 165, 167.

So Englishmen living in a foreign country at the time of a rupture with us, and continuing there afterwards, are not on that account adherents to the king's enemies, unless they voluntarily

voluntarily swear fealty to them, or actually assist them in the war; or, at least, unless they refuse to return home upon privy seal or proclamation, and notice thereof, though such a refusal is only evidence of adhering. The case of foreigners residing here during a war between their country and ours has been before sufficiently considered: They may undoubtedly be guilty of treason in adhering to their own country.

Ch. II. § 22.
*Refusal to serve
against Enemies.*

Dy. 296. a.

Ante, f. 4.

There is another offence against the crown and state, which, being analogous to those I have been just describing, I shall advert to in this place; although, being as well applicable to a state of peace as of hostility, it does not fall under the notion of high treason, unless done in aid of rebels or enemies: Yet it is, properly speaking, an offence against allegiance. This is,

§ 23.

*Vide 4 Blac.
Com. 101.*

Serving or procuring others to serve Foreign States.

Entering into the service of any foreign state without the consent of the king, or contracting with it any other engagement which subjects the party to an influence or control inconsistent with the allegiance due to our own sovereign, such as receiving a pension from a foreign prince without the leave of the king, is at common law a high misdemeanor, and punishable accordingly. Such also is the disobeying of the king's command to a subject abroad to return home; or his writ of ne exeat regno to a subject at home, commanding his stay.

*Serving Foreign
States.*
4 Blac Com. 122.
1 Hawk. ch. 22.
f. 2, 3.

Dy. 296. a.

Further, by stat. 3 Jac. I. c. 4. it is enacted, "that every subject who shall go out of the realm of England to serve any foreign prince, state, or potentate, or shall pass over the seas, and there shall voluntarily serve such prince, &c. not having before taken the oath of obedience (therein prescribed), shall suffer as a felon." And (f. 19.) "if any gentleman or person of higher degree, or any person who has borne any office, place, or charge in camp or army, or company of soldiers, or conductor of soldiers, shall after go voluntarily out of the realm to serve any foreign prince, &c. or shall voluntarily serve any such, before he be bound in a bond with two sureties not to be reconciled to the see of Rome, nor to enter into any conspiracy against the king, he shall be guilty of felony."

3 Jac. I. c. 4.
f. 18.

(The stat. 1 W.
& M. ft. 1. c. 3.
gives a new word.)

Ch. II. § 23.
*Serving Foreign
States.*

3 Inst. 80.

The offences are the going out of the realm with intent to serve a foreign state, although there be no service in fact, and the actual serving, after having gone out of the realm upon that or any other occasion. And the trial is to be where the offence is committed, which is at the place where the party passed out of the kingdom.

9 Geo. 2. c. 30.

By stat. 9 Geo. 2. c. 30. "If any subject of Great Britain shall enlist or enter himself, or if any person shall procure any subject to enlist or enter himself, or hire or retain any subject with intent to cause him to enlist or enter himself, or procure any subject to go beyond seas, or embark with intent and in order to be enlisted to serve any foreign prince, state, or potentate, as a soldier, without his majesty's licence under his sign manual; every such offender shall on conviction be guilty of felony without benefit of clergy." But if the person so enlisted or enticed to go beyond seas, in order to be enlisted as a non-commissioned officer or private soldier, shall discover upon oath to a magistrate his seducer, within 14 days after such enlisting or agreement to go beyond seas, so that he may be apprehended and convicted, such person shall be indemnified."

29 Geo. 2. c. 17.

And by stat. 29 Geo. 2. c. 17. If any subject shall take or accept of any military commission, or otherwise enter into the military service of the French king as a commissioned or non-commissioned officer, without such licence under the king's sign manual, he shall suffer death as a felon, without benefit of clergy.

S. 5. inflicts a forfeiture of 500 l. on any subject accepting a commission in the Scotch brigade in the service of the States General, unless within six months he take and subscribe the oaths of allegiance and abjuration, and certify the same to the secretary at war, &c.

By s. 4. for removing doubts upon the stat. 9 Geo. 2. it is further provided "That if any subject has or shall engage, contract, or agree, within Great Britain or Ireland, to go beyond seas, or embark with intent or in order to enlist or enter himself to serve as a soldier in any foreign service, though no enlisting money be actually paid to or received by him; or if any person has or shall hire, retain, engage, or procure any subject, though no enlisting money has or shall actually be paid to or received by him, to agree to go beyond seas, or embark with intent to be enlisted to serve

serve any foreign prince, &c. as a foldier, without the king's licence first had; every such offender shall be adjudged guilty of felony, without benefit of clergy."

Ch. II. § 23.
Serving Foreign
States.

Provision is also made by both of the above acts of Geo. 2., that offences against them committed out of the realm may be alleged to be committed and may be inquired of and tried in any county in England.

Trial.

VI. Counterfeiting the Seals.

The next head of treason relates to the king's seals. By the stat. 25 Ed. 3. it is further declared to be treason "if a man counterfeit the king's great or privy seal;" and by stat. 1 Ma. c. 6. "If any person falsely forge or counterfeit the queen's sign manual, privy signet, or privy seal, such offence shall be deemed high treason, and the offenders therein, their counsellors, procurers, aiders, and abettors, being convicted according to law, shall be adjudged traitors."

§ 24.
Counterfeiting the
Seals.

25 Ed. 3. ft. 5.
c. 2.
1 Hawk. ch. 17.
f. 53.
1 Hale, 178. 184.
275.
1 Ma. ft. 2. c. 6.
re-enacting the
27 H. 8. c. 2.
which has been

repealed by 1 Mar. c. 1, though saved by 1 Ed. 6. c. 12. f. 8.

By stat. 7 Ann. c. 21. f. 9. To counterfeit the seals used and continued in Scotland, according to the 24th article of the union, is high treason.

7 Ann. c. 21.
f. 9.

This is a species of the crimen falsi, or forgery; and yet it differs considerably from the legal construction of that offence, and therefore requires separate notice. It was treason at common law, and the judgment was to be drawn and hanged: but now the judgment is the same as in all other treasons I have before touched upon.

Vide 1 Hale, 178,
179. 187.
Bract Lib. 3.
c. 3. f. 2.
Flet. lib. 1. c. 22.
4 Hiac. Com. 89.
Ryl. Plac. Parl.
542.
Cro. Car. 383.
1 Ventri. 254.

Two points are to be considered;

1. *What shall be said to be the great or privy seal, &c.*
2. *What is a counterfeiting of the same?*

1. The great seal of England is that by which the king dispenses the principal acts of his government, and the administration of justice. It consists ordinarily, says Lord Hale, of two impressions, the principal one (properly called the great seal) with the king's effigies stamped on it; the other commonly called *pis sigilli*, and formerly *le targe*, being the impression of the king's arms in a target, which is used in matters of less moment. By the very delivery of this seal the office of keeper of the great seal is constituted,

Great Seal.
1 Hale, 170.

Ch. II. § 24
Counterfeiting the
Seals.

which in modern times has been to the lord chancellor, when any such officer has been appointed, otherwise to certain commissioners, who exercise the functions of that office; and in some few instances to a single person with the title only of lord keeper of the great seal.

40 Geo. 3. c. 67.
s. 1.

By the first article of the union with Ireland the stile and title appertaining to the imperial crown of the united kingdom and its dependencies, and also the ensigns armorial flags and banners thereof shall be such as his majesty, by his royal proclamation under the great seal of the united kingdoms, shall appoint. And by s. 3. of the act it is enacted, that the great seal of Ireland may, if his majesty think fit, after the union, be used in like manner as before, except where otherwise provided by the articles, within Ireland.

Privy Seal.
1 Hale, 171.

The privy seal is ordinarily a warrant for passing things under the great seal; sometimes a warrant to issue money, and for other purposes. It is for the most part in the custody of the lord keeper of the privy seal; but sometimes has been holden by commissioners.

Privy Signet.
2 Inst. 556.
2 Blac. Com.
347.
Vide ft. 27 H. 8.
c. 11.
1 Hale, 171, 172.

The privy signet is one of the king's seals, used in sealing his private letters and such grants as pass his majesty's hand by bill signed with the sign manual. It is in the custody of the king's principal secretary, who has four clerks of the signet-office attending on him; and it is made use of sometimes as a warrant to the privy seal, as this latter is to the great seal.

1 Hale, 174.

1 Hale, 179—
183.

There are other seals of the king, such as those appertaining to the several courts; those of the King's Bench and Common Pleas in the custody of the respective chief justices; that of the Exchequer holden by the chancellor of the Exchequer; those of the duchy and county palatine of Lancaster in the custody of their respective chancellors; also the seals of the county palatine of Chester, and of the several justices of assize oyer and terminer and gaol delivery; though these latter sometimes make their precepts under their own seals; also the king's seals of statutes and recognizances, and the seal of the cocket. The counterfeiting of any of these was, before the 25 Ed. 3., supposed to be treason, and afterwards felony; but it is now settled only to be a high misdemeanor, punishable by fine, imprisonment, and pillory.

Seals how de-
stroyed.
1 Hale, 176, 7.
Vide 6 Ann. c. 7.
s. 8. for continuing officers, &c. for six months after the demise of the crown, unless sooner displaced

Upon the demise of the king, though the office of keeper of the great seal expires, yet the same great seal continues to

to be the great seal of England till another be made and delivered. Formerly public proclamation was made in case of a change of the seal, though now a memorandum only is entered on the close rolls. But even after the making and delivery of a new seal, and the breaking of the old one, yet the counterfeiting of the latter, and applying it to an instrument of the date wherein it was in use, or to an instrument without date, is high treason.

Ch. II. § 24.
Counterfeiting the
Seals.

Burnet's MS. 18.
1 Hale, 177.
Post.

2. As to what shall be said to be a counterfeiting; although this is evidently a species of the crimen falsi or forgery, and might naturally have been supposed to be governed by the same rules, yet the difference is considerable; for though the sculpture of the instrument, which is in truth the great seal, be exactly counterfeited, yet if it be not used or applied to seal any thing, though intended for that purpose, the offence is not complete: but it seems there must be an impression made in wax, in testimony of some writing; otherwise it is no more than a mere intent or compassing to counterfeit the seal, and is only punishable as a high misdemeanor.

§ 25.
What a counter-
feiting.
Ante, p. 83.
1 Hale, 181. 183.
1 Hawk. ch. 17.
§. 50.

Again, it is said that the affixing the true great seal by the chancellor or any casual possessor of it, without warrant, or the affixing it to a wrong patent knowingly, though a great misprison, is no treason within the act of Ed. 3. (nor, by consequence, within that of Mary); because this is not a counterfeiting of the seal. For the same reason the raising of one manor out of a patent and inserting another, or any artificial removing of the true writing and adding new matter; or even, it is said, the taking off the wax impressed with the great seal from a true patent, and affixing it to a writing importing to be a grant from the king, are none of them high treason, but only great misprisions. It was formerly questioned whether these instances did not amount to high treason, and many cases are noticed by Lord Coke and Lord Hale upon this subject; but upon the whole, whatever the offence might have been before the statute of the 25 Ed. 3., and however in sound sense and a just estimate of guilt there is no kind of difference between the offence of one who puts a true seal to a false patent, and of one who forges the seal itself; yet since that statute which negatives all other treasons than those

1 MS. Som. 22.
1 Hale, 183.
3 Inst. 16.
4 Bac. Com. 83.
1 Hawk. ch. 17.
§. 51, 52.
Leake's case,
Kel. 80.

Vide 1 Hale,
181, &c.
3 Inst. 16.
and Leake's case,
12 Co. 16.
Robinson's case,
2 Rol. Rep. 51.

Ch. II. § 25.
Counterfeiting the
Seals.

therein enumerated, and the only treason therein described, touching this matter, is confined to the counterfeiting the seal itself; it seems to have been long ago agreed, and must be taken for law at this time, that none of the above-mentioned instances of misuser of the seals are within the meaning of that act. This seems to be one of those cases where, according to the caution given in the statute of treasons, recourse should be had to the advice of parliament.

And herein consists the difference between this offence and forgery, properly so called; that in the latter the crime consists in the falsification of the *instrument*, and therefore if any part of it be false it is not the same instrument which it purports to be: but here the crime consists wholly in the falsification of part of the instrument, namely the seal; and therefore if that be genuine, however false the instrument to which it may be applied, at least the party cannot be said to have counterfeited the seal, in the words of the act of Edward 3. Hence it is that in most, if not in all, of the acts which have passed to protect the property of public companies, provision has been made not only against counterfeiting their common seals but all those instruments under their common seals, which were intended to be protected.

1 MS. Sum. 22.
1 Hale, 178. 104.

Robinson's case,
2 Rol. Rep. 50.

It has been determined, however, that splitting the seal and closing it again to a false patent is a counterfeiting, and this upon the principle above adverted to; because this is an alteration of the seal itself. And where the seal is substantially counterfeited, the adding or omitting of a crown, the leaving out words in the stile or adding others, or making any other minute variations in the counterfeit, which is often done purposely, and by way of eluding the law, will not alter the case; as was ruled in Robinson's case, upon an indictment under the statute of Mary for counterfeiting the privy signet. The disparity, however, may be so great between the true and false seal that it would not amount to a counterfeiting within the statute, as if it be evident to the view of every man's eye. Neither would it if a man were to counterfeit the seal of one prince to a patent supposed to be granted in the time of another; or to a supposed patent of the same prince after a new seal had been made and delivered; if, says Lord Hale, the difference appear very legible and conspicuous; for at the time whereunto it relates there was no such great seal in being. In regard to
the

Vide 1 Hale, 211.
215.

the question of variance the same rule must govern as in case of coining, where it was ruled in Welsh's case, by all the judges, to be a question of fact for the jury to determine, Whether or not the counterfeit were made to resemble the real coin?

Ch. II. § 25.
*Counterfeiting the
Seals.*

Affizes, 1785, and in Easter term following; MS. Jud. Gould & Buller, Js. and vide R. v. Jones, tit. Forgery.

R. v. Welsh,
Hertford Lent

All aiders and consenters to the counterfeiting of the great or privy seal are within the act of Edward 3.; and that of Mary extends to such in terms. But receivers or aiders after the fact are not within the words of either: and it was always doubtful how far the stat. of Ed. 3. extended to them by implication; which doubt is rather strengthened by the stat. of Mary, which expressly mentions such as are in substance accessaries before, and does not mention receivers.

§ 26.
Accomplices.
1 MS. Sum. 22.
1 Hawk. ch. 17.
f. 49.
1 Ma. tt. 2. c. 6.
Ante, f. 24.
12 Co. 81, 2.
(3 Inst. 16. *fed.*
vide Ibid. 138.)
Pott. f. 35.

VII. High Treason against the King's Officers.

By the 25 Ed. 3. "If a man slay the chancellor, treasurer, or the king's justices of one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices," it is declared high treason.

§ 27.
*High Treason
against the King's
Officers.*
25 Ed. 3. ft. 5.
c. 2.

By the 7 Ann. c. 21. f. 8. to slay any of the lords of sessions, or judiciary of Scotland, in the exercise of their office, is high treason.

7 Ann. c. 21.
f. 8.

1st. The statute of Edward 3. extends to no other officers of state but those who are expressly mentioned; and therefore the lord steward, constable, or marshal are not included.

*To whom it ex-
tends.*
3 Inst. 18.
1 Hale, 231.
1 Hawk. ch. 17.
f. 47.

It may seem extraordinary that the lord treasurer should be the only officer of state named among the other high legal officers, who seem to have been the principal at least, if not (as I think they were) the sole objects of regard. But the lord treasurer seems to have been named on account of the judicial part of his office mixing with that of the other judges, which was not inconsiderable, as appears by several statutes. The exchequer too was the great repository of records, which were brought and laid up in the treasury there, of which he had the superintendence, from the other courts at Westminster. Lord Hale doubts whether dispatching business in the treasurer's house be *in his place*; and both he and Lord Coke seems to confine it to sitting in courts, as he does in the

20 Ed. 3. c. 6.
31 Ed. 3. ft. 1.
c. 12.
21 H. 8. c. 20.
31 Eliz. c. 1.
1 Hale, 232.
3 Inst. 18.
Vide post.

Ch. II. § 27.
*Slaying of the
 King's Officers.*

Burnet's MS. 17.
 Holborn's Reading, 48. 1 Hale, 231.

1 MS. Sum. 22.
 MS. Burnet, 17.
17 17th Holborn's
 Reading, 48.
 4 Blac. Com. 84.
 And *vide* Ba-
 rington on the
 Statutes, 137.
 249.
Ut supra.

5 Eliz. c. 18.
 1 Hale, 231.
 4 Blac. Com. 84.
 4 Inst. 34. 88.
 1 MS. Sum. 22.
 1 W. & M. R. 1.
 c. 21.

1 Hale, 231.

Post. f. 30.

court of exchequer, or exchequer chamber, or as he did in the star chamber while that court stood. The statute has also been said to extend to justices of nisi prius, and gaol delivery, but not to justices of the peace.

It is said by good authority, that among the judges the barons of the exchequer are included, because in the same predicament with the other judges. Mr. Justice Blackstone has indeed delivered a different opinion, and cited Lord Hale in support of it; but the latter takes no particular notice of this case, but merely states generally, that the statute extends to no other officers than those named, referring to the officers of state above mentioned.

The stat. 5 of Eliz. c. 18. having declared the office of lord keeper to be the same to all intents as if he were lord chancellor, it seems that the lord keeper, at least when there is no lord chancellor, is within the act. And as the office of commissioners of the great seal, when it happens to be in commission, is by statute declared to be the same, and the commissioners to have the same jurisdiction and privileges as the lord chancellor, they also seem to be within the act. But not the commissioners of the treasury, for they have not the same power as the lord treasurer, and therefore their office is not the same. But some other officers are included in other statutes, which will be presently mentioned.

§ 28.

At what Time.
 1 MS. Sum. 22.
 3 Inst. 18.
 1 Hale, 232.

2. The protection of the act is only during the times that the several officers above named are in the actual execution of their respective offices; that is, sitting judicially in their places in the king's courts, where they usually or by adjournment sit in the administration of justice; for there they represent the king's person. And Lord Hale extends it to the Lord chancellor's house, when the seal is open there, and to the hearing of causes in his chamber, where he says use has sufficiently obtained to give it the stile of *sesant son office*.

§ 29.

Killing.
 1 Hale, 230.
 1 Hawk. ch. 17.
 c. 47.
 3 Inst. 140.

3. The stat of Ed. 3. is also confined to the case of *killing* such officers, and extends not to a wounding or attempt to kill, unless death afterwards ensue from it. Yet the mere striking or assaulting them in the execution of their office is a great misprison, for which in some cases of aggravation the

the offender may lose his hand. But if many conspire to kill any such officer, and one actually accomplish it, it seems treason in all.

Ch. 11. § 29.
Slaying, &c. the King's Officers.

By the act of 3 H. 7. c. 14. the mere "compassing by any of the king's sworn servants named in the cheque-roll of his household, under the state of a lord, with any person, to kill the king, or any lord of the realm, or other person sworn to the king's council, or the steward, treasurer, or comptroller of the king's household," is made felony, but within clergy. According to Lord Coke, the conspiracy must be plotted to be done within the king's household. But the trial of offenders under this act being before a peculiar jurisdiction composed of officers of the household, there is less occasion to say more of it, being extraneous to the object of this treatise.

3 H. 7. c. 14.
Compassing to kill.
3 Inst. 37.
1 Hale, 661.

By stat. 9 Ann. c. 16. (which was made on occasion of Mr. Secretary Harley being stabbed by Anthony Guiscard, who was then under examination before the privy council,) it is enacted, "that if any person shall unlawfully attempt to kill, or shall unlawfully assault, strike, or wound any privy counsellor in the execution of his office, in council, or in any committee of council, he shall on conviction be declared a felon, and suffer death without benefit of clergy."

9 Ann. c. 16.
Assaulting a Privy Councillor.

VIII. High Treason in respect of the Coin.

As to offences against the coin, some of which amount to high treason, I shall treat of them altogether in another place; contenting myself here with enumerating the several statutes by which offences of this description are made high treason; which are 25 Ed. 3. st. 5. c. 2. 1 M. st. 2. c. 6. 1 & 2 Ph. & M. c. 11. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. 3. c. 26. 7 Ann. c. 25. 15 Geo. 2. c. 28, &c.

§ 30.
Coin.
Post. ch. 4.
Vide 1 Hale, 340.
4 Blac. Com. 88, &c.

IX. In respect of Papists.

The ninth class of offences against the allegiance and duty of the subject to the crown relates to papists. These, so far as they relate to religious matters, being in a manner grown obsolete, I shall barely refer to the mention which has already been made of them in the preceding chapter. They depend upon statutes passed in the reigns of Elizabeth and James the first, and were consequent upon the then recent separation of the church of England from the see of Rome.

§ 31
Papists.
Vide 1 Hale, 287.
329, &c.
4 Blac. Com. 87.
103. 112. 115.
1 Hawk. ch. 17.
f. 71, &c.
Vide post. f. 24.

These

Ch. II. § 31.
Papists.

These animosities are now happily buried in oblivion in a more enlightened age, and under better auspices.

§ 32.

*Protestant Suc-
cession.*

12 & 13 W. 3 c. 2.

Vide 4 Blac.

Com. 91.

ante, f. 5.

1 Hawk. ch. 17.

f. 85, &c.

1 Ann. st. 2.

c. 17. f. 3.

(1 W & M.

st. 2. c. 2. & 12.

and 13 W. 3.

c. 2.)

X. *High Treason, &c. against the Protestant Succession.*

Another principal branch of this offence is that which concerns the present protestant succession to the crown, as modelled by the act of settlement, to which I have before adverted. To secure which it is enacted by the statute 1 Ann. st. 2. c. 17. f. 3. that if any person shall endeavour to deprive or hinder any person, being next in succession to the crown for the time being, according to the limitations of the acts of settlement, from succeeding to the crown, and shall maliciously, advisedly, and directly attempt the same by any overt act or deed; such offence shall be adjudged high treason; and the offenders therein, their abettors, procurers, and comforters, knowing the said offence to be done, on conviction or attainder shall be adjudged traitors.

6 Ann. c. 7.
f. 1 & 2.

By stat. 6 Ann. c. 7. If any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm that any other person hath any right or title to the crown of this realm, otherwise than according to the acts of settlement, or that the kings of this realm, with the authority of parliament, are not able to make laws and statutes to bind the crown and the descent thereof, such person shall be guilty of high treason; and those who maliciously and directly affirm the same, by preaching, teaching, or advised speaking, shall be guilty of a præmunire. The st. 13 Eliz. c. 1. had before made a similar provision.

17 Geo. 2. c. 39.
*Corresponding
with the Pre-
tender, &c.*

By st. 17 Geo. 2. c. 39. If any subject of the crown shall hold any correspondence with the sons of the pretender, or knowingly with any person employed by them, or shall remit or pay any money for their use or service, he shall be guilty of high treason. And any of the pretender's sons attempting to land in Great Britain or Ireland shall stand and be adjudged attainted of high treason.

As a further security for the blessings of the protestant government and succession, a variety of statutes have from time to time been passed, requiring the oaths of allegiance and supremacy to be administered, sometimes in the cases of suspected persons, but principally in the instance of persons taking public offices or trusts. Most of these have been

already

already noticed in the preceding chapter; and further mention of them will occur when I treat of offences relating to such offices.

Ch. II. § 32.
Protestant Suc-
cession.

XI. *Seducing, or attempting to seduce others from their Allegiance and Obedience to the Crown.*

Another and not less important class of offences than many of the foregoing is that of withdrawing or attempting to withdraw others from their allegiance to the crown, and their obedience to the king's lawful commands in their several stations. In all cases falling within the legal notion of compassing the king's death, any attempt of this sort, though no act be done in consequence thereof, will amount, as was before shewn, to high treason, within the stat.

§ 33.

Withdrawing or attempting to seduce others from their Allegiance and lawful Obedience.

25 Ed. 3. But there are some other statutes relative to this matter well worthy of particular notice. By the stat. 23 Eliz. c. 1. "If any one shall have or pretend to have power, or shall by any ways or means put in practice, to absolve, persuade, or withdraw a subject from his natural obedience to the crown, or to withdraw him, *for that intent*, from the religion established by the queen's authority within her dominions to the Romish religion, or to move him to promise any obedience to any pretended authority of the see of Rome, or of any other prince, state, or potentate, to be had or used within the queen's dominions, or shall do any overt act to that intent or purpose; or, if any person shall by any means be willingly absolved or withdrawn as aforesaid, or willingly be reconciled, or shall promise obedience as aforesaid; every such person, his procurers, and counsellors thereunto, being thereof lawfully convicted, shall suffer and forfeit as in cases of high treason."

23 Eliz. c. 1.
s. 2.
Cro. Cir. Comp.
353.

It seems the bare pretending to such a power, without any further endeavour to persuade persons from their allegiance, or the bare endeavour so to persuade without pretending to such power, is within the act.

1 Hawk. ch. 17.
s. 78. Cam-
pion's case,
Sav. 3.

By s. 3. of the same act, aiding or maintaining of such offenders, knowing the same, or concealing any such offence for 20 days after knowledge thereof, without disclosing the same to some justice of peace or other high officer, is made misprision of treason.

In later times the same species of offence has taken another and not a less perilous shape; and it has been found necessary

Endeavouring to seduce Soldiers or Sailors,

Ch. II. § 43.
*Endeavouring to
seduce Soldiers or
Sailors.*

37 Geo. 3. c. 70.
Continued by several acts (lastly by the stat. 40 G. 3. c. 16.) to six weeks after the commencement of the then next sessions.

*Trial in any
county.*

Fuller's case,
O. B. July,
1797, cor. Buller, J. MS. Jud.

*Vide the same
case at large in
the chapter on
Form of Indictments.*

to pass an act for the better prevention and punishment of attempts to seduce the army and navy from their duty and allegiance to his majesty. For which purpose the stat. 37 G. 3. c. 70. has enacted, "That any person who shall maliciously and advisedly endeavour to seduce any person serving in the king's forces, by sea or land, from his duty and allegiance to his majesty, or to incite or stir up any such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traiterous or mutinous practice whatsoever, shall, on conviction of such offence, be adjudged guilty of felony without benefit of clergy." And, by s. 2. any such offence, whether committed in England or on the high seas, may be tried before any court of oyer and terminer or gaol delivery for any county in England, as if the offence had been therein committed. Provided (s. 3.) that no person tried and acquitted, or convicted under this act, shall be liable to be tried again for the same offence or fact, as high treason or misprision of treason, nor shall this act prevent the trial of any person as for high treason or misprision of treason, who has not been tried for the same fact under this act.

Richard Fuller was indicted on the above act; and the indictment stated that the defendant, after the passing of the act, and whilst it was in force, to wit, on, &c. with force and arms, at, &c. "feloniously did maliciously and advisedly endeavour to seduce one Mathew Lowe, he the said M. L. then and there being a person serving in his majesty's forces by land, from his duty and allegiance to his said majesty; against the form of the statute," &c. The second count was, for that the defendant "feloniously did maliciously and advisedly endeavour to incite and stir up the said M. L., he the said M. L. then and there being a person serving, &c. to commit an act of mutiny, and to commit traiterous and mutinous practices, against the form of the statute," &c. After conviction a question was reserved for the opinion of the judges, Whether the indictment were good in this general form? or, Whether it ought not to have stated how and by what acts the prisoner endeavoured to seduce the soldier? The case involving some difficulty, it was afterwards argued in the exchequer chamber before all the judges (except Buller, J. who was indisposed), and all those who were assembled held the indictment to be sufficient. This opinion was grounded upon consideration of many precedents in

Tremain

Tremain of the like general import, and on the nature of the offence itself, created by the act of parliament in the terms laid in the indictment.

Ch. II. § 33.
Trial in any County.

XII. *Desertion from the King's Forces.*

The last offence more immediately against the allegiance due to the crown, though not amounting to high treason, is desertion from the king's armies. This, whether by land or sea, in England or abroad, is by several ancient statutes, and particularly by the stats. 18 H. 6. c. 19. 7 H. 7. c. 1. 3 H. 8. c. 5. and 5 Eliz. c. 5. made felony, and, under certain circumstances, without benefit of clergy; and the stat. 2 & 3 Ed. 6. c. 2. renewed by stat. 4 & 5 W. & M. c. 23. takes away clergy generally from deserters in time of war. And the offence is made triable by the justices of every shire. These statutes are also levelled against some other inferior military offences, which are punishable as misdemeanors; but they are altogether fallen into disuse, as well on account of the manner of retaining soldiers therein referred to being no longer adopted, as because, since the annual acts for punishing mutiny and desertion, a more compendious and convenient system of military coercion has obtained.

§ 34.

Desertion.

3 Inst. 86.
4 Blac. Com. 102.
1 Hale, 674, &c.
1 Hawk. ch. 48.
f. 8, 9.
18 H. 6. c. 19.
2 & 3 Ed. 6.
c. 2.
5 Eliz. c. 5.
7 H. 7. c. 1.
3 H. 8. c. 5.

By the stat. 1 Geo. 1. c. 47. If any person (other than enlisted soldiers, who are already punishable by law for such offence) shall, in Great Britain, Ireland, Guernsey, or Jersey, persuade or procure any soldier to desert, he shall forfeit 40 l., to be recovered by any informer; and, if he has not property to that amount, or from the heinous circumstances of the crime it shall be thought proper, the court before whom he is convicted shall imprison him not exceeding six months, and also adjudge him to stand in the pillory for one hour in some market town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed. By f. 2. the prosecution must be commenced within six months after the offence.

1 Geo. 1. c. 47.

Of Accomplices, and when they may be put on their Trial.

§ 35.

I. It is generally said, that in high treason, whether at common law or by statute, there are no accessaries, but all are principals; and that whatever will make a man accessory before

All Principals.

1 MS. Sum. 100.
1 Hawk. ch. 17.
f. 39. ch. 20.
2 Hawk ch. 29.
f. 3. 14.

Fost. 341, 346. 1 Hale, 214. 239. 323. 328. 613. 3 Inst. 16. 138. Staunf. 40. Ke. 33.

Ch. II. § 35.
*Accomplices,
 Receivers.*

before or after in felony, will make him a principal in treason, and that nothing less will. And this is true, both with respect to new as well as old treasons, if it be taken with respect to the offence itself, or the offender after conviction; but with two exceptions:

1st Exception as
 to certain Re-
 ceivers.

Vide 1 Hale, 237.

Sum. 20. 127.

1 Hawk. ch. 17.

f. 55.

12 Co. 81, 2.

Conier's case,

Dy. 296. a.

3 Inst. 16.

1 Hale, 181.

223, 4.

And vide Bar-

ington on the

Statutes, 273.

1 Hale, 185.

& 223. n.

4 Blac. Com. 89.

1 Hale, 223, 351.

Vide 1 Hale,

220, 227.

1 Hale, 224.

Ibid. 220, 1.

1st, With respect to receivers of such as counterfeit the seals or money; concerning whom there is a difference of opinion, whether they are guilty of more than misprision of treason. Though in all other treasons against the king within the stat. 25 Ed. 3. the offence of receiving a traitor knowingly makes the receiver also a traitor. I do not find the grounds of this distinction any where plainly stated. But what seems to have led to it is the opinion hinted at by Lord Coke, as entertained by some, that the offences of counterfeiting the seals and the coin were only felonies at common law; or if, according to the better opinion, they were treasons, yet they were admitted to clergy, which Lord Hale says was formerly allowed in some cases of treason; and certainly it was allowed in these. The last-mentioned author in another place, speaking of counterfeiting the seals, says that at common law the offence was treason or felony, according to the king's pleasure to indict for either. But even if the indictment were laid proditorie, it was treason of an inferior kind, a kind of petty treason, as he says, in comparison to those of compassing the king's death, levying war, or adhering to his enemies; which opinion is adopted by Mr. Justice Blackstone. That there was a manifest distinction between them appears from the difference of the judgment at common law between the treasons for counterfeiting the coin and seals, and those of a superior kind. It seems doubtful whether the stat. 25 Ed. 3. was not in one respect introductive of a new treason, which was not such at common law, namely, as to the bringing of foreign money into the realm; but this is considered as subject only to the same judgment as other treasons relating to the coin: and, at least, in other respects, it must be considered that the statute was not intended to enhance the crime or punishment of treason; for the judgment in the case of the coin remains as it did before at common law. If then the offences of counterfeiting the coin and seals, admitting them to be treasons at common law, were clergyable; and that statute was in
 general

general a restraining statute, and not deemed to enhance the crime of treason beyond the letter of it; and as receivers cannot be indicted for the act of counterfeiting, &c. within the words of that statute, by force of which they would be ousted of clergy, as all other kind of aiders to treason may, but must be indicted specifically for the receipt; so it may be argued that by force of that, which was a restraining statute, receivers, who do not come expressly within the words or necessary implication of it, shall not thereby be subjected to greater penalties than they were liable to before the passing of it. And, as there is no such thing at this day as clergyable treason, therefore, as Lord Hale says, though the more probable opinion may be that such receivers are traitors (and so he states them to be in one part of the Summary), yet the more merciful opinion is against such a construction. According to the latter opinion, the case of John Conier, who was convicted upon an indictment for traiterously receiving and comforting J. F., knowing him to have traiterously counterfeited the coin, &c. was considered to be only misprision of treason; and he was at length pardoned. It is evident, however, from the statement of the reporter, that the case did not pass without doubt. And it must be admitted, that the best modern authorities have adopted the stricter construction of the two; considering it as a necessary one resulting from the general rule of law, that whatever will make a man accessory before or after in felony will make him a principal in treason; and that the ft. 25 Ed. 3. having declared these offences to be high treason, the consequence follows of course. It seems also to be greatly strengthened by this consideration, that otherwise the receipt of a common felon would be a higher offence than the receipt of a traitor of this kind, which appears to be incongruous. I have contented myself with stating how this question stands, and shall forbear to advance any direct opinion of my own.

As to what shall make a man a receiver or maintainer in treason, this follows the general rule in cases of felony, to which I refer. Thus much, however, may be observed in respect of counterfeiter's of the coin, that the bare uttering of false money, knowing it to be so, is not such a maintaining of the counterfeiter as will amount to treason, but merely a misprision: yet, if this were done with knowledge of the coiner, or in concert with him, it

Ch II. § 35.
Accomplices, Re-
ceivers.

1 Hale, 238.
Post.

Ibid. 237.

Vi. infra.
Conier's case,
Dy. 236. a.

3 MS. Sum 189.
Burnet's MS.
20, 1.
Sum. 1:7.
See vide ib. 20.
contra.

Vide 2 Hawk.
ch. 29. f. 3.

Oliver's case,
Kel. 33.
Fost 342.
1 MS. Sum. 96.
1 Hale, 214.
1 Hawk. ch. 17.
f. 56.

Ch. II. § 35.
*Accomplices, Re-
 ceivers.*

was ruled in Oliver's case to amount to treason. If it were done in consequence of an agreement with the counterfeiter before the counterfeiting, it makes the utterer an aider and abettor; if done after, he is a receiver and maintainer.

16 Geo. 2. c. 31.
*Vide ch. Offences
 against lawful
 Custody.*

The stat. 16 Geo. 2. c. 31. has further provided, that the mere aiding or assisting any prisoner, convicted, attainted, or committed for high treason, to make his escape, though no escape be actually made, shall be liable to transportation for seven years.

§ 36.
*Ante, p. 94.
 2d Exception on
 Wording of new
 Laws.
 Foist. 341.
 1 Hale, 235, 6.
 323. 328. 376.*

2. The second exception to the general rule, *that all are principals in treason*, is where the special penning of any act, creating a new treason, leads to a different construction; whereon it is to be observed that the construction has in general been very favourable in excluding mere receivers or comforters after the fact, not named in such act, from the penalties of high treason, if others who may be considered as accessaries before or at the fact are expressly named. This is founded upon the principle that *expressum facit cessare tacitum*. And it has been applied to statutes where even the word *aiders* was used, when joined with such words only as imported a consent to the offence. But even in the case of new-created treason, he who rescues the traitor from prison, or suffers him voluntarily to escape from his lawful custody, though not expressly named in the statute, is yet a traitor by a necessary construction of law upon the act itself; in the same manner as offenders of the like sort were punishable at common law as traitors, and still continue so though not named in the stat. 25 Ed. 3.

II. Next, as to the evidence affecting accomplices.

§ 37.
*Evidence of act-
 ing in concert.*

As it happens more frequently in trials for this than for any other offence, that the acts of some of the conspirators, in the absence of the others, are given in evidence against them, it may be worth a more particular enquiry in what manner the rule is applied.

In this, as in other cases founded in conspiracy, the conspiracy or agreement among several to act in concert together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must, gene-

rally speaking, be done by evidence of the party's own acts, and cannot be collected from the acts of others, independent of his own; as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts. But it may also be done by evidence of the acts of the prisoner, and of any other with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object. And here the evidence of a conspiracy is more or less strong, according to the publicity or privacy of the object of such concurrence, and the greater or less degree of similarity in the means employed to effect it. The more secret the one, and the greater the coincidence in the other, the stronger is the evidence of a conspiracy. Where it appeared that there was a conspiracy to levy war in the North-Riding of Yorkshire, and that there was at the same time a similar conspiracy in the West-Riding, in which latter only it took place; and it did not appear that those in the North-Riding agreed to the insurrection in the West, or that they knew any thing of it: it was agreed that the former could not be implicated in the acts of the latter. And yet the acts of both concurred at the same time to the same general object; namely, an insurrection against the government. In the case of the Earl of Southampton, in that of Purchase, and some others which have occurred, there was an actual presence and particular co-operation and aiding in the very acts of rebellion; and therefore they fell under a different consideration.

Ch. II. § 37.
*Accomplices.
Evidence.*

Kel 19.
25 Car. 2.

*Vide ante, p. 59.
Folt. 216.*

But when the connection between the parties, by one or other of the means above mentioned, is once established; of which the court must in the first instance judge, previous to the admission of any consequential evidence to affect the prisoner by the acts of others, to which he was not a party or privy; then whatever is done in pursuance of that conspiracy by one of the conspirators, though unknown perhaps to the rest at the time, is to be considered as the act of all. This must, however, be understood with those distinctions which obtain between principal and accessory in felony, in respect to the extent of their liability for each other's acts; so far as those distinctions are applicable to treason and misdemeanor, where all who take part are principals. If several

§ 38.
*Acts of one Con-
spirator Evidence
against all.*

Kel. 19.
3 Inst. 9.

H

persons

Ch. II. § 38.
Accomplices.
Evidence.

persons agree to levy war, some in one place, and some in another, and one party do actually appear in arms, this is a levying of war by all, as well those who were not in arms as those who were, if it were done in pursuance of the original concert: for those who made the attempt were emboldened by the confidence inspired by the general concert, and therefore their particular acts are in justice imputable to all the rest. But suppose a conspiracy to levy war and a plan of operations settled, and those to whom the execution of them is committed afterwards see occasion to vary in certain particulars from the original plan, which is accordingly done unknown to some of the conspirators: yet I conceive that if the new measures were conducive to the same end, and that in substance the original conspiracy were pursued, they all remain responsible for each other's acts.

Rex v. Horne
 Tooke, O. B.
 Nov. 1794. MS.

Upon the trial of John Horne Tooke for high treason, much of the sort of evidence to which I have alluded was given. The indictment was for compassing the king's death; and the overt acts charged were in substance, that the prisoner with several others named conspired to procure a convention to be called to usurp the powers of government, depose the king, and subvert the constitution. In support of which the counsel for the crown read the minutes, (being first verified to be true minutes of their proceedings,) of two societies or voluntary associations of persons calling themselves the society for constitutional information, and the London corresponding society, of the former of which the prisoner was a member: and also various letters addressed from similar societies in different parts of the country to the secretaries of these societies, found in their possession or in that of the members of the other societies who corresponded with them. To the reception of this body of evidence there was some opposition by the counsel for the prisoner. But the court ruled that all these papers, and the acts of persons engaged in the same design, were proper to be received as evidence of the general conspiracy. Also the minutes of the proceedings of a number of other persons who met at Edinburgh, and called themselves a British convention for the reform of parliament, to which the society for constitutional information had sent a delegate, whose conduct they approved of, were read; those minutes having been found on one Skirving who acted as secretary to that convention. Evidence was also given

given of a book called the second part of the Rights of Man, by Thomas Paine, which the society for constitutional information had made the subject of their thanks to the author, and of which they had promoted the distribution. The book was proved by one Jordan a bookseller, who looking at it said that he had published a book like it, and of the same type. This mode of proof was objected to; but the court overruled the objection, there being nothing of strict identity in the inquiry. Evidence of the like sort was given upon the other trials which took place about the same period.

Ch. II. § 38:
Accomplices.
Evidence.

Rex v. Hardy
and Thelwall,
O. B. Q. & Nov.
and Dec. 1794. MS.

In William Stone's case before mentioned, evidence having been given to connect the prisoner with John H. Stone and Jackson, and to shew that they were engaged in a conspiracy to transmit to the French enemy an account of the disposition of the people of England in case of an invasion, the secretary of state was called to prove that a letter of Jackson's, containing treasonable information of the state of this country, had been transmitted to him from abroad, but in a confidential way, which made it improper for him to say by whom it was communicated. This evidence was objected to on the part of the prisoner, as the letter was not proved to have come to his hands, and he ought not to be affected by any but his own acts. But the court admitted the evidence; and Lawrence, J. observed, that in Tooke's case (above referred to) he had alluded to the cases of Lord Stafford and Lord Lovatt, to shew that in order to prove a conspiracy the acts of the different conspirators were admissible, though acts to which the prisoner was no party: and that in this case evidence having been given from the acts of the prisoner himself, sufficient for the jury to consider whether he were not one of a treasonable conspiracy with Jackson; if they should be of that opinion, Jackson's acts done in pursuance of that conspiracy were in contemplation of law the acts of the prisoner. And Lord Kenyon, who had on the first day of the trial when the evidence was received relied altogether on the authority of the precedents in Hardy's case and Horne Tooke's case, on the next day declared himself perfectly satisfied on principle with the decision of the court: of which also the prisoner's counsel then signified their approbation. A paper was also read on the same trial found in the possession of Jackson, in the hand-writing of one Galliers a clerk

Rex v. W. Stone,
at the Bar of the
Court of B. R.
Hil. 36 Geo. 3.
MS.
and 6 Term Rep.
527.
Anie, p. 79.
Vide post. S. C.

Ch II. § 38.
Accomplices.
Evidence.

of the defendant, the reading of which was at first opposed; but afterwards the paper was agreed by the defendant's counsel to be evidence, when they found it contained parts of some other papers which the defendant had before obtained from other persons. Another paper so found, which was also in the hand-writing of Galliers, was not allowed to be read, merely on that account, as evidence of its having been sent to Jackson by the prisoner, which was the ground on which it was offered by the counsel for the crown; because it was properly observed it did not follow because the defendant had employed Galliers to write one paper, therefore he had employed him to write this. What were the contents or nature of the paper did not appear, and there was no resolution of the court on that ground. But if the paper had appeared to have related to the conspiracy in question, it must I conceive in that stage of the trial have undergone a different consideration.

§ 39.

How far the general rule applicable with respect to trial.

1 MS. Sum.

100, 1, 4.

Fost 312, 346.

1 Hale, 613.

But further, with respect to the trial, the general rule, *that all are principals in treason*, must be understood with more limitation. In regard to all acts of approbation, incitement, advice, or procuring towards that species of treason, which in judgment of law falls within the clause of compassing the king's death, or that of the queen or prince, there is no doubt but that the party may be tried before the person who acted upon such incitement; because the bare advising or encouraging to such actions is in itself a complete overt act of compassing; and it is totally immaterial whether the attempt were ever made or not. The case of Somerville proves no more than this; though the rule is there laid down in general terms, that a person aiding or procuring a treason may be tried before the actor. But with regard to all other treasons within the stat. 25 Ed. 3. if one advise or encourage another to commit them, or furnish him means for that purpose, in consequence whereof the fact is committed, the adviser will indeed be a principal; for such advice or assistance would have made him an accessory before the fact in felony: but if the other forbore to commit the act thus advised, the adviser could not be a traitor merely on account of his ineffectual advice and encouragement; though his conduct would be highly criminal: for it cannot be said that a person procured an offence which in truth was never committed.

(Somerville's case, 1 And. 107.)

Vide 1 Hale, 223.

In these cases therefore the treason is of a derivative nature, and depends entirely upon the question, Whether the agent have or have not been guilty of such treason? the proof of which can only be legally established by his conviction, if he continue amenable to justice, or his attainder by outlawry, if he abscond; unless the accessory choose to waive the benefit of the law, and submit to a trial.

Ch. II. § 39.
*Accomplices.
Trial.*

[1 Hale, 623.
2 Hale, 224.]

The same rule holds in case of assistance or protection to a traitor after the fact in all cases, or of permitting or procuring his escape from custody. The party knowingly affording such protection or contributing to such escape, if the treason have been in fact committed, will be a principal traitor; but the fact of the principal's guilt must first be established, and notice of it must also appear to have been received by him who may be called the accessory after. For it cannot be said that a person received or succoured a traitor knowingly, that is, with a knowledge of the treason's having been committed, when in truth either no such treason was committed by him, or the receiver was altogether ignorant of it. But it would be sufficient if a rescuer knew that the party was committed for high treason, if in fact he were guilty of it: and though he were not guilty of it, yet it would be a great misdemeanor to rescue one under such a charge, or suffer him to escape. And though the party himself, committed for treason and breaking his prison, may be tried for that offence before he is convicted of the treason, yet it can only be for felony, upon the statute *de frangentibus prisonam*. So if both be indicted together, the jury must be first charged to inquire of the guilt of the principal.

1 MS. Sum. 101,
102.
Post 342—346.
1 Hale, 235, 7,
8. 5. 8.
2 Inst. 510.
Reo. Treason, 11.
*Vide Offences
against lawful
custody, post.*

1 Ed. 2. ft. 2.
1 Hale, 238.
2 Hale, 223.

By a temporary act of the 14 Eliz. c. 2. the conspiring, imagining, or going about unlawfully and maliciously to set at liberty any person committed for high treason or suspicion thereof before indictment, and setting forth the same, or declaring it by express words, writing, or other matter, was made misprision of treason; but after indictment of the principal it was made felony so to conspire, and declare such conspiracy; and after his conviction or attainder, it was made high treason so to do. On this Lord Hale observes, that under the stat. 25 Ed. 3. if there were only a commitment of the principal for treason, but no treason in fact committed by him, the setting him at liberty was no treason. And that the mere conspiring to do so, though manifested by open

1 Hale, 326.

Ch. II. § 39.
Accomplices.
Trial.

act, neither was nor is treason, though the party imprisoned were indicted or even attainted, but only a bare misdemeanor punishable by fine and imprisonment; that is, provided the conspiracy were not effected.

It is not equally clear how the rule, with respect to the course of trial, would be in the case of a *constructive* levying of war, namely, in regard to such persons as accidentally join others in the commission of unlawful and traitorous acts, but without any knowledge of their previous traitorous design, which previous design alone constitutes such acts to be high treason. That such an aiding and supporting in the very act of rebellion does make the parties guilty of high treason, notwithstanding their ignorance of the treasonable intent, is clear. This was expressly determined in the case of Purchase before mentioned. The three dissenting judges in that case grounded their opinion on the consideration that it was not directly found that he aided and assisted the said traitors, though they agreed that the mob were continuing their act of treason when he joined them. The same doctrine was holden in the case of the Earl of Southampton, and those who lent their assistance to Essex's rebellion; and also by a majority of the judges in the cases of Appletree and Latimer, in the 20 Car. 2. But in each of these cases those who were actually privy to the design, and took a principal part in the very acts of treason, were indicted and convicted at the same time. Yet it must be considered that in this as in all other cases grounded in conspiracy, where several persons take the same or different parts all tending to the same end, that of itself is *prima facie* evidence that they all acted with the same design.

