ERRATA

P. 41. 42. in Marg. for 1. *Lev.* 62. read 1. *Lev.* 61.
p. 42. l. 19. for *p.* 278. read *p.* 378.
p. 138. in Marg. for *Chap.* 7. *Sect.* 9. read *Chap.* 8. *Sect.* 10.
p. 195. in Marg. for *Keil.* 24. read *Keil.* 21.
p. 226. in Marg. for 1. *Hale* 384. 385. read 1. *Hale* 354. 355.
p. 227. l. 16. from the Bottom, for 1st *Eliz.* read 5th *Eliz.*
p. 239. l. 26. for *the Indictment as well as the Trial* read *the Trial as well as the Indictment.*
p. 325. l. 30. for *all wilful Murder* read *all wilful Poisoning.*
p. 328. in Marg. for *Vid. Sect.* 9. read *Vid. Sect.* 10.

DISCOURSE II.

OF

HOMICIDE.

INTRODUCTION

TO THE

DISCOURSE OF HOMICIDE.

I SHALL confider the Law touching Homicide under the following Diftinctions.

IT is either occafioned by Accident which Human Prudence could not forefee or prevent.

OR it is founded in Juftice.

OR in Neceffity.

OR it is owing to a fudden Tranfport of Paffion, which through the Benignity of the Law, is imputed to Human Infirmity.

OR it is founded in Malice