I shall next consider where the trial is to be had, and the manner in which it is regulated.

Of the Trial.

§ 40.

Trial in what
Place.

1 & 2 Ph. & M.

c. 10. s. 7.

Dy. 132. a.

1 And. 105.

The stat. 1 & 2 Ph. & Mary, c. 10. enacts, "that all trials hereafter to be had, awarded, or made for any treason, shall be had and used only according to the due order and course of the common laws of this realm, and not otherwise. This offence is triable therefore, like all others, in the county where the offence is committed, that is, where the overt acts
charged

charged in the indictment were done; but as I shall hereafter shew, it is enough if one overt act be proved in that county.

The above act of Philip and Mary is a virtual repeal of the statutes of the 26 and the 32 Hen. 8. c. 4. as to the trials of treasons committed in Wales; for though the indictment is not properly the trial, yet it is so connected therewith that they cannot be separated in this respect without special provision for that purpose; and it is also a repeal of the stat. 33 Hen. 8. c. 23. as to treasons in general.

Treasons committed on the high seas are triable before the admiral, by commission under the great seal, by virtue of the stat. 28 Hen. 8. c. 15. which in this respect stands unrepealed by the stat. 1 Mar. stat. 1. c. 1.

As to other treasons committed out of the realm, provision is made by the stat. 35 Hen. 8. c. 2. which enacts, "that all manner of offences being then already made or declared, or after to be made or declared by any law of this realm to be treasons, misprisions of treasons, or concealment of treasons, and committed by any person out of this realm of England, shall be from thenceforth inquired of, heard, and determined before B. R. by jurors of the same shire where the said bench shall sit, or else before such commissioners and in such shire of the realm as shall be assigned by the king's commission (a), and by lawful men of the same shire; in like manner and form to all intents and purposes as if such treasons, &c. had been committed within the same shire where they shall be so inquired of," &c. By s. 2. the privilege of peerage is saved.

A like provision is made with respect to Scotchmen by the stat. 7 Ann. c. 21. s. 5., who are triable before commissioners in any shire, stewarty, or county of Great Britain, as shall be assigned by the crown for all treasons and misprisions of treasons committed out of the realm of Great Britain.

Neither the stat. 35 H. 8. c. 2. nor the 28 H. 8. c. 15., concerning the trial of treasons on the high seas, are repealed by the stat. 1 & 2 Ph. & Mary, c. 10.; for that was only meant to restore the common law trial of treasons within the realm, in which great innovations had been made in the reigns of Henry 8. and Edward 6. But there was no way regularly appointed at common law for the trial of

H 4

treasons

Ch. II. § 40.
Trial. Place.

Post, f. 61.
1 Hale, 157.
282.
Wales.
Foft. 238.

Treasons on High Seas.
28 H. 8. c. 15.
Vide tit. Piracy.
1 Hale, 282.

Foreign Treasons:
35 H. 8. c. 2.
Vide 1 Hale, 284.
The stat. 5 &
6 Ed. 6. c. 11.
s. 6. is to the
same effect.
Vide 1 Hale, 294,
5, 6.

(a) Which commission may be signed by the king's sign manual, or issued by the chancellor
by virtue of a warrant so signed. 1 Hale, 284

Ann. c. 21.
s. 5.

2 Hawk. ch. 25.
f. 53.
1 Hale, 284.
316.
Foft. 238.
Vaughan's case,
5 St. Tr. 38.
1 MS. Sum. 25.
3 Inst. 24.
post, p. 105.

Ch. II. § 40.
Trial. Place.

2 Hawk. ch. 25.
f. 50.
1 Hale, 284.
3 And. 195.

treasons committed out of the realm, as may be collected from the preamble to the stat. 35 H. 8. c. 2. Yet, if the court remove into a different county from that wherein the indictment was found, the trial must still be by jurors returned from the first county, agreeable to the rules of the common law.

One species of treason, namely, that of committing hostilities at sea, under colour of a foreign commission, or any other species of adherence to the king's enemies there, may be indicted and tried as piracy by virtue of the stats. 28 H. 8. c. 15. 11 & 12 W. 3. c. 7. and 18 Geo. 2. c. 30.

§ 41.
Foreign Dependencies.
O'Rorke's case,
1 Hale, 155.
284.
Sir John Perrot's case,
1 St. Tr. 189.
Lord M'Guire's case,
1 St. Tr. 949.
Dy. 360. b. c. n. tra.
Vide 2 Hawk.
ch. 25. f. 52.

There are instances in the books of trials in England for high treason, committed by Irishmen in Ireland before the union; one of them in the case of an Irish peer, who objected without avail to the defect of trial by his peers. This has not passed without question: but, since the legislative incorporation of the two countries, these cases cannot be brought into precedent again. And very shortly before the union an act passed directly repugnant in spirit to those authorities. This was the temporary act of the 39 Geo. 3. c. 44. f. 7, 8., by which it was provided, "that persons sent from Ireland to this country for safe custody, charged with treason, suspicion of treason, or treasonable practices there, and persons taken up in this country, on a charge of the same offences committed in Ireland, may be detained here in such places as his majesty may think fit: but that such persons, when entitled by the law of Ireland (if they had been in custody there) to be tried or discharged, may apply to the court of B. R. or any judge thereof, who shall order them to be discharged, or sent to Ireland to be dealt with according to law."

It seems to me that the true question in such cases is, whether by force of the relation between a foreign dependency and the parent state, the legislative acts of the latter be or be not binding proprio vigore upon the inhabitants of the former. But with respect to all those colonies and dependencies of the crown of England, which remain under its legislative control, all treasons committed therein are undoubtedly triable here by force of the stat. 35 H. 8. c. 2. although they may have some special laws of their own applicable to criminals, and jurisdiction for their trials. This seems to

arise

1 Hale, 256. 8.
Colepepper's case, 1 entr.
349.
Vide 4 Mod. 225
1 MS. Sum. 27.
2 MS. Sum. 445.
Vide Pratt's case,
O. B. 1777.
Leach, 144.

arise of necessity from the very nature of the tie of allegiance by which they are knit to the crown of England, unless there be any express convention or stipulation that the subjects thereof shall only be judged by their own particular laws and tribunals. In Platt's case above referred to, it was said by the court, that the ancient opinion was, that adherence to the king's enemies within the meaning of the stat. 25 Ed. 3. c. 2. might even before the stat. 35 H. 8. have been tried by the rules of the common law within the kingdom, though the aid and comfort were afforded out of it; but that every other species of treason committed without the realm could only be tried here under the provisions of that act.

Ch. II. § 41.
Trial. Place.

The stat. 35 H. 8. however, does not include Wales, which (c. 2.)

is within the realm of England; nor Scotland, which is incorporated therewith by the act of union. During the rebellion, which began in Scotland in the year 1745, an act passed empowering the king to issue commissions for trying the rebels in any county of the kingdom, in the same manner as if the treasons had been committed in that county. Alexander and Charles Kinloch, two of the rebels, who were Scotchmen born, and indicted for overt acts of high treason committed in Scotland, insisted upon the benefit of the act of union in a plea to the jurisdiction of the special commissioners in Surry; which was over-ruled upon the authority of the statute under which the court sat. Upon that occasion Mr. Justice Foster was of opinion, that the objection, if any, was available upon the plea of not guilty; for, unless the case of the prisoners was brought within the act, they would have been entitled to an acquittal for want of proving an overt act in the county where the commission sat, and from whence the jury came: or, as the merits of the objection appeared on the face of the indictment, which set forth the act of parliament, and laid the overt acts in Scotland according to the fact, it was also open to them to move in arrest of judgment on the same ground.

(19 G. 2. c. 9.)
Fost. 1.

The case of the
Kinlochs, in
1746. Fost. 15,
16. 23.

This and other acts of the like kind were necessary, because Scotland being by the act of union within the realm, the Scotch rebels could not have been tried in England for acts of rebellion committed in a shire of Scotland without a special authority for that purpose.

Burnet's MS.
Sum. 15.
Vide Calvin's
case, 7 Co. 3. 151

Ch. II. § 42.

§ 42.
Mode of Trial.

Regulations of
Trial by stat.
7 W. 3. c. 3.

*As to the Mode in which Trials for this Offence
shall be regulated.*

The legislature, for the safeguard of the subject under the weight of a state prosecution, and the popular odium of so detestable a charge, have deemed it necessary to make special provision by several acts of parliament, particularly by the stat. 7 W. 3. c. 3. These may be considered under the following heads of inquiry :

1. *To what Treasons these Regulations extend.*
2. *Before what Tribunals.*
3. *Within what Time Prosecutions must be commenced.*
4. *When and what Objections may be taken to Want of Form in the Indictment.*
5. *By what Witnesses and Evidence the Indictment must be supported.*
6. *To what Privileges the Defendant is entitled in preparing for and making his Defence.*

§ 43.

To what Treasons extending.

7 W. 3. c. 3.

Fost. 222. 224,

6, 7.

1 MS. Sum. 52.

83, 84.

2 MS. Sum. 477.

Post.

Vide st. 20 G. 2.

c. 30. enabling

persons impeach-

ed of high trea-

son, &c. whereby

any corruption of

blood may be

made, to defend

themselves by

counsel.

1. The act of the 7 W. 3. c. 3. for regulating trials in cases of high treason and misprision of treason, is confined to high treasons (except in the particulars after noticed,) whereby any corruption of blood may or shall be made to the offender or his heirs, and to the misprisions of such treasons. The 1st and 2d sections are expressly limited to such treasons, and all the subsequent clauses, except the 10th and 11th, use words of reference. This must be intended of all such treasons, as well those created by statutes subsequent as before, where the corruption of blood is not saved by the statute. And therefore, if high treason be committed on the high seas, the defendant in a prosecution under the stat. 28 H. 8. c. 15. will be entitled to the benefit of the act, notwithstanding the doubt (though as Mr. Justice Foster conceives, without just ground), whether a corruption of blood be wrought in that proceeding (a). But the cases of

(a) It is probable that Mr. Justice Foster had in view a case at an Admiralty Sessions in July 1705, where Powell, J. said, and which was agreed by the civilians, that it had been ruled by all the judges that the stat. 7 W. 3. extends to treasons on the sea, though they do not make a corruption of blood, and the purview of the statute confines it to treasons whereby any corruption of blood shall be made: for, said Powell, J. those words were expounded to relate to the treasons of counterfeiting the coin, &c. which are there excepted. MS. Tracy, 254 & 258. Vide Vaughan's case, 5 St. Tr. 37.

petty treason, of treasons created by acts saving the corruption of blood, and of the treasons expressly excluded by the 13th section of the act, of counterfeiting the king's coin (a), the great seal, privy seal, sign manual, and privy signet, all stand upon the same foot as they did before the making of this act. By the stat. 6 Geo. 3. c. 53. the same cases are excepted out of the stat. 7 Ann. c. 21. s. 11. after mentioned, which is auxiliary to that of W. 3.; and the same statute of Geo. 3. also provides, that nothing in the said statute of Ann. shall extend to any indictment for high treason, or to any proceedings thereupon against any offender, who by any act or acts now in force is to be indicted, arraigned, tried, and convicted by such like evidence, and in such manner as is used and allowed against offenders for counterfeiting the king's coin.

Ch. II. § 43.
Trial.
Regulations.

Fost. 227.

Vide post, l. 48.

The operation of the statute of King William has been still further confirmed by a late act, which took its rise from the attempt of a wretched maniac of the name of Hadfield to assassinate his majesty, by firing a pistol at him as he entered the theatre at Drury-lane. The reason of the statute, which is very shortly hinted at in the preamble, is obvious: it was thought incongruous that greater privileges and indulgence should be allowed to a prisoner upon his trial under a charge for assassinating or attempting the life of his sovereign, than if he had made the same attempt upon the life of any of his majesty's subjects. Upon this occasion the prisoner had the benefit of the stat. of King William, and soon after the legislature passed the following law:

By stat. 40 Geo. 3. c. 93. reciting "that it is expedient that in cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act or acts of such treason alleged in the indictment

40 G. 3. c. 93.
Exception in cases
of attempts on the
king's person.

(a) A doubt has been thrown out, Whether other treasons relating to coin, not the king's coin, are within this exception; namely, the importing coin counterfeited to the similitude of English coin, and the counterfeiting foreign coin made current here by proclamation; in both of which a corruption of blood is worked? Undoubtedly these stand *in pari ratione* with the exception as to the counterfeiting of the king's coin strictly so called; and to avoid a palpable incongruity, which cannot be imputed to the legislature, ought to receive the same construction. Besides, in the latter case any coin which is current here by the king's authority may justly be deemed the king's coin, unless the apparent sense of a statute lead to a different construction; the contrary of which is the case here.

Vide Fost. 226.

Ch. II. § 43.
Trial.
Regulations.

shall be the assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered, or his person may suffer bodily harm, the trial for such offence should not be different from trials for murder or wilful and malicious shooting; enacts, that in all cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act or acts of such treason which shall be alleged in the indictment shall be assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered or his person may suffer bodily harm, the person or persons charged with such offence shall and may be indicted, arraigned, tried, and attainted in the same manner, and according to the same course and order of trial, in every respect, and upon the like evidence, as if such person or persons stood charged with murder: and none of the provisions contained in the several acts of the 7 W. 3. and 7 Ann. respectively, touching trials in cases of treason and misprision of treason respectively, shall extend to any indictment for high treason in compassing and imagining the death of the king, or for misprision of such treason, where the overt act or acts of such treason alleged in the indictment shall be such as aforesaid: but upon conviction on such indictment, judgment shall be nevertheless given, and execution done, as in other cases of high treason."

2. Before what Tribunals.

§ 44.

*Before what
 Tribunals.*

7 W. 3. c. 3.
 s. 10, 11, 12.
 Foist. 246.
 1 Inst. 156. b.
 Moor, 622.
 4 Blac. Com.
 262.

The stat. of W. 3. is not only applicable to examinations of such treasons before the ordinary courts of justice, but special provision is also made therein for a more equal and indifferent trial of peers in the like cases. Before this time, upon the trial of a peer in the court of the high steward, the peers triers were a select number returned at the nomination of the high steward. This was the real mischief, though not that which is specified in the act; and for remedy thereof it is enacted, "That upon the trial of any peer or peerefs for high treason or misprision, all the peers who have a right to sit and vote in parliament shall be duly summoned, twenty days at least before the trial, to appear at such

such trial; and that every peer so summoned and appearing shall vote in the trial of such peer or peers, having first taken the oaths appointed by the act." This clause refers to trials for treasons generally, and is not confined to such treasons only as corrupt the blood. It is followed by a proviso, that nothing in the act contained shall extend "to any impeachment or other proceedings in parliament in any kind whatsoever." But notwithstanding the generality of these latter words it was clearly settled in the cases of the Earls of Kilmarnock and Cromartie, and of the Lord Balmerino, that they do not extend to exclude the trial of peers in full parliament in the ordinary course of justice; but that they are entitled to all the benefit of the act. And, accordingly, upon the trial of those peers for high treason, all the lords were summoned, and such as appeared took the oaths appointed by the act.

Ch. II. § 44.
Trial.
Regulations.

Vide Foxt. 222.
247.
ft. 7 W. 3. c. 3.
f. 12. not extending to impeachment or other proceedings in parliament.
Vide ft. 20 G. 2. c. 30. ante, p. 106.
Foxt. 247.
1 MS. Sum. 80.
Cases of the Lords Kilmarnock, Cromartie, and Balmerino.

3. *Within what Time Prosecutions must be commenced.*

By the same act of William no prosecution shall be for any of the treasons or misprisions within the act, committed in England, Wales, or Berwick upon Tweed, "unless the indictment be found by a grand jury within three years after the offence committed;" "except (by f. 6.) where any person shall be guilty of designing, endeavouring, or attempting any assassination on the body of the king, by poison or otherwise," in which case the prosecution may be at any time.

§ 45.
Limitation of Time.
7 W. 3. c. 3.
f. 5.
Foxt. 249.

The above limitation is, by the tenor of the stat. 7 Ann. c. 21., extended to treasons of the like kind committed in Scotland. It was so understood at the time of the rebellion in 1715; and, therefore, after all the proceedings upon the special commissions in England were at an end, another special commission went into Scotland, merely for the finding bills of indictment in the proper counties and stewarties, in order to prevent the limitation taking place.

4. *When and what Objections may be taken to the Form of the Indictment.*

"No indictment for any of the offences aforesaid, nor any process or return thereupon, shall be quashed for mis-writing, mis-spelling, false or improper Latin, unless the exception be taken in court by the prisoner, or his counsel assigned,

§ 46.
Objections to form of Indictment.
7 W. 3. c. 3. f. 9.

Ch. II. § 46.
Trial.
Regulations.

assigned, before any evidence be given in open court upon such indictment; and no such mis-writing, mis-spelling, false or improper Latin, after conviction on such indictment, shall be cause to stay or arrest judgment; but such judgment may, nevertheless, be reversed upon writ of error, as before the making of this act."

1 MS. Sum. 75.
Fost. 231.
Rookwood's
case, 4 St. Tr.
668. 674.
Cranburne's case,
ib. 698.

It has not at any time been usual to quash indictments for high treason, though it may be done. And though the act states that exceptions, grounded on those mistakes, must be taken before evidence be given, it does not therefore follow that the defendant may take such exceptions at any time before. The practice remains as it was at common law; and the construction upon this act has been conformable thereto, that they must be taken before plea pleaded; and accordingly in the several cases of Vaughan, Sullivan, and Layer, the court refused to hear such exceptions after plea: though it is still open to the prisoner afterwards to move in arrest of judgment.

Vaughan's case,
5 St. Tr. 17.
Sullivan's case,
O. B. 1715.
Layer's case,
6 St. Tr. 229.
Fost. f. 50.

1 MS. Sum. 75,
76.

Fost. f. 60.

Layer's case,
6 St. Tr. 237.
Vide Lovick's
case, 4 St. Tr.
717.

But though some words in the indictment are insignificant or improper, yet if others, which are proper, are also used, the court will not quash the indictment, but will reject the former as surplusage. Thus, in Layer's case, where the words were "*ad seiscind. capiend. et imprisonand.*" the words "*ad seiscind.*" were rejected, as the subsequent words "*ad imprisonand.*" were sufficient and proper. And it may be observed generally, that where several words are used in setting out an overt act of treason, one of which is improper; or if several overt acts are charged, and one of them defectively set out; the court will not quash the indictment, provided there be proper words sufficient to support it in the one case, or if any of the overt acts be well set out in the other: for otherwise the crown would be deprived of an opportunity of proving that which is well set out; and if any one overt act be well laid and proved, it is sufficient.

Fost.

§ 47.
Witnesses and
Evidence.

5. With respect to the fifth branch of inquiry proposed, namely,

By what Witnesses and Evidence the Indictment must be supported,

Fost. 5. 53, &c. I shall have an opportunity of considering it better in the next division of this chapter.

6. *As to what Privileges the Defendant is entitled in preparing for and making his Defence.*

Ch. II. § 48.
Trial.
Regulations.

By the stat. 7 W. c. 3. f. 1. "All and every person and persons indicted for high treason, whereby any corruption of blood may be made to such offenders or their heirs, or for misprisions of such treasons, shall be admitted to make their full defence by counsel; and the court before whom such person or persons shall be tried, or some judge thereof, is required, immediately upon his or their request, to assign to such person or persons such and so many counsel (not exceeding two) as he or they shall desire: to whom such counsel shall have free access at all reasonable hours." And by stat. 20 Geo. 2. this privilege is extended to impeachments for treason corrupting the blood, which had before been excepted generally from the benefit of the act of William.

§ 48.
Privileges of Defendant in his Defence.
7 W. 3. c. 3. f. 1.
Counsel.
Vide Foit. 228.

Each prisoner is entitled, under the stat. of William, to have two counsel assigned him, although indicted jointly with others for the same treason. This was so ordered in the cases of Rookwood and Lovick, who were indicted together for the Assassination Plot; and on the trials of Hardy and others at the Old Bailey, in 1794.

20 G. 2. c. 30.
7 W. 3. c. 3. f. 1.

The same act of William requires, that the person or persons so indicted "shall have a true copy of the whole indictment (but not the names of the witnesses) five days at least before trial, to advise with counsel thereupon to plead and make their defence, his or their attorney or agent requiring the same, and paying the officer his reasonable fees for writing thereof, not exceeding 5 s. for the copy of every such indictment.

4 St. Tr. 663.
718.
MS.

And by f. 7. of the same act, every such person shall have a copy of the panel of the jurors who are to try him, duly returned by the sheriff, and delivered unto him two days at least before he shall be tried.

Copy of Indictment.
7 W. 3. c. 3. f. 1.
To advise with Counsel.
Post.

But alteration has been made in some of these respects by the stat. 7 Ann. c. 21. which enacts, that after the decease of the pretender, "when any person is indicted for high treason, or misprision of treason, a list of the witnesses who shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, professions, and place of abode of the said witnesses and jurors, shall be

f. 7.
Copy of Panel.

7 Ann. c. 21.
f. 11.

List of Witnesses, and List of Jury, with their Professions and Places of abode.

also

Ch. II. § 48.

Trial.

Regulations.

also given at the same time that the copy of the indictment is delivered to the party indicted. And that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted *ten* days before the trial, and in the presence of two or more credible witnesses."

Douglass. 591.

These additional privileges were exercised for the first time on Lord George Gordon's trial.

1 Hawk. ch. 39.

per tot. Foist. 228.

231, &c.

1 MS. Sum. 59.

63.

Charnock's case,

4 St. Tr. 563.

Parkyn's case,

4 St. Tr. 630, 1.

None of these privileges of having counsel assigned to make a full defence, or of having a copy of the indictment, or of the panel, or a list of the witnesses, were demandable of common right; though upon the trial of collateral issues, whether in cases of treason or felony, as also upon a doubtful question at law, counsel have always been assigned, upon the prayer of the prisoner, to address the jury in the one case, and in the other to argue the point on his behalf. In Ratcliffe's case, who, having escaped after attainder, and been re-taken, was tried upon a collateral issue, whether he was the same person who had been before attainted; he was denied a copy of the record, but had the assistance of counsel, who observed fully on the evidence to the jury.

Ratcliffe's case,

M. 20 G. 2.

B. R. Foist. 40.

Johnson's case,

M. 2 G. 2. B. R.

Foist. 46.

The same course was taken in Johnson's case. In the former the venire was awarded and returnable instant.

§ 49.

How the Time
computed.

By necessary construction the *ten days* mentioned in the stat. 7 Ann. must be reckoned after the bill is found, and before the arraignment of the prisoner; for till the finding of the bill there is no indictment, and upon the arraignment the prisoner must plead instant. The ten days must in the instance of the copy of the indictment be reckoned exclusive of the day of delivery, and the day of arraignment; and, with regard to the copy of the panel, exclusive of the days of delivery, and of trial. By general practice too the time, at least with respect to the copy of the indictment, has also been reckoned exclusive of Sunday, that not being a day on which the prisoner may be presumed to be preparing for his defence; though the statute does not require this caution, nor is it of absolute necessity.

Time for giving
Copies.

Cases of Rook-

wood, Lowick,

and Cranburne,

4 St. Tr. 667.

Ld. George Gor-

don's case,

Douglass. 591.

1 MS. Sum. 59.

MS. Tracy.

Greg's case,

post., and in the

case of May,

alias Smith and

others, April

1708. MS. Tracy. Foist. 2. 230. 250.

Though

Though these acts mention only "*the whole indictment*," yet the prisoner ought to have a copy of the caption delivered to him with the indictment; and it was so ordered at a meeting of all the judges upon the intended trial of Greg, for holding treasonable correspondence with France: for this is in many cases as necessary to enable him to conduct himself in pleading as the other; and such is now the constant practice. But after pleading it is too late to object either to the want of a copy or to any insufficiency in it; for that admits it to be sufficient.

Ch. II. § 50.
Trial.
Regulations.

§ 50.

What are sufficient Copies of Indictment.

Folt. 220, 30.
Rookwood's case, 4 St.
Tr. 663.
1 MS. Sum. 59.
Greg's case, ante, f. 46.

12th Jan. 1777. MS. Tracy. Cooke's case, Salk. 634.

On the other hand, though the words of the statute of William are, that the prisoner shall have a copy of the panel "*duly returned by the sheriff*;" yet if the copy be delivered before the return of the precept it will be sufficient, within the words and intent of the act, if the prisoner have the advantage of it in the time allowed by law before his trial, the intent of which was to give him an opportunity of preparing his challenges. This was so ruled in Rookwood's case, and also at a meeting of the judges on Greg's case.

Of Panel.

Folt. 230.
2 Hawk. ch. 41.
f. 27.
1 MS. Sum. 60.
MS. Tracy.
Rookwood's case, 4 St.
Tr. 667.
Greg's case, sup.

In the case of Lord George Gordon the attorney-general moved the court of K. B. for a rule upon the sheriff to deliver to the prosecutor a list of the jurors whom he intended to return on the panel, in order that the prosecutor might be enabled to deliver such list to the prisoner; and the rule was made accordingly.

Ld George Gordon's case, H. 21 G. 3.
Doug. 591.

Where so many of the jurors were challenged that there were not left a sufficient number, the court, which sat under the commission of gaol delivery at St. Margaret's Hill for the trial of the rebels in 1746, awarded *ore tenus* a new panel, and adjourned to another day, to give time for the prisoners to have copies of the panels pursuant to the statute of William.

Folt. 63, 4.

Previous to the trials of the late state prisoners for high treason, it was found that the panel of the jurors, returned both to the court of gaol delivery and of oyer and terminer, was incorrect in not stating the professions of the several jurors, and in other respects. Whereupon a motion was made on the part of the crown in the court of gaol delivery, which was then sitting, that the sheriff might have liberty to amend the panel, by correcting mistakes and adding the professions of the jurors returned; which was thereupon directed

Rex v. Thomas Hardy & others, O. B. Oct. 1794, MS.
Vide tit. Jury, Talces.

Ch II § 50.
Trial
Regulations.

Layer's case,
6 St. Tr. 246.

Stone's case,
R.R. H. 36 G. 3.
6 Term Rep. 531.

Layer's case,
6 St. Tr. 323.

§ 51.
Course of Proceed-
ings after Bill
found and be-
fore Trial.
Foss. 1. c.

Rex v. Thomas
Hardy & others,
O.B. O.C. 1794,
MS.

to be done, upon advice among the judges who presided; and copies of the panels so amended were delivered to the prisoners, pursuant to the directions of the statute.

In Layer's case, the name of a jurymen was by mistake written Longbotham instead of Longbothom, both in the original panel and in the prisoner's copy; but the sound being the same, and written both ways, it was ruled to be sufficient. In Stone's case, who was tried at bar for high treason, his counsel objected to one of the jurymen as being ill described; his place of abode being stated to be Grafton-street; and as it was said, there being several streets of that name, that there should have been something added to distinguish which Grafton-street was meant: but the objection was over-ruled.

In Layer's case the court refused to order the venire to be read to the prisoner after his conviction.

In the course of the proceedings under the special commission in 1746, for the trial of the rebels, after the bills of indictment had been found against them, the prisoners were brought to the bar and informed that bills had been found against them, of which they should soon have copies; which were accordingly delivered to them after the rising of the court on the same day. A different course was pursued upon the late proceedings against Hardy and others for high treason. On the grand jury's returning the bill "found," Lord C. J. Eyre, who was the only judge in court, desired to know whether there were any persons present who were concerned as attornies or agents for the prisoners: if there were, he wished it to be understood, that on application made either to the court of oyer and terminer or of gaol delivery at the Old Bailey, or to either of the judges in those commissions, counsel would be assigned to the prisoners; and that such counsel and the agents of the prisoners should have proper access to them. That his reason for mentioning this was, that the prisoners might not be harassed by being brought up to be informed that bills were found against them, and then be remanded. This was done in consequence of a previous meeting at the Chief Justice's chambers, when the former precedent was considered, and the present mode agreed to be adopted as the more convenient. In truth, as far as respects notice of the indictment, all that the statute either of William or of Anne requires is, that the prisoner should have a copy of

of it, which seems in itself to be an adequate notice, and sufficient for all the purposes of the act. And so it was considered by one of the judges upon that occasion. But the propriety of this kind of communication, where the prisoners are not brought to the bar, as they were in 1746, seems evident on another account, namely, to enable them if they please in the first instance to apply for counsel to be assigned to them, whom they may consult as soon as they are served with copies of the indictment. For the st. 7 W. 3. requiring such copies to be delivered, assigns as a reason for it, to enable the prisoner "to advise with counsel thereupon to plead and make his defence." Therefore, by fair construction of the whole law upon this subject, such opportunity ought to be afforded to the prisoner, as that he may, if he please, have counsel assigned to him so long before his trial as the law expressly requires that he shall be furnished with a copy of the indictment, namely, 10 days.

Ch. II. § 51.
Trial.
Regulations.

Also by the act of King William the prisoner "shall have the like process of the court where he shall be tried, to compel his witnesses to appear at the trial, as is usually granted to compel witnesses to appear against prisoners in the like case;" and his witnesses are to be heard upon oath. Though now by the stat. 1 Ann. c. 9. the prisoner's witnesses in all cases of felony as well as treason are to be heard upon oath.

§ 52.
Process for witnesses and examination on oath.
7 W. 3. c. 3. l. 7.
1 Ann. st. 2. c. 9. l. 3.

Of the Indictment and Evidence—Witnesses and Confession.

Every indictment for high treason must lay the offence to have been committed *traiterously*, and should conclude *against the duty of the defendant's allegiance*. A charge of doing any thing *seditionously* does not amount to a charge of treason. Where the traitor is a natural-born subject, it is usual to lay the offence to have been done against his *natural* allegiance; but that is not necessary; for in the general word *allegiance* is comprised every species of it; and the addition of the word *natural* is even faulty where the defendant is a foreigner. Yet if that fact appeared upon the face of the indictment, I conceive that the word *natural* might be rejected as repugnant and superfluous.

§ 53.
General words.
3 inst. 4. 15.
1 MS. Sum. 76.
88. For. 186.
Cranburn's case,
4 St. Tr. 700.
Salk. 633.
Tucker's case,
4 Mod. 163—6.
1 Hale, 59. 77.
92. Dy 145. a.
Calvin's case,
7 Co. 6. b.
1 Hawk. ch. 17.
l. 5.
Vide post, l. 59.

Ch. II. § 53.
Indictment and
evidence.

1 MS. Sum. 5.
76, 77.
Cranburn's case,
4 St. Tr. 701.
Salk. 633.

Ante, f. 46.

It is sufficient if the species of treason, such as compassing the king's death, be laid to be done traitorously: there is no necessity to charge every separate overt act relating thereto to be so done. And it is sufficient in stating such several overt acts to couple them together by an *and*, without repeating *that the jury further present, &c.* or the like; but that form is the proper one in laying distinct species of treason.

In what manner an indictment may be quashed for insufficiency I have already observed.

§ 54.

Particular treason
must be laid,
and overt acts.

1 MS. Sum. 85,
6, 7.
Fost. 194. 220.
3 Hale, 108. 121.
131. 144. 147.
Vaughan's case,
5 St. Tr. 18.
21, 2. Salk. 634.
1 Hawk. ch. 17.
f. 29.
Burnet's MS. 15.
Ante, f. 6.

In every indictment for high treason upon the st. 25 Ed. 3. for compassing the death of the king, or of such of his family as are therein named, or for levying war, or adhering to his enemies, the particular species of treason must be charged in the very terms of the statute, being a declaratory law, as the substantial offence, and then some overt act must be laid as the means made use of to effectuate the traitorous purpose. For though the words of the statute, "and thereof be proveably (i.e. on sufficient proof) attained by open deed," &c. come immediately after the clause of adhering to the king's enemies, yet they refer to all the treasons before mentioned. The overt acts so laid are in truth the charge to which the prisoner must apply his defence. And therefore it is in no case sufficient to allege that the prisoner compassed the king's death, or that he levied war against him, or adhered to his enemies; for upon a charge so general and indefinite, he cannot know what acts he is to defend. The particular acts of compassing and adherence must be set forth: and in the other instance it must be alleged that he assembled with a multitude armed and arrayed in a warlike manner, and levied war. The indictment against Purchase and Damaree for pulling down meeting-houses, charged that they, with a multitude to the number of 500, to the jury unknown, armed and arrayed in a warlike manner with clubs and staves, and other arms offensive and defensive, levied war against the queen. No exception was taken to the indictment by Damaree's counsel: but on behalf of Purchase it was objected, that there ought to have been an overt act laid of the treason; because there being such a variety of facts which amount to levying war, if the particular facts intended to be brought forward against the prisoner were not alleged, he could not know how to make his defence. But it

3 Hale, 150.

Case of Purchase
and Damaree,
O. B. Sess. be-
fore East. term,
3 Ann.
MS. Tracy.
Vide 8 St. Tr.
219. 267.
Fost. 213.
5. C. ante, f. 17.

was resolved by all the judges, upon conference, that the indictment was good, and that levying war being an overt act of itself, no other overt act need be alleged. They agreed, however, that it ought to appear sufficiently upon the indictment that a war was levied, and that they appeared in such warlike manner; and that an indictment generally that A. levied war is not good. The indictments in Benstead's case, and in the case of the apprentices for pulling down bawdy-houses, were framed as this is. And they all resolved that the stat. 7 W. 3. did not make the laying an overt act necessary where it was not so before.

As to what may be laid as overt acts of each respective treason, of compassing the king's death, levying war, and adhering to his enemies, I have before had occasion to consider at length, in treating of those treasons. And as to the other treasons mentioned in the statute, they seem to be overt acts of themselves; and therefore require nothing more to be alleged than the facts themselves constituting the treason.

I have also had occasion to notice, that one species of treason may be laid and proved as an overt act of another. The instances are unnecessary to be repeated here. Yet it seems that no overt act can be given in evidence under any branch of treason, unless it be expressly laid as an overt act of such treason; although it be laid as an overt act of some other treason in the same indictment.

There are however some other overt acts to be examined, which being of a general nature, and requiring peculiar consideration, I have reserved to this place: these are words and writings.

Whatever doubts may have been formerly entertained, or however the law may have been stretched in arbitrary times to reach particular men, it is now settled that bare words not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason, but only a misprison, punishable at common law by fine and imprisonment, or other corporal punishment (a). They are frequently spoken in heat without any

Ch. 11. § 54.
Indictment and
Evidence.

5 St. Tr. 20, 1.

Vide 1 Hawk.
ch. 17. § 29.
3 MS. Sum. 64.
Benstead's case,
Cro Car 533.
Kel. 70.
Vaughan's case,
5 St. Tr. 21.

Ante, f. 7, 8, 9,
12—22.

Ante, f. 9.
Fost. 197. 211.
2 Hale, 121, 2.
144.

§ 55.
Overt acts.
Words.

Fost. 200. 202.
204. 7. 346.
4 Bac. Com. 80.
123.
Cro. Car. 117.
125. 332.
3 Inst. 14. 140.
1 Hale, 111. 114.
—117. 315.
322, 3.
1 Hawk. ch. 17.
f. 33, &c. 37. 39.
Charnock's case,
1 Salk. 631.
4 St. Tr. 593.
1 MS. Sum 13.
14. Kel. 13.
in margin.
T. Ray. 408.
Burnet's MS. 13.

(a) By a late temporary act of 36 Geo. 3. c. 7. f. 2. the operation of which so far as concerns this matter is now spent, seditious words or writings in hatred or contempt of the king or government were made punishable for the first time as other high misdemeanors, and for the second time by transportation for seven years.

Ch. II. § 55.
*Indictment and
Evidence.*

3 Hale, 309.

intention to act accordingly; they are still more frequently mistaken or mis-remembered; and sometimes it is to be feared the sense of them knowingly perverted. It is one of the causes mentioned in the preamble of the statute 1 Mar. st. 1. c. 1. for repealing all intermediate treasons created since the stat. 25 Ed. 3. on account of the severity of those laws that made words only, without other fact or deed, to be high treason.

Crohagan's case,
Cro. Car. 332.

But words may expound an overt act, and shew with what intent it was done. As in Crohagan's case, who when at Lisbon said, that he would kill the king if he could come to him; and afterwards coming to England, the overt act of coming here was explained by those words, and shewn to have been with intent to carry his purpose into execution; which seems to be the proper explanation of that case; though the speaking the words, as well as the act of coming to England, in order to kill the king, were laid as distinct overt acts. On the other hand, words of advice or encouragement to destroy the king, and above all, consultations for that purpose, are entitled to far different consideration: they expressly relate to such an act or design in contemplation; and come directly and properly under the notion of means made use of for that end. But the consultation or incitement is the overt act, and the words are properly evidence of it. One charge against Coke, one of the regicides, was the speaking as counsel against the king on his trial,

Fost. 202.

Fost. 204.
1 Hawk. ch. 17.
f. 39.

Coke's case,
Kel. 12. 23.

4 Ann. c. 8.
6 Ann. c. 7. f. 2.
*Vide post. the
next section.*

By the stat. 4 Ann. c. 8., re-enacted by stat. 6 Ann. c. 7., to affirm maliciously and directly, in preaching, teaching, or advisedly speaking, that there is any right or title to the crown, other than according to the act of settlement; or that the king and parliament have not a right to limit the succession, is a præmunire. By f. 3. of the latter statute it is provided, that no person shall be prosecuted, by virtue of the act, for any words spoken, unless information thereof be given upon oath to a justice of peace within three days after such words spoken, and the prosecution be within three months after such information: and that no person shall be convicted, by virtue of the act, for such words, but by the oaths of two credible witnesses.

13 Car. 2. c. 1.

The stat. 13 Car. 2. had before declared it a præmunire to assert, maliciously or advisedly, by speaking or writing, that both or either house of parliament have a legislative au-

thority

authority without the king. And, generally speaking, any words, acts, or writing, tending to vilify or disgrace the king, or to lessen him in the esteem of his subjects, or any denial of his right to the crown, even in common and unadvised discourse, amount at common law to a misprision, punishable by fine and corporal punishment.

Ch. II. § 5.
Indictment and Evidence.

4 Blac. Com. 123.

Writings of this nature, inasmuch as the very act betokens greater deliberation and malignity, may, I think, with strict propriety, be urged more strongly against the writer, as evidence of a treasonable intent. But this must be taken with some reserve. Writings plainly applicable to some treasonable design in contemplation are clear and satisfactory evidence of such design, although not published. If, say Mr. Justice Foster and Mr. Justice Blackstone, the papers found in Sidney's closet had been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him. The papers found in Lord Preston's custody, those found, where Mr. Layer had deposited them, and the intercepted letters of Dr. Hensley, were all read in evidence as overt acts of the treasons respectively charged on them; for they were all written in prosecution of certain determinate purposes which were treasonable, and then in the contemplation of the offenders: and such papers being found in the custody of the prisoners are admissible in evidence, without any proof of the hand-writing being theirs. Evidence of the same nature was received in the case of Tooke and others at the Old Bailey, in 1794; as also in Stone's case, who was tried at the bar of the court in Hilary 36 Geo. 3. And not only was evidence received of such papers as were found in their own possession, but also of such as were found in the possession of their accomplices; the connection between them being first proved. But writings which have no connection with any actual purpose of a treasonable nature, while they remain unpublished, will not amount to an overt act of treason; but the fact of publishing them is an overt act, and may be evidence of the treasonable purpose which they import. And this I think upon the same principle as words of incitement to treason are evidence of such incitement. Those are addressed to some one or more individuals; these to the

§ 56.
Writings.

Fost. 198.
4 Blac. Com. 80.

Vide Gregg's case, 10 St. Tr. App. 77. Layer's case, 6 St. Tr. 279. Dr. Hensley's case, 1 Burr. 644.

Layer's case, 6 St. Tr. 279.

Tooke's case, MS. Stone's case, MS. and 6 Term Rep. 327.

Fost. 198.
1 Hal. 112, 118.
1 Hawk. ch. 17.
§. 31, 32.
3 Inst. 14.
Burner's MS. 13.
Twyn's case, K. L. 22, 23.
1 MS. Sum. 15.
See *vide* 2 Roll. Rep. 89, 90.

Ch. II. § 56.
Indictment and
Evidence.

Twyn's case,
Kel. 22.

4 Ann. c. 8.
6 Ann. c. 7.

Fost. 201.

Vide 26 H. 8.
F. 13.
1 & 2 P. & M.
c. 10.
1 Eliz. c. 5.
13 Eliz. c. 1.
13 Car. 2. c. 1.
Vide 1 Hale,
261, 2.

Vide Fost. 201.
Vide ft. 5 Eliz.
c. 15. against
fond and fantas-
tical prophecies
with intent to
make insurrec-
tion, disturb-
ance, &c.

whole body of the people. But in both cases it seems that the intent to incite should appear to the satisfaction of the jury. So in all writings of a treasonable nature it appears to me that not only they should, in the judgment of the court and jury, import the treasonable purpose in proof of which they are adduced in evidence, but that the jury should be satisfied that the publication was made in furtherance of such purpose. Though if the immediate tendency of such writings be to cause the dethronement of the king, that would be proof of compassing his death; because the law has adopted it as such. In Twyn's case, a publication printed and distributed by him, exhorting the people to throw off their allegiance and put the king to death, was laid as the overt act of compassing the king's death; and the prisoner was convicted and executed. But by the stat. 4 Ann. c. 8. and 6 Ann. c. 7. it is made a substantive treason maliciously, advisedly, and directly to affirm, in print or writing, that there is any right or title to the succession of the crown, other than according to the act of settlement; or that the parliament has not a right to limit and bind the succession. On this statute Mr. Justice Foster remarks, that no man is to be argued into the penalties of it by inferences and conclusions; but the criminal position must be *directly* as well as maliciously and advisedly maintained in order to bring him within it.

Upon no other principle than what I have before advanced can the various temporary statutes be accounted for, which have, from time to time, been passed, making the publishing by writing of disloyal or seditious positions high treason. They were meant to repress and punish the very act of publishing such writings; although the publisher had no other design in so doing than to vent his spleen against the government, without any intention of stimulating others to any treasonable act. For though it must be admitted that the argument is not so strong in those instances as in the case where bare words of the like import have by several temporary statutes been made felony and misdemeanor; yet the frequent recurrence of statutes of the former kind upon so many occasions and at different periods, do at least imply great doubts in the legislature whether the publication of such seditious writings did of itself, without any intention of the publisher

publisher thereby to promote some treasonable purpose in contemplation, amount to high treason.

Ch. II. § 56.
Indictment and Evidence.

But though some overt acts must be laid and proved in the instances before mentioned, yet it is not necessary that the whole detail of the evidence should be set forth. The common law never required this exactness; and the statute of William does not make it necessary to charge particular facts where it was not necessary before. It is sufficient that the charge be stated with reasonable certainty, so that the prisoner may be apprised of the nature of it. Thus the laying, that A. and B. met and proposed the means how to effect the king's death is sufficient, without alleging the particular means upon which they agreed, which is matter of evidence.

The statute of William directs, that "no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever." This rule, though expressly prescribed by the statute, in order to suppress some abuses that had appeared in the heat of prosecutions for treason, is in truth no more than the common law itself directs generally. For in no case is a prisoner bound to answer unprepared for every action of his life, but only to that which is the subject of the indictment against him; and therefore no evidence ought to be admitted in any prosecution but what immediately relates to the crime imputed. This I think was always the law as well as the just rule in this particular case; though it must be owned that some high authorities did seem to countenance a contrary doctrine; which justifies the caution and wisdom of parliament in securing the observance of the rule by a legislative provision. But the meaning of the statute has often been attempted to be strained the other way; and such a construction has been argued for as would, if it had prevailed, have made it necessary to set forth specifically every fact intended to be proved at the trial. The true sense of the clause is, that no overt act amounting to a distinct independent charge, though falling under the same head of treason, shall be admitted in evidence, unless it be expressly laid in the indictment: but an overt act may be given in evidence, though it be not expressly laid, or not well laid in the indictment, if it amount to direct proof of any overt act which is well laid. Thus in the case of Rookwood, who

§ 57.
Evidence of overt acts not necessary to be laid.
1 MS. Sum. 13.
85. 87.
Fost. 194. 220.
1 Hale, 122.
Lowick's case,
4 St. Tr. 722.
Rookwood's case, 4 St. Tr. 696, 7.

7W. 3. c. 3. § 3.

1 MS. Sum 73.
Fost. 246.
1 Hale, 121.
Vide Kel. 8. the 5th resolution on the trial of the regicides.

Vide Fost. 246.
Kel. 8.
Hale, 121, 122.

Fost. 245.
1 MS. Sum. 71.
Vaughan's case,
5 St. Tr. 20, 1, 2.
MS. Tracy, 23.

MS. Burnet, 16.

Rookwood's case, 4 St. Tr. 687. 6, 0. 695, 696, 7.

was

Ch. II. § 57.
Indictment and
Evidence.

Major Lowick's
case, 4 St. Tr.
722.

Layer's case,
6 St. Tr. 286, 7.

Cases of Deacon
and Sir John
Wedderburne,
Fost. 9. 22.

(Ld. C. J. Willems,
Abney and Fost-
ter, Justices.)

was indicted for compassing King William's death, two of the overt acts charged were, that he and others met and consulted upon the proper means for way-laying the king, and attacking him in his coach; and also, that they agreed to provide 40 men for that purpose. Upon this indictment the counsel for the crown were allowed to give in evidence a list of the names of a small party who were to join in the attempt, of which the prisoner was to have the command, with his own name at the head of the list as their commander: for though this circumstance was not charged in the indictment, yet it amounted to a direct proof of the overt acts laid, viz. the meeting and consulting together how to kill the king, and their agreeing to provide 40 men for that purpose. And as this fell under the same species of treason, it was very proper evidence. In Major Lowick's case, upon the same charge, the court declared, that even if the circumstance of providing 40 men had not been laid in that indictment, the evidence would still have been admissible; for it was a direct proof of the first overt act laid, the meeting and consulting on the means of killing the king. So in the case of Layer, his corresponding with the pretender, though not laid in the indictment, and though made a substantive treason by the st. 12 & 13 W. 3. was admitted in evidence; because it tended directly to prove one of the overt acts laid, namely, his conspiring to depose the king, and to place the pretender on the throne. The like rule was observed in the cases of Deacon and Sir John Wedderburne, upon the special commission in Surry in 1746. In the former, his counsel objected to the receiving the evidence of one Craig a printer, touching the prisoner's obliging him to print the pretender's manifesto at Manchester, and his publishing it there while the rebel army was in the town; and also to the reading of the manifesto itself, because it was an overt act not laid in the indictment: but it was answered by the court, that an overt act not laid may be given in evidence, if it be a direct proof of any which is laid. That one of the overt acts laid being the assembling and marching modo guerino in order to depose the king, and set the pretender on the throne; and it being proved that the prisoner was with the rest of the rebel army at Manchester, and appeared in a hostile manner there; the fact of his causing to be printed and published the pretender's manifesto there was strong and direct proof

proof of his having joined the army for the purpose mentioned in the indictment. In Sir John Wedderburne's case the proof offered was, that he was appointed by the pretender's son collector of the excise, and that he did actually collect it in several places where the rebel army lay, by virtue of that appointment, for the use of the rebel army, with whom he was proved to have been present at divers places. The same objection was urged, and the stat. 7 W. 3. particularly relied on, but the court over-ruled it for the same reason given in *Deacon's case*.

Ch. II. § 57.
Indictment and Evidence.

On the other hand, if the overt act offered in evidence and not laid in the indictment be no direct proof of any of the overt acts charged, but merely go to strengthen the evidence or suspicion of some of those overt acts by a collateral circumstance, such evidence cannot be admitted, notwithstanding the opinion of Lord Hale to the contrary. As in the case of Captain Vaughan, who was indicted for adhering to the king's enemies on the high seas: The overt act laid was his cruising upon the king's subjects in a vessel called the *Loyal Clencarty*; and the counsel for the crown offered to give in evidence, that he had some time before cut away the Custom-house barge, and had gone cruising in that vessel; but as that was no proof of his cruising in the *Loyal Clencarty*, the court rejected the evidence.

Fost. 246.
1 MS. Sum. 71.

1 Hale, 127, 2.
Vaughan's case,
5 St. Tr. 22.

The rule abovementioned applies also as to the manner in which words or writings are to be laid in the indictment, and proved in evidence. Upon an indictment for compassing the king's death, in which a treasonable declaration of the prisoner was alleged as an overt act, but was only set forth in substance, it was objected in arrest of judgment, that the words of the declaration were not specified; but the court unanimously held the indictment sufficient. It was laid, that the declaration contained incitement, persuasions, and promises of reward to induce the people to join in rebellion, which was an overt act of the treason charged, namely, the compassing the king's death; and this being the substantial charge, it was sufficiently set forth. In the cases of Coleman and Lord Preston, the substance only and purport of the letters found upon him were set forth. In *Staley's case*, the words were spoken in French, and the import of them stated in Latin. In *Francia's case*, the like rule was

§ 58.
What certainty sufficient in laying and proving words and writings.

1 MS. Sum. 86.

Coleman's case,
2 St. Tr. 661.
Lord Preston's case, 4 St. Tr.
411. *Staley's case*,
2 St. Tr. 655.
Francia's case,
6 St. Tr. 73—7.
So *Layser's case*,
6 St. Tr. 330.

laid

Ch. II. §. 58.
Indictment and
Evidence.

Dr. Drake's case,
Salk. 660.

(a) The vari-
ance was not for
not.

Chapple's notes.

Fost. 218.

Gregg's case,
20 St. Tr. App.
77. Dr. Hensley's
case, 1 Burr. 642.

De la Motte's
case, O. B. July
1781, cor. Buller
and Heath, Js.
MS. Gould, J.

§ 59.

Surplusage need
not be proved.

2 MS. Sum. 13.

Fost. 194.

1 Hale, 122.

Lowick's case,

4 St. Tr. 722.

Layer's case,

6 St. Tr. 329.

330.

Burnet's MS. 16.

Vaughan's case,

5 St. Tr. 25, 6.

Ante, l. 46.

laid down, that it is not necessary to set forth the letters themselves of a treasonable correspondence; it is sufficient to state the substance and intent of them; for, they are evidence of the secret compassing and imagination of the heart. In Dr. Drake's case it was said by Lord Holt, that either the very words of a libel might be charged; but then the smallest variation which changed the word was fatal (a); or the substance and effect of them may be stated; and in that case if the sense be rightly stated, it is sufficient. And at the Cornwall Summer assizes in 1735, Lord Hardwicke said that this was law; though it was safer to lay the indictment both ways, viz. in one count the very words, in another the substance and sense of them only.

In the instances of Gregg and of Dr. Hensley, the letters respectively sent by them with intent to convey intelligence to the enemy were stopped at the post-office. In the case of the former, who pleaded guilty, the indictment charged, that the letters were sent from the place where the venue was laid into parts beyond the seas, to be delivered to the enemy. The indictment in Dr. Hensley's case with more propriety stated, that the letters were sent from the place where the venue was laid, to be delivered in parts beyond the seas to the enemy.

In the case of De la Motte, on suspicion of the traitorous correspondence which he was carrying on with the French government; then at war with this country, the packets were secretly opened, copies taken of their contents, and they were afterwards sealed again and forwarded to their place of destination. Persons who knew the prisoner's hand-writing proved that the original letters were written by him; and the copies being proved to have been examined were admitted in evidence.

If but one of several overt acts be well laid and proved, that is sufficient. And if it be laid with circumstances not necessary to constitute the act high treason they need not be proved, but may be rejected as surplusage. As in the case of treason in levying war; if the overt act be an arraying in an hostile manner, and thereby killing divers of the king's subjects; if the arraying in an hostile manner be proved, that is sufficient, without proof of the rest. Or if it be, as in Lowick's case, that A. and B. met and proposed the king's death,

death, and the particular measure by which they purposed to effect it be not well laid, this latter will not vitiate the rest.

Ch. II. § 59.
Indictment and Evidence.

Neither is the time or place laid in an overt act charged in the indictment more necessary to be strictly proved in this than in any other case, provided a time be laid before the finding of the bill, and a place be laid within the county. In Mr. Townly's case it was strongly pressed as an objection under the clause in the stat. of William, above referred to, that all the overt acts proved were subsequent to the time laid in the record. But all the court were clearly satisfied that such strictness was not necessary, but that it was sufficient, as at common law, to prove the overt acts on any day before the finding of the bill. The same was ruled on Lord Balmerino's trial in the House of Lords, by the advice of all the Judges.

§ 60.

Time and place.
Charnock's case,
4 St. Tr. 570.
Townley's case,
Fost. 8, 9.
Ante, f. 57.
Vide 3 Inst. 230.
1 Hale, 361.
2 Hale, 179, 291.
Kel. 16.
Ld. Balmerino's
case, Dom. Proc.
9 St. Tr. 601.

I have before had occasion to treat of the place where treasons, committed both abroad and at home, shall be tried, and how the law stands in that respect. But in all cases of treason within the realm, some overt act must be proved in the county where the indictment is laid and the trial had, according to the course of the common law. But, as in the case of compassing the king's death, any act done towards the accomplishment of that object within the county is sufficient. Lord Preston and two other gentlemen had procured a vessel to transport them to France, but were stopped before they got out of the river; and their papers were seized. Amongst those papers was found a scheme, intended to be laid before the French government, for invading the kingdom. Lord Preston insisted that no overt act was proved upon him in Middlesex, where all the overt acts were laid; for he was taken with the papers in the county of Kent. But the court told the jury, that if they believed that he had an intention of going to France with those papers, for the purpose charged in the indictment, his taking boat in Middlesex, in order to go on board the vessel, was a sufficient overt act in that county. But after proof of an overt act in the county in which the treason is laid, evidence may be given of any other overt acts of the same species of treason in other counties. In this sense the passage in Kelyng

§ 61.

Proof of overt act in the county where trial had.
Ante, f. 40, 41.
1 & 2 Ph. & M.
c. 10. f. 7.
2 MS. Sum. 186.

Ld. Preston's
case, 4 St. Tr.
447, 8.
Vide Fost. 196.
Ante, f. 9.

2 MS. Sum. 485.
Sir H. Vane's
case, Kel. 14, 15.
Parkin's case,
4 St. Tr. 639, 40.
per Holt, C. J.
Lyer's case,
6 St. Tr. 260.
314. 319.
post. f. 65.

Ch. II. § 61.
Indictment and
Evidence.

must be understood, where it is said to have been resolved in Sir H. Vane's case, that the treason laid in the indictment being the compassing the king's death, which was in the county of Middlesex, and the levying war being laid only as *one of the overt acts*; though it were laid to be in Middlesex, yet a war levied by the prisoner in Surry might be given in evidence; for not being laid as the treason, it is a transitory thing which may be proved in another county; otherwise, if the indictment had been for levying war as a substantive treason,

Vide post. f. 65.

2 MS. Sum. 485.

But further, it is observable that Kelyng appears to confine the rule for admitting in evidence other overt acts of the same treason in other counties (after proof of an overt act in the county where the offence is laid) to the case of compassing the king's death; and it is said that treason in levying war is local. But quære whether this distinction can be right. The case in *Kel. 15.* and the case of the Earl of Essex were indictments for compassing the king's death, and the levying war was laid as an overt act. And where is the difference, in point of reason or principle, whether the levying war be charged as the treason indicted, with overt acts laid of that fact, or whether the same facts be charged as overt acts of another branch of treason? In the case of Damaree, Purchase, and Willes, for high treason in constructive levying of war, evidence was given of houses pulled down in London as well as in Middlesex, where the prisoners were indicted. In the prosecutions for the rebellions in 1745 and 1746 evidence was given of the march of the rebels, and of the part the prisoners bore in the rebellion in every county through which they passed; and yet these were cases of indictments for levying war; but then some overt acts were proved in the county laid in the indictment. In Deacon's case in particular, evidence was permitted to be given of overt acts done in other counties, though all the overt acts were laid to be done in Cumberland; an overt act being first proved in that county,

Vide 8 St. Tr.
218, &c.

Deacon's case,
1746. Fost. 8.

§ 62.
How Accomplices
and Receivers are
to be charged.
Ante, f. 35. 37.

As all accomplices in treason are principals, as much as those who do the act, there is nothing to remark of difference between them in respect of the indictment: and I have before considered what evidence is necessary or sufficient to

connect them altogether, so as to let in proof of their respective acts against each other.

But an indictment against a receiver of a traitor, after the fact, must charge him specially with the receipt, and not generally, that he did the thing; which is otherwise in case of one who is a procurer, counsellor, or assenter.

Ch. H. § 62.
Indictment and
Evidence.

1 Hale, 214. 238.
Conier's case,
Dy. 296.
Fost. 345.
Ante, § 35.

Witnesses.

It is an essential requisite on the trial of this offence, that the treason charged in the indictment should be proved by two witnesses. This stands on several acts of parliament, which I will first set forth, and then notice the construction which has been made upon them.

§ 63.
*Witnesses necessary
to support the in-
dictment.*

The stat. 1 Ed. 6. c. 12. f. 22. enacts, "that no person shall be indicted, arraigned, condemned, or convicted for any treason, petty treason, or misprision of treason, unless he be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same."

1 Ed. 6. c. 12.
f. 22.

The stat. 5 & 6 Ed. 6. c. 11. f. 12. enacts, "that no person shall be indicted, arraigned, condemned, convicted, or attainted for any treasons that then were or after should be, unless thereof accused by two lawful accusers (i. e. witnesses); which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the accused to prove him guilty of the treasons or offences contained in the indictment, unless the said party arraigned shall willingly without violence confess the same."

5 & 6 Ed. 6.
c. 11.
Vide 1 Hale,
295. 71

Then by the stat. 1 & 2 Ph. & Mary, c. 10. it is enacted, "that all trials for any treason shall be had and used only according to the due order and course of the common law." And by another statute of the same session it is enacted, "that every person who shall be accused or impeached of any of the offences contained therein (a), or of any other offence concerning the impairing, counterfeiting, or forging of any coin current within this realm, shall and may be indicted, arraigned, tried, convicted, or attainted by such like evidence, and in such manner and form, as hath been used and accustomed within the realm before the 1 Ed. 6."

1 & 2 Ph. & M.
c. 10.
c. vi. f. 3.

(a) i. e. offences
relating to the
coin.

Lastly, the 7 W. 3. c. 3. enacts, "that no person what-
soever shall be indicted, tried, or attainted of high treason,

7 W. 3. c. 3.
l. 2. 4.

(such

CH. II. § 63.
Indictment.
Witnesses.

Ante, f. 43.

(such as have already been stated,) or of misprision of such treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act; or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted and arraigned or tried shall willingly without violence in open court confess the same; or shall stand mute, or refuse to plead; or in cases of high treason shall peremptorily challenge above 35." And it further enacts and declares, "that if two or more distinct treasons of divers heads or kinds shall be alleged in one bill of indictment, one witness produced to prove one of the said treasons, and another witness to another of the said treasons, shall not be deemed to be two witnesses to the same treason within the meaning of the act."

f. 3.
Vide post, f. 69.

There is also a proviso, "that any person being indicted as aforesaid for any of the said treasons or misprisions may be outlawed, and thereby attainted; and in cases of the high treasons aforesaid, where by the law after such outlawry the party outlawed may come in and be tried, he shall upon such trial have the benefit of this act."

§ 64.

Two witnesses to
what treasons,
and before whom.
Vide 3 Inst. 25. &c.
1 Hale, 298—
300.
Post. 232.

The first point to be noted upon these acts is the necessity of two witnesses to prove the treason; which extends as well to the finding of the bill of indictment by the grand jury as to the trial itself in open court; not only as in law and reason they stand on the same footing, but by the very words of all the acts, that no person shall be *indicted*, &c.

Post 233, &c.
1 MS. Sum. 64, 5.
K. 1. 18. 49.
1 Hale, 298. 316.
Sum. 262.
Sed vide 3 Inst. 26.

At common law, one witness was sufficient in case of treason as well as on any other capital charge. The stat. 1 Ed. 6. c. 12. first required that in cases of treason there should be two witnesses. This was followed by the stat. 5 & 6 Ed. 6. c. 11. to the same purpose. Little regard however was had to these statutes in the times next succeeding the passing of them, upon an idea entertained and acted upon by some, that they were repealed by the stat. 1 & 2 Ph. & M. c. 10; which restored the common law trial to all treasons. But it has been long settled, that the true object and operation of this last act, which was intended for the benefit of the subject, and not to deprive him of any advantage which he then enjoyed, was not to repeal the above statutes of Ed. 6.; but to restore the common law right of trial in the proper county, and the peremptory challenge of 35, which had been in-
trenched

(Vide 3 St. Tr.
56. 415. 645.
233.)

trenched upon by several acts in the reign of Henry the 8th. In this respect therefore the act of 7 W. 3. is only confirmatory of the law as it stood before.

Ch. II. § 64.
Indictment.
Witnesses.

The statutes of Ed. 6. I have already observed extended to all treasons; but the stat. 1 & 2 Ph. & M. c. 11. by an express provision excepts persons accused of any of the offences contained therein, or of any other offence concerning "the impairing, counterfeiting, or forging of any coin current within the realm." It was agreed by all the Judges, that this act extends to all offences touching the impairing the coin, which shall be made treason afterwards; and therefore it was agreed, that one witness was sufficient in clipping as well as counterfeiting the coin; though it appears that the opinion and practice had once been otherwise in the case of clipping. The stat. 7 W. 3., which only extends to treasons working corruption of blood, does also expressly exclude the counterfeiting of the king's coin, great seal, privy seal, sign manual, and privy signet: all these may be indicted and tried in such manner, and by such evidence, as before these several acts were made. The same provision is continued by the stat. 8 & 9 W. 3. c. 26. f. 7. and 6 Geo. 3. c. 53. f. 3.

[12 H. 8. c. 4.
33 H. 8. c. 22.
& c. 23.]

T. Jones, 253.
Vide 1 Hale, 221,
ex Relations
Holt C. J.
MS. Tracy, 262.
Vide post, offences
relating to the
coin, tit. Wit-
nesses.
Ante, p. 106, 7.
Gahagan's case,
O. B. 1748,
Leach, 39.
Hale, 221.

Vide post.

It also appears to be the intent of the stat. 40 Geo. 3. c. 93. that where the overt act of treason alleged shall be the assassination or killing of the king, or any direct attempt against his life, or against his person whereby his life may be endangered, or his person may suffer bodily harm, proof by one witness shall be sufficient; because it enacts, that the party may be "indicted and tried in every respect and upon the like evidence, as if he stood charged with murder." And yet the statute proceeds to negative specially, that any of the provisions in the acts of the 7 W. 3. and 7 Ann., touching the trial of treasons, should extend to the cases above mentioned; whereas it appears that the necessity of two witnesses in cases of treason stands upon other acts besides the two specifically referred to.

40 Geo. 3. c. 93.
Vide ante, f. 43.

It was fully established by the opinion of all the Judges on the trial of Lord Stafford, as it seems to have been before understood in the case of the regicides, that one witness to one overt act, and another to another overt act of the same species of treason, were two sufficient witnesses within the statutes of Edward 6. From that time the rule has prevailed. The stat. 7 W. 3. does not require that each overt act shall

§ 65.
Two witnesses to
what facts.
Case of the Re-
gicides, Kel. 9.
Lord Stafford's
case, 3 St. Tr.
204, 5. T. Ray-
407. Fost. 233.
237. 1 MS.
Sum. 66. But-
net's MS. 23. Parkyn's case, 4 St. Tr. 648. Ante, f. 57.

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Indictment.
Witnesses.

Ante, f. 64.

Overt acts in different counties.

Ante, f. 61.
2 MS. Sum. 485.
Deacon's case,
Fost. 9, 10.
Vide Parkyn's case, 4 St. Tr. 639, 640.

Layer's case,
6 St. Tr. 314.
319. 322.
2 MS. Sum. 485.

Rex v. Jellias,
Oct. 1746, MS.
Burnet, 13, 14.

Gavan's case,
2 St. Tr. 873.

Collateral facts.
Fost. 240, 2.
1 MS. Sum. 66.
Vaughan's case,
5 St. Tr. 38. &
Salk. 634.

Rex v. Smith,
alias May, Admiralty Sessions,
June, 7 Ann.
Fost. 242.

be proved by two witnesses, but only that the treason shall be so proved. And, by the express direction of that statute, either two witnesses to the same overt act, or one witness to one and another witness to another overt act of the same treason, that is of the same species of treason, are sufficient. But, if several overt acts be proved by different witnesses singly, such overt acts must relate to the same kind of treason, otherwise it is insufficient by the express provision of the statute 7 W. 3. c. 3. which in this respect is only declaratory of what was the known rule of law before.

In Deacon's case in 1746, it was expressly ruled by Abney and Foster Justices, that after proof of some overt act charged within the county in which the indictment is laid, evidence may be given of other acts of treason tending to prove the overt acts laid, though done in a foreign county. And evidence of that sort was given in almost all the trials for high treason at the same period. The like was done in most of the trials after the rebellion in 1715. But further, if one overt act be proved by one witness in the county in which the trial is had, which gives the grand jury jurisdiction to inquire, another overt act of the same species of treason proved by another witness in a different county will make two witnesses within the stat. 7 W. 3. This was expressly ruled in the case of Layer: and was so adjudged at York by Ld. C. B. Parker and the Judges Burnet, Clarke, and Dennison in the case of Jellias in 1746. Ld. C. J. North laid down the same doctrine in Gavan's case before the stat. of King William.

But though the treason itself must be proved by two witnesses in the manner above specified; yet a collateral fact, not tending to the proof of the overt acts, may be proved by one witness only. As in the case of Captain Vaughan, where the prisoner having called witnesses to prove that he was born in France, the counsel for the crown produced witnesses to prove that he was born in Ireland; and the prisoner insisting that there was but one credible witness to that fact, Lord Holt said that one witness was sufficient; for the statute of William relates only to the proof of the treason, and the overt acts of that treason; and the statutes of Edward 6. are confined to the evidence for proving the prisoner guilty of the offence; which must also be understood of the overt acts. The same doctrine was holden in the case of Smith, upon an indictment for adhering to the queen's enemies on the high seas. He made alienage his defence.

defence; and his confession, that he was an Englishman born, was holden admissible by the judges Trevor, Powell, Powis, Tracy, and Bury; though his counsel insisted on the act of the 7 W. 3., which the court said was intended to prevent a confession being conclusive evidence of the very overt act, but not to take away that sort of evidence of collateral matters.

Ch. II. § 65.
Indictment.
Witnesses.

Confession.

The stat. 7 W. 3. requiring two witnesses to prove the treason has this exception, "unless the prisoner shall willingly and without violence, in open court, confess the same." The statutes of Edward 6. make the same sort of exception, but with this difference, that the words "in open court," are in those statutes omitted; as well as some further variation in the wording of the latter act of Edward 6., which I shall presently have occasion to remark. It appears that till the case of Francia in 1716, the construction upon the statutes of Edward 6. had been, that to warrant a conviction it was not necessary that the confession should be made in court, but it was sufficient if it were made before any magistrate or person having authority, as a privy counsellor, to take such examination; and were afterwards proved at the trial by two witnesses, without any further proof of the overt acts. Lord Coke indeed seems to consider that the exception is confined to an examination out of court, upon the construction of the words "*without violence*," as meaning without any torture; and therefore, says he, by "confession without violence" is not meant of a confession before the judge; for he is never present at any torture; neither upon the prisoner's arraignment was ever any torture offered. This appears to be a very extraordinary construction; more especially as it is directly repugnant to the express words of the auxiliary stat. of 5 & 6 Ed. 6. which are, that the two witnesses shall, "at the time of the arraignment of the party accused," be brought before him to prove the treason, "unless the said party arraigned shall willingly without violence confess the same." If indeed no other violence than the rack (the use of which was very unfrequent and always illegal) had ever been made use of to draw confessions from prisoners, there might be less reason for doubting this construction

§ 66.
Confession.
1 MS. Sum. 66.
Folt. 240, &c.

Vide the case of
Tong and others,
1662. 1 Hale,
304. Kel. 18, 19.
2 And. 67.

3 Inst. 25.
Vide Folt. 241.

Vide Folt. 244 n.

Ch. II. § 66.
Indictment.
Confession.

Tong's case,
Kel. 17, 18.

tion of the act, though the latter words would still be repugnant to such a construction: but when we find so late as in 14 Car. 2. the advice of all the judges, which I presume was found necessary to be given, that *no promise* should be made, or *any threatnings* used, to the *witnesses*, in case they did not give *full evidence* against the prisoners, we need not be surprised at the care of the legislature at all times both before and since to hinder any undue advantage being taken of the situation of a prisoner to wring a confession from him; of which I fear the history of former times can furnish but too many examples. The same words are to be found in the statute of William, where it cannot be supposed that the legislature could allude to the torture. If the matter had undergone no further discussion, I should have had but little hesitation in collecting the sense of the legislature in these several acts of parliament. The words of the stat. 1 Ed. 6. might beget some doubt from their generality, in what manner the confession intended to be excepted was to be made, and by what proof it was to be sustained. This was meant to be cleared up by the stat. 5 & 6 Ed. 6. which followed so close upon it, and which seems to me to have defined what confession was intended to be excepted; namely, a confession *at the time of the arraignment by the said party arraigned* (a). Was it then intended to exclude evidence of any other confession? In my apprehension, neither the words nor the obvious meaning of these acts have any such tendency. For the rule, out of which the exception is taken, is the necessity of proving the treason by two witnesses: the thing excepted is a confession; which confession therefore was not required to be proved by two witnesses. No sort of confession could, consistently with the principle of those acts, be so intended to be excepted, but a confession, as the statute of William in plain terms expresses it, a confession *in open court*, such as required no proof by witnesses; which I conceive was expressed as plainly before by the stat. of the 5 & 6 Ed. 6. All other proof then of the treason was required to be confirmed by two witnesses, except a proof in open court by the confession

Vide 1 Hale, § 14.

(a) So the stat. 1 & 2 Ph. & M. c. 10. s. 9. required that at least two witnesses examined to any treasons in that act shall be brought forth before the party arraigned, if he require the same, and say openly in his hearing what they can say against him concerning the treasons in the indictment, unless the party arraigned shall willingly confess the same upon his arraignment.

of the party; which of itself was sufficient to warrant his conviction and attainer. There are no negative words in any of the statutes, declaring that no evidence of any other confession shall be received; but all other proof of the treason, including a confession out of open court, must be made by two witnesses. The question then is simply this; Whether evidence of the confession of the prisoner of any fact be or be not legal proof of the truth and existence of such fact? which I presume cannot be denied. I am aware that the above reasoning carries the admission of this sort of evidence beyond the rule which I before alluded to; and that it lets in as well evidence of confession at any time, or upon any occasion, as confession upon an examination before a magistrate or other person having authority to take such examination. I stop not to inquire what degree of weight is due to bare evidence of a confession out of court, unsupported by any other proof of the fact; for that is foreign to the present inquiry: but I see nothing upon the face of these acts of parliament to warrant the distinction aimed at. I submit the above reasons with great deference to better judgments. But the conclusion which I have drawn has higher authority to support it: for at a conference of the judges, preparatory to the trial of Francis Francia in 1716, it was agreed that the confession, which the statutes of Edward 6. intended to except, was only a confession upon the arraignment of the party, which amounts to a conviction: and that the design of those acts was merely to prevent any other confession from operating as a conclusive and absolute conviction: but that in all cases the confession of a criminal may be given in evidence against him; and that in cases of treason, if such confession be proved by two witnesses, it is proper evidence to be left to

Ch. II. § 66.

Indictment.

Confession.

Vide Kcl. 23.

Ante, p. 131.

Francia's case,
1 MS. Sum. 67.
Folt 11 Burnet's MS. accord.
This case is also alluded to in Folt 241 but the resolution there is not so fully reported as in the MS. (a).

(a) The report of this case in the MS. of Mr. Justice Burnet is in these words:
"It was resolved by the judges that though a confession before a magistrate does
"not take away the necessity of two witnesses, as it did by the 5 & 6 of Ed. 6.
"c. 11.; yet the stat. of 7 W. 3. c. 3. which requires two witnesses [unless
"there be a confession, which amounts to a conviction, as a confession in open
"court does] has not altered the nature of evidence. That therefore a witness
"to a confession before a magistrate, or a witness to a confession in conversation,
"is a witness within both these acts. And if two such witnesses are produced,
"and the grand and petty jury believe them, they are two sufficient witnesses to
"indict and convict the party of the overt acts confessed to two such witnesses."
Francia's case, 1719, MS. Report. "To this he adds, that the case of Rex
"v. Berwick, at the court of St. Margaret's, Southwark, August 1746, was
"so ruled by the judges."

Ch. II. § 66.
Indictment.
Confession.

1 MS. Sum. 67
—70.

Ante, f. 65.
Willis's case,
8 St. Tr. 254, 5.
262, 3.

Ante, p. 113.
Greg's case,
1 MS. Supra, 69.
MS. Tracy, 262.

Q. of Price, B.

Case of Rebels
in 1746, MS.
supra.

a jury (a). By this construction the statute of William has not added any new restriction with respect to confessions, than was before implied in the statutes of Edward 6.; and consequently if confessions out of court might under those statutes be given in evidence, if proved by two witnesses, the same kind of evidence is admissible now. But from Mr. Justice Foster's manner of stating the opinion of the judges above referred to, and observing upon it, we may collect that he was not well satisfied with it. He says, that no regard was paid to the former authorities: and he also adverts to the case of Smith before mentioned; and to that of Willis, where it was admitted on the part of the prosecution, that a confession out of court, though admissible in evidence, was not of itself sufficient to ground a conviction: and where Ward, C. B. afterwards said, that there must be two witnesses to the treason notwithstanding a confession. Upon the whole it seems to have been the inclination of Mr. Justice Foster's own opinion, that a confession out of court would not warrant a conviction since the statute of W. 3.; that that statute, by the insertion of the words "*in open court*," was intended to carry the necessity of two witnesses to the overt acts a step further than the statutes of Edward 6. were at first construed to have carried it; and that the intention of the legislature was to require two witnesses to the overt acts themselves in all cases, except where the prisoner confessed the treason upon his arraignment in open court; and therefore that by that statute no other confession, though proved by two witnesses, was sufficient to convict the prisoner: the exception extending to a virtual exclusion of all other evidence of confession, as a sufficient ground at least for conviction in itself. But the rule was certainly laid down otherwise in Francia's case before mentioned. And at a meeting of the judges upon Greg's case, which is cited in that of Francia, Holt, C. J. and the judges Powell, Powis, Smith, Dormer, and Bury were clearly of opinion, that the prisoner's confession, though not made in court, might be given in evidence within the stat. 7 W. 3. Trevor was of a contrary opinion; Tracy doubted; and the Chief Baron, Blencowe, and Gould, Js. were absent. On the trial of the rebels in the North in the

(a) The same appears to have been the opinion of Lord Hale, 1 Hale, 306. and *vide* Kel. 18. in the case of the Regicides.

summer of 1746, the judges in that commission admitted the confession of the prisoners to be given in evidence against them upon proof by two witnesses. And in the case of John Berwick, at St. Margaret's Hill in the same year, Lord C. J. Willes and Sir Thomas Abney pursued the same doctrine, and over-ruled Mr. J. Foster. In that case, however, other circumstances were proved against the prisoner; such as his appearing in the prison where the rebel officers were confined apart from the common men after the surrender of Carlisle, and giving in his name as such an officer to the persons appointed to take the account; which facts were considered by the learned judges not merely as a bare confession after the fact, but as evidence arising from the very scene of action. Finally, Mr. Justice Foster himself says, that perhaps it may now be too late to controvert the authority of the opinion in 1716, warranted as it has been by later precedents; but he insists that this evidence of confession should never be carried further than to a confession made with solemnity and deliberation, before a person who has a proper authority to take it; which was an ingredient in the cases of Francia and Greg. I have before submitted some reasons why I think such a distinction cannot be supported. Those advanced by Mr. Justice Foster in support of it, however well worthy of attention in point of the weight which ought to be given to this species of evidence, are yet general in their nature, and equally applicable to confessions in all other criminal cases as in this of high treason. The resolution of the judges in Francia's case is not confined to examinations before magistrates, but comprehends in the very terms of it confessions of every kind. The opinion of the two judges in Berwick's case, is, as far as it goes, against the distinction; not to mention the cases of the rebels on the trials in the North in 1746, which from the nature of those cases were as little likely to be governed by it.

Ch. II. § 66.
Ind. Timent.
Confession.

Berwick's case,
1746, MS. su-
pra, & Fost. 10.
241.

Fost. 243.

Standing Mute.

In all cases of high treason standing mute amounts to a conviction: and this is now extended to all cases of felony and piracy by stat. 12 Geo. 3. c. 20.: and persons standing mute are excepted out of the benefits of trial conferred by the 7 W. 3. c. 3.

§ 67.
Mute.

1 Hale, 228.
2 Hale, 317.
7 W. 3. c. 3.
f. 2.

Ch. II. § 68.

Clergy.

§ 68.

Clergy.

2 c. Ed. 3. ft. 3.

c. 4.

Folt. 190, 1.

Concerning the punishment of traitors, the statute de clero provides, that “clerks convicted for any treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church.” By force of this reservation all new created treasons, which in judgment of law are levelled at the person or royal majesty of the king, are excluded, without special words for that purpose. Of this kind are the treasons created by statutes made for establishing the regal supremacy, for avoiding doubts touching the succession of the crown, and for establishing such succession; for the punishing seditious and defamatory libels tending to raise suspicions touching the king’s title or government, or the royal issue. For all these have a direct tendency to disturb the peace of the kingdom, and endanger the stability of the government; and, therefore, by a just, reasonable, and necessary construction, come within the above description. But with respect to treasons of a lower kind, such as petty treason, or any other terminating in injuries to particular persons, the rule is otherwise; and clergy can only be taken away by express words.

Outlawry.

§ 69.

Outlawry.

5 & 6 Ed. 6.

c. 11. f. 7.

By stat. 5 & 6 Ed. 6. c. 11. f. 7. “All process of outlawry against any offenders in treason, being resiant or inhabitant out of this realm, or in parts beyond the sea, at the time of the outlawry pronounced against them, shall be as effectual in law to all intents and purposes, as if such offenders had been resident and dwelling within this realm at the time of such process awarded and outlawry pronounced. Provided (f. 8.) that if the party outlawed shall, within one year next after the said outlawry pronounced or judgment given thereon, yield himself to the chief justice of England, and offer to traverse the indictment or appeal whereon the said outlawry shall be pronounced, then he shall be received to the said traverse; and being thereupon found not guilty by verdict, shall be acquitted and discharged of the said outlawry, as though it had not been made.”

Johnson’s case,
M. 2 Ger. 2.
B. R. vide 6 St.
Tr. 983. n.

One outlawed, and retaken in England, was, notwithstanding his being in custody, allowed to be within the benefit
of

of this proviso; and, upon proving himself to have been beyond sea at the time of the outlawry, it was reversed, and he was admitted to a trial, and acquitted; and Armstrong's case, which had been otherwise ruled by the odious advice of Lord C. J. Jefferies, was declared an unfit precedent to be followed.

Ch. II. § 69.
Outlawry.

Armstrong's
case, 5 St. Tr.
583. 3 Mod. 47

The stat. 7 W. 3. c. 3. f. 3. saves the benefit of the regulations thereby enacted on trials for treason to such as, having been outlawed, do afterwards entitle themselves to a trial on the merits.

Judgment.

The judgment in high treason for a man in all cases, except counterfeiting the coin, is to be drawn upon a hurdle to the place of execution, there to be hanged by the neck; to be cut down while he is alive, and his entrails taken out and burnt before his face; and his head to be cut off, and body quartered; and the head and quarters to be at the king's disposal.

§ 70.

Judgment.

1 M^s. Sum. 89.
2 M^s. Sum. 586.
590.
M^s. Tracy, 281.
1 Hale, 137.
350, 1.
2 Hale, 396.
3 Inst. 210.
Sum. 268.

Fost. 336. 2 Hawk. ch. 48. f. 3. 4 Elac. Com. 92. Walcott's case, 4 Mod. 395.

In the entry of the judgment in treason it is only said, that he shall be drawn to the place of execution, without adding "upon a hurdle," though it ought to be so pronounced: and thus it was pronounced by Holt, C. J. in the case of James Boucher, 27th February, 2. Ann. In the same case he also pronounced the judgment, that his privy members should be cut off: this ought also to be omitted in the entry of the judgment: and both these things were omitted in the entry of the judgment against Boucher, by the opinion of all the judges of England. And Holt, C. J. there produced the records of the judgments against Somerville and Arden in the time of Queen Elizabeth, and against Sir Walter Raleigh, which accorded therewith. And he said, that those words, that the privy members should be cut off, were not in any records that he had seen but those in the case of the regicides. Nor indeed are they usually pronounced.

Boucher's case,
M^s. Tracy, 295.
See Tucker's
case, 4 Mod. 162.
Show. C. P. 136.

(1 And. 106.)

Vide the judgment in the case of Ld. Derwentwater and others, 6 St. Tr. 16.

For women the judgment was always the same in all cases of treason, whether high or petty treason, namely, to be drawn to the place of execution and there burnt alive: but that is

Women.
Authorities ut
supra.

Ch. II. § 70.
Women.

30 Geo. 3. c. 48.

*Vide tit. Homi-
cide (Judgment.)*

Coin.

1 MS. Sum. 45.

2 MS. Sum. 589.

MS. Burnet, 19.

1 Hale, 219, 220.

224. 351.

2 Hale, 397.

Sum. 45.

2 Hawk. ch. 48.

f. 4, 5, 6.

Ante, f. 24.

1 Hale, 239.

354. 359, &c.

4 Blac. Com.

380, &c.

1 Hale, 342.

now altered to being drawn and hanged, by the statute 30 Geo. 3. c. 48. f. 1.; and by f. 4. the like forfeitures and corruption of blood shall ensue as before the act. And by f. 2. women convicted as principals or accessaries before in petty treason shall be liable to the further punishment inflicted by the stat. 25 Geo. 2. c. 37. on persons convicted of murder.

In all cases of treason respecting the coin, whether newly created such or not, and so in petty treason, the judgment is only to be drawn on a hurdle and hanged; for that was the judgment before the statute 25 Ed. 3. ft. 5. c. 2., and was not intended to be altered thereby: and these being all offences in *pari materia*, and auxiliary to the original law, have the same judgment. And such it seems was formerly the judgment for counterfeiting the great or privy seal; but now that is the same as in other treasons.

The consequences of a judgment and the attainder consequent thereon in treason, are, 1. Corruption of blood to the party attain; by which he can neither inherit nor transmit lands by descent to his heirs. 2. Loss of dower to his wife. 3. Forfeiture (a) to the king of all his lands, goods, and chattels: and this relates back to the time of the treason committed. 4. Execution. Without attainder, there is no forfeiture of lands, unless, says Lord Hale, where the Chief Justice of B. R. as supreme coroner, in person upon the view of the body of one killed in open rebellion records it, and returns the record into his own court; when both lands and goods are forfeited.

By the stat. 7 Ann. c. 21. it was provided, that after the decease of the then pretender no attainder for treason should extend to the disinheritance of any heir, nor to the prejudice of any other person than the traitor himself for his life. The operation of that provision was by stat. 17 Geo. 2. c. 39. f. 3. further suspended till the death of the pretender's sons. But the provision never took effect, and is now wholly repealed by the act of the 39 Geo. 3. c. 93.

(a) *Vide* Chapter of Crimes (Felony, Forfeiture) for the general description of property liable to forfeiture.

CHAP. III.

MISPRISION OF TREASON.

Definition.

A Knowledge and Concealment of Treason, without Participation or Consent. § 1. Knowledge to what Extent necessary; Disclosure, what is sufficient. - - - § 1.

Trial and Punishment. - - - § 2.

MISPRISION of treason is where a person knowing of a treason, but no party or confenter to it, does not reveal it by a fair and full disclosure in convenient time to the king, or his privy council, or to some magistrate or person having authority to take the examination. And it is doubtful whether a declaration to any other than these is sufficient. Such a concealment or keeping secret of any high treason shall, by the stat. 1 & 2 Ph. & M. c. 10. f. 8. and other prior statutes, be now taken to be only a misprision, though formerly it was deemed evidence of an aiding and abetting to the treason itself. But still, under particular circumstances, such as I have before noticed, concealment may amount to evidence of assent to the treason, and so make the party a principal traitor.

The knowledge must be of the person of the offender as well as of the design or offence: for a man cannot be said to conceal that which he does not know. Therefore if one say to J. S. that there will be a rising, but do not acquaint him with the persons or the nature of the plot, the concealing of this

§ 1.

Definition.

1 Hale, 214.
371, 3.
Sum. 127.
3 MS. Sum. 183.
3 Inst. 24.
Kel. 17. 21, 22.
4 Blac. Com. 120.
1 Hawk. ch. 20.
1 & 2 Ph. & M.
c. 10. f. 8.
Vide 1 Ed. 6.
c. 12. f. 19.
1 & 2 Ph. & M.
c. 10. f. 8.
1 Ed. 6. c. 12.
f. 20.
5 & 6 Ed. 6.
c. 11. f. 11.
Ante, f. 7.

Knowledge, to what Extent.
3 MS. Sum. 183.
1 Hale, 372.
Kel. 21.
MS. Tracy, 127.

Ch. III. § 1.
Definition.

is not misprision. On the other hand, if the party have an explicit knowledge of an intended rising, his merely telling another in a general way that there will be a rising will not acquit him of misprision.

Vide authorities
at the beginning.

By necessary construction of the stat. 25 Ed. 3. ft. 5. c. 2. there can be no misprision of any other treason than what is declared and enacted therein, (which includes petty treason,) unless created by some subsequent statute in force. But if a new statute create a new treason, it virtually and consequentially makes the concealing thereof misprision of treason. There are however some offences, made positive misprisions of treason by particular statutes, which are noted in their proper places.

§ 2.

Trial and Punishment.

Staunf. 37.

1 Hale, 374.

4 Blac. Com.

119.

1 Hawk. ch. 20.

Post. tit. Crimes,
(Merger.)

3 Inst. 24.

1 Hale, 300.

Ante, c. 2. f. 64.

2 Inst. 49.

1 Hale, 374.

Punishment.

1 Hale, 374, 5.

4 Blac. Com. 120.

Sum. 128.

All treason, it is said, includes misprision of treason and more; and therefore that the king may indict a traitor for the misprision only. And the trial, says Lord Hale, may be in a foreign county, under the circumstances specially provided for by the stat. 33 H. 8. c. 23., which in that respect is not repealed by the stat. 1 & 2 Ph. & M. c. 10. Two witnesses however are necessary by the statutes 1 Ed. 6. c. 12. f. 22. and 7 W. 3. c. 3. before referred to, both upon the indictment and trial of misprision of treason, except in the cases I have there noticed. For this offence a peer shall be tried by his peers, upon indictment found by a grand jury.

The punishment for misprision of high treason is the loss of the profits of lands during life, forfeiture of goods, and imprisonment during life: but misprision of petty treason is only punishable by fine and imprisonment, as in case of misprision of felony.

CHAP. IV.

OF OFFENCES RELATING TO THE COIN AND TO BULLION.

Introduction relative to the Coin. - § 1.

1. *Definition of "the King's Money or Coin."*

It consists properly of Gold and Silver only. The relative Proportions of Allay. Introduction of Copper Coin. *ib.*

2. *The Legitimation and current Value of Coin.* § 2.

Regulated by the Prerogative. Currency continues till recalled by Proclamation. Disuse Evidence of recall. *ib.*

Evidence of Legitimation. - § 3.

What the King's Coin a Question of Fact, proved by Usage and Notoriety. Proclamation where necessary. Where it may be presumed from Time and Usage. *ib.* What Species of Currency within the Statutes. *ib.*

Touching the Coin of Ireland and other foreign Members of the Crown. - - § 4.

1. *The counterfeiting and impairing of it.*

The counterfeiting, clipping, or impairing thereof High Treason. So the clipping, &c. foreign Coins current within the Realm or Dominions thereof. *ib.*

2. *Concerning the Importation of counterfeit Coin of Ireland, &c. into the Realm.* - - § 5.

Semble Treason. *ib.*

3. *Importing false Money into Ireland, &c.* § 6.

If from foreign Parts Treason. Aliter the importing it from one Part of the King's Dominions to another. *ib.* To make Treason, the counterfeiting

Offences relating to the Coin.

must be of Money current within the Realm.
Felony if not current. § 6.

Division of Offences relating to the Coin. § 7.

I. Counterfeiting the Coin. § 8.

1. What Coin. § 8.

Description of the several Species of Coin, the counterfeiting whereof is punishable, and in what Degree. *ib.*

i. Gold and Silver Coin of the King.

Counterfeiting thereof Treason by stat. 25 Ed. 3. ft. 5. c. 2. 8 & 9 W. 3. c. 26. and 15 Geo. 2. c. 28. *ib.* Pardon on discovering others. *ib.* Trial and Evidence. *ib.* Limitation of Prosecution. *ib.* Seizure of base Coin. *ib.*

The Statutes confined to such Coin. - § 9.

ii. Gold and Silver foreign Coin. § 10.

Counterfeiting thereof, when current, Treason by 1 Mar. ft. 2. c. 6. When not current, Misprision of Treason by 14 Eliz. c. 3. and Felony by 37 Geo. 3. c. 126. f. 2. *ib.* Misdemeanor at Common Law. *ib.* Procurers within the 1 Mar. ft. 2. c. 6. and 14 Eliz. c. 3. but not mentioned in 37 Geo. 3. c. 126. *ib.*

iii. Copper Coin of the Realm. § 11.

Counterfeiting thereof formerly a Misdemeanor by 15 Geo. 2. c. 28. Now Felony by 11 Geo. 3. c. 40. as to Halfpence and Farthings; and by 37 Geo. 3. c. 126. f. 1. extended to other Copper Money current by Proclamation. *ib.* Extend to Counsellors, Aiders, and Procurers. *ib.* Power to seize the Counterfeits. *ib.* Quære, as to Prosecutions on 37 Geo. 3. c. 126. whether optional for Felony or Misdemeanor? *ib.*

2. How the Offence of counterfeiting may be committed. § 12.

i. By an actual Imitation of the real Coin; not

merely an Attempt to do so: except by particular Statutes. *ib.* (and post, f. 13.)

ii. Under

- ii. Under particular statutes. Under 8 & 9 W. 3. c. 26. By marking the Edges of Coin with Letters, &c. By gilding, silvering, or casing over with any Wash, &c. base Coin, or round Blanks, &c.; or gilding Silver Blanks to resemble Gold Coin. Under 15 Geo. 2. c. 28. by making Shillings or Sixpences resemble Guineas or Half Guineas, or making Halfpence or Farthings resemble Shillings or Sixpences. - - - § 12.

The Similitude of the counterfeit to the real Coin a Question of Fact; it need not be perfect: sufficient if it be such against which common Prudence cannot guard. - - - § 13.

What a Colouring within the Statutes. § 14.

Preparing Blanks with such Materials as when rubbed will resemble the real Coin. *ib.* Bringing to the Surface the latent Silver in a Blank of mixed Metal, by means of Aqua Fortis. *ib.*

3. By whom the Offences may be committed. § 15.

By Officers of the Mint as well as others. *ib.* Indictment on 8 & 9 W. 3. c. 26. must negative that Defendant was employed in the Mint, such Persons being excepted in enacting Clause. *ib.*

II. Making, mending, or having any Instrument, &c. applicable to counterfeiting the Coin. - - - § 16.

Offences of this Sort made High Treason by Stat. 8 & 9 W. 3. c. 26. s. 1. *ib.* So by s. 2. conveying such Tools, &c. out of the Mint. Extends to Aiders and Abettors, and to Receivers and Concealers of such Tools, &c. *ib.* Tools, &c. to be seized and produced in Evidence. *ib.* Prosecution within six Months, by 7 Ann. c. 25. s. 2. *ib.*

A Press or Mould for coining is a Tool or Instrument within the Statute of William. § 17.

How to be described in the Indictment. *ib.* & § 18.

What a sufficient Excuse for having such in Possession. - - - § 17.

Resemblance to a common Purpose of the Instrument to the Coin sufficient. - - - § 18.

Having knowingly in Possession a Puncheon for coining, is within the 8 & 9 W. 3.; though that alone without the counter Puncheon not sufficient to make the Figure, &c. *ib.* And though it be without the proper Letters. *ib.* How to be described in the Indictment. *ib.* Not necessary to prove actual coining with it. § 18.

Indictment for Misdemeanor at Common Law for having Tools for coining in possession with Intent to use them. - - § 19.

III. *Impairing the Coin.* - - § 20.

Statutes relating thereto; 17 Ed. 4. c. 1. 13 & 14 Car. 2. c. 31. 5 Eliz. c. 11. 18 Eliz. c. 1. *ib.* Melting down Coin a Misdemeanor. *ib.* Clipping, washing, rounding, or filing, or by any Means whatever impairing, &c., falsifying, scaling, or lightning the current Coin, High Treason. *ib.* Extends to Accessaries before. *ib.* Impairing Irish Coin within the Statutes. *ib.* The Act must be done for Lucre. *ib.*

By 6 & 7 W. 3. c. 17. having in possession the Clippings, or Filings of current Coin, a Misdemeanor. *ib.* So by Stat. de Monetâ. *ib.*

IV. *Importing counterfeit or light Coin into the Realm.* - - § 21.

1. *Counterfeit Coin.*

Counterfeited to the Likeness of the King's Money, High Treason by Stat. 25 Ed. 3. st. 5. c. 2. Counterfeiting foreign Coin current, Treason by 1 & 2 Ph. & M. c. 11. *ib.* Extends to Procurers, Aiders, and Abettors. *ib.* Quære, as to counterfeiting the King's Coin beyond Sea by a Subject. *ib.*

What Money is within the Statutes. What Similitude to the real Coin required. From what Place it must be brought. By whom. With what Intent. - - § 22.

Importing counterfeit foreign Gold or Silver Coin not current, with Intent to utter it within the Realm,

Realm, or any of its Dominions, Felony,
Transportation; by 37 Geo. 3. c. 126. s. 3. § 23.

2. *Light Silver Money of this Realm.* - § 24.

Exceeding 5l. subject to Seizure and Condemnation on Importation. *ib.*

V. *Exporting Counterfeit Coin, &c. from hence to the British Colonies in America or the West Indies.* - § 25.

Subject to Forfeiture by Stat. 38 Geo. 3. c. 67.

So exporting any foreign Copper Coin. *ib.* But genuine Money may be exported to Ireland. *ib.*

VI. *Receiving, uttering, or tendering Counterfeit Coin.* - § 26.

An Agreement to receive and vend before the counterfeiting, Treason in case of Gold or Silver Money: accessory before the Fact to Felony in case of Copper Coin. *ib.* Such Agreement after the counterfeiting, but with Knowledge, is a receiving and comforting the Principal. *ib.* Venting, without such Agreement, a Misdemeanor at Common Law. *ib.* With Knowledge of the Principal, may be Misprision of Treason. *ib.*

Receiving, paying, or putting off counterfeit milled Money at a lower Rate than it imports, Felony by Stat. 8 & 9 W. 3. c. 26. § 27. Confined to Gold and Silver Coin of the Realm. *ib.* Extended to Copper Coin by Stat. 11 Geo. 3. c. 40. *ib.* What a putting off. *ib.* What is diminished Money within the Stat. of William. *ib.* Form of Indictment. *ib.* What is milled Money. *ib.* Not necessary to prove the counterfeit milled. *ib.* Punishment. *ib.*

Uttering or tendering in Payment false Money knowingly, Misdemeanor by Stat. 15 Geo. 2. c. 28. Further Punishment if Party have other false Money at the Time, or utter again within ten Days. For second enhanced Offence, Felony without Clergy. Confined to Gold and Silver Coin. - § 28.

Offences relating to the Coin.

How Indictment to be drawn on 3d sect. of the Statute, where two Utterings. It must aver the Fact, but need not conclude that Defendant is a common Utterer, &c. - § 29.

Uttering or tendering base foreign Gold or Silver Coin, not current, Misdemeanor for first and second Offence, Felony without Clergy for third Offence, by Stat. 37 Geo. 3. c. 126. Having in Possession more than five Pieces of foreign base Gold or Silver Coin of any Kind, liable to Seizure and Forfeiture. - § 30.

VII. *As to general Matters relating to the Coin.* - - - § 31.

Principal and Accessary. *ib.* Indictment and Evidence. *ib.* What is Commencement of Prosecution within a limited Time. *ib.* One Witness sufficient. *ib.* Challenges thirty five. *ib.* Reward and Pardon. *ib.* Seizure of base Coin, and Tools for coining. *ib.* Production of such in Evidence. *ib.*

*Regulations and Offences relating to Bullion.*1. *What it is.*

Bullion is Gold and Silver in the Mass. § 32.

Of what Standard. *ib.* Statutes relating thereto, 28 Ed. 1. ft. 3. c. 20. 17 Ed. 4. c. 1. 8 W. 3. c. 8. 6 Geo. 1. c. 11. allowing two different Standards for Silver Wares, with respective Marks. 12 Geo. 2. c. 26. dealers exempt from Prosecution on Discovery of the Makers. *ib.* Selling or exporting Gold or Silver Wares without proper Marks. *ib.* 24 Geo. 3. c. 53. requiring a Mark for the Duty. *ib.* 30 Geo. 3. c. 31. making Exceptions. 38 Geo. 3. c. 69. allowing a lower Standard for Gold Manufacturers, with a particular Mark. - § 32.

Result of all the Statute Standards and Marks. § 33.

Offences and Punishments. - § 34.

2. *Counterfeiting Bullion.* - - § 35.

Blanching Copper for Sale, or mixing it with Silver, -

ver, or buying, selling, or offering to Sale such, or the like, or any Composition like Gold, Felony. - - - § 35.

3. *Exportation of Bullion.* - - - § 36.

Allowed by Stat. 15 Car. 2. c. 7. Modified by Stat. 6 & 7 W. 3. c. 17. Ingots or Bars made in Imitation of Spanish, prohibited. *ib.* Bullion exported must be stamped. *ib.* Owner must distinguish between English and foreign. *ib.* By Stat. 7 & 8 W. 3. c. 19. Certificate from the Lord Mayor, &c. of London required before Exportation. - - - § 36.

4. *Sale of Bullion.* - - - § 37.

Brokers prohibited from buying or selling Bullion.

5. *Possession of Bullion unaccounted for.* - - - § 38.

Punishable by Stat. 6 & 7 W. 3. c. 17. s. 8.

Of Offences relating to the Coin, and to Bullion.

BEFORE I proceed to consider of offences relating to the coin, I shall give a short introductory account of the coin itself, so far as it may be useful to the present purpose.

Lord Hale has written several chapters upon this subject, wherein he has traced the history of the coin with sufficient certainty at least as far back as the time of Edw. 1st. From thence it appears, that the coin or money of this kingdom consists properly of gold or silver only, with a certain alloy, constituting what is called *sterling*, coined by the king's authority: and to such money only does the stat. 25 Ed. 3. ft. 5. c. 2. refer, which mentions "*the king's money*" generally. And therefore it seems, that where any statute names *money* generally, it must be taken to have the same meaning. The copper coin, concerning which Lord Hale doubted, has since his time been protected from being counterfeited or impaired by special enactment. According to the above-mentioned standard of sterling, which had continued with little alteration at least from the time of Hen. 3. to the period in which Lord Hale wrote, one pound of sterling gold contained 23 carats 3 grains and a half of fine gold and half

§ 1.

*Introduction.
As to the coin.*

- 1 Hale, chap. 17,
- 18, 19, & 20.
- Vide post.* s. 27.
- Cirwan's case.
- Co. Litt. 207.
- 1 Blac. Com.
- 278.
- 4 Blac. Com.
- 84. 88.
- 1 Hale, 189.
- 210, 211.
- 1 Hawk. ch. 17.
- s. 57.
- 1 M. S. Sum. 91.
- 2 Inst. 577.
- 3 Inst. 17.
- 1 Hale, 212.

- 1 Hale, 189.
- 190, 1. 203. 209.

Ch. IV. § 1.
Introduction.
As to the coin.

Vide 12 Geo. 2.
ch. 26. post.
f. 32.
& 14 G. 3. c. 42.
f. 2.
17 Ric. 2. c. 1.
Vide post. p. 160.
1 Hale, 197.

1 Hale, 195.

1 Hale, 211.

2 Rushw. 202.

§ 2.
Legitimation and
current value of
coin.

1 Hale, 183.
191, 2, 3.
2 Inst. 577.
3 Inst. 17. 93.
1 Blac. Com.
273. 4 Blac.
Com. 33.

1 Hale, 122.

a grain of alloy of copper, making together 24 carats of Troy weight. But for many years past the standard has been fixed at 22 carats of fine gold and two carats of copper (*a*). And by the same standard, every pound weight of sterling silver must contain 11 ounces 2 penny-weights of fine silver and 18 penny-weights of copper alloy, making together 12 ounces. By an old statute of the 17 Ric. 2. c. 1. no foreign coins of gold or silver are to run in any manner of payment within this realm, but are to be brought as bullion to the mint to be turned into English coin. The introduction of copper money into general currency is of comparative late date. Lord Hale refers to a proclamation just issued at the time he wrote, in 1672, whereby copper halfpence and farthings, such as are now in circulation, were made current in certain cases. Though indeed he makes mention of proclamation for farthing tokens before that time; which however he says were not used for current money but merely for tokens. But those who counterfeited them or made instruments for that purpose were punished in the Star-Chamber.

The coining and legitimation of money, and the giving it its current value, are the unquestionable prerogatives of the crown; though great doubt has been entertained whether by force of the stat. 25 Ed. 3. c. 13., the 9 H. 5. st. 2. c. 6., and other acts settling the standard of sterling, the king is not now restrained from altering it by increasing the alloy. But at this day it is the less necessary to consider the point, because the impolicy of the act is alone sufficient to prevent the attempt from being made; unless the marketable and relative value of gold and silver should sensibly alter (*b*). Lord Hale, though he upholds the prerogative in this respect, says however, that it would be a dishonour to the nation to put it in practice, and not safe to be attempted without parliamentary advice. But any coin once legally made and issued by the king's authority continues to be the current coin of the kingdom until recalled, notwithstanding any change in the authority which constituted it. This recall may be by

(*a*) A pound weight of gold is coined at the Mint into 44 guineas and a half; an ounce therefore is worth 3*l.* 17*s.* 10½*d.* in silver. A pound weight of standard silver is coined into 62 shillings, which is 5*s.* 2*d.* an ounce.—Smith's *Wealth of Nations*, 1 vol. 62, 3.

(*b*) About the years 1796 and 1797 the marketable value of gold and silver fluctuated in a manner unprecedented at least in modern times.

pro-

proclamation; and long disuse may, I conceive, be evidence of it. But it has also been effected by act of parliament (a).

Ch. IV. § 2.
Introduction.
As to the coin.

The weight, alloy, impression, and denomination of money made in this kingdom, are regularly settled by indenture between the king and the master of the mint; which has sometimes been followed by a proclamation, as a more solemn manner of giving it currency. But this in general cases is certainly not necessary; and in prosecutions for coining need not be proved. Neither is it necessary in the same case to produce the indentures, though it may be of use in case of any new coin, with a new impression, not yet familiar to the people, to produce either the indentures, or one of the officers of the mint cognizant of the fact, or the stamps used, or the like evidence. By the act of the 37 Geo. 3. c. 126. s. 1. relative to the new copper coinage, the king's proclamation is made necessary; and therefore seems to be required in proof of any indictment upon that statute. But in general, whether the coin, upon a question of counterfeiting or impairing it, be the king's money, or not, is a mere question of fact, which may be found upon evidence of common usage or notoriety. But proclamation by the writ of proclamation under the great seal, or a remembrance thereof, is necessary to prove a coin current in the following instances: 1. In the case of foreign coin, which is otherwise to be considered as no more than bullion. None such is now current in this kingdom. Mr. Justice Blackstone intimates an opinion, which remains however to be judicially confirmed, that the currency mentioned and intended by the statutes must be such as is general, and extending to all payments. It may however be worthy of consideration, when that case comes in judgment, that if the subject be in any case compellable by law to accept certain coin in payment upon a legal tender, his case is just as much within the reason of the law against counterfeiters, and he is as much entitled to the protection of it, as if the currency of that particular coin extended to all other cases: Such a practice is equally "in deceit of our lord the king and of his people." And by a parity of reason I conceive, that an importation of foreign counterfeit money into this realm, with intent to utter it within the same or any of the dominions thereof, would fall within the stat. 1 & 2 Ph. & M. c. 11. although it were only

§ 3.
Evidence of legitimate current coin.
1 Hale, 101.
6, 7, 8. 204.
212, 213. 327.
1 MS. Sum. 46.

1 Hale, 192.
197. 213.
1 MS. Sum. 46.

Vide 17 Ric. 2.
c. 1. ante, p. 148.

4 Blac. Com. 89.

25 Ed. 3. ff. 5.
c. 2.

(a) Vide Stat. 9 W. 3. c. 2. and 6 Geo. 2. c. 26.

Ch. IV. § 3.
Introduction.
As to the coin.

current in some part of the dominions and not throughout the realm at large. 2dly, A proclamation under the great seal is required to legitimate base or mixed coin below the standard of sterling. 3dly, To enhance the denomination or extrinsic value of a coin already current: as was done upon the enhancing of 20s. and 10s. pieces by K. James I. 4thly, To decry any coin before current: as was done not long since in the instance of the broad pieces of 25 and 23 shillings. The stat. 6 Geo. 2. c. 26., which made them payable at the mint and offices of revenue for one year after they were so decry'd, specially provided that the counterfeiting of them during that year should be high treason. 5thly, By the late act of the 37 Geo. 3. c. 126. s. 1., relative to the new copper coinage, the king's proclamation is made necessary, and therefore evidence of it seems to be required in proof of any indictment upon that statute. But proclamation, where necessary, may be presumed in length of time; especially when supported by continual and approved usage, which in itself affords a presumption of a legal commencement.

Touching the Coin of Ireland and other foreign Members of the Crown.

§ 4.
Irish coin, &c.

Before I quit this part of the subject, I must notice another question of great importance and difficulty made in the books, respecting the money of Ireland, or any other independent member of the crown of England, I shall collect together in this place all that I find, or that occurs to me on the subject. It has been considered upon high authority that the counterfeiting of Irish money is high treason, within that branch of the stat. 25 Ed. 3. s. 5. c. 2. against counterfeiting *the king's money*; first, because it comes expressly within the words of the act, which are of large signification. The coining of money is the exclusive prerogative of the crown: the king alone is entitled to the profit of it: it is part of his revenue: and all money coined and issued by his authority is *his money*. He may coin money here and issue it in Ireland, or coin it in Ireland and issue it here; and he is equally defrauded and injured whether his money issued there or here be counterfeited. All money coined and issued by the king's authority is necessarily and legally current throughout

1 Hale, 2. 1.

221. 225. 317.

1 MS. Sum. 46.

91.

out all the dominions of the crown; unless the king shall by his proclamation specially direct otherwise. And this it may be said is not like a local law, affecting merely the interests of the subjects of this particular kingdom, which might perhaps require a narrower interpretation adapted to the nature of the subject matter, but a matter of general concernment pervading every part of the dominions of the crown of England. But, 2dly, There is another, and in my mind a still stronger reason for this construction; for it appears that the legislature themselves must have so considered it. By the stat. 5 Eliz. c. 11. and 18 Eliz. c. 1. the clipping or impairing of any of the proper monies or coins of *this realm, or any the dominions thereof*, is made treason. Upon these statutes, says Lord Hale, though Irish coin be not current in England, when of a baser alloy, yet it is the king's coin; and clipping it in England is treason by those acts. And it is not to be supposed that the parliament would make the clipping of Irish coin treason, unless the counterfeiting thereof were such. This argument it must be owned has great weight: and upon another occasion, which I have elsewhere adverted to, has been carried still further. The force of it is also considerably strengthened by the provisions of the stat. 1 & 2 Ph. & M. c. 11., to which I shall presently have occasion to refer more particularly. It is further confirmed by the judgment in the case of mixed monies; where money which was coined by the queen for Ireland, and made current there by her proclamation in that country, but which was not current in England, was yet holden to be lawful money of England; and that payment of 100l. such money, made payable in Ireland, was a good discharge of a bond conditioned for the payment of 100l. sterling current and lawful money of England.

Yet still there appears this difficulty: if money be coined for the exclusive use of Ireland, and only circulated there, and it be different from the coin of England and not current here: or if the king issue a proclamation in Ireland legalizing some foreign coin there, which is not legalized nor current here, how is a subject of England resident here to take cognizance of these acts, so as to be legally warned not to counterfeit or clip such coin, unless such currency be notified here by a proclamation under the great seal of England? In the case of money coined and issued here by the king's authority, it is true that it is not strictly requisite in prosecution

Ch. IV. § 4.
Introduction.
Coin of Ireland,
&c.

5 Eliz. c. 11.
f. 2.
18 Eliz. c. 1.

1 Hale, 211.
221. 317.

Vide Fost. 330,
&c.

Post. p. 154-156.

Case of mixed
monies, Davis'
Rep. 18.
1 Hale, 193. 211.

Ante, f. 3.

1 Hale, 198. 327.

Ch. IV. § 4.
Introduction.
 Coin of Ireland,
 &c.

Ante, f. 3.
 Post, f. 11.

5 Eliz. c. 11.

18 Eliz. c. 1.

tions of this sort to prove a proclamation giving it currency : yet that is the more regular way ; especially in the case of new coin issued with a new impression, as was lately done in the new copper coinage of pennies, and which was made necessary by the express words of the stat. 37 Geo. 3. c. 126. f. 1. “ For how,” says Lord Hale, “ can men reasonably know at first, whether this be the king’s coin, without some such public notification, where long use and custom hath not made it familiarly known to them ?” But with respect to coin heretofore issued and current in England, the subject has that kind of evidence which supplies the more regular notification by a proclamation, namely, the notoriety of the fact : but no such notoriety exists in the instances I have put. With respect however to the clipping of foreign coin current here, I take it that by the very words of the statutes of Elizabeth there must have been a proclamation in this country, legalizing the currency, in order to make the offence high treason in a subject of England. The stat. 5 Eliz. c. 11. makes it high treason to clip, &c. “ the monies or coins of any other realm allowed and suffered to be current within this realm or the dominions thereof, at this present, or that hereafter at any time shall be the lawful monies or coins of this realm, or of the dominions thereof, or of any other realm, *and by proclamation allowed and suffered to be current here.*” The stat. 18 Eliz. c. 1., which was made to supply some omissions in the former act, is confined in like manner to “ the monies or coins of any other realms *allowed and suffered to be current*, at the time of the offence committed, within this realm of England, or any the dominions of the same, *by the proclamation of the queen’s majesty,*” &c. This I apprehend must mean such a proclamation, whereof the subjects of either kingdom respectively are bound to take cognizance ; namely, in this country by a proclamation under the great seal of England. But with respect to money coined by authority of the crown in Ireland, or elsewhere within the dominions of the crown, perhaps in strictness the subject may be bound at his peril to take notice of its being the king’s money ; the very act of counterfeiting implying some knowledge of the coin which is counterfeited, more especially if it bear any stamp or device, denoting the authority from whence it issued. It is clear, that in the case of counterfeiting or clipping the king’s coin, made and issued here,

here, the very act itself constitutes the treason; and there is no necessity to prove any particular knowledge in the party, that it was the king's coin; but only to satisfy the jury of the fact of its being so: of which notoriety indeed is one and the most general medium of proof; but it may also be proved by the officers of the mint or any other who has a knowledge of the fact. And indeed in the case of old coin, which has gradually fallen into disuse, though still the legal coin of the king, there can be no general notoriety of the fact. There is less ground for complaining of hardship from want of notice at the present day; because the counterfeiting of any gold or silver coin, whether of this or any other realm, or whether current or not, is highly illegal; being in no instance less than misprision of treason by the stat. 14 Eliz. c. 3., or felony by the stat. 37 Geo. 3. c. 126.

Ch. IV. § 4.
Introduction.
Coin of Ireland,
&c.

The same sort of questions occur upon the other branch of the stat. of Ed. 3. concerning the bringing of false money into the realm counterfeit to the money of England. First, What is meant by *the money of England*? Is it something different from *the king's money*, or the same? It certainly must appear strange, if for the reasons before adverted to the legislature intended to make the counterfeiting of any coin, made and issued by the king in any of the dominions of the crown, high treason, though not the proper coin of England, nor current here, that they should have altered their phrase in this branch of the statute, concerning the importation, from "the king's money" to "money counterfeit to the money of England:" and from thence it might be argued, that these latter words explain the former ones, and shew that the money meant by *the king's money*, was *the money of England*; such as in the words of the statute was calculated *to merchandize or make payment with*: in other words, such as was current in England, and of which the subjects of this country must be taken to be cognizant. This consideration might deserve some weight if the question were new. It is indeed said in general terms in the books, that the importation under the statute of Ed. 3. must be of money counterfeit to the similitude of the money of England: but these are merely the words of the statute, and not given as an interpretation of them. The question still remains, What is meant by *the money*

§ 5.
Importing counterfeit Irish coin into the realm.

Strunk. 3.
3 Inst. 18.
1 Hale, 227.
1 Hawk. ch. 17.
f. 65.

Ch. IV. § 5.
Introduction.
Coin of Ireland,
&c.

Ante, f. 4.

Post. f. 23.

money of England? and whether any thing more was meant than to distinguish such money from the money of foreign realms? In order to make the law consistent, the construction of the statute of Ed. 3. ought to be, that it is high treason to bring into the realm the same false money, the counterfeiting of which within the realm was before declared to be so. In that case *by the money of England* must be understood all such money as is coined and issued by the authority of the crown of England; and must consequently include money coined and issued by the king in Ireland: and such was the opinion that prevailed in the case of mixed monies. If this be not the true construction, for aught I can observe, the importing into England such false Irish coin from any foreign kingdom is only punishable as a misdemeanor at common law, or at most as a misprision of treason, within the stat. 14 Eliz. c. 3.; although by the stat. 1 & 2 Ph. & M. c. 11. the importation of counterfeit foreign coin, current within the realm, into the realm or any of the dominions of the same, with intent to utter it in either, is made high treason. In truth I conceive, that neither the above-mentioned act of the 14 Eliz. nor that of Ph. & Mary, nor any other which treats of money “not the proper coin of this realm,” or to that effect, can be understood of any other coins than those of foreign powers independent of the crown of England; and which I think are emphatically designated by the late act of the 37 Geo. 3. c. 126. f. 2.; in which case unless the money of Ireland come within the description of *the king's money*, and *the money of England*, I know of no statute which will reach even the case of counterfeiting such Irish money in this country.

§ 6.
*Importing false
money from one
part of the king's
dominions into
another.*
Post. f. 20.

3 H. 7. 10.
Bro. Abr. Treason, pl. 19.

Lastly it has been considered, whether the bringing in of false money, counterfeit to the money of England, from Ireland, or other transmarine member of the crown of England, into England or other the dominions thereof, be within the prohibition of the stat. 25 Ed. 3. ft. 5. c. 2. against bringing false money *into this realm*. The only direct resolution I can find upon the subject is that in the year-book 3 H. 7. 10., where it was resolved, that counterfeit money imported into England out of Ireland was not within the statute, because Ireland was a member of England, governed by its laws, and
money

money was coined there by the authority of the king. The question simply was, Whether Ireland at that day was within "this realm?" As to which Lord Hale, speaking in another place of the stat. 1 & 2 Ph. & M. c. 11., says, that an importation out of Ireland into England is not within the act, because Ireland is within *the dominions of this realm*, though not within *the realm*; evidently considering them as the same in effect for this purpose. And Staunford and Lord Coke, grounding themselves on the above resolution in the time of H. 7., expressly say, that if a man bring counterfeit money from Ireland, it is not within the statute of Edward 3., but that it must be money made in a foreign nation, and brought from thence into this realm. Lord Hale however speaks with more doubt upon this part of the stat. of Ed. 3.; for, says he, although Ireland be within the st. 35 H. 8. c. 2. for the trial of treasons out of the realm; yet it has been holden upon the *obscure book* of 3 H. 7. 10. that an importation of counterfeit coin from Ireland into England is not treason here within the statute; principally because the counterfeit-ing itself is punishable by the stat. 25 Ed. 3., which is of force in Ireland. The same reason is adopted by Hawkins. It certainly is not conclusive; because it depended with respect to Ireland in later times on the will of a different legislature to give it efficacy. And the construction does in truth let in much of the mischief with respect to the subjects of this country, which the act was intended to guard against. But if we attend to the subject matter, and consider that the interest of the crown was principally in view, then most, if not all, of the reasons which were first urged to shew, that *the king's money* mentioned in the first branch of the stat. 25 Ed. 3. extended to the money coined and issued by his authority in Ireland, will also apply to shew that the bringing of counterfeit money into Ireland or other part of the dominions of the crown is just as much within the reason of the law against bringing it into the realm: for the prerogative of the crown of England, of which Ireland is a member, is as much invaded, and the revenue of the king as much defrauded, whether the counterfeit money be first brought into one part of his dominions or into another; into Ireland, or into England. The construction therefore which has prevailed is certainly in unison with the reason of the law; though

Ch. IV. § 6.
Introduction.
Importing false
Money, &c.

1 Hale, 155.
225. 317.
ante, ch. 2. f. 19.

Staunf. 3.
3 Inst. 18.

1 Hale, 225.
& vide ib. 317.

1 Hawk. ch. 17,
f. 67.

Ch. IV. § 6.
Introduction.
Importing false
money, &c.

1 Mar. st. 2.
c. 6.

[1 Hale, 210.]
1 & 2 Ph. & M.
c. 11.
Post. f. 20.

Vide 1 Hale,
211. 352, 3.
ante, p. 151.

1 Hale, 317.
ante, p. 154.

1 Hale, 225.
317.
1 Hawk. ch. 17.
f. 67.
1 MS. Sum. 94.
Burnet's MS. 21.

Vide 1 Hale, 225.
Et qu. in case
of a subject for
counterfeiting.

3 Inst. 18.
ante, f. 6.

though perhaps the words do not obviously lead to it. But however doubtful this interpretation might have been at first, it seems to have been greatly confirmed by other acts of the legislature. For by the stat. 1 Mar. st. 2. c. 6. the counterfeiting of any gold or silver coin, not the proper coin of, but current within, the realm by the consent of the crown, (which consent must be signified by proclamation and writ under the great seal,) is made high treason; and the statute 1 & 2 Ph. & M. c. 11. made in aid thereof, provides, that whoever shall bring from parts beyond sea *into this realm, or into any of the dominions of the same*, any counterfeit money, *current within this realm* by the consent of the crown, shall be guilty of high treason. The same argument then which Lord Hale drew from the statutes of Elizabeth in aid of the construction of the first branch of the stat. 25 Ed. 3. relative to counterfeiting the king's money, may be also derived from the stat. of Ph. & M. in confirmation of the construction put on the second branch of the stat. 25 Ed. 3. relative to the importation of false money. For it cannot be supposed that the legislature would have made the bringing of *foreign* counterfeit current money into any of *the dominions of the realm* high treason, unless the bringing of money into such dominions, counterfeited to the likeness of our own coin, had been deemed to have been as high an offence before; this being by far the greater mischief of the two. And consonant to the construction put on the stat. 25 Ed. 3. the bringing of such counterfeit money out of Ireland into this country is not within the statute. But under both the statutes of Ed. 3. and Ph. & M. the money must be brought from some foreign place out of the king's dominions. If this construction be admitted, it must in reason be taken to extend to all the plantations and dominions of England, where the same laws are in force, by which the counterfeiter himself is punishable; which is not the case of a counterfeiter of our coin in the dominions of another sovereign; against whom it must be admitted that this provision was principally levelled. Therefore it seems, that if the counterfeiting be within the king's dominions, the importer from thence into England, as such, is only punishable as an utterer of counterfeit coin. But further, in order to bring a case within the statute of the 1 & 2 Ph. & M., it seems by the very words of the act that the importation, whether into England or into any of the dominions

dominions parcels of the crown of England, must be of such counterfeit money as is *current within this realm*, i. e. of England, *by the consent of the crown*; which consent, as we have seen, must be signified by proclamation under the great seal of England: for the legislature speaking of the currency alter their phrase, and do not as in the preceding part extend the description to *the dominions of the realm*. And besides, in the case of foreign coin, how else can a subject of England take cognizance of its legal currency, so as to take warning not to import it under the penalty of the law? Also by the stat. 14 Eliz. c. 3. even the forging of any foreign coin, not current within this realm, was only misprision of treason; a fortiori therefore the importation of such forged coin could not have been considered as treason itself. But now by the stat. 37 Geo. 3. c. 126. s. 2. as well the counterfeiting as the bringing into the realm foreign coin not current is made felony.

Ch. IV. § 6.
In reduction.
Importing false
money, &c.

Ante, p. 156.
1 Hale, 210.

14 Eliz. c. 3.

Post. s. 23.

Some verbal difference is observable in the wording of some of the statutes on the subject of the coin since the Revolution. The stat. 8 & 9 W. 3. c. 26. speaks of the gold and silver coin "of this kingdom," or "current within this kingdom." The stat. 15 Geo. 2. c. 28. in one part expresses by name, "guineas and half guineas," "shillings and sixpences," and is consequently confined to those identical coins. In another part it speaks of counterfeit money generally, the explanation of which has been before given. The stat. 11 Geo. 3. c. 40. as to the copper coin, and in the stat. 37 Geo. 3. c. 126. s. 2. as to gold and silver coin, describe each as the coin of "this realm," following the words of the more ancient statutes. No stress can be laid upon such verbal differences between statutes passed in *pari materia*, further than that the construction which the reason of the thing points out must be such as the words are capable of receiving without violence to their proper or accepted legal signification.

Ante, s. 1.

To proceed now to the consideration of

Offences relating to the Coin.

§ 7.
Division of offences relating to the coin.

These may be considered under several different heads.

1. *As to the Offence of counterfeiting the Coin; with a Description of the several Species of Coin, the counterfeiting whereof is punishable, and in what Degree.*

2. *The*

Ch. IV. § 7.
Division of offences
relating to the
coin.

2. *The making, mending, or having any Instrument applicable to counterfeiting the same.*
3. *Impairing the Coin.*
4. *Importing counterfeit or light Coin into the Realm.*
5. *Exporting the same.*
6. *Receiving, uttering, or tendering counterfeit Coin.*
7. *General Matters relating to the Coin.*

I. Counterfeiting the Coin.

§ 8.
Counterfeiting
what coins.
1 Hale, 77. 222.
4 Plac. Com.
88, 9.

The counterfeiting of the current coin of the realm is in truth a species of the crimen falsi or forgery, though ranked by the law of England in the highest class of offences by reason of its affecting the royal majesty of the crown in a great prerogative of government. The legislature have respectively made provision against the counterfeiting of the gold or silver coin of this realm, and of any foreign realm, and of our copper coin; upon each of which I shall have occasion to observe in its turn.

Statutes.

25 Ed. 3. ft. 5.
c. 2. ante, f. 1.
ante, ch. 2. f. 6.
Gold and silver
coin of the realm.
8 & 9 W. 3. c. 26.
f. 3. made per-
petual by 7 Ann.
c. 25. f. 3.

1st, The stat. 25 Ed. 3. ft. 5. c. 2. declares it to be high treason "if a man counterfeit the king's money."

By stat. 8 & 9 W. 3. c. 26. f. 3. made perpetual by stat. 7 Ann. c. 25. "If any person, (other than the persons employed in his majesty's mint or mints, or such as shall have authority from the Lords Commissioners of the Treasury or Lord High Treasurer of England for the time being,) shall after the 15th of May 1697 mark on the edges of any the current coin of this kingdom; or if any person whatsoever shall mark on the edges of any the diminished coin of this kingdom, or any counterfeit coin resembling the coin of this kingdom, with letters, or grainings, or other marks or figures like unto those on the edges of money coined in his majesty's mint; every such offence shall be adjudged high treason; and the offenders therein, their counsellors, procurers, aiders, and abettors, being thereof convicted or attainted, shall suffer death," &c. The prosecution to be commenced in six months after the offence, by stat. 7 Ann. c. 25. f. 2.

*Colouring or gild-
ing, &c. base coin.*

(a) *Vide post.*
f. 14.
what is a colour-
ing.

By f. 4. of the same statute of William, "if any person whatsoever after the 15th of May 1697 shall colour (a), gild, or case over with gold or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling any the current coin of this kingdom, or any round blanks

blanks of base metal, or of coarse gold or coarse silver, of a fit size or figure to be coined into counterfeit milled money, resembling any the gold or silver coin of this kingdom; or shall gild over any silver blanks of a fit size and figure to be coined into pieces resembling the current gold coin of this kingdom; all such offenders, their counsellors, procurers, aiders, and abettors shall be guilty of high treason, and being convicted or attainted thereof, shall suffer death," &c. But without corruption of blood. Prosecutions to be commenced within three months after the offence committed, by s. 9.

Ch. IV. § 8.
Counterfeiting the coin.

By stat. 15 Geo. 2. c. 28. s. 1. "If any person shall after the 29th September 1742 wash, gild, or colour any of the lawful silver coin called a shilling, or a sixpence, or any counterfeit or false shilling or sixpence, or add to or alter the impression or any part of the impression of either side of such lawful or counterfeit shilling or sixpence, with intent to make such shilling or sixpence resemble, or look like, or pass for, a piece of lawful gold coin, called a guinea, or a half guinea respectively; or shall file or any wise alter, wash, or colour any of the brass monies called halfpennies or farthings, or add to or alter the impression, or any part of the impression, of either side of a halfpenny or farthing, with intent to make such halfpenny or farthing resemble or look like or pass for a lawful shilling or sixpence respectively; such offenders, their counsellors, aiders, abettors, and procurers shall be guilty of high treason." But by s. 4. the blood shall not be corrupted. And by s. 8. the offender shall be pardoned in case [being out of prison] he discovers two or more offenders of the same kind mentioned in the act, so as they shall be thereof convicted. By s. 5. offenders shall be indicted, arraigned, tried, and convicted by such like evidence and in such manner as other offenders for counterfeiting the coin; with a proviso that the prosecution be commenced within six months after the offence committed.

15 G. 2. c. 28.

*No corruption of blood.
Pardon on discovering others.*

Trial and evidence.

Limitation of time.

And by the 5th section of the last-mentioned act of William, spurious money produced on the trial in a court of justice shall be cut in pieces in open court.

8 & 9 W. 3.
c. 26. s. 5.

All the abovementioned statutes relate only to the gold and silver coin made and issued by the king's authority, in the sense I have before shewn; the counterfeiting of which

§ 9.
Confined to gold and silver coin of the king.

Ante, s. 1.
1 Hawk. ch. 17.

s. 57. 1 MS. Sum. 91. Ante, s. 1. Vide Cirwan's case, post.

Ch. IV. § 9.
Counterfeiting the
coin.

by all of them amounts to high treason. The statute of 25 Ed. 3. has always been so considered; the provisions of the 8 & 9 W. 3. are only referable to such coinage, and in some parts mention gold and silver coin by name; and the same appears in terms by the stat. 15 Geo. 2.

§ 10.

Counterfeiting
gold or silver
foreign coin.
Ante, f. 4, 5, 6.
Vide 1 Hale, 210.
215, 216.

1 Mar. st. 2. c. 6.
Gold and silver
foreign coin cur-
rent.

1 Hale, 210.
310.

14 Eliz. c. 3.
Gold and silver
foreign coin not
current.

1 Hale, 376.

1 Hale, 210.
311. 318.

37 G. 3. c. 126.
f. 2.

2. With regard to foreign coin of gold or silver, some observations upon which I have before made, the counterfeiting of such as is current here was not within the stat. 25 Ed. 3., but was made treason for the first time by the stat. 4 H. 7. c. 18. But that being repealed by the stat. 1 Mar. c. 1. the same provision was revived by stat. 1 Mar. st. 2. c. 6., which enacts, that "if any person or persons falsely forge or counterfeit any such kind of coin of gold or silver as is not the proper coin of this realm, and is or shall be current within this realm by the consent of the crown, they and their counsellors, procurers, aiders, and abettors, shall on conviction be adjudged guilty of high treason." This consent must be notified under the great seal by proclamation, and a writ annexed thereto: for by the stat. 17 Rich. 2. c. 1. foreign coin is not to run in payment in England.

By the stat. 14 Eliz. c. 3. "If any person falsely forge or counterfeit any kind of coin of gold or silver of other realms as is not the proper coin of this realm, nor permitted to be current within this realm; such offence shall be adjudged misprision of high treason; and the offenders, their procurers, aiders, and abettors, being convicted, shall be imprisoned, and forfeit such lands, goods, and chattels, as in case of misprision of treason." By "aiders" is meant such as aid in the fact, and not aiders of the offender after the fact. At common law this offence was only punishable as a misdemeanor.

Both the statute of Mary and that of Eliz. are to be understood of the counterfeiting of such foreign coin as is for the most part of gold or silver. But the stat. 37 Geo. 3. c. 126. has now provided another punishment for the offence of counterfeiting foreign gold or silver coin not current here: that statute reciting, that "whereas the practice of counterfeiting foreign gold and silver coin, and the bringing into this realm and uttering within the same false and counterfeit foreign gold and silver coin, and particularly pieces of gold coin commonly called louis d'or, and pieces of silver coin commonly

commonly called dollars, has of late greatly increased, and it is expedient that provision should be made more effectually to prevent the same;" enacts, "that if any person or persons shall hereafter make, coin, or counterfeit any kind of coin, not the proper coin of this realm, *nor permitted to be current within the same*, but resembling, or made with intent to resemble or look like, any gold or silver coin of any foreign state, &c. or to pass as such foreign coin; such person or persons offending therein shall be deemed guilty of felony, and may be transported for any term of years not exceeding seven." By the words, "not permitted to be current within the realm," must be understood not permitted to be current by proclamation under the great seal.

Ch. IV. § 10.
Counterfeiting the coin.

Vide ante, f. 3. 6.

Procurers, who are named in the statutes 1 Mar. st. 2. c. 6. and 14 Eliz. c. 3. are not mentioned in this law; but the offence being made felony attaches to it all the incidents of felony at common law, and consequently may have accessaries. But quære, if they are liable to transportation, or to any other punishment than is authorised by the general act of the 18 Eliz. c. 7. f. 2. after mentioned?

Post. p. 162.

3. Lastly, As to the copper coin of this realm, the counterfeiting of which was by the stat. 15 Geo. 2. c. 28. f. 6. punishable as a misdemeanor by two years' imprisonment, and finding sureties for two years more; it is now enacted by the stat. 11 Geo. 3. c. 40. that "if any person after the 24th of June 1771 shall make, coin, or counterfeit any of the copper monies of this realm, commonly called an half-penny or a farthing, such offender, his counsellors, aiders, abettors, and procurers, shall be adjudged guilty of felony." But clergy is not taken away. Sect. 3. enables any justice of peace, on the oath of one witness, that there is just cause to suspect that one or more persons have been concerned in such coining, by warrant under his hand to cause their dwelling-houses, outhouses, &c. or other place belonging to them to be searched for tools and implements for such coining; and if they shall be found concealed there, or in the custody or possession of any person whatsoever not employed in his majesty's mint, or having the same by some lawful authority, to seize such tools and carry them before a justice of peace of the place, &c. where seized, who shall cause the same to be secured and produced in evidence on the trial of

§ 11.
Copper coin.
15 G. 2. c. 28.

11 G. 3. c. 40.

Ch. IV. § 11.
*Counterfeiting the
coin.*

the offenders, and afterwards destroyed by order of the court, or of such or some other justice of peace in case there be no trial.

37 Geo. 3.
c. 126. s. 1.

By stat. 37 Geo. 3. c. 126. "The provisions of the two last-mentioned statutes, (by name,) and all other acts concerning the copper monies of this realm, called an half-penny and a farthing, or any other copper money of this realm, shall extend to all such pieces of copper money as shall be coined and issued by order of his majesty, &c. and as shall by royal proclamation be ordered to be deemed and taken as current money of this realm, as if such pieces had been particularly mentioned in such acts respectively."

It may now be a question, Whether under this latter statute it is not optional to prosecute either for a misdemeanor, as the offence is made by the stat. 15 Geo. 2.; or for a felony, as it is made by that of the 11 Geo. 3., since the provisions of both statutes are extended to the new copper coinage? And yet such an option without varying circumstances is unusual, and incongruous with the general rule of law, that the misdemeanor is merged in the felony.

Rex v. West and
others, O. B.
Sept. 1780.
1 MS. Sum. 91.

The punishment, however, under the act of the 11 Geo. 3. is only a year's imprisonment; which is founded on the general stat. of the 18 Eliz. c. 7. s. 3.

§ 12.
*What a counter-
feiting.*
1 Hale, 214.
Kel. 33.

1. It is first to be seen what is a counterfeiting within these statutes. There must be an actual counterfeiting either by the party himself or by those with whom he conspires: a mere attempt to counterfeit, such as preparing the materials or fashioning the metal, is not sufficient, except in those particular instances which have been so declared by statute.

Ante, s. 8.

From the several statutes before set forth it is to be collected, that the offence of high treason in counterfeiting our own gold or silver coin attaches in the several instances following;

*Complete counter-
feiting.*
25 Ed. 3. s. 5.
c. 2.
post. s. 13.
*Marking the
edges of coin.*
8 & 9 W. 3. c. 26.

1. In a complete counterfeiting of any gold or silver coin of the realm; at least to the degree of resemblance after mentioned.

2. By marking on the edges of any the current or diminished coin of this kingdom, or counterfeit coin resembling the coin of this kingdom, with letters or grainings, or other marks or figures, like those on the edges of money coined in his majesty's mint.

3. By

3. By colouring, gilding, or casing over with gold or silver, or with any wash or materials producing the colour of gold or silver, any coin resembling the current coin of this kingdom: or,

Ch. IV. § 12.
*Whut a counter-
feiting.*

4. Any round blanks of base metal, or of coarse gold, or coarse silver, of a fit size or figure to be coined into counterfeit milled money, resembling the gold or silver coin of this kingdom.

*Gilding or silver-
ing coin.*
*Gilding or silver-
ing blanks.*
8 & 9 W. 3. c. 26.

5. By gilding over any silver blanks of a fit size and figure to be coined into pieces resembling the current gold coin of this kingdom.

*Gilding silver
blanks to be made
into gold coin.*
8 & 9 W. 3. c. 26.

6. By washing, gilding, or colouring any lawful or counterfeit shilling or sixpence, or adding to or altering the impression on either side, to make it resemble a guinea or half guinea respectively.

*Making shillings
or sixpences to
resemble guineas
or half guineas.*
15 G. 2. c. 28.

7. By filing, or any wise altering, washing, or colouring any halfpence or farthings, or adding to or altering the impression on either side, with intent to make them resemble respectively a shilling or sixpence.

*Making half-
pence or farthings
resemble shillings
or sixpences.*
15 G. 2. c. 28.

Several of these provisions were in truth superfluous; for they amount after all to a counterfeiting of the coin attempted to be imitated. For example; one who alters a lawful shilling, so as to make it resemble a guinea, may with as much truth and propriety be said to have counterfeited a guinea, as if he had actually fabricated the whole piece from the original state of the metal. In like manner, as one who alters the principal sum of a bond is as much a forger of the bond so altered, as if he had written the whole. These are kindred offences. The 3d, 4th, and 5th descriptions only seem to carry the offence further than the stat. 25 Ed. 3. had done: because they constitute acts to be high treason which are only preparatory to, and in the progress of actually counterfeiting the coin.

Whether there be a counterfeiting, or, in the words of some of the statutes, a resembling of the real coin, is a matter of fact of which the jury are to judge upon the evidence before them: in which respect there can be no distinction between our own and foreign coin. There must be a resemblance, such as may in circulation ordinarily impose upon

§ 13.
*The similitude a
question of fact.*

*It need not be
perfect.*
1 Hale, 178. 184.
211. 215.

Ch. IV. § 13.
What a counter-
feiting.

1 MS. Sum. 50.
Ridgeley's case,
post. f. 18.

Rex v. Welsh
and another,
Hertford Lent
Assizes 1785,
cor. Perryn, B.
MS. Gould, J.
*It is not necessary
that there should
be an impression
on the counterfeit,
if it resemble the
common worn
coin.*
Leach, 293. S. C.

the world; but it is clear, that in order to warrant a conviction the resemblance need not be perfect. Thus a counterfeiting, with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin.

Patrick and John Welsh were indicted for counterfeiting a piece of false and counterfeit money and coin, *of the likeness and similitude of the good, legal, and current coin, money, and silver coin of this realm* called a shilling, against the form of the statute. A second count charged a similar offence in counterfeiting a sixpence. It appeared that all things necessary for coining, with a mould for shillings and sixpences, were found in P. Welsh's house, where the other prisoner was at work in coining when he was apprehended: and several shillings and sixpences which they had coined were found in the room or upon them in a perfect state for circulation, and many had been circulated and passed off. The objection made was, that there was no impression on any of these coins, and that the offence was not complete till the stamp was put upon them, till when they could not be said to resemble the current coin. But it was over-ruled at the trial, and the case went to the jury, who found the prisoner guilty. Judgment was however respited to take the opinion

Easter term 1785.

of the judges, all of whom thought that the conviction was proper. They said, it was a question of fact, Whether the counterfeit were *of the likeness and similitude of the lawful current silver coin* called a shilling? and the jury having so found it, the want of an impression was immaterial; because from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected. The counterfeit was perfect therefore for circulation, and possibly might deceive the more readily from having no appearance of an impression; and in the deception the offence consists. But in Varley's case, where the impression of money was forged on an irregular piece of metal, not rounded, without finishing it, so as not to be in a state to pass current, the offence was holden to be incomplete, although he had actually attempted to pass it in that condition.

Varley's case,
1771, 2 Blac.
Rep. 632.
1 MS. Sum. 46.
Leach, 71. S. C.
& 253.
Vide Rex v.
Harris and Mi-
nion, Leach, 126.

But

But if there be a counterfeiting, such as I have before described, in fraud of the king, the offence within the respective statutes is complete before any uttering or attempt to utter. The uttering is punishable in another manner, as will be shewn.

Ch. IV. § 13.
What a counterfeiting.

3 Inst. 16.
1 Hale, 215. 228.
1 Hawk. ch. 17.
Post. f. 26, 27, 28.

L. 55. 4 Blac. Com. 84. 1 MS. Sum. 91. Post. f. 26, 27, 28.

But besides the offence of counterfeiting, which requires a similitude to a common intent to the exemplar, the above-mentioned statutes, as I before observed, go further in some instances; and in particular it has been made a question, What is a colouring, &c. within the stat. 8 & 9 W. 3. c. 26.?

§ 14.
What a colouring, &c. within the statute.
Ante, f. 12.

Ante, f. 8.

William Case was found guilty on an indictment for traitterously colouring with materials producing the colour of silver a piece of base coin resembling a shilling, against the statute. The prisoner was taken in the very act of making counterfeit shillings in the ordinary way, by steeping round blanks composed of brass and silver in aqua fortis. None of them were found in a finished state; but many were taken out of the liquor by those who apprehended the prisoner; and others had been before taken out by himself and were dry. These exhibited the appearance of lead, and some of them had the impression of a shilling, and by rubbing them a little they would perfectly resemble silver coin, and would readily pass current; but in their then state the jury found, that none would pass current. The question therefore was, Whether this offence were complete, inasmuch as the colour of silver had not been produced in any of the blanks? The counsel for the crown argued, that if the colour of silver had been produced, it would have been high treason within the stat. 25 Ed. 3.; and that the stat. 8 & 9 W. 3. was made to punish the inchoate offence, which before was not punishable; and that offence was complete by dipping the round blanks in the aqua fortis, by which some change of colour had been produced; for that the words, "producing the colour of silver," were to be restrained to the next antecedent words, "materials," &c. and not to the preceding words "colour," &c. This matter being referred to the judges, there was some difference of opinion amongst them. One judge said, he understood the words "colour," &c. to mean producing on the piece of metal the colour of silver,

Rex v. Wm. Case, Lancaster Spring assizes 1795, cor. Heath, J. MS. Buller, J. and MS. Jud. Preparing blanks with such materials as when rubbed will make them resemble the real coin, is a colouring within the statute, before the resemblance has been produced by such friction.

Easter term 1795, absent Perry, B. and Buller, J.

Ch. IV. § 14.
*What a counter-
 feiting.*

which was not done here; for, without rubbing, the money coined would not pass: and another observed, that the word in the statute was “*producing*,” in the present tense, and not materials *which would produce*. But all the other judges thought the conviction right. They considered, that the offence was complete when the piece was coloured; for it was then coloured with materials which produce the colour of silver; and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause. And it was observed, that a contrary construction would prevent any conviction until a wash was discovered which would in the first instance produce a perfect bright shilling or sixpence.

Rex v. Lavey,
 and Parker,
 O. B. Dec.
 1776. MS.
 Gould, J. and
 MS. Crown Caf.
 Ref.

*Bringing to the
 surface the latent
 silver in a blank
 of mixed metal by
 means of dipping
 it in aqua fortis,
 which corrodes
 the base metal, is
 a colouring within
 the statute.*

Leach, 140. S.C.

A case under the like circumstances had been before expressly decided by the unanimous opinion of the judges to come within the statute. But there the doubt was not, as in the last instance, upon the necessity of rubbing the blank after it was taken out of the wash, in order to give it the appearance of silver; but whether the legislature did not intend such a colouring only as is altogether produced by some outward application. But they all thought that this process of extracting the latent silver by the power of the wash, from the body to the surface of the blank, was a colouring within the words of the act. They thought besides, that it might be charged as a colouring with silver; for the effect of the aqua fortis is to corrode the base metal, and leave the silver only on the superficies, and so the copper is coloured or cased with silver.

§ 15.
*Counterfeiting by
 officers of the
 Mint.*

1 Hale, 213.
 1 Hawk. ch. 17.
 s. 55.
 3 Inst. 16, 17.
 4 Blac. Com. 84.
 1 MS. Sum. 91.
 Ante, s. 3.

Not only all such as counterfeit the king's coin without his authority, but even such as are employed by him in the mint, come within these statutes, if for their own lucre they make the money of baser alloy, or lighter than by their indentures they are authorised and bound to do: for they can only justify their coining at all under such an authority; and if they have not pursued that authority, it is the same as if they had none. But it is not any mistake in weight or alloy that will make them guilty of high treason; the act must be wilful, corrupt, and fraudulent; for it must be laid and proved to be done traiterously. The stat. 8 & 9 W. 3. does indeed make a special exception of persons employed in his majesty's mint; which seems unnecessary, and would have been im-
 plied

plied by law, when they were employed by his majesty's authority in the sense before described. Nevertheless it was holden about Hilary term 13 W. 3. by all the judges, that in an indictment on that act it ought to be averred that the party was not employed in the mint, or authorized by the treasurer, &c.; because the exception of such persons is within the enacting clause; and the want of such an authority is part of the description of the offence itself. This question was moved by Mr. Justice Turton, who had convicted one upon this statute at York, upon an indictment which had not such an averment; and for this reason it was holden bad, and that the prisoner ought to be tried again, which was done at the Lent assizes 1702, before Powis, J., when the prisoner was attainted and executed.

Ch. IV. § 15.
Who are offenders.

MS. Tracy, 19.
Vide Cro. Cir.
Comp. 361.
1st edit.
Vide Bell's case,
Foth. 430. 3d ed.
& 1 Burr. 154.
post. f. 17.
1 MS. Sum. 92.

II. *The making, mending, or having any Instrument applicable to counterfeiting the Coin.*

§ 16.

Making, mending, or having instruments for coining.

By stat. 8 & 9 W. 3. c. 26. f. 1. "after the 15th of May 1697, no smith, &c. or other person whatsoever, (other than the persons employed in his majesty's mints in the tower of London or elsewhere, and for the use and service of the said mints only, or persons lawfully authorized by the lords commissioners of the Treasury or lord high treasurer of England for the time being,) shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending of any puncheon, counter-puncheon, matrix, stamp, dye, pattern, or mould, of steel, iron, silver, or other metal or metals, or of spaud, or fine foundry's earth or sand, or of any other materials whatsoever, in or upon which there shall be or be made or impressed, or which will make or impress, the figure, stamp, resemblance, or similitude of both or either of the sides or flats of any gold or silver coin, current within this kingdom; nor shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending of any edger, or edging tool, instrument, or engine, not of common use in any trade, but contrived for making (a) of money round the edges with letters, grainings, or other marks or figures resembling those on the edges of money coined in his majesty's mint; nor any press for coinage, nor any cutting engine, for cutting round blanks, by force of a screw, out of flattened bars of gold, silver, or other metal; nor shall knowingly buy or sell, hide or conceal, or without lawful authority or

8 & 9 W. 3.
c. 26. made perpetual by 7 Ann.
c. 25.

(a) *Quere, a misprint in the printed statute for marking.*

Ch. IV. § 16.
Making, &c. or
having instru-
ments for coining.

sufficient excuse for that purpose, knowingly have in his or their houses, custody or possession, any such puncheon, counter-puncheon, matrix, stamp, dye, edger, cutting-engine, or other tool or instrument before mentioned. And every such offender and offenders, their counsellors, procurers, aiders, and abettors shall be guilty of high treason, and being thereof convicted or attainted, shall suffer death," &c.

Conveying out of
the mint, or con-
cealing such in-
struments.

By f. 2. "If any person or persons whatsoever after the 15th of May 1697, shall, without lawful authority for that purpose, wittingly or knowingly convey or assist in conveying out of any of his majesty's mints any puncheon, counter-puncheon, matrix, dye, stamp, edger, cutting-engine, press, or other tool, engine, or instrument used for or about the coining of monies there, or any useful part of such tools or instruments; such offenders, their counsellors, procurers, aiders, or abettors, as also all and every person and persons knowingly receiving, hiding, or concealing the same, shall be adjudged guilty of high treason, and being convicted or attainted thereof shall suffer death," &c.

7 Ann. c. 25. f. 2.
Prosecution with-
in six months.

By 7 Ann. c. 25. f. 2. the prosecution of such as offend against the above act, "by making, or mending, or beginning or proceeding to make or mend, any coining tool or instrument therein prohibited, may be commenced within six months after such offence committed."

8 & 9 W. 3.
c. 26. f. 5.
Coining tools, &c.
to be seized to be
produced as evi-
dence.
Post.

Also by f. 5. of the same statute of King William, "If any puncheon, dye, stamp, edger, cutting engine, press, flask, or other tool, instrument, or engine used or designed for coining or counterfeiting gold or silver money, or any part of such tool or engine, shall be hid or concealed in any place, or found in the house, custody, or possession of any person, not then employed in the coining of money in some of his majesty's mints, nor having the same by some lawful authority, then any person discovering the same may seize and carry them forthwith to some justice of peace of the county or place, to be produced in evidence at the trial of the offender; and they shall be afterwards defaced and destroyed by order of the court," &c. By f. 7. no attainder by this act shall corrupt the blood.

§ 17.
Construction of
the statute of
William.
Ante, f. 15.

As to the manner of drawing the indictment on the statute of William, I have before spoken of it.

John

John Bell was indicted on the statute, for that he not being a person employed in or for the mint, &c. knowingly, feloniously, and traiterously had in his custody a prefs for coinage, without any lawful authority, or sufficient excuse for that purpose, against the duty of his allegiance, &c. It was proved, that the defendant knowingly had a prefs in his house and custody, of the same sort as those used in the mint for coinage, and proper to be made use of for coining guineas, shillings, and louis d'ors, or any other smaller pieces, and also proper for making certain manufactures. It did not appear that it was ever made use of or intended to be made use of by the defendant for such manufactures, or for coining any of the current coin of this kingdom: but it was proved, that he intended to use it for coining louis d'ors and other foreign pieces, not the current coin of this kingdom. And no proof was given by him of his being employed in the mint, &c.; or that he had any lawful authority, or any excuse but as aforesaid, for having the said prefs in his custody or possession. The defendant was found guilty: but two points were reserved for the consideration of the judges; 1. Whether a prefs for coinage be one of the tools or instruments within that clause of the act on which the indictment is founded? And if it were, 2. Whether the facts stated amounted to a sufficient excuse, to save the defendant from the penalties of the act. A majority of the judges answered both questions in the affirmative; considering on the second question, that this act was only intended to prevent the counterfeiting the current coin of this kingdom, and not foreign coin. Lord C. J. Ryder and Foster, J. dissented from the last resolution; considering that the act, though principally levelled against counterfeiters of the current coin of the kingdom, was not confined solely to that object. That the intention of the legislature was to keep out of private hands, as far as possible, all means of counterfeiting the coin; and therefore makes it high treason to be knowingly possessed of such instruments, in fact, without lawful authority or sufficient excuse. That it was therefore incumbent on the defendant to shew such lawful authority or sufficient excuse. But that, supposing his mere intention to be an ingredient in the case, the intention found of using the prefs for the purpose stated did not amount to a sufficient excuse; and upon the fullest consideration afterwards Mr. Justice Foster was

Ch. IV. § 17.
Having, &c. in-
struments for coin-
ing.

Bell's case, O. B.
1753. Folt. 430.
A prefs for coin-
age is a tool or
instrument within
that branch of
the stat. 8 &
9 W. 3. c. 26.
which makes it
treason to have
the same know-
ingly in the par-
ty's custody.
Having such in
possession for the
purpose of coining
foreign gold coin
not current here,
ruled to be a suf-
ficient excuse to
take the case out
of the act. Sed
dubietur, et
quere.

On a conference
at Serjeant's Inn,
30th June 1755.

Vide the Preface
to the 3d edit. of
Folt. C. L. p. 8.

Ch. IV. § 17.
*Flawing, &c. in-
struments for coin-
ing.*

Lennard's case,
Taunton Lent
assizes 1772,
MS. Cro. Caf.
Ref.

1 MS. Sum. 93.
2 Blac. 807.
& Leach, 85.
S. C.

*A mould for coin-
ing is a tool or
instrument within
the statute 8 &
9 W. 3 c. 26.
the unlawful
custody of which
is treason.*
Easter term
1772, (absent
De Grey, C. J.)

*A mould on
which is im-
pressed the re-
semblance of a
shilling inverted
is sufficiently de-
scribed in the
indictment as
"a mould on
"which was
"impressed the
"figure of a
"shilling;"
though it mig't
be more properly
described as a
mould which
would make such
figure.*

of opinion that the case did fall within the act; in which opinion it appears that Lord Hardwicke fully concurred.

Hugh Lennard was indicted for high treason on the stat. 8 & 9 W. 3., for having in his custody and possession, without any lawful or sufficient excuse, one mould made of lead, on which was made and impressed the figure, stamp, resemblance, and similitude of one of the sides or flats of a shilling, viz. the head side, &c. The prisoner being convicted, it was submitted to the judges, 1st, Whether the mould found in the prisoner's custody be comprised under the general words, "*other tool or instrument before mentioned,*" so as to make the unlawful custody of it high treason: it being observable that the words, "*pattern or mould,*" which are mentioned in the first part of the act, are omitted in the latter. 2dly, If it be so comprised, Whether it should not have been laid in the indictment to be *a tool or instrument*, in the words of the act? The judges were unanimously of opinion, that the mould was a tool or instrument, mentioned in the former part of the statute, and therefore included under the general words in the latter part; and that having been before expressly mentioned by name, it need not be averred in the indictment to be such tool or instrument. Another doubt afterwards arose, Whether the indictment properly laid it to be a mould, *on which was made and impressed the figure, &c. of a shilling?* the evidence being of a mould on which the resemblance of a shilling was inverted, and therefore more properly an instrument to make or stamp the resemblance of a shilling, than an instrument on which the resemblance was made. Yet the evidence was holden by most of the judges to support the indictment; for the stamp of the coin was impressed on it. But they, as well as the rest who doubted, agreed that the indictment would have been more accurate if it had stated that the prisoner had in his custody a mould that *would make* the figure of one of the sides of a shilling.

§ 18.

*Resemblance to a
common purpose
of the instrument
to the coin is suffi-
cient.*
Ante, f. 13.

The degree of similitude to the real coin which the tools or instruments must be capable of impressing, in order to bring the case within the statute of King William, seems to be governed by the same considerations as were before noticed in regard to the counterfeit coin itself. The jury are to judge whether the instrument in question be calculated to impress the

the figure, stamp, resemblance, or similitude of the coin current. These latter words extend the offence beyond an exact imitation of the original and proper effigies of the coin: and the intention of the legislature would be entirely defeated by a different construction.

Rowland Ridgeley was indicted, for that he, not being employed by the mint, &c. knowingly, feloniously, and traitterously had in his custody and possession one puncheon made of iron and steel, in and upon which was impressed and made the figure, resemblance, and similitude of the head side of a shilling without lawful authority, &c. He was charged in another count with having such a puncheon, which would make and impress the figure, &c. The puncheon was found in the prisoner's lodging, with a quantity of bad money: and the jury were satisfied that he had it knowingly, and for the purpose of coining, but would have found a verdict only that the puncheon was knowingly in his custody; submitting to the court whether the proof of such puncheon being found satisfied the words of the act. The verdict however was taken generally; and as the officers of the mint remembered no prosecution under this branch of the act, the court wished to have the opinion of the judges thereon. It appeared by the evidence of the engraver of the mint, that the puncheon was complete and ready for use; and that the manner of making it is this: a shilling is cut away to the outline of the head; that outline is fixed upon a piece of steel, which is filed or cut close to the outline, which makes the puncheon; the puncheon makes the dye, which is the counter-puncheon. That a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never so made at the mint; but after the dye is struck the letters are engraved upon it. That a puncheon alone without the counter-puncheon will not make the figure. That to make an old shilling current, nothing else was necessary but such a puncheon. That the puncheon was hardened and ready for use; but it was impossible to say that the shillings found on the prisoner were made with it, the impression was so faint, though they had all the appearance of it. The judges were all of opinion that the prisoner's case came within the words of the stat. 8 & 9 W. 3.

The word *puncheon* is expressly mentioned in the act; and it will

Ch. IV. § 18.
Having, &c. instruments for coining.

Ridgeley's case,
O. B. Dec.
1778, MS.
Gould and Bul-
ler, Js. Leach,
1-2 S. C.

Having knowingly in possession a puncheon for the purpose of coining is within the stat. 8 & 9 W. 3. though that alone, without the counter-puncheon, will not make the figure, &c. And though such puncheon had not the letters, yet held sufficiently described in the indictment as a puncheon which would impress the resemblance, &c. of the head side of a shilling.

At Serjeants'
Inn, 23 Jan.
1779. (absent
De Grey, C. J.)

Ch. IV. § 18.
Having, &c. in-
struments for coin-
ing.

will by the means of the counter-puncheon or matrix impress, &c. to the similitude of the current coin. The words "figure, stamp, resemblance, or similitude," in the act, do not mean an exact figure, &c.; but if the instrument impress a resemblance in point of fact, such as will impose on the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the act would be quite evaded; for the letters would be omitted on purpose. The puncheon in question was one to impress the head of King William; and the shillings of his reign, though the letters were worn out, are current coin of this kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though there were no letters. This was compared to the case of counterfeiting the great seal mentioned in 1 Hale 184., where he says, that the omission or addition of words in the inscription of the true seal, for the purpose of evading the law, would not alter the case. And the judges all agreed, that it was not necessary to prove that money was actually made with the instrument in question.

Ante, ch. 2. s. 25.

Not necessary to
prove money made
with the instru-
ment, &c.

§ 19.

Sutton's case,
East. 10 G. 2.
Rep. temp.
Hardw. 370.
Indictment for
misdemeanor at
common law for
having tools for
coining in posses-
sion, with intent
to use them.

In Sutton's case, the indictment, which was framed as for a misdemeanor at common law, charged that the defendant, without any lawful authority, had in his custody and possession two iron stamps, each of which would make and impress the figure, resemblance, and similitude of one of the sceptres impressed upon the current gold coin of this kingdom, called half guineas, with intent to make the impression of sceptres on divers pieces of silver coin of this realm, called sixpences, and to colour such pieces of the colour of gold; and fraudulently to utter them to his majesty's subjects as lawful half guineas; against the peace, &c. Page, Probyn, and Lee, Justices, held, that the bare having such instruments in possession, with the intent charged, was a misdemeanor: but Lord Hardwicke thought that the bare possession was not unlawful, unless made use of, or unless made criminal by statute, as in the instance of the stat. 8 & 9 W. 3.

III. *Impairing the Coin.*

This offence stands at this day on the following statutes:

By stat. 17 Ed. 4. c. 1. No person shall melt down any money of gold or silver sufficient to run in payment, upon pain of forfeiture of the value: and by stat. 13 & 14 Car. 2. c. 31. melting down any current silver money of the realm" shall be punished with forfeiture of the same, and double the value; and if done by a freeman of a town, with disfranchisement; if by any other person, with six months' imprisonment.

§ 20.
Vide 2 Inst. 577.
17 Ed. 4. c. 1.
13 & 14 Car. 2.
c. 31. post.
f. 32, &c.

The stat. 5 Eliz. c. 11. reciting that the stat. 3 Hen. 5. c. 6. concerning clipping, &c. is repealed by stat. 1 Mar. ft. 1. c. 1., and the mischief that happens thereby; enacts (f. 2.) "that clipping, washing, rounding, or filing, for wicked lucre or gain's sake, any of the proper monies or coins of this realm, or the dominions thereof, or of the monies and coins of any other realm, allowed and suffered to be current within this realm, or the dominions thereof, or that hereafter at any time shall be lawful monies or coins of this realm, or of the dominions thereof, or of any other realm, and by proclamation allowed to be current here, shall be adjudged high treason; and the offenders, their counsellors, consenters, and aiders, traitors, being thereof lawfully convicted or attainted." By f. 4. there shall be no corruption of blood or loss of dower.

5 Eliz. c. 11.
Vide 1 Hale, 216.
220. 267. 318.

(1 Hale, 327.)

The auxiliary statute of 18 Eliz. c. 1. declaring that the falsifying, impairing, diminishing, or lightning of such last mentioned money was not within the stat. 5 Eliz. which ought to be taken strictly according to the words thereof, &c. enacts "that if any person or persons shall, for wicked lucre or gain's sake, by any art, ways, or means whatsoever, impair, diminish, falsify, scale, or lighten the proper monies or coins of this realm, or any the dominions thereof, or the monies or coins of any other realm, allowed to be current at the time of the offence committed within England or any the dominions of the same by proclamation, &c.; the offenders, their counsellors, consenters, and aiders, being lawfully thereof convicted or attainted according to the due order and course of the laws, shall be adjudged guilty of high

18 Eliz. c. 1.

Ch. IV. § 20.
Impairing.

1 Hale, 221, 2.
MS. Burnet, 19.
Vide ante, f. 4.
&c. as to Irish
coin.
1 Hale, 220. 228.

high treason." By f. 2. no corruption of blood or loss of dower shall ensue.

It is clear that the impairing of Irish coin, though not current in England, is within the express words of these statutes.

The clipping, &c. must be for gain or lucre under these statutes, and must be so laid in the indictment; which must also pursue the words of the statutes in describing the offence; and conclude against the form of the statute, because they were in some respects introductive of a new law.

6 & 7 W. 3. c. 17.

(a) Qu. and for
er in the printed
statute.

By the stat. 6 & 7 W. 3. c. 17. f. 4. "for the better preventing the clipping, diminishing, or impairing the current coin of this kingdom, if any person shall buy or sell, and (a) knowingly have in his custody or possession, any clippings or filings of the current coin of this kingdom, he shall forfeit the same, and also 500 l. half to the king and half to the informer; and shall also be branded in the right cheek with a hot iron with the letter R, and be imprisoned till payment of the 500 l. By f. 8. of the same act, the very possession of bullion, under certain circumstances of suspicion, throws the onus upon the party indicted of proving that it was neither coin nor clippings melted, under pain of imprisonment for six months.

3 Inst. 18.

By the stat. De Monetâ, &c. if money false or clipped be found in the hands of any that is suspicious, he may be imprisoned until he have found his warrant.

IV. Importing counterfeit or light Money into the Kingdom.

§ 21.
25 Ed. 3. st. 5.
c. 2.
Vide 1 Hale, 216.

First of counterfeit money. By the stat. 25 Ed. 3. st. 5. c. 2. "If a man bring false money into this realm, counterfeit to the money of England, as the money called Lushburg, or other like to the said money of England, knowing the money to be false, to merchandize or make payment, in deceit of our said lord the king and his people," it is high treason.

1 & 2 Ph. & M.
c. 11.
Vide 1 Hale, 317.
ante, f. 6.

By stat. 1 & 2 Ph. & M. c. 11. it is enacted, "that if any person shall bring from parts beyond the sea into this realm, or into any of the dominions of the same, any false or counterfeit coin or money, being current within this realm as aforesaid, (viz. gold and silver coin of foreign realms cur-

rent

rent here by the sufferance and consent of the crown, which must be by proclamation or by writ under the great seal,) knowing the same coin or money to be false and counterfeit, to the intent to utter or make payment with the same within this realm or any the dominions of the same, by merchandizing or otherwise; such offenders, their counsellors, procurers, aiders, and abettors shall on conviction or attainder be deemed traitors."

It is said by Lord Hale, that at common law the counterfeiting (meaning of our own coin) beyond sea seems not to have been such a treason as could be tried here, in like manner as adhering to the king's enemies might be; and that therefore the importing was made treason by the act of Edward 3. He cites no authority for this position, the grounds of which I can find no where suggested. Certainly however the necessity of this branch of the law was no less apparent, whether a subject of England counterfeiting the king's coin abroad were or were not amenable to justice; for such counterfeiting might be by a foreigner owing no allegiance to the crown of this realm; and therefore the making this provision is of itself no argument in support of such an opinion.

It has been shewn before what kind of money it is, the bringing in of which is prohibited by these statutes; and what shall be said to be a sufficient resemblance of the counterfeit to the true coin. It has been also shewn that the money so prohibited must be brought from some foreign place out of the king's dominions into some place within the same. But further, the acts are confined to the importer, and do not extend to a receiver at second hand; though by force of an ancient statute *de monetâ*, if false money be found upon a suspicious person, he may be arrested till he have found his warrant. And such importer must also be averred and proved to have known that the money was counterfeit.

It is said by Lord Coke, that the importer must also merchandize therewith, or make payment thereof: but if he import it with intent so to do, it is within the words, and, according to the better opinion, within the intent and true construction of the statutes of Ed. 3. and Philip & Mary; to which purpose the latter statute is explanatory of the former.

For

Ch. IV. § 21.
Importing counterfeit money.

Vide 1 Hale, 228.

1 Hale, 225.

§ 22.
Construction of the statutes.
Ante, f. 1. 4. § 9.
& ante, f. 13. 18.
Ante, f. 6.
The counterfeit must be brought from foreign parts.
1 Hale, 227, 8.
9. 317.
3 Inst. 18.
Sum. 21.
1 Hawk. ch. 17. f. 65. 68.
Vide post. f. 26.
Confined to the original importer.

3 Inst. 18.
1 Hale, 227. 318.
1 MS. Sum. 30.
94. 1 Hawk. ch. 17. f. 69.

Ch. IV. § 22.
Importing coun-
terfeit money.

For though the best trial and proof of an intent be by the act done, yet it may also be evinced by a variety of circumstances, of which the jury are to judge. At any rate, such intent must be averred in the indictment.

§ 23.

Importing coun-
terfeit gold or
silver foreign coin,
not current.

37 G. 3. c. 126.
f. 3. Vide the
preamble, ante,
f. 10.

The above construction is confirmed, and a new offence also created by the stat. 37 Geo. 3. c. 126.; the 3d section of which enacts, "that if any person or persons shall bring into this realm any such false or counterfeit coin as aforesaid, (i. e. by sect. 2. "any kind of coin, not the proper coin of this realm, nor permitted to be current within the same,") resembling or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, to the intent to utter the same within this realm, or within any dominions of the same; every such person shall be deemed guilty of felony, and may be transported for any term of years not exceeding seven."

Vide ante, p. 161,
162.

Several matters are to be remarked in this statute: 1st, It embraces the importers of known counterfeit gold or silver foreign coin, though *not current* within the realm, who were not included in the stat. 1 & 2 Ph. & M. c. 11. 2dly, Accessories before are not mentioned; but these are incident to every felony. Yet quære, If they are liable to the punishment of transportation? 3dly, An importation *with intent to utter* is sufficient, without any actual uttering; which intent must be collected from circumstances. But though an actual uttering may be the best evidence of such intent, yet it seems safest that the indictment should follow the words of the statute. 4thly, The offence created is the bringing such counterfeit money into *this realm*, with intent to utter the same *within this realm, or within any dominions of the same*; in which respect the wording is very different from that of the stat. 1 & 2 Ph. & M. c. 11. which prohibits the *bringing into this realm or into any of the dominions of the same* any counterfeit coin being current *within this realm*. I remark this the rather, because by a subsequent statute, viz. 38 Geo. 3. c. 67. the exporting or shipping for that purpose any sort of counterfeit coin, whether resembling our own or any foreign coin, in order to its being sent to any of our colonies in the West Indies or America, only subjects the party to a forfeiture;

Post. f. 25.

ture; and yet the very fact of such exportation may afford pregnant evidence that it was with intent to utter such base money within those *dominions of this realm*. Nor can it in reason affect the merits of an offender, whether he has collected such base money from the venders of it in this country, or whether he has himself imported it hither, which is necessary to bring him within this clause; his object in exporting it from hence into the British West Indies or America being the same in both instances. But the former case does not seem to be provided for by the stat. 37 Geo. 3.

Ch. IV. § 23.
Importing counterfeit, &c. coin not current.

Another offence is created by the stat. 14 G. 3. c. 42. intitled, an act to prohibit the importation of light silver coin from foreign countries into Great Britain and Ireland. The act recites, that whereas considerable quantities of old silver coin of this realm, or coin purporting to be such, greatly below the standard of the mint in weight, have been lately imported into this kingdom; and that it is expedient to prevent a practice which may be carried on at this time, to the great detriment of the public; enacts, that from the 1st June 1774 all silver coin of this realm, or any money purporting to be such, which is not of the established standard of the mint in weight and fineness, shall be prohibited to be imported or brought into the kingdoms of Great Britain or Ireland from foreign countries; and if any silver coin being, or purporting to be the coin of this realm, exceeding in amount the sum of five pounds, shall be found by any officer of his majesty's customs on board any ship or vessel, in any port, &c. or in any boat or other vessel upon the water within the said kingdoms, or in the custody of any person coming directly from the water side, or from the information of one or more persons in any house or other place, on search there made in the manner directed by the stat. 14 Car. 2. &c., the officer may seize the same; and if upon examination it shall appear to be of the standard weight, it shall be restored, otherwise it shall be seized and confiscated in the manner therein mentioned, and after condemnation melted down:

§ 24.
14 G. 3. c. 42.
made perpetual
by 39 G. 3. c. 75.

Ch. IV. § 25.
Exporting counterfeit money.

§ 25.

V. *Sending counterfeit Coin, &c. out of the Kingdom, for the purpose of its being imported into the British Colonies in America or the West Indies.*

38 G. 3. c. 67.

By stat. 38 Geo. 3. c. 67. s. 1. "All copper coin whatsoever, not being the legal copper coin of this kingdom, and all counterfeit gold or silver coin, made to the similitude or resemblance, or intended to resemble, any gold or silver coin either of this kingdom or of any other country (a), which shall under any pretence, name, or description whatsoever be exported or shipped, or laden or put on board any ship, vessel, or boat, for the purpose of being exported from this kingdom to the island of Martinique, in the West Indies, or any of his majesty's islands or colonies in the West Indies or America, shall be forfeited," &c. And by s. 2. "Every person who shall so export, or ship, lay or put on board any ship, vessel, or boat, in order to be so exported, or cause to be so shipped, &c., or shall have in their custody, in order to be so exported, any such coin as aforesaid, shall forfeit 200 l. and double the value of such coin, to be recovered by bill, suit, action, or information in any court of record at Westminster." But genuine gold or silver coin may be exported from hence to Ireland since the repeal of the stat. 19 H. 7. c. 5. by the stat. 20 Geo. 3. c. 18.

vide 37 G. 3.
c. 120. s. 6.
Ance. s. 23.

Exporting genuine money to Ireland.
22 G. 3. c. 18.

VI. *Receiving, uttering, or tendering of counterfeit coin.*

§ 26.

Receiving, uttering, or tendering base coin.

Treason.

1 Hale, 214.
Fost. 343.

Felony.

MS. Burnet, 40.

These may amount to different degrees of offence according to the circumstances. If A. counterfeit the gold or silver coin current, and by agreement before such counterfeiting B. is to receive and vend the money, he is an aider and abettor to the act itself of counterfeiting; and consequently a principal traitor within the law. In the case of the copper coin, he would be an accessory before the fact to the felony within the stat. 11 Geo. 3. c. 40. And if B. had

(a) The general current money of the British West Indies is Spanish; which accounts for this branch of the law.

done this afterwards for A.'s benefit, without any such agreement precedent to the counterfeiting, but yet knowing the fact; this seems to be the same as a receiving of the principal, because he maintains him. But if he had merely vented the money for his own benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanor before the stat. 15 Geo. 2. hereafter mentioned. Yet if he then knew by whom it was counterfeited, it might be evidence of his concealment of the treason, and therefore a misprision of the same. In like manner I have before shewn, that the statutes against the importation of false money do not extend to the receivers, not having taken any part in the bringing in of such money.

Ch. IV. § 26.
Receiving, uttering, or tendering base coin.

Misdemeanor.
1 Hale, 214.
372.
1 MS. Sum. 96.
MS. Burnet, 20.
Kel. 33
post. f. 28.
1 Hawk. ch. 17.
f. 56. & vide
Fost. 342.
Misprision of treason.
Ante, f. 22.

By stat. 8 & 9 W. 3. c. 26. f. 6. "Whoever shall take, receive, pay, or put off any counterfeit milled money, or any milled money whatsoever, unlawfully diminished and not cut in pieces, at or for a lower rate or value than the same by its denomination doth or shall import or was coined or counterfeited for, shall be guilty of felony." By f. 7. the corruption of blood is saved; and by f. 9. the prosecution must be commenced within three months after the offence committed.

§ 27.

Receiving, paying, or putting off, Treason.
8 & 9 W. 3.
c. 26. made perpetual by 7 Ann.
c. 25. f. 3.

This statute mentioning "counterfeit money," generally, must it seems be confined to gold or silver coin, in the manner before described. But by stat. 11 Geo. 3. c. 40. f. 2. "If any person after the 24th of June 1771, shall buy, sell, take, receive, pay, or put off any counterfeit copper coin, not melted down or cut in pieces, at or for a lower rate or value than the same by its denomination imports, or was counterfeited for, he shall be adjudged guilty of felony."

Ante, f. 1. 9.
post. Cirwan's case, p. 182.
11 G. 3. c. 40.
Vide ante, f. 11.

The putting off under these statutes means an actual passing or getting rid of the money, and not merely an attempt to do so; as by tendering it to another who returns it again, refusing to accept it; which is a distinct offence provided for by the stat. 15 Geo. 2. after-mentioned. In the case of Wooldridge, who was indicted on the stat. 8 & 9 W. 3. c. 26. f. 6. for putting off counterfeit money to a Mrs. Levey, it appeared that he had carried a large quantity of such money to her house, which he had agreed to put off to her, and she to receive from him, at the rate of 29s. for every guinea; and having laid the shillings down on a table,

What a putting off.

Wooldridge's case, Leach, 2 C. 1.
G. B. Feb. 1784.
coram Perren, B. and Gould, J.
Sess Pap. p. 482.
S. C.

Ch. IV. § 27.
Receiving, utter-
ing, or tendering
base coin.

she was proceeding to count them out at that rate, and had counted out part of the heap when the officers entered the room, and apprehended them, before she could pay the prisoner for those she had selected. This was ruled not to be a completion of the offence charged, and the prisoner was acquitted.

It must be vented
at a lower rate,
&c.

The mere venting of the money does not come within these acts, unless it be done at a lower value than the coin imports; and it should be so stated in the indictment.

Must be charged
to be unlawfully

Nor is it felony within the stat. 8 & 9 W. 3. to put off *diminished money*, by which I understand genuine money diminished, if it be not stated to be *unlawfully* diminished.

diminished. Tooke v. Hollingsworth, 5 Term Rep. 217.

Should state to
whom put off,
&c.
MS. Tracy.

At the sessions at the Old Bailey before Michaelmas term 1702, a woman was indicted for putting off ten pieces of counterfeit gilt money like guineas to divers persons unknown. Holt, C. J. said, that the names of the persons ought to be mentioned and be laid severally; yet he tried the prisoner and she was convicted. This must be governed by the same rule as prevails in the case of stealing the property of persons unknown.

What is milled
money, &c.
Rex v. Bunning,
alias Pendegrast,
O. B. Sept. 1794.
MS. Jud.

To support an in-
dictment for put-
ting off counterfeit
MILLED MO-
NEY, it is not
necessary to prove
that the counter-
feit was MILL-
ED.

HIL. Term 1795.

As to what shall be considered as milled money within the statute of William; James Bunning was indicted for putting off to J. P. nine pieces of false and counterfeit *milled* money and coin, each counterfeited to the likeness of a piece of legal and current *milled* money and silver coin of the realm, called a shilling, at a lower rate and value than the same did by the denomination import and were counterfeited for; i. e. at so much, &c. The fact of knowingly putting off counterfeit shillings at a lower value than according to their denomination was fully proved; but it could not be proved that the money had any marks of *milling* upon it. The prisoner being convicted, the objection was referred to the judges, who all held the conviction right. Milled money is so called to distinguish it from hammered money^(a); and all the money now current is milled, i. e. passed through a mill or press to make the plate out of which it is cut of a proper thickness; though by a vulgar error it is frequently supposed to mean

(a) I am informed there has been no hammered money since the time of Car. 2. and by stat. 9 W. 3. c. 2. the currency of all hammered silver coin after January 1697 was prohibited.

the marking on the edges, which is properly termed *graining*. Ch. IV. § 27.
The judges therefore thought it unnecessary that the coun- *Receiving, utter-*
terfeit money should appear to have been milled : for consider- *ing, or tendering*
bafe coin.
ing *milled-money* as one word, (as if written with a hyphen,) *Vide 8 & 9 W. 3.*
and descriptive of the money now current, if the counterfeit *c. 26. f. 3.*
resemble the money which if genuine would have been
milled, it is enough.

The like resolution was made in the case of Hannah Dor- *Hannah Dor-*
rington; and also in the case of Jacobs and Lazarus; which *rington's case.*
were considered by the judges at the same time. *Case of Jacobs*
and Lazarus,
O. B. January 1795, MS. Jud.

The punishment under the abovementioned statutes of *Punishment.*
W. 3. and Geo. 3. is burning in the hand, and imprisonment *Rex v. West &*
not exceeding a year; and that under the stat. 18 Eliz. c. 7. *others, O. B.*
f. 3. *Sept. 1780.*
1 MS. Sum. 91.

I have before remarked in what views the uttering of base *Ante, f. 26.*
money knowingly may be considered, according to the cir-
cumstances under which the act is done, and particularly in
cases where it is uttered in concert with the coiner : but as
such concert must always be difficult of proof, the legislature
have provided against the fact of uttering it knowingly.

By stat. 15 Geo. 2. c. 28. f. 2. " If any person shall after *§ 28.*
the 29th of September 1742 utter, or tender in payment any *Uttering or ten-*
false or counterfeit money, knowing the same to be so, to *dering in payment.*
any person or persons, and shall be thereof convicted, he shall *15 G. 2. c. 28.*
suffer six months' imprisonment, and find sureties for good
behaviour for six months further; and on conviction for a
second offence shall suffer two years imprisonment, and find
sureties for two years more; and on conviction for a third
offence shall be adjudged guilty of felony without benefit of
clergy."

By f. 3. " If any person shall after the said 29th September *Further punish-*
utter or tender in payment any false or counterfeit money, *ment if the utter-*
knowing the same to be so, to any person or persons; and *er have other ba e*
shall either the same day or within ten days then next utter *money in possion*
or tender in payment any more or other false or counterfeit *at the time of*
money, knowing the same to be so, to the same or any other *uttering, or shall*
person or persons; or shall at the time of such uttering or *within 10 days*
tendering have about him in his custody one or more pieces *after utter more.*
of counterfeit money, besides what was so uttered or tender-

Ch. IV. § 28.
Uttering or tendering base coin.

2d enhanced offence, felony without clergy.

Pardon on discovery.

Trial and evidence.

Limitation of time.

Certificate of former conviction.

Ante, f. r. 9. 27.
1 Hale, 211.

Cirwan's case,
Oxford Sum.
Ass. 1794.
MS. Jud.

Hil. Term 1795.

ed; he shall be deemed and taken to be a common utterer of false money; and being thereof convicted shall suffer a year's imprisonment, and find sureties for his good behaviour for two years more: and for a second offence he shall be adjudged guilty of felony without benefit of clergy."

By f. 4. the corruption of blood is saved; and by f. 8. any offender out of prison discovering two or more persons guilty of any of the said offences, so as they be thereof convicted, shall be pardoned. By f. 5. offenders shall be indicted, arraigned, tried, and convicted by such like evidence and in such manner as counterfeiters of the coin; with a proviso that the prosecution be commenced within six months next after the offence committed.

By f. 9. "If any person be convicted of uttering or tendering any false or counterfeit money as aforesaid, and shall afterwards be guilty of the like offence in any other county or city, the clerk of the assize or clerk of the peace of the county or city where such conviction was had, shall, at the request of the prosecutor or any other on his majesty's behalf, certify the same by a transcript in a few words, containing the effect and tenor of such conviction, for which certificate 2s. 6d. and no more shall be paid; and such certificate being produced in court shall be sufficient proof of such former conviction."

This statute also mentioning counterfeit money generally, must, as was before observed, be confined to the gold and silver coin of the realm.

Francis Cirwan was indicted for "unlawfully uttering and tendering in payment to J. H. ten counterfeit halfpence, knowing them to be counterfeit;" and this was laid in the one count against the form of the statute, and in another, generally. The defendant was convicted on the general count, it being admitted at the trial that there was no statute applicable to the fact. But upon reference to all the judges, they held the conviction wrong, it not being an indictable offence.

§ 29.
Construction on
f. 3. of stat.
15 G. 2. c. 28. Eliz. Tandy's case, O. B. Jan. 1799. MS. Jud.

An indictment against Elizabeth Tandy on the act of the 15 Geo. 2. charged her in the first count with having on

the

the 15th December, 39 Geo. 3. uttered to one George Swinburn a counterfeit half-crown, knowing it to be so; and a second count charged her with having on the said 15th December, &c. uttered another counterfeit half crown to the same person. The prisoner having been convicted on both counts, it was referred by Mr. Justice Heath to the judges to consider what judgment was proper to be passed on this record; whether the uttering the counterfeit money twice on the same day, being stated in two counts, would enable the court to pronounce the greater punishment inflicted by the 3d section, or whether it were to be restrained to the lesser punishment inflicted by the 2d section (a). In Hilary term 1799 the judges (absent Eyre, C. J., Buller and Heath, Js.) held, that this indictment was not sufficient to subject the prisoner to the larger penalty, as for uttering two pieces of counterfeit coin on the same day; there being no distinct averment of that fact. And upon the whole they thought it more adviseable only to give judgment of imprisonment for six months singly, and not on each of the counts.

Some doubt was at the same time entertained, whether a count charging two such utterings on the same day, to bring an offender within the third clause, should not conclude with an averment that the offender was a *common utterer of false money*, as that clause declares him to be. But this doubt was shortly after solved in the following case:

James Smith was indicted on the above statute, (15 & 16 G. 2. c. 28.) for that he on, &c. one piece of false and counterfeit money, made and counterfeited to the likeness and similitude of a piece of good, lawful, and current money and silver coin of this realm, called a half-crown, then and there unlawfully and deceitfully did utter to one J. F., he the said defendant, at the time when he so uttered the said piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit. And also that he the said defendant at the time when he so uttered the said piece, &c. as aforesaid, to wit, on the said day, &c. had about him in his custody and possession one other piece of false and counterfeit money, made and counterfeited to the

Ch. IV. § 29.
Uttering or tendering false coin.

Charging two utterings on the same day, each in a different count, will not warrant a judgment on the 3d section of the stat. 15 G. 2. c. 28. as for two distinct utterings on the same day, there being no precise averment of that fact.

Smith's case, coram Buller, J. at Maidstone Sum. Ass. 1799. MS. Buller, J. et alia MS. Jud. On an indictment on the statute 15 G. 2. c. 28. for uttering false money knowingly, and having about him at the time of such uttering other false money, the defendant may be adjudged to suffer the greater punishment of one year's imprisonment, and sureties for two years more, imposed by section 3. 3 al.

(a) It was observed that this form of indictment had prevailed at the O. B. and on the circuits.

though there be no averment in the indictment that the defendant was a common utterer of false money; for that is a conclusion of law from the facts so stated.

Ch. IV. § 29.
*Uttering or ten-
dering base coin.*

likeness, &c. of an half-crown; he the defendant then and there well knowing the said last-mentioned piece of false and counterfeit money to be false and counterfeit, against the form of the statute, &c. and against the peace, &c. After conviction judgment was respited to take the opinion of the judges, whether on this form of indictment the defendant were liable to suffer the greater punishment inflicted by the 3d section of the act, or only the lesser one provided by the 2d section; in other words, whether to bring the cases within the 3d section the indictment should not have concluded with a distinct averment, that the defendant was a common utterer of false money; or whether that were not the necessary conclusion of law from the facts stated. In Hilary term 1800 the judges, upon search of precedents for many years back, finding that judgment had been given for the greater punishment upon indictments drawn in this form, although some were to be found containing the averment in question, held such averment, though it would not hurt, was not necessary in order to warrant the greater punishment.

Rex v. Levi.

There was at the same time another case reserved of a similar conviction against Benjamin Levi, on which the same judgment was given.

§ 30.
*Uttering or ten-
dering foreign
base coin.*
37 G. 3. c. 126.
1. 4.

Provisions of a nature similar to those contained in the stat. 15 Geo. 2. c. 28. are now extended to foreign coin by stat. 37 Geo. 3. c. 126. f. 4. which enacts, "that if any person or persons shall after the passing of this act utter or tender in payment, or give in exchange, or pay, or put off to any person or persons any such false or counterfeit coin as aforesaid, (i. e. by f. 2 & 3. not the proper coin of this kingdom, nor permitted to be current within the same,) resembling, or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, and shall be thereof convicted, every such offender shall suffer six months' imprisonment, and find sureties for his good behaviour for six months more: and if the same person shall afterwards be convicted a second time for the like offence, he shall suffer two years' imprisonment, and find sureties for good behaviour for two years more: and if the same person shall afterwards offend a third time, and shall

Vide ante, in
margine.

1st offence.

2d offence.

3d offence

shall

shall be convicted of such third offence, he shall be adjudged guilty of felony without benefit of clergy."

Ch. IV. § 30.
Uttering or tendering foreign base coin.

By s. 5. "If any person shall be convicted of uttering or tendering any such false or counterfeit coin as aforesaid, and shall afterwards be guilty of the like offence in any other county, city, or place, the clerk of assize or clerk of the peace for the county, &c. where such former conviction shall have been had, shall at the request of the prosecutor, or any other on his majesty's behalf, certify the same by a transcript in few words, containing the effect and tenor of such conviction, [for which 2s. 6d. and no more shall be paid]; and such certificate shall be sufficient proof of such former conviction."

Certificate of former conviction.

By s. 6. of the same act, "If any person or persons shall have in their custody, without lawful excuse, any greater number than five pieces of false or counterfeit coin, of any kind or kinds, resembling, or made with intent to resemble or look like, any gold or silver coin or coins of any foreign prince, state, or country, or to pass as such foreign coin; every such person, being thereof convicted upon oath before one justice of the peace, shall forfeit all such false and counterfeit coin, which shall be cut in pieces by order of such justice; and shall for every such offence forfeit a sum not exceeding 5 l. nor less than 40 s. for every such piece of false or counterfeit coin which shall be found in the custody of such person; one moiety to the informer, the other to the poor of the parish where the offence was committed; and in default of payment forthwith shall be committed to the common gaol or house of correction, there to be kept to hard labour for three calendar months, or until such penalty be paid."

Having in possession foreign counterfeit coin.

This last section includes all counterfeit foreign coin therein described, whether current here or not.

By s. 7. justices of peace may grant warrants to search suspected places for foreign counterfeit coin; and such coin, and any implements for making it, when found, may be taken before such justices, who shall order the same to be secured for evidence, and to be afterwards destroyed.

VII. *As to general Matters relating to the Coin.*

§ 31.

Principal and accessories.

Ante, c. 2. f. 35.

1 MS. Sum. 99.

1 Hale, 214.

Ante, f. 26.

I have before shewn in what light accomplices or receivers, in all offences concerning the coin amounting to high treason, are considered. In those amounting only to felony, they follow the general rule applicable to felony. A few general instances will suffice. Two agree to counterfeit, and one does it in consequence of that agreement; they are both guilty. One counterfeits, and another by agreement beforehand afterwards puts it off; the latter is a principal: so if he put it off afterwards, knowing that the other coined it; for that makes him an aider: so if he furnished the coiner with tools or materials for coining.

*Indictment and evidence.**Judgment.*Ante, c. 2. f. 53.
70.

In like manner it will be sufficient to refer to what has been before said touching the form of the indictment and evidence applicable thereto, under the general head of high treason; and also touching the judgment, and punishment peculiar to offenders of this sort. The variations in any of these particulars by statute were shewn at the same time that the statutes themselves were set forth.

Commencement of prosecution within time limited.

Prosecutions under some of the acts referred to are limited to take place within a certain time. Amongst others, the stat. 8 & 9 W. 3. c. 26. f. 9. provides that no prosecution shall be made for any offence against that act, unless such *prosecution be commenced* within three months next after such offence committed. In Willace's case, who was indicted for high treason in colouring a piece of base coin resembling a shilling with materials producing the colour of silver, the evidence was, that on the 5th May 1797 search was made in the prisoner's lodgings in consequence of information; and upon the party's entering the room the prisoner immediately ran away. There was found in his room a quantity of base money such as described in the indictment, some in earlier some in more advanced stages of the process. The prisoner was apprehended the same evening and lodged in Durham gaol. He was afterwards carried before a magistrate, and by warrant dated 8th May was committed to gaol, charged on oath "with suspicion of high treason in *counterfeiting* the current money of this kingdom, viz. shillings," &c. The assizes at Durham were holden on the 8th of August; so that more than three months had elapsed between the commission

Rex v. James Willace, Durham Sum. Ass. 1797, afterwards before all the judges. MS. Jud. Information and proceeding before a magistrate held the commencement of prosecution, and not the preferring the indictment.

of the offence and the preferring of the indictment. But the judges, at a conference, unanimously held that the information and proceeding before the magistrate was the commencement of the prosecution within the meaning of the act; and that the variance between the manner of laying the offence in the indictment and charging it in the commitment made no difference.

Further it has appeared, that in respect to traitors of this kind there is not the same necessity for two witnesses to prove the treason as in the higher species of that offence; but they may be indicted, tried, convicted, or attainted by such like evidence, and in such manner and form, as felons in general; except that they are entitled to a peremptory challenge of thirty-five.

Rewards are given by the statutes 6 & 7 W. 3. c. 17. and 15 Geo. 2. c. 28. on the apprehension and conviction of coiners.

And by the same act of King William, s. 12. coiners, clippers, &c. are entitled to a pardon on discovery and conviction of two other offenders of the same description.

It remains only to add, that the legislature have made special provision for the suppression of base coin, and for the production of it in evidence against offenders of this description. By stat. 9 & 10 W. 3. c. 21. s. 1. any person to whom any silver money; and by stat. 13 Geo. 3. c. 71. s. 1. any person to whom any gold money shall be tendered, which shall be diminished otherwise than by reasonable wearing, or which from the appearance of it he shall suspect to be counterfeited, may cut, break, or deface the same: but if the same shall afterwards appear to have been lawful money, the person who cut, &c. shall take the same at the rate it was coined for: and every question respecting the validity of such coin shall be finally determined by the chief magistrate of the place.

By stat. 8 & 9 W. 3. c. 26. and the 11 Geo. 3. c. 40. and the 37 Geo. 3. c. 126. s. 7. before mentioned, houses and other places may be searched for tools, which when found, together with all false coin, shall be seized, and produced in evidence against the offenders, and afterwards destroyed.

Ch. IV. § 31.
General matters.

Michaelmas
1797.

Witnesses.

Ante, c. 2. s. 64.
1 Hale. 221.
1 MS. Sum. 50.
93. Foist. 239.
1 & 2 Ph. & M.
c. 11.

Reward.

See tit. Rewards,
more at large.

See tit. Pardon,
at large.

*Seizure of base
coin and tools for
coining; and pro-
duction of them in
evidence.*

9 & 10 W. 3.
c. 21.
13 G. 3. c. 71.

8 & 9 W. 3.
c. 26. s. 5.
11 G. 3. c. 40.
37 G. 3. c. 126.
*Coining tools, &c.
to be seized.*
Ante, s. 11. 16.
& 30.

Ch. IV. § 32.

Regulations and Offences concerning Bullion.

§ 32.

*Bullion.**Vide 2 Inst. 577.**Plowd. 336.*

With regard to bullion, which signifies properly either gold or silver in the mass, and is here intended to denote those metals in any state other than that of authenticated coin, the legislature for the prevention of frauds both with respect to the coin and to plate have made several provisions.

28 Ed. 1. st. 3.
c. 20.

By the stat. 28 Ed. 1. st. 3. c. 20. no goldsmith shall make any vessel, jewel, or any other thing of gold or silver, except it be of good and true allay, viz. gold not worse than the touch of Paris, and silver of sterling allay or better: and that the latter should be assayed by the wardens of the goldsmiths' company, and marked with the leopard's head; and any such made otherwise may be seized; and if he be attainted of the fact, he shall be punished by imprisonment, and ransom at the king's pleasure.

Ante, f. 1.

17 Ed. 4. c. 1.
1 Hale, 191.

What the standard of sterling gold or silver coin is has been before shewn; and by the stat. 17 Ed. 4. c. 1. it is provided, that no goldsmith shall sell any gold under the fineness of 18 carrats, nor silver under the allay of sterling.

4 H. 7. c. 2.
Vide 5 H. 4 c. 4.
1 Hale, 644.

By stat. 4 H. 7. c. 2. all silver fined or parted shall be made so fine that it may bear 12 penny-weight of allay in a pound weight, and yet be as good or better than sterling. By stat.

18 Eliz. c. 15.
Gold wares
22 carrats; silver
11 oz. 2 dwt.
8 W. 3. c. 8.
Standard for silver wares 11 oz.
10 dwt.

18 Eliz. c. 15. goldsmiths' wares are required to be not less in fineness than 22 carrats of gold, nor of silver less than 11 ounces 2 penny-weights. By stat. 8 W. 3. c. 8. after the 25th of March 1697, no person shall work or make any manufacture of silver, less in fineness than 11 ounces and 10 penny-weights of fine silver in every pound troy; nor put to sale, exchange, or sell any such made after that time, (unless it be silver wire or such small things as are not capable of receiving a mark,) until such time as the same shall be marked as therein described. And if the wardens and masters of the said mystery mark any plate for good contrary to the act, they shall also forfeit the value of the plate so deceitfully marked, to be recovered in like manner.

Wardens, &c.
fraudulently
marking, &c.

6 Geo. 1. c. 11.
f. 41.
Allowing two
different standards for silver
wares with re-
spective marks,
1 oz. 10 dwt.
and 11 oz. 2 dwt.

By stat. 6 Geo. 1. c. 11. f. 41. reciting, that it may be requisite for encouraging the several manufactures of wrought plate to continue both the standard of plate of 11 ounces 10 penny-weights, and also the standard of

11 ounces

11 ounces 2 penny-weights (*a*) to the pound troy, enacts, that from the 1st of June 1720 all silver vessels of plate or manufactured of silver shall not be less in fineness than those respective standards, each to be marked with distinguishing marks; the greater standard with the workman's mark, the mark of the wardens of the goldsmiths' company, and with the figure of a lion's head erased, and the figure of the Britannia; and the lesser standard with the workman's mark, that of the wardens of the goldsmiths' company, and with the figure of a lion passant, and the figure of a leopard's head; and that it shall not be lawful to make any manufactures of silver of a coarser alloy than above specified, under the penalties and forfeitures prescribed by any laws then in force concerning wrought plate.

Ch. IV. § 32.
Standard.

The stat. 12 Geo. 2. c. 26. reciting several prior statutes for regulating the standards of gold and silver plate, enacts, "that after the 28th of May 1739 no goldsmith, silversmith, or other person making, trading, or dealing in gold or silver wares, within England, shall work, or make, or cause, &c. any gold vessel, plate, or manufacture of gold whatsoever less in fineness than 22 carats of fine gold in every pound weight troy; or any silver vessel, &c. less in fineness than 11 ounces 2 penny-weights of fine silver in every pound troy; nor sell, exchange, or expose to sale, or export out of this kingdom any gold or silver manufacture, &c. less in fineness than such respective standards, on forfeiture of 10 l. for every such offence, one moiety to the king, the other to any informer who will sue; and in default of payment the defendant shall be committed by the court in which judgment shall be given thereon to the house of correction for the county, &c. where convicted, there to be kept to hard labour not exceeding six months, or until payment." The act contains exceptions of certain small wares particularly described. By s. 3. "Persons (other than the makers or workers thereof) dealing, &c. in gold or silver wares, exporting, selling, or exposing to sale the same worse than the respective standards, who shall within fourteen days after notice of the coarseness thereof discover to the party grieved, or to the master, wardens, or clerk of any of the companies of goldsmiths of the place where such dealer resides, the name and place of abode of the maker or worker thereof, or of the

12 G. 2. c. 26.
regulating standards of gold and silver wares.

Dealers, &c. exempt from prosecution on discovery of the maker.

(*a*) For this last standard vide stat. 13 Eliz. c. 15.

Ch. IV. § 32.
Standard.

person of whom such dealer really bought the same, and shall produce him if living, so that he may be prosecuted; and if such dealer shall give material evidence against such person, and the judge before whom the trial is had shall under his hand on the record certify the same, and also that there did not appear any ground to believe that such dealer, &c. was privy to the fraud; or if such dealer shall, on the trial of any suit or prosecution against himself, concerning the premises, prove that he delivered to such maker or worker a sufficient quantity of standard gold or silver to make the said wares, and paid a reasonable price for the fashion thereof, or paid the maker or worker or other person a market price for standard gold or silver of that weight, besides a reasonable price for the fashion thereof; then such dealer, &c. shall be discharged from any penalty or forfeiture to be incurred by this act for exporting, selling, or exposing to sale such coarse gold or silver wares, and from any action, suit, or prosecution for the same." Provided (s. 4.) "that such dealer, &c. need not give material evidence, or produce such certificate as aforesaid, in order to indemnify himself from any penalty or forfeiture under this act, unless such trial against such maker, worker, or other person of whom the said wares were bought, shall be had within four terms after such discovery made, nor unless reasonable notice shall be given to such dealer, &c. of the time of such trial."

*Limitation of
prosecution.*

*Marks.
Selling, &c. or
exporting gold or
silver wares
without such
marks.*

By s. 5. "after the 28th of May 1739 no goldsmith, silversmith, or other person whatsoever making or selling, trading or dealing in gold or silver wares, shall sell, exchange, or expose to sale, within England, any gold or silver manufacture whatsoever, made after that time, or export the same out of this kingdom, until such manufacture of gold (being of the standard of 22 carrats of fine gold per pound troy) and such manufacture of silver (being of the standard of 11 ounces 2 penny-weights of fine silver per pound troy) shall be marked with *the mark of the worker or maker*, which shall be *the first letters of his christian and surname*, and with these marks of the goldsmiths' company in London, viz. *the leopard's head, the lion passant, and a distinct variable mark or letter* to denote the year in which such plate shall be made; or with *the mark of the worker or maker*, and with *the marks of the assayers at York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne*; or plate (being of the standard of 11 ounces

10 penny-

10 penny-weights of fine silver per pound troy) with *the worker or maker's mark as aforesaid*, and with these marks of the said company, viz. *the lion's head erased, the figure of a Britannia*, and the said mark or letter to denote the year as aforesaid; or with *the worker or maker's mark, and the marks of one of the said cities or towns*; upon pain of forfeiting 10l., half to the crown, and half to any informer who will sue; and for default of payment the offender shall be committed by the court in which judgment shall be given thereon to the house of correction for the county, &c. where convicted, there to be kept to hard labour not exceeding six months, or until payment be made of the said forfeiture."

Ch. IV, § 32.
Standard marks.

By s. 6. certain wares by reason of their smallness or thinness are excepted from being marked.

By stat. 24 Geo. 3. c. 53. s. 5. (to denote the payment of a certain duty) over and besides the other legal marks, there is required on the same manufactures, when sent to be assayed and marked, the mark of *the king's head*; on pain of forfeiting (by s. 8.) under the like circumstances as are before mentioned in the former act, 50 l., to be recovered and disposed of as aforesaid, or in default of payment to be committed in like manner to the house of correction, not exceeding one year, or less than six months, or until payment, and also on pain of forfeiting the gold or silver manufacture so sold, exchanged, or exposed to sale without such mark, one moiety to the crown, the other to any person who will sue, with the like exceptions as in the former statute.

24 G. 3. c. 53.
s. 5.
The duty mark.

The stat. 30 Geo. 3. c. 31. repeals the exceptions in the two last-mentioned acts, as to silver wares, and enacts others in lieu thereof.

30 G. 3. c. 31.
s. 1.
Repealing exceptions of former acts, and making new exceptions.

Lastly, By the stat. 38 Geo. 3. c. 69. s. 1. it is enacted, "that from and after the 1st of October 1798, it shall be lawful for any goldsmith or other person making, trading, or dealing in gold wares in Great Britain, to work or make any gold vessel, plate, or manufacture of gold whatsoever of the standard of 18 carrats of fine gold in every pound weight troy, and to sell, exchange, or expose to sale, or export the same out of the kingdom." By s. 2. "After the said 1st of October 1798, no person shall sell, exchange, or expose to sale, or export out of the kingdom, any such manufacture of gold made after that time, until marked with a crown

38 G. 3. c. 69.
Giving a new standard for gold manufactures.

Ch. IV. § 32.
Standard marks.

crown and the figures 18, instead of the mark of the lion passant, on forfeiture of 10 l.; which mark is (by f. 3.) to be affixed by the respective companies of goldsmiths in London, Edinburgh, Birmingham, and Sheffield, and by the wardens and assayers of gold at York, Exeter, Bristol, Chester, Norwich, and Newcastle-upon-Tyne." By f. 4 & 5. this is not to prevent the making, selling, &c. manufactures of gold of the standard of 22 carrats directed by former laws; but not to authorize the assaying or marking with the mark used before the act any gold manufactures of lower standard than 22 carrats per pound troy. But by f. 6. the making or selling of any manufacture of gold after the said first of October, not duly marked with one of the marks required by law to denote the respective standards, is subjected to a forfeiture of 50 l. By f. 7. the counterfeiting of any of the assay marks, and removing them from one piece of manufacture to another, or selling, &c. the article with such forged or removed mark, knowingly, is made felony, punishable with transportation for seven years. By f. 8. all the powers, regulations, forfeitures, methods, &c. prescribed by the act of the 12 Geo. 2. c. 26. or by any other act therein referred to, or still in force, are made applicable with respect to manufactured gold of the standard of 18 carrats thereby allowed, except where otherwise provided for expressly by this act.

See tit. Forgery
more at large.

§ 33.

Result of the statutes.

Ante, f. 1.

28 Ed. 1. ft. 3.

c. 20.

17 Ed. 4. c. 1.

Wile 1 Hale, 191.

Hence it appears, that by the stat. 28 Ed. 1. ft. 3. c. 20. all gold manufactures were required to be made of good and true alloy, that is, not worse than the touch of Paris. By stat. 17 Ed. 4. c. 1. gold was not to be manufactured under the fineness of 18 carrats in the pound troy, which was increased to 22 carrats by stat. 18 Eliz. c. 15. and so continued by the stat. 12 Geo. 2. c. 26. f. 1. in respect of all goods manufactured after the 28th of May 1739. But by the stat. 38 Geo. 3. c. 69. f. 1. it was again permitted to be manufactured at the lower standard of 18 carrats after the 1st of October 1798.

*Marks for gold
manufactures of
22 carrats.*

By stat. 12 Geo. 2. c. 26. f. 5. manufactured gold of the standard of 22 carrats shall have, 1. the worker or maker's mark, viz. the first letters of his christian and surname; 2. the marks of the goldsmiths' company in London, viz.
the

the leopard's head, the lion passant, and a distinct variable mark or letter to denote the year in which it was made: or else it shall have, 1. the worker or maker's mark, together with, 2. the marks of the assayers at York, and other places named, (i. e. respectively, according to the party's place of residence). By the stat. 38 Geo. 3. c. 69. s. 1. manufactured gold of the standard of 18 carrats shall be marked with a crown and the figures 18 instead of the lion passant, to be affixed by the respective companies of goldsmiths in London, Edinburgh, Birmingham, and Sheffield, and by the wardens and assayers, &c. at York, Exeter, &c.

Ch. IV. § 33.
Standard marks.

Of 18 carrats.

Vide post.

By statutes 28 Ed. 1. st. 3. c. 20. and 17 Ed. 4. c. 1. silver manufactures were to be of true sterling alloy or better, the value of which has been noticed before. By stat. 4 H. 7. c. 2. the silver was to be made fine enough to bear 12 penny-weights of alloy per pound weight. By the stat. 18 Eliz. c. 15. the standard was settled at 11 ounces 2 penny-weights to the pound troy. This by stat. 8 W. 3. c. 8. was raised to 11 ounces 10 penny-weights in respect of goods manufactured after the 25th of March 1697. But the stat. 6 Geo. 1. c. 11. s. 41. confirmed by the stat. 12 Geo. 2. c. 26. s. 5. ratified both the standards again under distinguishing marks, the one from the 1st of June 1720, the other from the 1st of October 1798, as after-mentioned. Silver manufactures of sterling alloy were by the stat. 28 Ed. 1. st. 3. c. 20. to be assayed by the wardens of the goldsmiths' company, and marked with the leopard's head. The marks were afterwards varied on the change of the standard by the stat. 8 W. 3. c. 8., and distinguishing marks given by the stat. 6 Geo. 1. c. 11. s. 41. upon establishing the two different standards before mentioned.* The marks in use since the 28th of May 1739 are fixed by the stat. 12 Geo. 2. c. 26. to be, for manufactured silver of the standard of 11 oz. 2 dwt. per pound troy, the same marks as are before set by the same statute for manufactured gold of 22 carrats. And for manufactured silver of the standard of 11 oz. 10 dwt. the worker or maker's mark as aforesaid, and these marks of the goldsmiths' company in London, viz. the lion's head erased, the figure of Britannia, and a distinct variable mark or letter to denote the year in which it was made; or else with the worker or maker's mark, and the marks of the assayers at York, Exeter, &c.

Silver standard
sterling.

Ante, s. 1.
Vide 5 H. 4. c. 4.
& 14 G. 2. c. 42.
1 Hale, 644.

11 oz. 2 dwt.
per pound troy.

11 oz. 10 dwt.

Marks. Sterling.

11 oz. 2 dwt.
supra.

11 oz. 10 dwt.

Ch. IV. § 33.
Standard marks.

*Gold and silver
additional mark.
24 G. 3. c. 53.
s. 5.*

In addition to the marks above mentioned, there is another mark common both to gold and silver manufactures of whatever standard, namely, the mark of the king's head; which by stat. 24 Geo. 3. c. 53. is required in all instances where other marks are necessary, to denote the payment of a certain duty.

§ 34.
*Offences and
punishments.*

Rex v. Jackson,
Cowp. 297.

Wde tit. Cheats.

Fabian's case,
O. B. 1664,
Kel. 39.

*Wde tit. For-
gery, Stamps.*

The principal offences created by these statutes are the making, working, putting to sale, exchanging, selling, or exporting any gold or silver manufactures of less fineness than the standards respectively fixed at the time by the several acts. Besides the particular penalties and forfeitures inflicted on the delinquents, or in default of payment the commitment to the house of correction, it is to be remembered that the stat. 28 Ed. 1. st. 3. c. 20. is still in force, which subjects them to a discretionary fine and imprisonment: and though the description of the offence therein is not so large as in the subsequent statutes, yet the penalty of it seems virtually to be adopted in the latter by general words of reference to former laws. Besides which, I conceive that offenders of this description fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat.

Joseph Fabian a working goldsmith was indicted for falsifying plate, by putting in too much alloy, and then corrupting one of the assay master's servants to help him to the proper marks, with which he stamped his plate; and being convicted was fined 100 l. and adjudged to stand three times in the pillory; and was also forejudged of his trade that he should not use that trade again as a master workman. Such a judgment must have been at common law.

I have in another place mentioned the offence of forging the marks on bullion or wrought plate.

§ 35.

*Counterfeit
Bullion.*

2. *Counterfeiting Bullion.*

The counterfeiting of bullion in the mass is also provided against, with a view to discourage false coining as well as private impositions.

8 & 9 W. 3.
c. 26. made per-
petual by 7 Ann.
c. 24. s. 3.
*Blanking copper
for sale, or mixing
with silver, or*

By stat. 8 & 9 W. 3. c. 26. "If any person whatsoever after the 15th of May 1697 shall blanch copper for sale, or mix blanched copper with silver, or knowingly buy or sell or offer to sale blanched copper alone, or mixed with silver; or shall

shall knowingly and fraudulently buy or sell or offer to sale any malleable composition, or mixture of metals or minerals, which shall be heavier than silver, and look and touch and wear like standard gold, but be manifestly worse than standard; every such person shall be guilty of felony, and being thereof convicted or attainted shall suffer death." By f. 7. the corruption of blood is saved; and by f. 9. the prosecution must be commenced within three months after the offence committed.

Ch. IV. § 35.
Counterfeit Bullion.

buying, selling, or offering to sale such or the like; or any composition like gold.

3. *Exportation of Bullion.*

§ 36.

At former periods the exportation of bullion has been prohibited by various statutes; but these having been found greatly inconvenient to commerce, the stat. 15 Car. 2. c. 7. f. 12. provides, that any person may export any foreign coin or bullion duty free, first making an entry thereof in the custom-house. But it having been found that, under colour of this regulation, English money or wrought plate had been melted down into the form of foreign coin, or bullion, for the purpose of exportation, the stat. 6 & 7 W. 3. c. 17. f. 3. enacts, that none shall cast or make ingots, or bars of silver, in imitation of Spanish bars or ingots of silver, nor stamp any mark or impression upon any ingot or bar in likeness of the Spanish marks or impression, on pain for each offence of forfeiting the silver so cast, and 500 l., half to the king, and half to the informer. And by f. 5. "No person shall transport or cause to be transported out of England into parts beyond the seas any molten silver, but only such as shall be marked or stamped at goldsmiths' hall, &c. nor without a certificate under the hands of one of the wardens of the goldsmiths' company, that oath has been made by the owner or owners thereof, and likewise by one credible witness, that the same is lawful silver; and that no part thereof was (before the same was molten) the current coin of this realm, nor clipplings thereof, nor plate wrought within this kingdom," &c. And by f. 6. "Any custom-house officer may seize any molten silver put on board any vessel without such mark or stamp and certificate." By f. 13. of the same act, "in case of any seizure of any bullion shipped to be exported, if any doubts shall arise whether the same be English or foreign, the proof shall lie upon the owner, claimer, or exporter, that the same is foreign bullion, and has not been melted down

Exportation of Bullion.

1 Hawk. ch. 18. f. 6.
1 Hale, 654.
15 Car. 2. c. 7.

6 & 7 W. 3. c. 17. f. 3.
Ingots or bars made in imitation of Spanish prohibited.

Bullion exported must be stamped.

If doubt arise proof lies on the owner.

Ch. IV. § 36.
Exportation.

7 & 8 W. 3.
c. 19. f. 6.
*Certificate from
the lord mayor
and aldermen.*

in England," &c. And by f. 14. "if any person shall enter or ship any bullion allowed by the act to be exported, other than in the name of the true owner, proprietor, or importer, the exporter shall forfeit the same or the full value thereof, half to the king, and half to the person seizing or discovering." Also by stat. 7 & 8 W. 3. c. 19. f. 6. "no person shall ship or cause to be shipped any molten silver or bullion whatsoever, in any form, unless a certificate be first obtained from the court of the lord mayor and aldermen of London; oath having been made before the court by the owners and two witnesses, that the same was and is foreign bullion, and that no part thereof was the coin of this realm, or the clippings thereof, nor plate wrought within this kingdom," &c.; "which oath the said court shall circumstantially certify to the commissioners of the customs before any cocket shall be granted for shipping the same, on pain to the owner of loss of the goods and forfeiting double the value; to the captain the forfeiture of 200 l., and if in the king's service, the loss of command; to the cocket officer 200 l., and incapacity to hold any office."

§ 37.

Sale of bullion.
6 & 7 W. 3.
c. 17. f. 7.
*Brokers prohibited
from buying or
selling bullion.*

4. *Sale of Bullion.*

The exportation of gold or silver manufactures under the standard allay allowed by law, has been just noticed.

By f. 7. of st. 6 & 7 W. 3. c. 17. "If any broker, not being a trading goldsmith or refiner of silver, shall buy or sell any bullion or molten silver, he shall suffer imprisonment for six months without bail." This regulation was probably intended to prevent gambling speculations which might enhance the price of the precious metals.

§ 39.

6 & 7 W. 3.
c. 17. f. 8.
*Persons having
silver bullion
found in their pos-
session under cer-
tain circumstances
of suspicion, shall
upon indictment
be bound to prove
it to be lawful
bullion, on pain of
six months im-
prisonment.*

5. *As to the Possession of Bullion unaccounted for.*

The stat. 6 & 7 W. 3. c. 17. f. 8. for "preventing the counterfeiting and clipping the coin of this kingdom," after imposing certain penalties and other punishment on persons selling or paying broad silver money, or money unclipped, for more than it is coined for; or casting bars of silver in imitation of the Spanish; or for buying, selling, or having clippings or filings; and after prohibiting the exportation of bullion except it be properly stamped, and subjecting it to seizure if shipped, and inflicting imprisonment on brokers trading in bullion; enacts by f. 8. that for the better discovery

of

of offenders in the premises, that one or more of the wardens of the goldsmiths' company, with any two or more of the court of assistants of the said company within the bills of mortality, or any two justices of the peace within any county, city, or town corporate, out of the bills of mortality, may enter into the house, room, or workshop of any person suspected of buying or selling unlawful bullion, and search for the same; and in case the occupier of such house, &c. shall refuse to permit the said warden and assistants, or justices, to make such search as aforesaid, they may, with the assistance of a constable, break open any door, box, &c. in order to search for such bullion; and in case of finding any such, shall seize as well the same as the person and persons in whose possession it shall be found; and the said wardens, assistants, and constables shall bring the parties before the next justice of the peace, who shall, upon oath made of such finding (which justice within the bills of mortality, and the said two justices without the said bills of mortality, shall and may) examine the person so brought before him, or found by them respectively, upon oath, whether the bullion so found be lawful silver, and whether the same were not (before the melting thereof) the current coin of this kingdom, or clippings thereof; and in case the person so examined shall not prove by their oath, or by the oath of one credible witness, before the said justice and justices respectively, that the bullion so found is lawful silver, and that the same was not, before the melting thereof, the current coin of this realm, nor clippings thereof, then the said justice or justices respectively shall commit the person so examined to prison, and shall secure the bullion so found, and shall likewise oblige the persons that can give any evidence concerning the same to enter into recognizance to prosecute the said offender and offenders; and in case such offender and offenders, in whose possession such unlawful bullion shall be found, shall not, upon their trials on an indictment for melting the current silver coin of this realm, prove by the oath of one credible witness at the least, the bullion so found to be lawful silver, and that the same was not the current coin of this realm, nor clippings thereof, then, and for want of such proof, such offender shall be found guilty of the offence contained in such indictment, and shall suffer imprisonment for the space of six months, without bail or mainprize."

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. <i>Justifiable</i> 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. <i>Excusable.</i> | 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 a Street. If the Act only done incautiously, Manslaughter. Resolution to oppose all Opposition in committing Trespafs, Murder. § 18.

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

Upon what Principle the Offence is extenuated, Not where exprefs 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 Trespafses on Property, petty Thefts, fighting between Children, - - § 22.

Result of the Cases on extenuating Provocations. § 23.

No Provocation will avail if fought; 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,

Of Homicide.

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 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 Surprise 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 Chancemedley, 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 Dueling, 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 cundo, 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.)

I. *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 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 Durefs, 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 fore-

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 Accessories 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.

Of Homicide.

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 Accessories.* - - § 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 versa. - § 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 Rescuers before and after execution. - - - §136.

In *Manſlaughter*, &c. *ib.*

The ſeveral Kinds of Homicide, and the reſpective Punishments thereof.

§ 1.

The ſeveral kinds.
Vide 3 Inſt. 54.
4 Foſt. 255.

HOMICIDE, which is here uſed to denote the killing of a perſon by whatever means; is uſually treated of under the heads of murder, (of which petit treaſon is a more aggravated ſpecies,) *felo de ſe*, *manſlaughter*, *per infortunium* or *chance-medley*, and *homicide ex neceſſitate*; which latter relates either to the execution or advancement of juſtice, or to ſelf-defence. But as the ſhades between ſome of theſe are in many inſtances very faint, and as the difficulty in this branch of law lies chiefly in diſcriminating between the one and the other, a different arrangement ſeems neceſſary in order to facilitate inquiry and avoid repetition as much as poſſible. It is therefore propoſed to treat of theſe ſeveral ſorts of homicide as they ariſe out of ſubjects and ſituations moſt familiar to common underſtanding, and agreeable to the uſual courſe of human affairs. Previous however to the conſideration of theſe heads it will be proper to take a review of the ſeveral terms made uſe of in our law to expreſs the different degrees of the offence now treating of; together with the puniſhments annexed to each: after which it will only be neceſſary to refer particular caſes to this or that head; by which means the proportionable enormity or alleviation of the offence will be diſtinctly underſtood.

§ 2.

Felonious homicide.

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

Murder.

3 Inſt. 47. 51.
2 Ld. Raymond,
3487.
1 Hale, 425.
1 Hawk ch. 31.
f. 3. 18.
Kel. 127. Foſt.
256. 4 Blac.

1. *Murder*, in the ſenſe in which it is now underſtood, is the voluntarily killing any perſon (which extends not to infants in *venere ſa mere*) under the king's peace, of malice prepenſe or aforethought either expreſs or implied by law: the ſenſe of which word *malice* is not only confined to a particular

icular

ticular ill-will to the deceased, but is intended to denote, as Mr. Justice Foster expresses it, an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent upon mischief. And therefore malice is implied from any deliberate cruel act against another, however sudden.

Ch. V. § 2.
Murder.

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

When this malice is exerted to the death of a master by his servant, or of a husband by his wife, or of an ecclesiastical superior by one owing obedience to him as such, it takes the name of *petit treason*.

The grosser instances of murder, where the depravity of the heart or malice above-mentioned is apparent, form the first class of cases under this head. 2. Where an officer, or one who assists in the advancement of justice where he lawfully may, is killed in the regular discharge of his duty. 3. Where a private man, lawfully interfering to prevent a breach of the peace, is opposed in such his endeavour, and slain. 4. Where death happens incidentally in the prosecution of some other felony. 5. Where it happens from other unlawful acts, of which death was the probable consequence, done deliberately, and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately fall where it may; though the death ensue against or beside the original intent of the party. 6. From deliberate duelling.

Clergy is taken away in all cases of murder and petit treason from accessaries before as well as principals; and lands and goods are forfeited; the forfeiture in such case relating back to the stroke or other cause of the death.

§ 3.
Clergy.

Vide Folt. 304, &c.
1 Hale, 426.

The question of clergy in cases of murder and petit treason stands on several statutes, of which I shall take a short review. These are the statutes 12 H. 7. c. 7., 1 Ed. 6. c. 12., 4 & 5 Ph. & M. c. 4., and 3 & 4 W. & M. c. 9. s. 2. I forbear to rely on the stat. 28 H. 8. c. 1. or the 25 H. 8. c. 3. which as to the point of ousting clergy stand repealed in all respects not re-enacted by the 1 Ed. 1. c. 12. s. 10. For although Hawkins thinks that the whole of the

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

Ch. V. § 3.
Murder, Clergy.

2 Hale, 346, 7.
Fost. 330, &c.

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, 342.

2 Hawk. ch. 33.

s. 52. 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.

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 accessory before, by necessary implication ousts it from the principal in the like cases, it should follow that the accessory 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 materia*, 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 accessory before only 20. At this day however the consequence

Ch. V. § 1.
Murder, Clergy.

2 Hawk. ch. 33.
f. 56.

2 Hale, 147.
Fost. 333, 4, 6.

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

1 & 2 Ph. & M.
c. 10. f. 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.

Manlaughter.

1 Hale, 449,

450. 466.

3 Inst. 55.

1 Hawk. ch. 30.

f. 2.

Vide R. v. Maw-
gridge, Kel. 124.
Fost. 290.

2. *Manlaughter*, 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 Corn-
wallis's case,
Dom. Proc.
1678.
2 St. Tr. 730.

Punishment.

1 Hale, 466.

4 Blac. Com.

193.

19 Geo. 3. c. 74.

f. 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. f. 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. f. 28.

The benefit of clergy is however taken away by the stat. 1 Jac. 1. 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 prior to the stat. 39 Geo. 3. c. 37. constantly directed to be acquitted. But now by f. 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

39 Geo. 3. c. 37.

f. 2.

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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."

CH. V. § 4.
Manslaughter.

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.

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.

§ 5.
Felo de se.
1 Hale, 411.
4 Blac. Com.
189, 190.
Post. f. 16. and
vide the next
chapter as to the
form of the in-
quisition.

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

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

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.

§ 6.
*Justifiable or ex-
cusable homicide.*
1 Hawk. ch. 28.
f. 1. 22.

Foll. 270. 288.
1 MS. Sum.
38, 9.
1 Hale, 471.
477. 492, 3.
2 Hale, 304.
3 Inst. 214.
4 Blac. Com.
182. 183.

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

(The several Kinds.)

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?

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.

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 seems

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 ff. 24 H. 8.
c. 5.
Fost. f. 44-50.

Dalt ch. 68.
Bract. 120.

§ 8.
Misadventure and
chance-medley.

3 Inst. 55, 7.
Fost. 275.
Vide supra.

Fost. 258.
1 Hawk. ch. 29.
f. 1.
1 Hale, 472.

4 Blac. Com. 182.
Ante, f. 6.

Ch. V. § 8.
Misadventure.

Vide 2 Inst. 143.

315.

Stat. of Marib.
c. 26.

Folt. 288.

4 Blac. Com. 188.

Vide 1 Hale,

477. 492.

2 Hale, 303.

Ante, f. 6.

Folt. 258.

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.

§ 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.*

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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.

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

§ 11.

From particular
malice to the de-
ceased.
Ante, l. 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.

(From Malice afrethought exprefs.)

Ch. V. § 11.
From particular
malice to the de-
ceased.

2 Hale, 290.

1 Hale, 451.

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.

§ 12.
Malice by impli-
cation of law.
Fost. 255.
1 Hale, 455.
Fost. 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. xiii. 19.
MS. Tracy, 47.
1 Vent. 159.
1 Hale, 452.
Oneby's case,
2 Ld. Ray. 1490.
Fost. f. 19. 23.

(From Malice aforethought express).

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. f. 10 & 13. which again makes it wilful murder, and takes away clergy.

Ch. V. § 12.
From particular
malice to the de-
ceased.

1 Hawk. ch. 314
f. 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.
Fost. 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.

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 prepen-
se.

§ 13.
Manner of pro-
curing death not
material. Mur-
der, if by malice.

Sum. 50.
1 Hale, 429. 451.

1 Hawk. ch. 31.
f. 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

Palm. 548.
1 Leon. 327.
1 Hawk. ch. 31.
f. 5. 6.
1 Hale, 431, 2.

(From Malice aforethought express).

Ch. V. § 13.
From particular
malice to the de-
ceased.

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

1 Hale, 432.

2 (vulgo) Jac. 1.
c. 31. f. 7.

40 Geo. 3. c. 80.
Vide post. Qua-
rantine.

Ladd's case,
1773, MS. Jud.

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

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.

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.

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.

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

(From Malice aforethought express).

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).

Ch. V. § 13.
From particular
malice to the de-
ceased

East. 16 Geo. 3.
(absent) Greay
C. J. and Ash-
burn J.)

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 misprision: 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:

§ 14.
Against whom
malice may be
directed.
1 Hale, 473.
5 Elz. c. 1.
3 Inst. 50.
Sum. 53.
1 Hawk. ch. 31.
f. 16.
Staundf. 21.
4 Black. 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.

(From *Malice aforethought express*).

Ch. V. § 14.
From particular
malice to the de-
ceased.

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
Accessory.

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 idiot 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.

Kelw. 136.
1 Hale, 431.
1 Hawk. ch. 27.
f. 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. 488.
Kel. 32, 3.
c Hawk. ch. 46.
f. 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

Q. B. Dec. 13,
1659.

2 Hale, 289.

collected

(From Malice aforethought express).

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.

Ch. V. § 15.
From particular
malice to the de-
ceased.

Bastards.

Rex v. Jane Peat,
Exeter Sum. Ass.
1793.
Post. f. 119.
Vide Domat.
liv. 3. tit. 6. f. 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.
f. 6.
Vide Moor. 754.

Of Homicide

(From Malice aforethought express).

Ch. V. § 17.

§ 17.

*Malice to one
which falls on
another.*

Sum. 50.

1 Hale, 379.

442. 456.

Dyer, 128.

Kel. 111, 112.

117. Pult. de

Pace, 124. b.

Fost. 261. *Vide*

post. f. 27. 32.

1 Hale, 438.

1 Hale, 437. 436.

1 Hawk. ch. 31.

f. 42.

1 Hale, 429.

Mary Tinckler's
case, 6th Nov.

1781, by all the
judges.

MS. Gould J.

post. f. 124.

1 Hale, 413.

1 Hawk. ch. 27.

f. 4.

Sum 28.

Dalt. ch. 144.

3 Inst. 54.

1 Hale, 413.

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

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.

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.

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.

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

(From Malice aforethought express).

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.

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

On the other hand, if the blow intended against one, and lighting 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. 261.
Brown's case,
Dolt 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.

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, 276.
4 Blac. Com.
200.
1 Hawk. ch. 29.
f. 12. ch. 31.
f. 61.
Fost. f. 38, &c.

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

1 Hale, 475.

(From Malice aforethought express).

Ch. V. § 18.
From general
malice.

4 Blac. Com.

200.

1 Hawk. ch. 29.

f. 10. ch. 31.

f. 46. *Vide tit.*

Principal and
Accessory.

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

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, f. 12.

Oneby's case,

2 Ld. Ray 1450.

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.

(From Transport of Passion or Heat of Blood).

Ch. V. § 20.

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.

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.

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 repented 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.

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.

There

§ 20.

What is a sufficient provocation.
Fost. 290.
1 Hale, 455, 6.
1 Hawk. ch. 34.
f. 33. Kel. 55.
130, 1. 4 Blac.
Com. 200. Rex
v. Kidd, 5 St.
Tr. 296. Maw-
gridge's case,
9 St. Tr. 64.
Ld. Morley's case,
7 St. Tr. 421.
Cro. Eliz. 773.
Post. f. 22.

1 Hale, 456.

Kel. 55.

Assault.

Kel. 135.
4 Blac. Com.
191.

Lanure's case,
17 Car. 1.
1 Hale, 456.

*Restraint of li-
berty.*
Buckner's case,
Styl. 467.
Post. 1. 29.
Withers's case,
Stafford Sum.
Aff. 1784, cor.
Buller J. alter-
wards before all
the judges in M.
25 Geo. 3. MS.
Gould and Bul-
ler, Js.

(From Transport of Passion, or Heat of Blood).

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

*Detecting adul-
terer.*

Fost. 296.

1 Hale, 486.

Fost. f. 29.

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

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.

§ 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 Den-
ton, 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:

(From Transport of Passion, or Heat of Blood).

Holt C. J. that this was murder; the blow 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 blow 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. § 22.
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.

Id. 293.

Rex v. Reason
and Tranter,
1 Stra. 499.
Post 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.

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,

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

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

1 Hawk. ch. 31
f. 34.

(From Transport of Passion, or Heat of Blood).

Ch. V. § 22.

*What provocation
may extenuate.*

Fost. 291.

1 Hale, 473.

1 Hawk. ch. 31.

f. 34.

Kel. 132.

Post. L. 56.

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

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 repentment, whereof he had died, it had been murder.

R. v. John Fray,
O. B. Seff. 1785,
cor. Gould, J.
Seff. 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 findings,) 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

(From Transport of Passion, or Heat of Blood).

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.

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

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 favoured 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.

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

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

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

(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."

(From Transport of Passion, or Heat of Blood).

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

Cro. Jac. 296.

* Godb. 182.
says, "a rod."

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. 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.

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

Post. f. 62, &c.

f 37.

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.

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 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

(From Transport of Passion, or Heat of Blood).

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.

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

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

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.

§ 23. b.
Provocation will not avail if sought.
1 Hale, 457.
1 Hawk. ch. 31.
f. 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.
not 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

Rd. Mason's case, Winchester Sum. Ass. 1756. Foit. 132.
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

side,

(From Transport of Passion, or Heat of Blood).

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

(From Transport of Passion, or Heat of Blood).

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.

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

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

§ 24.
*Death on mutual
combat.*
Ante, f. 19.
Fost. 295.
Kel. 135.
2 Ld. Ray. 1493.
1 Hale, 453-456.
Post. f. 51. &c.
Staunf. 15.
Crompt. 28.
1 Keb. 17.

R

sudden

(From Transport of Passion, or Heat of Blood).

Ch. V. § 24.
On mutual combat.

Deliberate duelling.

1 Hawk. ch. 31.

f. 21.

1 Hale, 452, 3.

Ante, f. 12.

1 Hawk. ch. 31.

f. 31. 1 Hale,

441. 443. 453.

4 Blac. Com. 199.

11 St. Tr. 114.

Cosmo Gordon's

case, O. B. Sept.

1784, Sess. Pap.

2043. Post. f. 59.

fudden 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.

§ 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. 1493.

1 Hawk. ch. 31.

f. 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 sought 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,

(From *Transport of Passion, or Heat of Blood*).

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.

Ch. v. § 25.
On mutual combat.

Mawgridge's case, Kel. 128.
2 Ld. Ray. 1489.
Fost. 296.
Post. f. 47. S.C.
Vide Oneby's case, post. f. 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. f. 47.

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.

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

(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.

(From *Transport of Passion, or Heat of Blood*).

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 Cal.
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;

but

(From Transport of Passion, or Heat of Blood).

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.

Ch. V. § 26.
On mutual combat.

Michaelmas term
1776.

Serjt. Foster's
MS.

In this as in the case of malice premeditated 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

§ 27.
Where blow intended for one falls on another.
Fost. 262.
1 Hawk. ch. 31.
f. 44. ante, f. 17.
Brown's case,
1776, MS.
Crown Caf. Ref.
Leach, 151. S. C.
Post. f. 46. S. C.

(From Transport of Passion, or Heat of Blood).

Ch. V. § 27.
On 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.

Folt. 278.

Post. f. 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.

Folt. 298.

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

Ld. Morley's
case, Kel. 55.
1 Hawk ch. 50.
f. 5. Folt. 298.
302. Morgan's
case, 1 Bullstr. 87.
Rex v. Taylor,
5 Burr. 2796.

at

(From Transport of Passion, or Heat of Blood).

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.

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 excluded 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."

Ch. V. § 28.
Statute of Stabbing.

See the end of the next section.

1 Jac. 1. c. 2.
continued by
3 Car. 1. c. 4.
and 16 Car. 1.
c. 4.

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.

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

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

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

(From *Transport of Passion, or Heat of Blood*).

Ch. V. § 29.
Statute of *stab-*
bings.

1 Hawk. ch. 30.
s. 8.

Kel. 131.
Williams's case,
W. Jones, 432.
Newman's case,
O. B. Oct. 8.
Ann. MS. Den-
ton and Chapple.
MS. Burnet, 58.

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*."

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

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.

So if the party killed be armed at any time of the affray before the mortal stroke.
Hunter's case,
3 Lev. 255.

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

(From Transport of Passion, or Heat of Blood).

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.

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.

Ch. V. § 29.
Statute of stabbing.

1 Hawk. ch. 39.
f. 8.
Vide infra.

What a weapon drawn.
Fost. 300.
1 Hale, 470.
3 Lev. 236.
Sty. 468.
Godb. 154.
Vide supra.

This

(From Transport of Passion, or Heat of Blood).

Ch. V. § 19.
Statute of stab-
bing.

Sty. 468.
3 Lev. 256.

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

Skin. 668.
Fost. 301.

4 Blac. Com.
193, 4.

1 Hawk. ch. 30.
f 6.

Sty. 468.
Exceptions.

Fost. 298.

Ante, f. 20.

Sty. 469.

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.

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.

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

(From Transport of Passion, or Heat of Blood).

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. § 46.

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

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

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.*

§ 30.

Duration of passion.
Ante, § 19.

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.

Post. 296.

Ante, § 20.

Ante, § 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.

(From Transport of Passion, or Heat of Blood).

Ch. V. § 30.
Duration of
Passion.

2 Ld. Ray. 1496.

Ante, f. 21, 22,
23.

Instrument or
manner of death.

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.

Oneby's case,
post.
Kel. 56.

Ante, 251.

Ante, f. 22.

Fost. 294.

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

(From Transport of Passion, or Heat of Blood).

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.

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 aggressor; 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.

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.
Crompt. 23.
1 Sid. 277.
Major Oneby's
case, O. B.
12 Geo. 1.
2 Stra. 766. and
2 Ld. Ray. 1485.

(From Transport of Passion, or Heat of Blood).

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 warn-

Ante, p. 243.
Post. l. 47.

(From Transport of Passion, or Heat of Blood).

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.
f. 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; where- in Death ensues collaterally to or beside the principal Intent.

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.

§ 31.

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.

Death ensuing
collaterally from
an act malum
in se.
Fost. 258, 90
Plummer's case,
1 Hale, 475.
3 Inst. 56.
Kel. 117.
Sum. 56.
6 St. Tr. 222.
1 Hawk. ch. 29.
f. 11. ch. 31. f. 41.

1 Hawk. ch. 29.
f. 3.
1 Hale, 476.

By

(In the Prosecution of some other unlawful Act).

Ch. V. § 31.
From an act ma-
lum in se.

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

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

3 & 4 W. & M.
c. 10. f. 5.

4 & 5 W. & M.
c. 23. f. 4.

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

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.

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. f. 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.
Fost. 259.
MS. Burnet, 47.
49. 1 Hawk.
ch. 29. f. 10.
ch. 31. f. 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

(In the Prosecution of some other unlawful Act).

violation 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.

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.

§ 33.
Conspiracy to do unlawful acts.
1 Hale, 53. 442.
445. 1 Hawk.
ch. 29. f. 10.
ch. 31. f. 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.
f. 14. ch. 31.
f. 48. vide the Riot Act,
1 Geo. 1. c. 5.
tit. Riots, &c.

Vide post. Homicide in advancement of Justice.

S

Several

(In the Prosecution of some other unlawful Act).

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.

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.

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

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.

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.

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

(In the Prosecution of some other unlawful Act).

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.

Ch. V § 33.
By confederacy.

1 MS. Sum 187.

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.

§ 34.

To affect all the confederates the killing by one must be during the actual strife or abatement of all.

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

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

1 Hale, 444.

(In the Prosecution of some other unlawful Act).

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.

Death on act *malum prohibitum*.
Fost. 259.
1 Hale, 475.
Fost. l. 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 Prosecution of an Act lawful in itself, or intended by way of Sport or Recreation.

§ 36.

General principle.

Fost. 258.

1 Hale, 39. 444.

472.

MS. Burnet, 43.

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*

(From Improprity, Negligence, or Accident in lawful Acts, or at Sports).

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. § 36.
General Principle.

Ante, f. 31, 32.

Infra.

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.

§ 37.
Correction in foro domestico.
Fost. 262.
Kel. 28. 133.
1 Hale, 454.
457. 473, 20.
1 Hawk. ch. 29. f. 5.

Grey's case,
Kel. 64, 50.

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.

(From Improprity, Negligence, or Accident in lawful Acts, or at Sports).

Ch. V. § 37.
*Correction in foro
domestico.*

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 com-
mon 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 throw-
ing rubbish.*
Fost. 262, 3.
1 Hale, 472, 5.
2 Hawk. ch. 29.
f 4. 4 Blac.
Con. 191.
Punt. de pace,
123.

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 exilientibus et not apparentibus eadem est ratio*. So if

Hull's case, C. B.
1864, Kel. 40.

any

(From Impropry, Negligence, or Accident in lawful Acts, or at Sports).

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 crowded street few people hear the warning or sufficiently attend to it, however loud.

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.

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

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

Fost. 263.
Kel. 10
1 Hawk. ch 29.
f 2
41 Jac. Com. 192.
1 MS. Sum. 134.

In driving carriages
1 H. c. 4-6
Fost. 263, ante.

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

Pest. 140.

(From Impropiety, Negligence, or Accident in lawful Acts, or at Sports).

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

1 Hale, 39.
1 Hawk. ch. 29.
§. 2.

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.

Overloading boats, &c.
10 Geo. 2. c. 31.
1. 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. §. 8. if any person navigating for hire or gain on the Thames between Gravesend and Windsor receive into his tilt-boat, row-berge, 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.

Overloading 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.

Brit. c. 5.
4 Inst. 251.
1 Hale, 429.
1 Hawk. ch. 31.
§. 62.

1 Hale, 431.
Ante, §. 17.

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.

§ 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

(From Improprerty, Negligence, or Accident in lawful Acts, or at Sports).

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.

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

1 Hale, 431.
Pult. de pace, 126. 4 Blac. Com. 127.
1 Hawk. ch. 31. f. 8. MS. Burnet, 53.

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 amenable 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.

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

(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.

(From Impropriety, Negligence, or Accident in lawful Acts, or at Sports).

Ch. V. § 40.
*Accidents in un-
expected occur-
rences.*

1 Hale, 431.
Sum. 50.

Burton's case,
1 Stra 481.

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.

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.

1 Hale, 476.

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

Post. f. 46.

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

(From Impropriety, Negligence, or Accident in lawful Acts, or at Sports).

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 quæ- 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 muzzle 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 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 carried it home: but being of opinion upon the whole

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

Rampton's case,
Kel. 41.

Fost. 265.

(From Improprity, Negligence, or Accident in lawful Acts, or at Sports).

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. RMS.
Sum. 131, 2.
Dalt. ch. 148.
1 Hawk. ch. 29.
f. 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 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.

1 Hale, 472.

Sir John Chichester's case,
Alleyne, 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) *Id* de Comb. 408.

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

(From Impropropriety, Negligence, or Accident in lawful Acts, or at Sports).

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.

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

1 Hale, 38, 9.

472, 5.

Fost. 259.

1 Hawk. ch. 29.

f. 6.

1 MS. Sum. 135.

Ante, f. 35.

(From Impropiety, Negligence, or Accident in lawful Acts, or at Sports).

Ch. V. § 41.
At Sports, &c.

sport and without any felonious intent, whereby a bystander 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.
1 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. Ashhurst 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

(From Impropiety, Negligence, or Accident in lawful Acts, or at Sports).

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.

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.

§ 43.
Concussion.

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

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.

§ 44.
Defence of subjects.

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

In defence against felonies.
Fost. 273.
1 Hawk. ch. 28.
c. 21. 24.
1 Hale, 415. 431.
482, 5, 8. 493.
1 Mod. Sum 151.
4 Bac. Com 180.
Poi de pace,
121. b.

has

(In defence of Person or Property).

Ch. V. § 44.
Against known
felons.

1 Hale, 465.

1 Hale, 52.

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, 485, 6.

Pult. de pace,
121, 2.

Sum. 40.

1 Hawk. ch. 28.

f. 23.

Kel. 132.

Dalt. ch. 127.

f. 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 affirmation 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 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

Vide ante, f. 7, 8,

Post. f. 50.

Post. 276.

1 Hale, 487, 8.

4 Blac. Com. 180.

26 Affize, 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.
Fost. 274.
Post. f. 57.

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.

§ 45.
Not extending to secret felonies without force.
1 Hale, 438.
4 Blac. Com.
180, 1.
11 Rep. 82. b.

MS. Burnet, 39.

Fost. 274.

1 Hale, 484.
Post. f. 58.

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*

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

1 Hale, 470.
Fost. 299.

T

officer,

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

(1 Jac. 2. 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, l. 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,
Crim. 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.

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*.

Sir William Hawkefworth 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.

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.

Ch. V. § 46.
Against supposed felons.

1 Hale, 42.

1 Hawk. ch. 23.

f. 27.

MS. Burnet, 40.

ad idem.

1 Hale, 40.

Ante, f. 31.

1 Hale, 42.

(In defence of Person or Property).

Ch. V. § 47.

§ 47.

Concerning appa-
rency 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.

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

2 Ld. Ray. 1493.

1 Hawk. ch. 31.

f. 28.

Kel. 130.

Ante, f. 24.

Ante, f. 25.

(In defence of Person or Property).

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 assailant under the plea of necessity.

Ch. v. § 47.
Against expected felony.

Nailor's case,
O. B. 1704.
MS. Tracy.
1 MS. Sum. 136.
S. C.

Post f. 55. S. C.

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.

§ 48.

Party justifying killing on necessity must be wholly without fault.
1 Hawk. ch. 28
f. 22.

on Ante, f. 34.

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

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

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

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.

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.
Fott. 277.
1 Hawk. ch. 31.
f. 27.
Pult. de pace,
122. b.
Mawgridge's
case, 9 St. Tr. 63.

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

1 Hale, 482.

1 Hale, 479, 480.
Pott. f. 54.

Dalt. ch. 150.
f. 8.

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.

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

1 Hawk. ch. 29.
f. 13.

Post. f. 54.

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.

§ 49.
Officers of justice.

Post. f. 63, &c.

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.

§ 50.
Excusable self-defence.
Fost. 273, 5.
209.

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

4 Blac. Com. 188.
Fost. 288.

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

§ 51.
Difference between chance-medley and manslaughter.
Ante, f. 24.

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

Fost. 277, 8.

1 Hale, 484.

1 MS. Sum. 155.

4 Blac. Com. 184.

Pult. de pace,

322.

Post. f. 54.

4 Blac. Comp.

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, 480.

1 Hawk. ch. 27.

f. 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

(In defence of Person or Property).

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.

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

Ante, f. 8.

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 attacked 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

§ 53.
*As to the first
assault.*
Fost. 277.
MS. Tracy, 42.
Pult. de pace,
122. 1 Hale,
479. ante, f. 24.
1 Hawk. ch. 29.
f. 17.
1 Hale, 482.
Sum. 41.

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

such

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

Vide 1 Hale,
482. n.

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 manslughters 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 supra et
ante, f. 24.

§ 54.
When the first
assault is upon
malice.
Pult. de pace,
122. b.
Ante, f. 44:

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 fought 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.

Fost. 277.
MS. Tracy. 42.

(In defence of Person or Property).

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*

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

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

1 Hale, 452.
Burnet's MS. 43.

1 Hale, 479. 480.

Ante, f. 48.

Copstone's case,
1 Hale, 479.
487.

Of Homicide
(In defence of Person or Property).

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

Ante, l. 51.

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

deliberate act; namely, by the compact to meet and fight his antagonist. And it may be questioned how far that *quere* is reconcilable 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 premeditated, 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 Oneyby'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.

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

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, withhold 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.

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

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 Naylor'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

§ 55.
As to the existence of the necessity to kill sufficient to excuse.
Ante, s. 50. and the authorities there cited.

Naylor's case,
Ante, s. 47.

(In defence of Person or Property).

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

Fost. 278.

Infra.
Ante, f. 44.

Kel. 131.
Fost. 292.

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 and 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 misadventure

(In defence of Person or Property).

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.

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.

§ 56.
*In defence of pro-
perty against tres-
passers.*
Ante, f. 44, 45.

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

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

On

Ch. V. § 56.
In defence of pro-
perty against tres-
passers.

R. v. Willough-
by and another,
Bodmin Sum.
Aff. 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, i. 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;*

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*.

§ 57.

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

Fost. 274.

1 Hale, 484, 5.
2 Hawk. ch. 12.
f. 19.

R. v. Cooper,
Cro. Car. 544.
Ante, f. 44, 45.

9 Ann. c. 16.

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 *quare* 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.

§ 58.

Interfering in mutual combats or sudden affrays between others.
1 Hale, 484.

Ante, f. 45.

U

would

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

1 Hale, 484.

Kel, 136.

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

B.

(In defence of Person or Property).

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. § 52.

*Interference of
third persons.*

Kel. 61, 62.

1 Hawk. ch. 51.

f. 35. 50.

1 Roll. Rep. 408.

Kel 88 113.

136. Pulk. de

pace, 124 b.

Post. f. 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. f. 121.

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 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.

Kel. 61. 136.

Vide post. f. 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. 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 very different consideration; which will be treated of at large

1 Hawk. ch. 31.
f. 51.

Post. f. 63. 81.
Sec.

(In defence of Person or Property).

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 disproves 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, f. 12. 24.

Vide post. c.

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

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, 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

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

1 Hawk. ch. 23,
f. 21.

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.
f. 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.
Antes f. 12.

Vide ante, ch. 2.
f. 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.
f. 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.

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 fought 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.

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

§ 63.
General principles.
Protection of officers of justice, &c. against resistance.
Folt. 270. 303.
&c. 1 Hale, 457.
Post. l. 67.

Rex. v. Withers,
Stafford Sum.
Att. 1-84, cor.
Buller J. afterwards before all the judges in Mich. term following.
MS. Gould and Buller Js.

Buckner's case,
ante, l. 29.

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

(In advancement of Law).

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

(Vide Jackson's case, post. p. 298.)

Vide ante, f. 58.
Post. f. 83.

R. v. Sir Chas. Stanlie and Andrews, 1 Sid. 160.
MS. Burnet, 46. accord.

At Hertford, temp. Will. 3. incipium.
MS. Tracy, 53.

Regin. 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.

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.

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 Rooksbj, 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.

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.

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

(In advancement of Law).

ever the homicide might otherwise have admitted of alleviation.

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.

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

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

MS. Burnet, 37.

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.

§ 64.
Assistants.
Folk. 272. 309.
1 Hale, 461, 3.

¶ de ante, f. 59.
Post. f. 71.

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;

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

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

(In advancement of Law).

Ch. v. § 66.
On arrest for felony.

§ 66.
Arrest.
Introduction.

I. Touching Homicide on the Arrest of Persons.

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.

§ 67.
Arrest on felony committed.

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

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

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, New-
gate Lent Vac.
20 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

(In advancement of Law).

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.

Ch. V. § 67.
On arrest for
felony.

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.

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

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.

Vide Levett's case, ante, p. 274.

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;

Arrest upon authority by mistake.
Fost. 318.
1 Hale, 489, 490.
1 Hawk. ch. 28.
118. 4 Inst. 177.

f. 12. 2 Hawk. ch. 12. f. 16, 17. ch. 13. f. 11. 3 Inst.

(a) And by stat. 22 G. 2. c. 44. f. 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.

Ch. V. § 68.
On arrest for
felony.

(Genner v.
Sparks, Salk. 79.
6 Mod. 173.
Cole v. Cameron,
M. 32 Geo. 3.
B. R.)

Ante, f. 67.

2 Hale, 84, 5.
See vide 1 Hale,
489, 490.

1 Hawk. ch. 28.
f. 12.

2 Hale, 83, 92.

2 Hale, 85, 87.
91. 3.

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.

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,

(In advancement of Law).

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 *prima facie* evidence of the fact, till the contrary were proved.

Ch. V. § 62.
On arrest for felony.

Dalt. ch. 170.
l. 5.

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,

§ 69.

Constable acting on information of private person.
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,
D. ug. 349.
1 MS. Sum. 92.

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

if

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.

Post. f. 87.

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.

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

§ 70.
On arrest for
misdemeanors.
Fost. 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 Malef. in
Parc. 21 E. 1.
ft. 2. 3 & 4 W.
& M. c. 10. f. 5.
1 Hale, 491.
1 Hawk. ch. 28.
f. 15. 9 St. Tr.

375. 4 Blac. Com. 120. Ante, f. 31. Comyn. Rep. 16. 2 Roll. 120. Palm. 546.

(In advancement of Law).

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.

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

Nightwalkers.
2 Hawk. ch. 13.
1. 6. ch. 8. f. 38.
vide 2 Inst. 52.
1 Roll. Rep. 237.
Litch. 173.
Poph. 208.
9 Co. 68. b.
2 Hale, 85. 97.

Tooley's case,
2 Ld. Ray. 1301.
Post. f. 89.

2 Hale, 89. (n f).

Litch. 1-3.
Poph. 208.
2 Hawk. ch. 8.
1. 38.

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.

§ 71.
*Breaches of the
peace in which
the constable or
party interposing;*
1 Hale, 463.
1 Hawk. ch. 31.
f. 44.
Post. § 10, 301.
Kel. 66.
Post. f. 81.

But

(In advancement of Law).

Ch. v. § 71.
On arrest for
misdemeanor.

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

1 Hale, 442.

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

1 Hawk. ch. 28.
f. 14.

Poph. 1218

Peace-officerstak-
ing opposite parts.
1 Hale, 460.

Ibid.

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.

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. I. 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 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.

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 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

(In advancement of Law).

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.

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

§ 72.
*Arrest by con-
stable for breach
of peace out of
his view.*
2 Inst. 52.
2 Hawk. ch. 12.
s. 20. and ch. 13.
s. 8. 2 Ld. Ray.
1301. Strick-
land v. Bell,
Dalt. ch. 1. s. 7.

Middleton 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
sedition.

2 Hale, 38.

Dalt. ch. 116.
§ 3.

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

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

fureties (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.

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.

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

(In advancement of Law).

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.

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

4. Pressing.

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. Solly*, 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. § 74.
Arrest in civil suits.

Vide 1 Roll. R. 189.

Fost. 270, 1.
1 Hale, 481.
494. 3 Inst. 55.
1 Hawk. ch. 23.
f. 17. 18.
Ante, f. 63.

1 Roll. Rep. 189.
Vide ante, f. 63.

1 Hawk. ch. 23.
f. 19.

§ 75.

Pressing.

See the argument of Mr. J. Foster when Recorder of Bristol in the case of Alexander Broadfoot, Fost. 154.
1 Hawk. ch. 22. f. 2. Ex parte Solly, E. 41 G. 3. 1 East's Rep. 466.
1 Ed. 3. c. 5.
11 H. 7. c. 1.
16 & 17 Car. 1. c. 28.
Dixon's case, post f. 80.
Post. c. 76. 79.

Ch. V. § 75.
On pressing.

Ante, p. 302.
307.

Post. p. 312.

Rex v. Phillips,
Cowp. 832.

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.

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 balliards 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.

(In advancement of Law).

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.

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

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.

§ 76.
Ante, f. 66. 73.
1 MS. Sum.
163.

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.

§ 77.
Jurisdiction legal.
Simpson's case,
4 Inst. 333.
1 MS. Sum. 163.
Folt. 311.
9 Co. 62.

Vide Cook's case, post.

Withers's case,
ante, p. 233.
MS. Tracy. 42.

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.
Protecting officers executing warrants.

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*, *hieri facias*, writ of assistance, or any other writ of the

§ 78.
Process legal in its frame.
1 MS. Sum. 167.
Folt. 311.
1 Hawk. 457.
1 Hawk. ch. 31.
f. 56.
9 Co. 68, 9.

(In advancement of Law).

Ch. V. § 78.
*Legality of pro-
 ceeds and arrest.*

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

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

Curtis's case,
 Post. 135.

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

R. v. Stockley,
 1772. Sess.
 Forster's MS.
 1 Hale, 457.

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.

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.

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 Sep-
 tember

(In advancement of Law).

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. § 70.
Legality of process and arrest

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 conviction.

Blank warrants illegal.

vide Curtis's case, Fort. 137, 3. ante 330.

(In advancement of Law).

Ch. V. § 78.
*Legality of pro-
cess and arrest.*

*Fousin v. Bar-
row, M. 35 G. 3.
6 Term Rep. 122.
post.*

violation for murder, independent 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.

§ 79.

*Prep. warrants.
Vide Post 154.
&c. ante, f. 75.*

With regard to prep. 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.
1 MS. Sum 169.
1 Hale, 457-459.
Ante, f. 76.
Gordon's case,
10th. 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. 23 O. 3.
1600, Rekeby's
MS. cited in
Sergt. 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 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.

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.

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

CH. V. § 80.
Arrest by a legal officer.

Dixon's case,
Kingston Aff.
156, car Den-
don, J. 1 MS.
Sum. 170. [said
to be 1758, in
Sergeant Foster's
MS.]

Borthwick's
case, Dougl.
207.

Ante, 308.

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

(In advancement of Law).

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

1 Hale, 459.

Officer acting out
of his jurisdiction.
1 Hale, 458, 9.
ante, f. 51. 55.

2 Hawk. ch. 13.
f. 27. 30.
Vide Tooley's
case, post. f. 89.

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.

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.

§ 81.

Due notice to the
parties.
Ante, f. 71. 80.

1 Hale, 470;
O. B. 1657,
Fost. 298.
ante, f. 46.

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.

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.

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.

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. § 81.
Notice of the officer.

Post. f. 24.

Gordon's case,
Northampton
Sp. Ass. 1789,
cor. Thomson
B., MS. Buller J.
post. f. 122. S.C.

26th June 1789.

1 Hale, 583.
Mackally's case,
9 Co. 69.
Post. f. 34.

§ 82.

Notice to some and not to others.
1 Hale, 438.
446. 461.
Kel. 115, 116.

Ch. V. § 82.
Notice of the of-
ficer.

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.

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.

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

(In advancement of Law).

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. 53.

Ch. V. § 82.
Notice of the of-
ficer.

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 ig-
norantly but bona
fide interfering to
preserve the peace
against an officer.

R. v. Sir C.
Standie and An-
drews, Sid.
159. MS. Bur-
net, 56. accord.
Kel. 86.

Ante, f. 63.

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

(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.

(In advancement of Law).

express notice of his intention, the bailiff has an opportunity of correcting his mistake. Ch. V. § 83.
Notice of 100 of-
ficer.

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. § 84.
Notice on process.
1 MS. Sum. 169.
ante L. 21.
Fost. 311.
1 Hale, 461.
Mackally's case,
9 Co. 68, 9.
1 Hale, 458.
2 Hawk. ch. 13.
s. 28.

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. § 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.

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 Male, 459.

1 MS. Sum. 92.

5 Co. 59.

1 MS. Sum. 170.
 Fost. 319.

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.

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. Luttrell 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 Luttrell, 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 Luttrell 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, l. 21.

(In advancement of Law).

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.

Ch. V. § 86.
Arrest to be duly made.

6 St. Tr. 195.

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?

§ 87.
Breaking doct.

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

Privilege confined to civil suits.
1 MS Sum. 171.
Fost. 319.
2 Hawk ch. 14.
Cooke's case,
Cro Car. 537, 8.

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.

Folt. 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.

Folt. 324.

1 MS. Sum. 172.

Folt. 321.

2 Hawk. ch. 14.

f. 7.

Vide Samuel v.

Payne, Ante, f.

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 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 superintendence of the police; the constable or his watch may break open doors to suppress 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.

2 Hale, 95.

2 Hawk. ch. 14.

f. 8.

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

3 Jac. 1 c. 4.

f. 35.

Popish recusants.

Forcible entry.

2 Hawk. ch. 14.

f. 4. 6.

Capias utlag. or capias pro fine.

Hab. fac. poss.

5 Co. 93. b.

2 Hawk. ch. 14.

f. 5.

Warrant of justice.

required

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.

Ch. V. § 87.
Breaking doors.

27 G. 2. c. 20.

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.

Privilege confined to outward doors.
1 MS. Sum. 171.
Fost 319.
1 Hale, 458.

In the case of *Lee v. Gansel*, 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 Gansel's chamber: and it was ruled that he was justified in so doing.

Lee v. Gansel,
Cowan, 1.

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.

Baker's case, at
Serjeant's Inn,
Mich. Term
1775, before all
the judges,
Crown Caf. Ref.
MS. & Leach.
106. last edit.
131. S. C.

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

*To the occupier
and his family.*

Fost. 320.
1 MS. Sum.
170, 1.
5 Co. 93.

(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.

2 Hale, 103.
Vide Fost. 321.

*Confined to arrests
in the first instance.*
Fost. 320.

1 Hale, 459.
Salk 79.
2 Hawk. ch. 14.
§ 9.

John Stevenson's
case,
10 St. Tr. 462.

*Previous notification
and demand
of entrance.*
Fost. 320.

1 MS. Sum. 171.
2 Hawk. ch. 14.
§ 1.

2 Hawk. ch. 14.
§ 11.

§ 88.
*Time for making
arrest.*

1 Hale, 457.
1 Hawk. ch. 31.
§ 56. 9 Co. 66. a.
29 Car. 2. c. 7.

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.

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.

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.

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.

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 unreasonable hour would be murder. But since the stat. 29 Car. 2. c. 7. f. 6. all process, warrants, &c. served or executed on

(*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.

(In advancement of Law).

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. § 22.
Time of 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.*

§ 89.

How far a third person interfering to prevent arrest, and killing the officer, can avail himself of the illegality of such arrest.

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. § 87.
How far illegality
of arrest an excuse
for third persons.

Vide Rex v.
Keate, Com.
Rep. 13. ad idem.

Ante, f. 58.

Fost. 312.

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

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 illegality 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 state 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.*

Ante, f. 20, &c.

Hugget's case,
 Kel. 59.
 Ante, 327.

Inde Hale, 465.
 Ante, f. 58.

Ante, f. 63, 83,
 84.

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;

(In advancement of Law).

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 Huggett'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) Huggett'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 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.

Safe custody by officer arresting.

Ante, f. 68.
1 Hale, 489.
Pult. de pace, 121.

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.

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.

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.

§ 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.
f. 13.

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 *durefs* of imprisonment, it will be murder *in the person guilty of such durefs*. 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.

§ 92.
Durefs by gaolers.
Folt. 321.
1 Hale, 466.
3 inst. 52.
Post. ch. 6. f. 2.

Castell widow v.
Barnbridge and
Corbett, 2 Stra.
85b. 9 St. Tr.
177. 181.
Folt. 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,

Rex v. Huggins
and Barnes,
2 Stra. 882.
Folt. 322.
Vide Rex v.
William Steven-
son, O. B. Sept.
1784, Sess. Pa-
pers 1177.

the

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 unwholesome 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 necessities 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.*

2 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

(In execution of Law).

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 recititude 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.

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

§ 94.
As to witnesses.

3 Inst. 48.
Foll. 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.
f. 9. Brit. c. 52.
Brac. lib. 3. c. 4.
Vide 1 Hawk. ch. 31 f. 7.
4 Blac. Com. 196. 3 Inst. 98.

(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.

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 conscientię, 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 cognizance 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 that 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.
f. 4, 5. ch. 31.
f. 59.
1 Hale, 497.
500, 1.
4 Blac. Com. 178.

1 Hale 454. 497.
&c.

Vide Farrington's
case, T. Jones,
222. Trem. P.C.
250. 1 MS.
Sum. 138, 9.
1 Hawk. ch. 28.
f. 6.
1 Hale, 501.

(In execution of Law).

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.
f. 60.
1 Hale, 498.

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 before 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.

§ 96.

Execution must conform to the sentence.

3 Inst. 52. 211.
1 Hale, 433.
454. 466. 501.
2 Hale, 411.
Folt. 267, 9.
4 Blac. Com. 405.
1 MS. Sum. 142.
4 St. Tr. 129.

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.

§ 97.

Must be by proper officer.

1 Hawk. ch. 28.
f. 9. 2 Hawk.
ch. 51. f. 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. ft. 5.

c. 2. vide 1 Ed. 6.

c. 12. f. 1.

1 Hale, 377.

3 Inst. 19.

Folt. 106. 323.

326, 7.

1 Hawk. ch. 32.

f. 6. Sum. 24.

1 Hale, 378.

2 Hale, 184.

The stat. 25 E. 3. ft. 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.

f. 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. 26.
Fitz. Crompt.
Just. 19.

There are accessaries before and after in petit treason, as in case of felony; but some distinctions are to be noted.

(Fitz. Crompt.
Just. 20.)

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.

1 Hale, 380.
Dait. ch. 142.
s. 2, 3.
Plowd. 475.

§ 103.

Indictment and
verdict.

Fost. 325. 328.
1 Hale, 378.
(Vide a case in
6 St. Tr. 224.
cont'd, cited by
Mr. Justice Fos-
ter, & rejected.)
Swan's case,
1 Ost. 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 in-
dictment

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 Wilton 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.

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.

Auterfoits 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.

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.

(a) St. 1 & 2 Ph. & M. c. 13. and 2 & 3 Ph. & M. c. 10. extending only to Felonies.

Ch. V. § 103.
Indictment and
verdict.

1 Hale, 184, 292.
Henrietta Radburne's case.
O. B. July 1787.
MS. Butler J.
Vide post. S. C.
f. 124.

1 Hale, 3-8.
2 Hale, 232.

Fost. 329.
Swan's case, ib.
104, 7.
Dalison, 16.

Fost. 337.

2 Hale, 246.
Vide Fost. 328, 9.

Fost. 323.

§ 104.

Witnesses and
trial.
1 Ed. 6. c. 12.
c. 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. f. 7.
3 Inst. 24, 27.
Vide 1 Hale, 316.
Fost. 337.

Ante, 139.

Ch. V. § 105.
Indictment and
evidence.

Of the Indictment, and Appeal, and Evidence.

§ 105.
General rules.

*Indictment for
murder most usual
in cases of homi-
cide.*
1 MS. Sum. 33.
2 Hale, 60. 158.

*Vide Latch. 12.
T. Jones, 222.
Co. Entr. 356. b.*

MS. Tracy,

1 Hawk. ch. 29.
f. 23.
2 Hale, 158.

Appeal.
2 Inst. 316.
Latch, 126.

§ 106.
*Presumption of
malice from the
fact of killing.*
Foss. 255. 290.
1 Hale, 455. 471.
Kel. 27. 50.
1 Hawk. ch. 31.
f. 32.
4 Blac. Com 201.
Ante, f. 12.

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.

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.

No appeal lies for homicide less than manslaughter.

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.

(Indictment, Appeal, and Evidence).

As to the Form of the Indictment.

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.

Ch. V. § 107.
Manner of death.

§ 107.
2 Hawk. ch. 23.
f. 79. 84.
ch. 25. f. 57.

2 Hale, 185.
Sum. 265.
4 Blac. Com. 196.
2 Hawk. ch. 46.
f. 37.
2 Inst. 319.

Sharwin's case,
Oakman 8th
July 1785, cor.
Gould J.

In Mich. T.
1785, MS.
Buller J.

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 dead and forfeited

§ 108.
How the instrument was holden, and the value of it.
2 Hale, 185.
Vide 2 Hawk.
ch. 23. f. 79.
80. &c.

(Indictment, Appeal, and Evidence).

Ch. V. § 108.
By what instru-
ment, and how
bolden.

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.
Lonkin's case,
1 Bull. 124.
MS. Tracy, 55.
2 Inst. 319.
2 Hawk. ch. 23.
f. 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 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.

MS. Tracy, 55.

§ 110.

*Decription of
wound.*

2 Hale, 185.
2 Hawk. ch. 23.
f. 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 fort. 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 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 much

2 Hale, 186.
2 Hawk. ch. 23.
f. 81.
2 Inst. 318.
4 Co. 42. a.

2 Hale, 186.

(Indictment, Appeal, and Evidence).

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. f. 81. 2 Inst. 318. 4 Co. 40. b.

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.

§ 111.
Death by means stated to be alleged.
2 Hale, 186.
1 Hawk. ch. 23. f. 82, 83.
Kel. 125.

Lad's case, Easter Term 1774. before all the judges at Serjeants' Inn, MS. Cro. Caf. Ref. and MS. Gould J. Leach. 91. S. C.

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-

§ 112.
Time and place.
2 Hale, 179. 186.
1 Hawk. ch. 37. f. 6. 2 Hawk. ch. 23. f. 33. 90. 91.
3 Inst. 49. 53.
Ealing's case, post. f. 133.
Vide Cotton's case, Cro. Bliz. 738. 2 Inst. 319.

Ut supra, and 1 Hale, 412. 426. 8.
1 Hawk. ch. 31. f. 9, 10.
3 Inst. 53.

Ch. V. § 112.
Time and place.

2 Inst. 318.
4 Blac. Com. 197.
Pult. 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.
f. 33. 86, 87. 88.
2 Inst. 318.

§ 113.

Evidence of death
fr m 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 Rolfe 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 admi-

Rew's case,
Kel. 26.
MS. Tracy, 53.

(Indictment, Appeal, and Evidence).

administered in consequence of such hurt; it is not homicide.

Ch. V. § 113.
Evidence of cause of death.

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.

§ 114.
Name of deceased.
2 Hale, 481. 6.
2 Hawk. ch. 23.
1. 78. 3 MS. Sum.
45. 22 Aff. 106.
4 Co. 41. b.

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; and 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.

§ 115.
Special circumstances of the case.
2 Hawk. ch. 46.
f. 41
Mackalley's case, 9 Co. 62,
3-7.

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

§ 116.
Terms of art.
1 Hale, 466.
2 Hale, 184.
186, 7. 344.
Fost. 256. 303, 4.
2 Hawk. ch. 23.
f. 77. 83.
ch. 25. f. 55.
2 Blac. Com. 307.
Yelv. 205. Cro.
Jac 283.
MS. Borneet, 43.
1 Bullstr 144.
Dy. 69. a. 261. a.
4 Co. 39. b. 41.
Kel. 124.
1 Hale, 450. 466.

Ch. V. § 116.
Terms of art.

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.
f. 88.

Mary Nicholson's case, before
Rooke J. Dur-
ham Sum. Ass.
1798, MS. Jud.

Upon a confer-
ence of the
judges, 6th Nov.
1798. (absent
Eyre C. J.)

stroke was given *feloniously*, or that the defendant *murdered*, &c. without adding of *malice aforethought*; or if it only charge that he *killed* or *flew*, 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. feloniously and of his malice aforethought assaulted B. and with a sword, &c. *then and there* struck him, &c. the first allegation of "*feloniously 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, feloniously, 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 "*feloniously and of her malice aforethought*" again 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.

33 H. 8. c. 8.
2 Hawk. ch. 23.
f. 85. ch. 25.
f. 90, 91.
2 Hale, 187.

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.

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.

(Indictment, Appeal, and Evidence).

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, 112.
1 Roll. Rep. 408.
1 Sid. 230.

Cary's case,
3 Bullstr. 206.
Post. 350.

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 feloniously, 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.

§ 117.
Apt conclusion.
2 Hawk. ch. 23.
f. 88 ch. 25. f. 55.
Kel. 125.

Ante, 346.
2 Hawk. ch. 23.
f. 70.
1 Hale, 427.
2 Hale, 118.
2 Hawk. ch. 23.
f. 88.

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

§ 118.
Indictment on stat.
of stabbing.
1 Jac. 1. c. 8.
1 Hale, 468.
Cro. Cir. Comp.
312.
Fost. 299.

Ante, f. 28.

of

(Indictment, Appeal, and Evidence).

Ch. V. § 118.
On stat. of stab-
bing.

Vide general title
Prosecution by
Indictment.

1 Hale, 468, 469.
1 Hawk. ch. 30.
f. 9. 2 Hawk
ch. 25. f. 115.
Sum. 266
Post. 349.
Ante, f. 28. &c.

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.
f. 9.
Post. f. 121.

(Ld. Cornwallis's
case, Dom Proc.
1678, 2 St. Tr.
730.)

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.

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.

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.

§ 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 conceal-
ing the death of a bastard child, in order to put the mother
upon proof by one witness that it was born alive, must
charge

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.

Ch. V. § 119.
On 21 Jac. 1. for concealing death of bastard.

2 Hale, 190. 288.
2 Hawk. ch. 46.
f. 43.
Wid. ante, f. 15.
and p. 343.

Ann Davis's
case, Kcl. 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, f. 15.

Some things are necessary to be added in respect to appeals of death, not referable to indictments. By the statute of Gloucester, 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 accessory 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.

§ 120.
Form of appeal, vide general title of prosecution by appeal.
2 Hawk. ch. 23.
f. 33. 34.
1 Hale, 427.
3 MS. Sum. 8.

In the first case she must be innocent of the fact, and prove herself lawful wife of the deceased: wherefore ne unques accoupled 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 wife.
2 Hawk. ch. 23.
f. 36 to 38.
3 MS. Sum. 5.
(printed page 181.) 2 Inst. 68.

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 im-

By the heir.
2 Hawk. ch. 23.
f. 39 to 43.
3 MS. Sum.
6. 11. (printed page 181, 2, 7.)
Staundf. 59.

licated

(Indictment, Appeal, and Evidence).

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 deceased 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.

2 Hawk. ch. 31.
 f. 49. 2 Hawk.
 ch. 29. f. 7.

Ante, 347.

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. 23.
 f. 76.

1 MS. Sum. 483.
 Sum. 65. 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.

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.

(Indictment, Appeal, and Evidence).

blow. But it is otherwise, as I have shewn on the statute of stabbing, being a particular law, and pointed at the actor himself.

Ch. V. § 121.
Accomplices.

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.

Acquittal of principal, conviction of abettor.
Alex. Shaw's case, Suffex Sp. Ass. 1735, debated in East. and Trin. terms following, M.S. Gould and Buller Js., S. C. reported in Leach. 290. last edit. 398.

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.

Regina v. Wallis and others, O. B. 1703, cor. Holt C. J. et al. Just. Salk. 334.

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.

How abetment laid.
2 Hawk. ch. 23. f. 89.
4 Co. 42. b.

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.

Husband and wife.
Kel. 31.

The same rule of evidence which I have above adverted to as governing the case of accomplices charged as principals, or vice versa, 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.

§ 122.
Accessaries.
Ant. f. 121.
Fost. 361.

Ch. V. § 122.
Accessaries.

Sum. 265, 6.
2 Hawk. ch. 46.
f. 40.
Rex v. Winifred
Gordon, North-
ampton Lent Ass.
1789, MS. Bul-
ler J. ante, f. 81.
and tit. Principal
and Accessary
S. C. *vide* 2 Inst.
162.

24th June 1789.

4 Co. 42. b.

2 Hawk. ch. 23.
f. 25. Lodowick
Grevil's case,
And. 195.

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 afore-
“said by the said T. G. in manner and by the means afore-
“said 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 man-
“ner and by the means aforesaid then and there felonious-
“ly, wilfully, and of their malice aforethought did kill
“and murder the said George Linnel,” &c. After argu-
ment 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.

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
persons

(Indictment, Appeal, and Evidence).

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.

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. f. 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.

Accessaries in another county.
2 Hawk. ch. 29.
f. 51. Lord Sanchar's case,
9 Co. 118.

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 accessory after, though the principal have his clergy, since the stat. 1 Ann. st. 2. c. 9. f. 1. which makes a conviction in this respect equivalent to an attainder.

§ 123.
No accessaries before in manslaughter.
1 Hale, 437.
450. 466.

2 Hawk. ch. 29.
f. 24 41, 2, 3, 4.

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

§ 124.
Declarations of deceased.
Vide general title Evidence in Felony.
Rex v. Reason and Tranter,
6 St Tr 201, &c.
1 Stra. 499.
Eating'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. *Geo ge Drummond's case*, O. B. Sept. 1783; Leach, 275.

Ch V. § 124.
Evidence.
Declarations of
the deceased.

Videtit. Witnesses.

Woodcock's
case, O.B. 1789,
post. 356.
and John's case,
post. 357.

Margaret Tinck-
ler's case, Dur-
ham, 1781, cor.
Nares J. MS.
Gould J. and
MS. Crown Caf.
Ref.

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 accessory 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

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 accessory with the deceased, yet the deceased was not willingly or knowingly an accessory 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. 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 evi-

Ch. V. § 124.
Evidence.
Declarations of
the deceased.

(1 Hale, 429.)

First day of
Mich. term
1781, at Ser-
jeant's Inn.

Ch. V. § 124.
Evidence.
 Declarations of
 the deceased.

MS. Buller J.

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.

R. v. Radburne,
 alias Gibbons,
 O. B. July 1-87,
 cor. Wilton J.
 MS. Buller J.
Vide general title
 Evidence, Depo-
 sitions, and
 2 Leach. 512.
 S. C.

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.

Woodcock's
 case, O. B. 1789,
 cor. Lord C. B.
 Eyre, Ashurst J.
 and Adair Serjt.
 Recorder, Leach,
 397 new edit.
 563.
Vide Dingley's
 case, ib. 638.

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, quæ 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

Trowter's case,
 B. R. E. 8 G. 1.
 1 Vin. Abr. 113.

(a) 1 & 2 Ph. & M. c. 13. and 2 & 3 Ph. & M. c. 10.

would

(Indictment, Appeal, and Evidence).

would not admit parol evidence of the declarations of the deceased which had been reduced into writing.

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 sevensnight 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

Ch. V. § 124.
Evidence.
Declarations of the deceased.

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.*

See general title Wives.

(Indictment, Appeal, and Evidence).

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 Wel-
bourn's case,
Lincoln Sum.
Ass. 1792, cor.
Ashurst J.
MS. Butler J.
To the same ef-
fect as the last
case; and further,
*If the deceased
thought she should
recover at the
time the declara-
tions 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

(Indictment; Appeal, and Evidence).

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-

Ch. V. § 124.
Evidence.
*Declarations of
the deceased.*

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,
Stafford Ass
1784, cor Buller
J. and by all the
Judges in Mich
term 1784, MS.
Gould and Bul-
ler 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 accessory 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.
7. In parts beyond the sea. Trial.

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 counsel, 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.

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.

Also by the statute of Articuli super chartas, c. 3. special provision is made concerning homicide within the verge.

§ 127.
Stroke and death in same county.
3 Inst. 27.
1 Hale, 283, 374.
2 Hale, 28.
16, 34. 2 Hawk.
ch. 25. f. 35, 36.
33 H. 8. c. 23.
Ely's case, O. B.
Dec. 1720.
Roache's case,
Dec. 1775.
Post. f. 133.

2 Hale, 66.
1 MS. Sum. 54.

Verge.
2 Inst. 549, 550.
2 Hale, 54.

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. f. 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

§ 128.
Stroke and death in different counties.
1 Hawk. ch. 31.
f. 13. 2 Hawk.
ch. 25. f. 36.
ch. 29. f. 48,
49, 50.
1 Hale, 426.
2 Hale, 66, 163.
Post. f. 131.
2 & 3 Ed. 6.
c. 24.

(1 MS. Sum. 54.
2 Hale, 66.)

3 Inst. 49, 135.
2 Hawk. ch. 29.
f. 52.

(a) That opinion, however, is contrary to the sense of the legislature as expressed in the stat. 2 & 3 Ed. 6. c. 24. f. 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 coun-
ties.

“ King’s Bench in the county where it sits, 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 (f. 3.) also provides, “ that an appeal of
“ murder may be commenced, taken, and sued in the same
“ county where the party feloniously 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.
f. 13. 2 Hawk.
ch. 23. f. 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 un-
necessary 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. f. 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 f. 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 accessory 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 accessory 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 accessory in the county where he
 “ became accessory, in such manner and form as if both
 “ the said principal offence and accessory had been commit-
 “ ted in the said county where the offence of accessory was
 “ committed. And every such accessory, &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.
*Accessories in one
 county to murder
 in another.*

See further title
 Prosecution by In-
 dictment—
 (Trial—County).

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.

§ 130.
In Wales.
 26 H. 8. c. 6.
 f. 6. *vide more*
 at large under
 the general title
 Prosecution by In-
 dictment—(Trial
 —County).
 1 Hale, 156, 72
 2 Hale, 38.
 1 Hawk. ch. 31.
 f. 14.
 Stroke in English
 county and death
 in Wales, or vice
 versa.
 Ante, f. 128.
 1 Hale, 158.
 2 Roll. Rep. 28.

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. § 170.
Stroke in English
county and death
in Wales, or vice
versa.

Post. 366.

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*, *both* “*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

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 shores 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. § 110.
*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 versa.

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

§ 131.
*Stroke or death
at sea or out of
England.*
3 Inst. 48.
1 Hale, 426.
2 Hale, 163.
1 Hawk. ch. 31.
f. 11, 12.
Vide ante, f. 128.

Ch. V. § 131.
Stroke or death
at sea or out of
England.

2 Hale, 20.
3 Inst. 48.
Post, f. 132.

Vide 2 Hale, 12
—15.

Post, f. 133.
2 Hale, 22.

1 Hawk. ch. 31.
f. 11.

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.

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

“ authority to inquire of murders, shall be as good and ef-
 “ fectual in law as well against the principals as the accessa-
 “ ries, as if such felonious stroke and death, or poisoning
 “ and death thereby ensuing, and the offence of such ac-
 “ cessaries, 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
 “ accessories 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 de-
 “ fences, 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.

6. Where both the stroke and death are at sea, or in ha-
 vens, &c.

§ 132.

*Stroke and death
 at sea.*

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.

“ the common course of the laws of this realm used for
“ treasons, felonies, murders, &c. committed upon the land
“ within this realm.”

Vide title Piracy.

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 statute 15 Ric. 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; 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 says, *where a man standing on one side may see what is done on the other*.

15 Ric. 2. c. 3.
4 Inst. 137.

3 Hale, 16. 54.

2 Hawk. ch. 9.
f. 14.

3 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, f. 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.
2 Hawk. ch. 31.
f. 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 consufance 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. § 113:
Stroke and death
in foreign parts.

Vide ante, §. 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.)

1 Hawk. ch. 32.
 §. 11.
 1 MS. Sum. 54.

This statute extends not to accessaries.

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 commis-
 sion of the sessions of oyer and terminer “ ad inquirendum

Ludowick Gre-
 vil’s case,
 1 And. 194.
 temp. Eliz.

Rex v. Ealing or
 Ely, O. B. Dec.
 1720. Ex rela-
 tione Foster J.
 Serje. Foster’s
 MS. RMS. num.
 54 cites Ed.
 King’s MS 300.
Vide 3 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 prodicionibus, misprisionibus
“ prodicionum, et murdris extra Angliam ubicunque perpe-
“ trat. secundum actum parliamenti domini Henrici octavi
“ predicti. 33. et ad easdem prodiciones et alia premissa (hac
“ vice) audiend. et terminand.” It was insisted by Ealing’s
counsel before King Ch. J., Eyre Ch. B., and Baron Mon-
tague, 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 exe-
cuted (a).

Vide 8 Mod. 144.
S. C. mentioned.

10 & 11 W. 3.
c. 25. f. 13. In
Newfoundland,
&c. Vide tit.
Piracy.

By stat. 10 & 11 W. 3. c. 25. f. 13. murder and all other
capital crimes in Newfoundland and the isles thereto be-
longing 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 ap-
pears therein to shew that the jurisdiction under the statute
of King William is taken away.

(a) Jacob’s Law Dict. tit. Homicide, f. 5. mentions another instance of a com-
mission issued against Capt. Locke for killing Mr. Ferguson at the Cape of Good
Hope: but no time is mentioned.

II. *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.

Ch. V. § 134.

§ 134.
Arraignment.

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.

§ 135.

Manner of taking and construing verdict.

1 Hale, 449.
2 Hale, 302.
2 Hawk. ch. 47.
1. 8. Plow 101.
Ante ad incipium, and f. 17.
Redburne's case, ante, p. 339. 356.
Ante, f. 118.
1 Hale, 449. 450.
2 Hawk. ch. 23.
f. 95.

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.

Guilty in different degrees.

Ante, f. 68. 82.
1 Hale, 438. 447.
2 Hawk. ch. 29.
f. 7: 15.
Ld. Mohun's case, Dom. Proc. 1692. 4 St. Tr. 541.

Vide tit. Mayhem.

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.

Special finding.
M. & K. 10. 60.
H. & W. 10. 60.
P. & W. 10. 60.

Ch. V. § 135.
Commitment and
bail.

3 H. 7. c. 1.
Kel. 25.
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 accessory, 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.
f. 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 f. 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 appoint, who shall give the sheriff, &c. a receipt for the same: and the body so delivered shall be dissected and anatomized by the said surgeons, &c. And in case such conviction 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 conviction (except as aforesaid); and the body of such mur-

derer

(Trial, Judgment, and Execution).

“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-
 “cution thereof, and the marks of infamy directed for such
 “offenders.”

Ch. V. § 135.
 Form of Judgment in murder.

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.

Stay of execution.
 4Blac. Com. 202.

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:—

Serjt. Foster's
 Mth. execution
 Case J.
 Fort. C. L.

“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 anatomi-
 zing, 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 dis-
 section 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

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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,
 Darn. Proc.
 1760. Foist. 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

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“ 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 transport-
 “ ation.”

Ch. V. § 136.
*Rescue of the
 body, &c.*

The judgment in cases of manslaughter and other less
 degrees of homicide have been before mentioned.

In manslaughter.
 Ante, l. 4, 5,
 &c.

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 Accessories 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

(Duty of Constable, Vill, &c.)

<i>The several Sorts of Inquisition.</i>	-	§ 11.
1. Finding the Death by the Visitation of God.	-	<i>ib.</i>
2. By an inanimate or irrational Thing.	-	§ 12.
<i>Diocands. What are such.</i>	-	§ 13.
How the Value to be assessed. Relation of Forfeiture.	<i>ib.</i>	
3. By the Act of the Deceased.	-	§ 14.
Relation of Forfeiture of Felo de se.	<i>ib.</i>	
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.	<i>ib.</i>	
Jury may find the Fact done by one not charged.	<i>ib.</i>	
Presentment of Flight, how far traversable.		§ 19.
Fees of Coroner.	-	§ 20.

Touching the Arrest of Offenders 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.

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 same 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

§ 1.
Arrest of offender on homicide committed.

- 1 Hale, 448.
- 2 Hale, 75, 6.
- 2 Hawk. ch. 12.
- f. 1. 4.
- Wilburn's case, Noy. 50
- 4 Ed. 1. st. 2.
- Duty of constable, &c. on notice.

Ch. VI. § 1.
Arrest of persons present.

hue and cry he shall forfeit 5l. 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. 6c4.
2 Hale, 73.
2 Hawk. ch. 12.
s. 2. 3.
3 H. 7. c. 1.
Kel. 5.

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 amerciamment, the hundred shall be charged therewith, and, in default of that, the county.

Of hundred and county.

§ 2.
Notice to be given to coroner.
1 Hale, 424.
2 Hale, 57. 8.
Sum. 170. *Vide*
1 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

Thus much of negligent escapes; such as are voluntary will fall under a different consideration in another place.

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 40s. 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.

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.

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.

Ch. VI. § 3.

Vide offences against lawful custody.

§ 4.

Duty of coroner.
2 Hale, 58.
2 Hawk. ch. 9.
f. 29. 1 H. 8. c. 7.

3 H. 7. c. 1.
2 Hale, 58.

Inquisition to be made super visum corporis.

1 Hale, 58, 9.
2 Hawk. ch. 9.
f. 23, 24.
1 Bac. Abr. 753.
1 Str. 22. 167.
533. 2 Lev. 140.

§ 5.

Where the body not found.

1 Hawk. ch. 27.
f. 12. 23.
1 Hale, 414. 419.
3 MS. Sum. 312.
3 Inst. 55.
1 Burr. 17.

What

Of Homicide
(Duty of Coroner).

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 recognizance 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 whether 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

Of Homicide
(*Duty of Coroner*).

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“ 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 before said.”

“ 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.
§. 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.
§. 26. Nicot, 27.

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 is to be
taken

1 Hale, 424.
2 Hale, 57, 58.
vide 1 Bac. Abr.
tit. Coroner.

(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.

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 exercised 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.

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 removed 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,

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.

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.

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.

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.

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.

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

Ch. VI. § 8.

§ 8.

Manner and form of inquisition.

2 Inst. 143.

2 Hale, 59.

2 Hawk. ch. 5.

f. 22.

Pinner's case,

Cro. Eliz. 31.

2 Hawk. ch. 9.

f. 25. 3 Bultr.

1734 Bac. Abr.

753.

3 Inst. 71.

Staudf. 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*)

Cro. Jac. 635.

1 Hale, 417.

2 Hale, 56. 58.

1 Bac. Abr. 757.

2 Hale, 62.

§ 9.

Evidence.

2 Hale, 62, 1, 2.

137.

Scory's case,

M. 22 G. 2.

1 Leach, 50.

2 Sid. 90. 107.

1 Hale, 415.

Dispositions.

1 & 2 Ph. & M.

c. 13 f. 5.

(*a*) The inquisitions there were only signed by the coroner and the foreman of the jury.

" person

Ch. VI. § 9.
Evidence on In-
quisition.

Witnesses to be
bound over by
recognizance.

“ person or persons shall be indicted for murder or man-
“ slaughter, or as accessory or accessories 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, § 124.8.
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. § 5.
Ante, § 9.

And further by st. 25 Geo. 2. c. 29. "If any coroner who is not appointed by virtue of an annual election or nomination, 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 adjudge that he be removed from his office."

25 G. 2. c. 29.
§ 6.

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

§ 11.
The several sorts of inquisition.

1. *By the visitation of God.*
2. *By means of some inanimate or irrational thing.*

C c

3. *By*

Of Homicide

(Duty of Coroner).

Ch. VI. § 11.
The several sorts
of inquisition.

By visitation of
God.

Ante. f. 7.
1 Hale, 418.
2 Hale, 62.

3. By the party's own act.
4. By the act of another.

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.

3 Hawk. ch. 9.
f. 28 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.
Fent. 265.
1 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 these 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.
f. 9.

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.

Ch. VI. § 13.
Deodand.

1 Hale, 422, 3, 4.
1 Hawk. ch. 26.
f. 6.
1 Hale, 420 422.
1 Hawk. ch. 26.
f. 5.
1 Lev. 136.
Rym. 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 be 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.

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

Assessment of the value.
Folt. 266.
2 Bac. Abr. 294.

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. Monpeffon 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. 54.
Plowd. 260, &c.

The relation of the forfeiture is to the stroke so as to avoid all mesne conveyances.

1 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.*
2 Hale, 62.
1 Hawk. ch. 27.
f. 9.
1 Hale, 414.
1 Saund. 367.
n. by Serjt. Wil-
liams. Fost. 266.

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 amenable 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.

1 Hale, 413.
Plowd. 261.
3 Inst. 55.
1 Bac. Abr. 748.
*Wid. Crimes, Fe-
lony, Forfeiture.*

The forfeiture in this case is of goods and chattels only, and not of lands.

Wid. 3 Inst. 54.
1 Hawk. ch. 27.
f. 10. Sum. 29.
4 Blac Com. 190.
Plowd. 261, 2.
1 Lev. 8.
1 Hale, 414.

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.

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. f. 15.
1 Hale, 412.
1 Salk. 377.
1 Keb. 66.
Vide Saund. 356. note (2) by Mr. Serjt. Williams.
1 Hawk. ch. 27. f. 15.
1 Hale, 415.
3 Mod. 101.
Vide 2 Lev. 146. 152. 2 Hawk. ch. 9. f. 56.
T. Jones, 198.
1 Vent. 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. r83. d.
1 Hale, 414 to 417. 1 Hawk. ch. 27 f. 11, 12.
2 Hawk. ch. 9. f. 55. *Vide* Authorities collected by Serjt. Williams, Saund. 362. n. 1.
1 Vent. 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 insanity ought not to be strained to that length to which it is sometimes carried by the coroner's juries,

§ 17.
Evidence of insanity.
4 Black. Com. 189.
1 Hale, 412.

Of Homicide
(*Duty of Coroner*).

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.

1 & 2 Ph. & M.
c. 13 f. 5.
2 Hale, 63.

3 MS. Sum. 27.

4. If the party be slain by another, and the felon be 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.

§ 19.
Flight.
2 Hale, 63, 64.

Ante, f. 12.

Whether traversable.

Ante, f. 16.
1 Bac. Abr. 755.
Vide 1 Hale,
416, 17.
2 Hale, 63, 4.

1 Hale, 363.

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.

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,

feited, 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.

Ch. VI. § 19.
Inquisition of death against another.

2 Hawk. ch. 9.
f. 54.
1 Bac. Abr. 755.
& vide Saund.
363. note by
Sergt. Williams.

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 further 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 f. 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.

§ 20.
Fees.
3 H. 7. c. 1.

1 H. 8. c. 7.
25 Geo. 2. c. 29.
f. 1.

(a) R. v. The
Justices of the
W. R. of York-
shire, 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 Accessories.* - - - § 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 Mayhem or Maims.

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.

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.

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 prepenfed, 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.

By stat. 37 H. 8. c. 6. If any person "maliciously, willingly, or unlawfully cut or cause to be cut off the ear or ears of any subject, otherwise than by authority of law, chance

Ch. VII. § 1.

§ 1.

Maims at common law.

- 1 MS. Sum. 221.
- Co. Lit. 126. b.
- 288.
- 3 Inst. 62. 118.
- Staundf. 38. b.
- 1 Hawk. ch. 44.
- f. 1, 2. 2 Hawk.
- ch. 23. f. 16.
- 3 Blac. Com. 121.
- 4 Blac. Com. 205.

Punishment.

- Co. Lit. 127.
- 1 Hawk. ch. 44.
- f. 3. 2 Hawk.
- ch. 23 f. 18.
- 4 Blac. Com.
- 205, 6.

§ 2.

By statute.

- 5 H. 4. c. 5.
- 3 Inst. 62.
- Kel. 65.
- Cutting tongues or eyes.*

- 37 H. 8. c. 6.
- f. 4.
- Cutting off ears.*

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. §. 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.

Revv. Carrol
and King, O. B.
July 1765.
1 MS. Sum. 224.
Sergt. 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,

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 instrument 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, synonymous with fissure, incision, or gash. 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 cau-

Ch. VII. § 3.
By the Coventry
act.

*Slitting of the nose
within the act
may be by a trans-
verse cut.*

tion,

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 flitting 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.
1 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

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

Ch. VII. § 5.
*By the Coventry
act*

Rex v Mills,
O. B. April
1783. cor. Eyre
C. B.
Leach, 172. n.
last edit. 294.

Carrol's case,
ante f. 3.
MS. Gould J.

circum-

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.

4. *As to the intent.*

For what purpose.

Carrol's case,
ante, f. 3.

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.

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.
(a) This is made
a misdemeanour
by 13 G. 3.
c. 32.

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.

And the same line of construction has been adopted even where personal violence was intended, it being of
a dif-

a different and less atrocious sort, and with a different view.

Ch. VII. § 6.
By the Country
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 Caf. Ref.
and MS. Gould
J.

*The commander of
a press-gang
maiming a man
whom he casually
met, and who re-
sisted being im-
pressed, (being in
truth a mariner,)
but against whom
he appeared to
have an antec-
edent 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.
f. 6. 4 Bac. Abr.
487.

Ch. VII. § 6.
By the County
off.

“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 Sup-
folk, 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.
Accessories.
1 Hale, 618.
Tracy's MS.
215. b. 2 Hawk.
ch. 29. f. 5. 19.

Lord Hale considers that there are no accessories 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.

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.

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.

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,

D d

because

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.

1 MS. Sum 223.

Arrigoni's case,
ante, p. 399.

§ 8.
Appeal and Indictment
3 Inst. 118.
2 Hawk. ch. 23.
f. 15. 17, 18.
24. ch. 25, f. 55.

Ch. VII. § 8.
Appeal and In-
dictment.

because anciently the party was subject to the loss of mem-
ber, though he is no longer so now.

2 Hawk. ch. 23.
f. 20. 75.

If an appellant count of battery, the writ abates ; because
it supposes no battery.

2 Hawk. ch. 25.
f. 57.
ch. 23. f. 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 feloniously
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
feloniously 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 feloniously 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
Carroll's case,
1 Leach, 60.
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.

2 Hawk. ch. 23.
f. 23.
1 Ld. Raym. 177.
11 Mod. 43.
Bull. N. P. 18.
Foss. 406.

1. It seems clear that son assault demefne 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 immedi-
ate mayhem, such as cutting off a leg or hand, or biting off a
joint of a man's finger, unless it happened accidentally, with-
out 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 proportionable to the mayhem (a).

2 Hawk. ch. 23.
f. 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 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).

Ch. VII. § 9.
Defences.

2 Hawk. ch. 23.
f. 22.

(a) Q. May not the court in such cases increase the damages on view? *Vide Bull. N. P. 214*

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.
f. 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.
f. 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.
f. 128.
Post. *Prosecution by appeal.*

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.

§ 10.
Trial.
2 Hawk. ch. 23.
f. 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.
f. 28.

C H A P. 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

(*With felonious, malicious, or unlawful Intent, &c.*)

How far necessary to prove it in the same Person's
Dwelling-house as laid. - - § 8.

Trial may be in any County. - - § 9.

Affault 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 Affault 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.

Affaults on Revenue Officers; vide Offences relating to the
Customs and Excise. - - § 14.

Affaults on Persons wrecked with Intent to kill, &c. Felony
without Clergy by Stat. 26 Geo. 2. c. 19. § 15.

Affaulting Officers and others on account of their En-
deavours to preserve the Property, &c. Transportation
for 7 Years. *ib.*

Affaults 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.

Affault 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.*

Affault 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.*

Affault 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.*

(*With felonious, malicious, or unlawful Intent, &c.*).

Assault on Master Woolcombers, &c. to compel Obedience 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.

Vid; Bull. N. P.
15.

1 Hawk. ch. 62.
f. 1, 2.

Bull. N. P. 15.

Battery.

Justification or
excuse.

1 Hawk. ch. 60.
f. 23.

Ib. ch. 62. f. 1. 3.

Bull. N. P. 15. &
ante tit. Mayhem.
p. 402.

Punishment.

4 *Biac. Com.* 217.

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.

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 threatening 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

(With felonious, malicious, or unlawful Intent, &c.).

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.

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.”

§ 2.

Assaulting privy counsellors.
9 Ann. c. 16.
Ante, p. 89.

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 burghers, 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,

Members of parliament, &c.
11 H. 6. c. 11.

(*With felonious, malicious, or unlawful Intent, &c.*)

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, sit-
ting the courts of Chancery, Exchequer, K. B. and C. B., or be-
fore justices of assize or oyer and terminer, shall draw a wea-
pon 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
Thames & others,
B. R. Trin.
39 Geo. 3. MS.

In a late case, the information set forth a special commis-
sion 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

[With felonious, malicious, or unlawful Intent, &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.*

(*With felonious, malicious, or unlawful Intent, &c.*).

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 1000 l. and be imprisoned in the Tower for a year, and give security for seven years, himself in 10,000 l. and two sureties in 5000 l. each; and that Mr. Ferguson should pay a fine of 100 l., be imprisoned for a year, and find surety for seven years, himself in 500 l. and two sureties in 250 l. 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 misprison, 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.

(*With felonious, malicious, or unlawful Intent, &c.*).

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.

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.

Perchall's case,
2 Leon. 188.
Cro. Eliz. 465.
2 Hale, 171.

Of Assaults with Intent to murder, &c.

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.

§ 5.

Assault with intent to murder, &c.

Staundf. 17.
Bacon's case,
1 Lev. 146.
1 Sid. 230.
4 Blac. Com. 196.

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

(With felonious, malicious, or unlawful Intent, &c.).

Ch. VIII. § 6.

§ 6.

Shooting at another.

9 G. 1. c. 22. f. 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 King-
 ston, 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 Gatti-
 neaux's case,
 O. B. May 1786,
 cor. Adair Serjt.
 Rec. Sess. Pap.
 p. 738. 748.

*Vide Harris's
 case, tit. Arrest.*

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.

Shooting at.
 4 Blac. Com. 207.

Empton's case,
 O. B. 1781,
 cor. Adair Serjt.
 Recorder, Sess.
 Pap. p. 240.

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 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, (Deer.)*

a sword

(With felonious, malicious, or unlawful Intent, &c.).

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.

Ch. VIII. § 6.
Shooting at another.

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.

§ 7.
Principals, accomplices, and accessories.
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, King-
ston Lent Ass.
1785, MS.
Gould and Buller
Js. 2 MS. Sum.
522. Leach, 397.
last edit. S. C.

(*With felonious, malicious, or unlawful Intent, &c.*).

Ch. VIII. § 7.
Shooting at another.

Wells' case,
Kent Sp. Aff.
1786, MS.
Buller and Gould
Js. & MS. Jud.

ing, as if a string were tied to the trigger and they all pulled it.

Finally in Wells' case the indictment charged that the prisoner and divers others unknown did with a loaded gun, &c. unlawfully, wilfully, maliciously, and feloniously 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 feloniously, 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.
Rex v. Davies,
Hereford Sum.
Aff. 1788, and
last edit. S. C.

The indictment must pursue the words of the act, and charge the offence to have been done "*wilfully and maliciously*" as well as *feloniously*. In Davies' case, it was laid to before all the judges in Hil. T. 1789. MS. Buller J. and MS. Jud. 2 Leach, 556.

(With felonious, malicious, or unlawful Intent, &c.).

to be done "unlawfully, maliciously, and feloniously," 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.

Ch. VIII. § 8.
Shooting at another.

(a) *W. Cro. Eliz.*
147. *Held. 12.*

The statute says "if any person shall shoot at any person in any dwelling-house or other place." Count Durore 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.

Durore's case,
O. B. December
1784, cor. Ho-
tham B. Sess.
Pap. 229.
2 Leach, 390.
S. C.

Vide Pye's case,
and *Johnstone's*
case, tit. *Larceny*
and *Robbery*.
(*Indictment*)
Rex v. Harris,
Salop Sp. Ass.
1801, and after-
wards before all
the judges. *MS.*
Jud.

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.
Trial.
9 Geo. 1. c. 22.
s. 14.

Rex v. Morris,
H. 11 G. 3.
2 Blac. R. 733.

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 it

§ 10.
Assault with in-
tent to rob.
Staundf. 27. b.

(*With felonious, malicious, or unlawful Intent, &c.*).

Ch. VIII. § 10.
With intent to rob.

7 Geo. 2. c. 21.

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."

By s. 2. "If any such offender break gaol, or escape before 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

(With felonious, malicious, or unlawful Intent, &c.).

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.

CH. VIII. § 11.
With intent to rob.

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. Ashhurst, 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 1784.
cor. Ashurst
Sess. P. p. 271.
S. C. Leach,
271. last ed. 371.

(*With felonious, malicious, or unlawful Intent, &c.*)

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.

(*With felonious, malicious, or unlawful Intent, &c.*).

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.

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 referred 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*

Ch. VIII. § 11.
With intent to rob.

§ 12.
Form of indictment.
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.

(With felonious, malicious, or unlawful Intent, &c.)

Ch. VIII. § 12.
With intent to rob.

July Sess. 1783,
Sess. Pap. 729.

Rex v. Remnant,
H. 33 G. 3.
5 Term Rep. 169.

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.

Ante, f. 2.

Monteth's case,
O. B. October
1795, cor. Ho-
rham B. and
Heath J.

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.

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.

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.

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,

(*With felonious, malicious, or unlawful Intent, &c.*).

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.

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With intent to rob.

2 Leach, 809.
vide off. Pap.
p. 1300 and
1321.
*How the intent
to rob must be
charged.*

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.

§ 13.

*Description of
weapon.*
Ante, p. 341.
Sharwin's case,
Oakham, July
8th 1785, cor.
Gould J. MS.
Butler J.

(*With felonious, malicious, or unlawful Intent, &c.*).

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 Mis-
chief, and Lar-
ceny.

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 majesty'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 convicted thereof shall suffer death without benefit of clergy."

By f. 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 dominions; then any person or persons so assaulting beating and wounding, shall upon trial and conviction, by indictment 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 transportation 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. f. 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

(With felonious, malicious, or unlawful Intent, &c.).

“ 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.*

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.”

§ 17.
*Affault on account
 of gaming, &c.*

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 ob-
 jected 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.

Rex v. Randal
 and others,
 Bristol Sum. Ass.
 1787.

(With felonious, malicious, or unlawful Intent, &c.).

Ch. VIII. § 18.
*With intent to
spoil garments.*

§ 18.
*Assault with in-
tent to spoil gar-
ments.*
6 G. 1. c. 23.
f. 11.

*Vide general head
of Transporta-
tion.*

4 Blac. Com. 245.

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 pe-
" nalties thereof; and the courts by and before whom he
" fine 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."

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 privately 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
MS. Jud.
Leach, 426. S.C.
1st edit. 597.
(-bent Lord
C. B. Lyre and
Wilson J.)

*If the intent were
to wound, though
the cloaths must
be and were cut
by the manner of
executing such in-
tent, the case is
not within the
statute.*

Ante, p. 400.

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

(With felonious, malicious, or unlawful Intent, &c.).

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 feloniously 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.

Ch. VIII. § 18.
*With intent to
spoil garments.*

Vide Buckier's
case, Dy. 68.
R. v. Frances,
Com. R. 478.

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

§ 19.
*Assault with in-
tent to obstruct
the free passage
of grain*
See further tit.
Malicious Mis-
chief. 30 G. 3.
c. 9.

*2d offence felony,
and transportation
for seven years.*

" by

(*With felonious, malicious, or unlawful Intent, &c.*)

Ch. VIII. § 19.
*Obstructing pas-
sage 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 wool-
combers.*

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 f. 1. all con-
tracts, 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 exer-
cising the art and mystery of a woolcomber or weaver, or
journeyman woolcomber or journeyman weaver in this king-
dom, for regulating the said trade or mystery, or for regu-
lating 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

(With felonious, malicious, or unlawful Intent, &c.).

“ 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 wool-
 combers.*

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 KIDNAPING.

-
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 Com-
 mon Law. - - - - § 4
 Punishable by Habeas Corpus Act with 500 *l.* Damages,
 to be recovered, and by the Penalties of a Præmu-
 nire, 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 Imprison-
 ment by stat. 11 & 12 W. 3. c. 7. - § 5
-

False Imprisonment.

§ 1.
*False imprison-
 ment.*

Bull. Ni. Pri. 22.
 & vide 6 Bac.
 Abr. 569.

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.

There

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 attorneys and solicitors, prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted by the confession of the party, or by the oath of one or more credible witnesses, before the Lord Chancellor, 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 inflicted." 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."

Ch. IX. § 2.
*Arrest of ambaf-
sadors, &c.*

§ 2.
*Vide 1 Blac.
Com. 255.
7 Ann. c. 12.*

Kidnapping.

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,

§ 3.
*Ld. Grey's case,
T. Raym. 473.
Comb. 10.*

Ch. IX. § 3.

*In the northern
counties.*

43 Eliz. c. 13.

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, detaining, 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.”

§ 4.

*Kidnapping by
sending to foreign
countries.*

4 Blac. Com. 219.

31 Car. 2. c. 2.
s. 12.*Sending prisoners
beyond sea.*

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 resident of this kingdom of England, dominion of Wales, or town of Berwick upon Tweed, shall be sent prisoner into Scotland, Ireland,

“ 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 500*l*.;
 “ 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-
 “ lance, 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

Ch. IX. § 4.
*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 imprisoned, or his or her delivery out of prison, which shall first happen."

§ 5.
Masters of ships
forfeiting or wilful-
ly 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.

R A P E,

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. ft. 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 Accessories. - - - § 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 Accessories 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. ft. 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.
 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. ff. 1.
 c. 34.

By ft. 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.
 ff. 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 *rapt* 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. 139.

Ch. X. § 1.
Of children.

"shall be felony; and the offender thereof being duly convicted shall suffer as a felon, without benefit of clergy."

§ 2.

Consent.

2 MS. Sum.

334, 5.

1 Hawk. ch. 41.

f. 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.

f. 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 unnecessary

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.

Ch. X. § 3.
Evidentia facti.

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 feminis 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 feminis without penetration makes not rape. But in the 12 Rep. 37. the same author says, that there must be penetratio et emissio feminis 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 corrected work, who says, that to make rape there must be an actual penetration or *res in re*; and therefore emissio feminis 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 feminis; 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.

§ Inst. 59, 60.

Sum. 117;
1 Hawk. ch. 4.
f. 2. ch. 41. f. 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 *injection feminis*. Injection, they said, cannot be proved in the case of a child, or of bestiality, and

Duffin's case,
O. B. 2nd June
1721. (Qu. Dec.
1722) Baron
Price's MS.

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Evidentia facti.

(352.)

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.

Cave's case,
O.B. Oct. 1747,
Serjt. Foster's
MS.

MS. supra.

Mathew Cave was indicted for a rape on Martha Flanners, 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 Clive J. did the same upon an indictment against Blomfield for a rape on Elizabeth Reynolds.

R. v. Blomfield,
Thetford, March
1758, MS. sup.

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. Ruffen,
O. B. Oct. 1777.
Serjt. Forster's
MS.

Benjamin Ruffen 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

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.

Ch. X. § 3.
Evidentia facti.

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.

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,

Samuel Hill's
case, Tr. term
1781, MS.
Gould and Bul-
ler Js.

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).

Ante, p. 438.

1 Hawk. ch. 4.
f. 2.
Harmwood's
case, Winchester
Sp. Ass. 1787,
MS.

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 *prima 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.

Rex v. Flem-
ing and Wind-
ham, before the
judges in Trin.
term 1799,
2 Leach, 996.

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.

§ 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 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.

Ch. X. § 4.
Attempt to ravish.

Page's case,
Cro. Car. 332.

3. *As to the Testimony of the Party grieved.*

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 sees 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.

§ 5.

Witnesses.
1 Hale, 502. 634.
2 Hale, 279. 284.

4 Blac. Com. 214.

A child

Ch. X. § 5.
*Witness.*Dy. 303. b. in
margin.(a) R. v. Ter-
mont, O. B.1740, Serjt. For-
ster's MS. 182.(b) O. B. Mich.
1705, MS. Dea-
ton.(c) Young v.
Slaughterford,
Trin. 1709.Rex v. Travers,
1 Stra. 700.

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).

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. Dannel,
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

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.

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 sergeant, 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.

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.

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 Str. 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.
 f. 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.
f. 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 Ruffen'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.
f. 3.
2 MS. Sum. 335.
Staundf. 22.

Ante, p. 438.

Ch X. § 7.
Confirmatory evi-
dence.

place or company about that time: these and the like cir-
cumstances afford a strong, though not conclusive presump-
tion that her testimony is feigned.

5. Of Principals and Accessories.

§ 8.

*Principals and
accessaries.*
1 Hale, 628, 9,
630. 1 Hawk.
ch. 41. § 6.
4 Blac. Com. 212.
Plowd. 99, 100.
Bro. Appeal, 32.

ante, § 6.

1 Hale, 629.
Pull's case.

Vide post. ch. 11.

1 Hale, 632, 3.

Ante, § 1.

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 mis-
chievous 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.

There may be accessaries before and after in rape, though,
as Lord Hale observes, the felony be created by act of par-
liament which speaks only of those who commit the offence;
for this is incident to the nature of felony.

The punishment of these offenders has been before con-
sidered.

6. Of the Indictment and Appeal.

§ 9.

*Indictment and
appeal.*
1 Hale, 631-3.
2 Hawk. ch. 23.
§ 58. 72.
4 Blac Com. 211.
(2 Hawk. ch. 23.
§ 51.)

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 ap-
peal: 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 pre-
sumption that her suit is malicious and feigned. 2. That

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. ft. 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 convicted 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.

Ch. X. § 9.
Indictment and appeal.

Supra, and
3 MS. Sum. 10.
ante, p. 434.

Ante, p. 435.

6 Ric. 2. ft. 1.
c. 6.
1 Hale, 631.

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-

§ 10.

Form of the count.
1 Inst. f. 190.
2 Inst. 180.
1 Hale, 628.
2 Hale, 184.
Bro. Abr. Indictment, pl. 7.
9 Ed. 4. 26.
Staundf. 96.
Pult. de pace, 126.
(a) 11 H. 4. 13.
cited in Bro. Appeal, 32. Fitz. Coron. pl. 86.
2 Hawk. ch. 23.
f. 79. Sum. 187.
& Staundf. 81.

(1) *Vide* ante, p. 435.

(2) *Vide* 2 Hale, 172.

Ch. X. § 10.
Indictment and
appeal.

(b) 2 Hawk.
ch. 25. l. 56.

1 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.
f. 6.

2 MS. Sum. 336.

3 MS. Sum.
324—6.

Ante, f. 2.

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 *contra 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 feloniously, 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.

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.
f. 58 62, 3. 67.
70.

The trial must be in the county where the fact was committed: and by stat. 13 Ric. 2. ft. 2. c. 1. no charter of pardon shall be allowed for rape, unless it be therein specified.

§ 11.
Trial.
Ib. f. 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 Accessories 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.*

Witnesses, 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.*

Forcible, or fraudulent Abduction, Marriage, or Defilement.

451

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.

*I. Of the forcible Abduction, Marriage, or De-
filement 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.
ousts 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. 116.
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

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 receivers principals; yet the stat. of Eliz. distinguishing between principals and accessories 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 accessory after the fact; and as such would be plainly entitled to clergy. Those who are only privy to the marriage, 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 accessories.

2 MS. Sum.
333. a.

Fulwood's case,
Cro. Car. 489.
403.
Vide post. 454.

If a woman be forcibly taken in one county, and afterwards go voluntarily into another county, and be there married or defiled with her own consent, the fact is not indictable 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.

§ 3.
Trial—county.
Fulwood's case,
Cro. Car. 489, 8.
Note, 600.
1 Hawk. ch. 42.
f. 9.
Hob. 182.
2 MS. Sum. 332.

The indictment must expressly set forth that the woman taken had lands, or tenements, or goods, or was heir apparent; 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. carnally 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.

§ 4.
Indictment and proof.
1 Hawk. ch. 42.
f. 3. 4. Inst. 61.
1 Hale, 600.
1 And. 115.
Hob. 182.
Fulwood's case,
Cro. Car. 482, 5.
1 Vent. 44.
12 Co. 20. 100.
Hutt. 2.
4 Blac. Com. 208.
2 MS. Sum. 332.

Ch. XI. § 4.
Indictment and
proof.

(a) Hutt. 3.
(b) 1 Hawk.
ch. 42. f. 5, 6.
1 Hale, 60.
4 Blac. Com.
208. 2 MS.
Sum. 332. a.
Cro. Car. 485.
493. Haagen
Swendfen's case,
5 St. Tr. 450.
464. 473. 4.

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.

§ 5.
Witness.
1 Hale, 301.
660, 1. Full-
wood's case,
Cro. Car. 488.
Brown's case,
1 Ventr. 243.
Haagen Swend-
fen's case, 5 St.
Tr. 456.

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 Swendfen'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

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 jabs-
tance.*

Jagger's case,
Mich. 1796,
MS. Buller J.
vide tit. Witness.

2. *Of fraudulently alluring away female Children under the Age
of sixteen from their Parents, &c.*

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;" recit-
ing, 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 chil-
" dren, 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 con-
" veyed 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 govern-
" ance, 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 socage, &c. of such maid or woman child."

§ 6.
*Alluring away
women.*
4 & 5 Ph. & M.
c. 8.

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.

(a) i. e. mother after the death of the father, according to the subsequent clause. 3 Co. 39. Ratcliffe's case. Post. 458.

“ 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.”

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.
Coun. 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 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.

Ch. XI. § 6.
Taking or fraudulently alluring away of female infants.

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

§ 7.

Construction.
R. v. Cornforth,
2 Stra. 1162. &
MS. *R. v. Sweet-*
ing, 1766. S. P.
MS.
(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 Star Chamber; 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. Mar-
riot, 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

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 (*f. 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.

Ch. XI. § 9.
By unlawful means at common law.

R. v. Pierfor and others, Andr.
310. R. v. Story,
3 Keb. 101. R.
v. Ld. Ormiston
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 Mod. 130.

R. v. Harris,
4 Term R. 202.

R. v. Sainsbury,
4 Term R. 457.

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.), "cerning 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

§ 10.
2 Inst. 440.
2 P. Wms. 110.

detain

Ch. XI. § 10.
By unlawful
means at common
law.

R. v. Ld. Grey
and others, trial
at bar, Mich.
34 Car. 2. 3 St.
Tr. 519.
*Conspiracy to en-
tice a young wo-
man under age to
leave her father's
house and live in
fornication with
one of the defend-
ants, and concert-
ing measures with
her own appro-
bation to carry
her off and con-
ceal her for that
purpose.*

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.

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 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.

Ch. XI. § 10.
By unlawful means at common law.

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

§ 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.

R. v. Fowler
and others,
Taunton, Sp.
Ass. 1788, cor.
Buller J. MS.

Ch. XI. § 11.
*Conspiracy to
marry paupers.*

Cald. 247.

Indictment.
Rex v Park-
house and Trem-
let, Exeter, Sum.
Ass. 1792, cor.
Buller J. MS.

R. v. Edwards
and others,
8 Mod. 320.

*Vide Crown
Circ. Assize, 182.*

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 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 indictment 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.

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 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.

C H A P. 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.

Witnesses. - - - - - § 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 married, 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."

2 (vulgo 1)

Jac. 1. c. 11.

Felony.

Clergy, punishment, burning, imprisonment.

Fine or whipping.

Transportation for 7 years.

35 G. 3. c. 67.

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 England 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 penalties 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

4 G. 1. c. 11.

& 6 G. 1. 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 without 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 disinheritance of heirs.

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.

§ 2.

What marriage is an offence under the stat. 1 Jac. 1. c. 11.
1 Hale, 602.
1 Hawk. ch. 43. s. 7. Kel. 79.
80. 1 Sid. 171.

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 with-
 in the statute*
 1 Jac. I. c. 11.

Lady Madifon's
 case, O. B. 1648.
 1 Hale, 693.

3 Inst. 88.

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.

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. I. c. 11.

The statute itself of Jac. I. 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 *prima 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. I. 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.

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 ob- 1 Hale, 693.
 serves 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 in-
 tended within *England, Wales, and Scotland*.

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 sævi-
 tiam 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 causa adulterii, (which is only a divorce a mensâ et
 thoro,) it was agreed that he was not within the statute.
 It is also agreed that a second marriage, pending an appeal
 from a divorce a vinculo matrimonii, is aided by this excep-
 tion; though the appeal suspends and possibly may repeal

Ch. XII. § 4.
Exceptions, Sec.
Affence within
the king's domini-
ons

§ 5.
 3d and 4th Ex-
 ceptions, sentences
 of divorce.
 1 Jac. 1. c. 11.
 s. 3.

1 Hale, 699.
 2 MS. Sum 330.

Porter's case,
 Cro. Car. 451.

3 Inst. 89.
 1 Hawk. ch 43.
 s. 5, Sum. 122.
 4 Bac. 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 sen-
tence.

Duchefs of
Kingfton's cafe,
Dom. Proc.
16 G. 3.
11 St. Tr. 262.

the fentence; in which cafe the fecond marriage would of courfe be invalid.

In the cafe of the Duchefs of Kingfton, who was tried for polygamy, a fentence in the ecclefiaftical court againft the validity of a former marriage in a fuit of jactitation of marriage was produced in evidence on her behalf, and contended to be conclufive, being unappealed from. But firft it was holden not to be conclufive in itfelf; the fentence having decided on the invalidity of the marriage only collaterally, and not directly. But further, admitting it in general to be conclufive, yet the effect of it might be avoided by fhewing that it had been obtained by fraud or collufion: and ſhe was declared guilty.

§ 6.

5th Exception,
within age.
1 Jac. 1. c. 11.
f. 3. 3 Inft. 89.
1 Hale, 17. 694.
2 MS. Sum. 330.
1 Hawk. ch. 43.
f. 6.

Holt v Ward,
Tr. 5 G. 2.

1 Hale, 694.
4 Blac. Com. 165.

Laftly, it is provided that the act ſhall not extend “to any perfon or perfons for or by reafon of any former marriage had or made within age of confent.”

If either party be within the age of confent, which in the man is 14, and in the woman 12, the 5th exception extends to both; for the power of difſent to the former marriage muft be reciprocal. And yet in a civil light a promife of marriage by an adult to one under age will fubject the adult to an action for a breach of fuch promife. But if both are above thofe refpective ages at the time of the firft marriage, though under 21, a fecond marriage would be felony. And though either were under the age of confent when the firft marriage was contracted, if they agreed to it when both had attained fuch age, by which the marriage is completed; it feems that a fecond marriage would be within the reafon and penalties of the act.

Trial.

§ 7.

Trial.
1 Jac. 1. c. 11.
f. 1.

Ed Digby's cafe,
Hutt. 131.

1 Hale, 694.

35 G. 3. c. 67.

Offenders within the ftatute of James are directed to “receive fuch and the like proceeding, trial, and execution, “in fuch county where they ſhall be apprehended, as if the “offence had been committed in the fame county where “fuch perfon or perfons ſhall be taken or apprehended.”

This, according to the refolution in Lord Digby's cafe, may be in the place where the party is imprifoned. And it is only an accumulative provifion; for the offender may ftill be indicted where the fecond marriage was, though he be never apprehended; and fo may be outlawed.

By f. 3. of the ftat. 35 Geo. 3. “fuch perfon and perfons “fo ordered to be tranſported as aforeſaid, and afterwards

Ch. XII. § 7.
Trial.

“ 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.”

Indictment.

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.

§ 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.

Witness.

The first and true wife cannot be a witness against her husband, nor vice versa; 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.

§ 9.

1 Hale, 697.
2 MS Sum. 171.
Ann Chen's
case, O. B. May
1730, Serjt. For-
ster's MS.

Evidence of Marriage.

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.

§ 10.

Evidence.

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 under-

Lyon's case,
O. B. Dec 1738,
Serjt. Forster's
MS.

Ch. XII. § 10.
Evidence of marriage.

* The second marriage was by a clergyman of the church of England.

Mary Norwood's case, ante, 335.

Morris v. Miller,
4 Burr. 2059.

Truman's case,
Nottingham Sp. Aff. 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.

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.

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.

Joseph Truman was indicted, for that he having married Mary Russell, spinster, at Ruglen in Scotland, afterwards on, &c. at, &c. married Jane Cals, 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. 31. 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) *Quare*; 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 witnesses. 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. f. 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 f. 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 credible 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 parents 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.
(a) Per Lord
Mansfield C. J.
in Morris v.
Miller, 4 Burr.
2059.

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.

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.

Mr. Justice
Blackstone.

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.

§ 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 solemnized 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. 4. “ 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.” “ Provided (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.

*Solemnizing mar-
riage other than
as above, felony,
and transportation
for 14 years.*

Then by s. 8. “ If any person shall solemnize matrimony in any other place than a church or public chapel, where
“ banns

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 f. 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. be-
fore.*

By f. 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

*Marriage by Li-
cense without con-
sent of parents,
&c. of minors void.*

touching the validity of such marriage.” By f. 11. mar-
riages 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 guar-
dians, 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.

§ 4.

*Register of banns
and marriages to
be kept,*

Then “ for preventing undue entries and abuses in regis-
ters of marriage,” f. 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 marriages;” “ all marriages shall be solemnized in the presence 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 expressed 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 counterfeited 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 offending, 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 Dodley's case, 2 Sid. 71. Mademoiselle's case 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, & places beyond sea.

By

Ch. XIII. § 6.
Marriages in new churches.

§ 6.
21 G. 3. c. 53.

R. v. Northfield,
Doug. 659.

Vide 15 Vin. Abr.
258.

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.

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.

12 G. 3. c. 11.

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 contracting matrimony, without the previous consent of his majesty, 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

“ 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 fam-
ily:*

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 solemniz-
ing or assisting at
such marriages
incur a præmunire.*

CHAP. XIV.

SODOMY.

§ 1.

Definition.

3 Inst. 58, 9.

1 Hale, 669.

1 Hawk. ch. 4.

f. 1. 2 MS. Sum.

336. 3 Kel. 800.

THIS offence, concerning which the least notice is the best, consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast. The nature of the evidence with respect to the actual commission of this offence being the same as in case of rape, it is sufficient to refer to that head. And in proportion as the crime is most detestable, so ought the proof of guilt to be the clearest and most undoubted.

4 Blac. Com. 215.

12 Co. 37.

§ 2.

Principals and accessories, and their punishment.

25 H. 8. c. 6.

5 Eliz. c. 17.

By stat. 25 H. 8. c. 6. revived, confirmed, and made perpetual by st. 5 Eliz. c. 17. reciting that "Forasmuch as there is not yet sufficient and condign punishment for the detestable and abominable vice of Buggery committed with mankind or beast," enacts, "that the same offence be from thenceforth adjudged felony; and the offenders being thereof convicted by verdict, confession, or outlawry, (standing mute, not directly answering, or challenging peremptorily above 20, being supplied by the stat. 3 & 4 W. & M. c. 9. f. 2.) shall suffer death as felons, without benefit of clergy."

1 Hale, 632. 669,

670. 3 Inst. 59

2 MS. Sum. 336.

This being made felony generally, there may be accessories both before and after, neither of whom however are ousted of clergy. But those who are present aiding and abetting to the fact are principals, and excluded clergy. If the party on whom the offence is committed be within the age of discretion, namely, under 14, it is not felony in him, but only in the agent. If both be of the age of discretion, it is felony in both.

22 G. 2. c. 33.

f. 19.

By mariners.

By the articles of the navy, 22 Geo. 2. c. 33. mariners guilty of this crime, their aiders and abettors, are punishable with death by the judgment of a court martial.

§ 3.

3 Inst. 59.

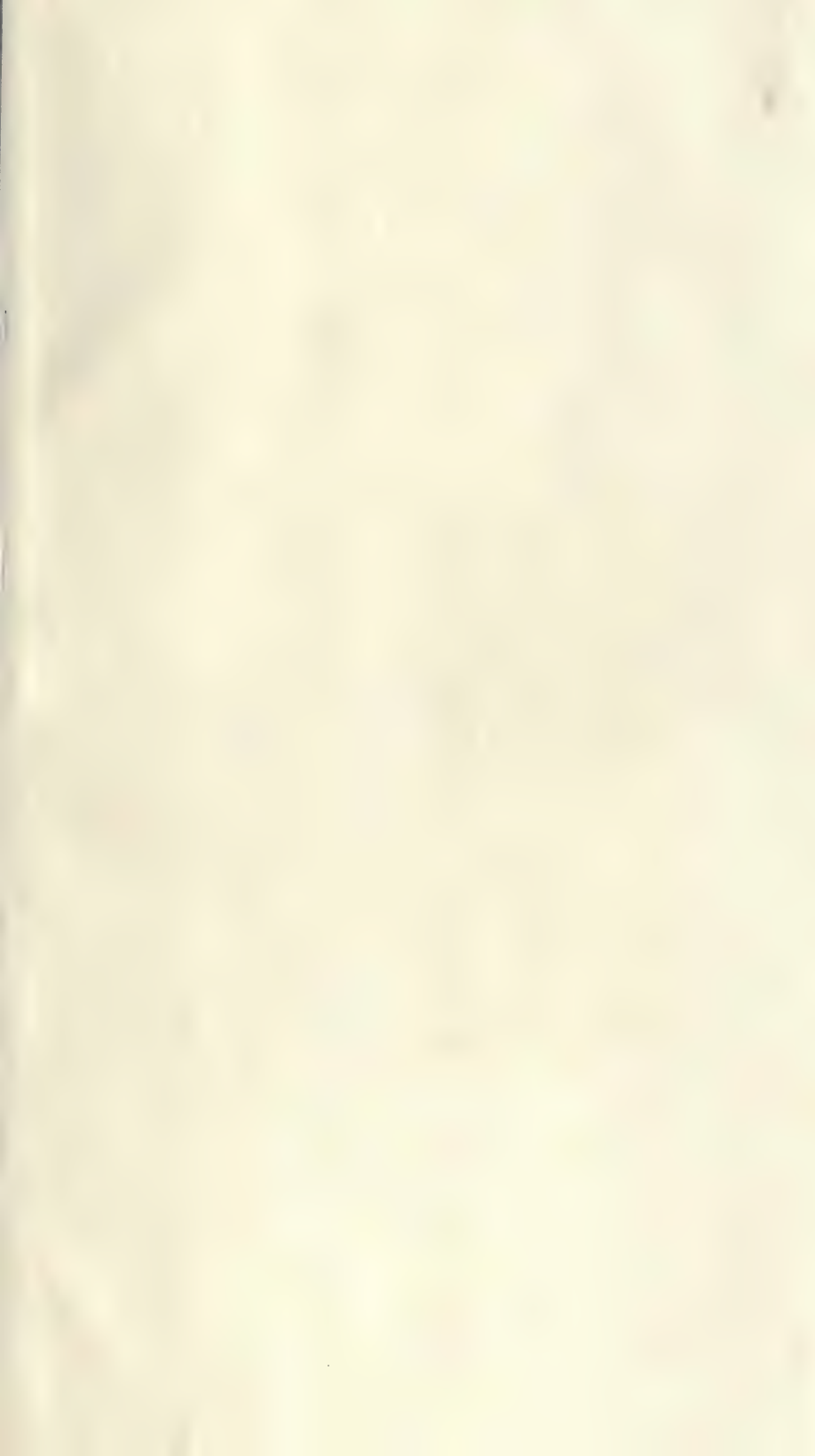
1 Hawk. ch. 4.

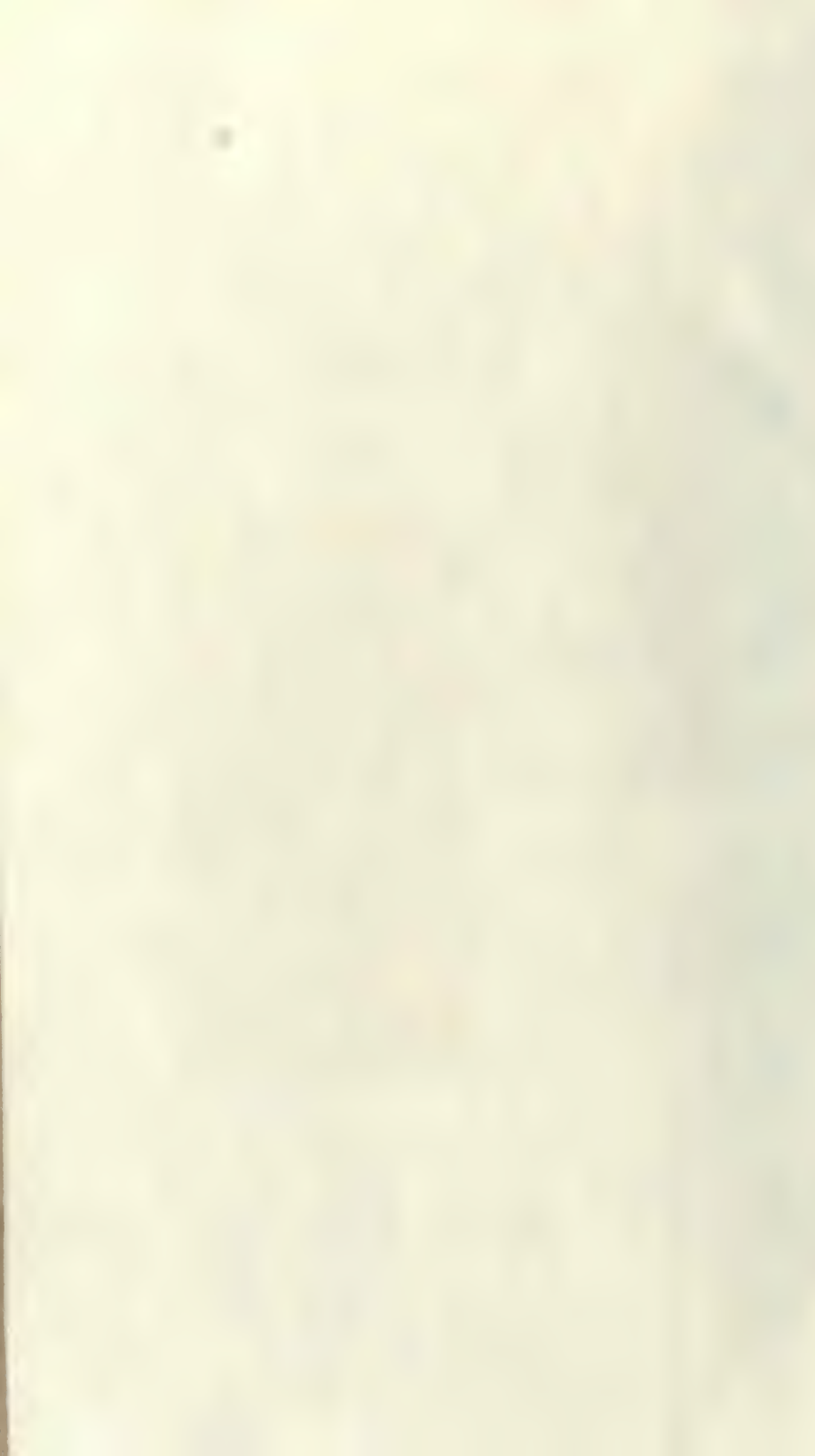
f. 2. Fost. 424.

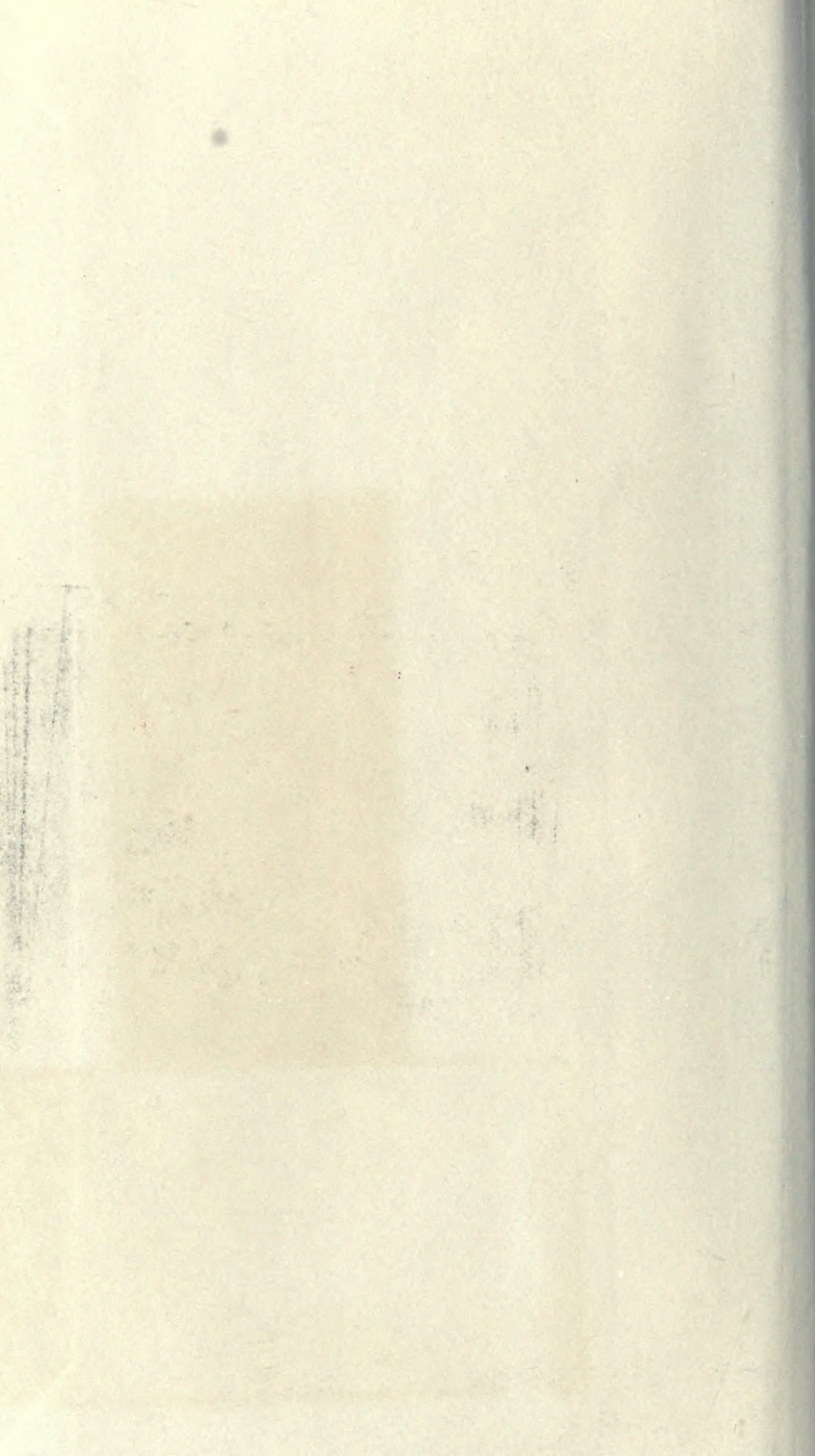
Appx. to edit.

of 1792.

The indictment has the words *contra naturæ ordinem rem habuit veneream, et carnaliter cognovit*: but Mr. Justice Foster says this was never thought sufficient without also charging, *peccatumque illud sodomiticum, anglice dictum Buggery, (the term made use of by the statute,) adtunc et ibidem nequiter felonice, &c. commisit et perpetravit*; and he refers to Co. Entr. 351. b. as a precedent settled by great advice.







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East, (Sir) Edward Hyde
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of the crown

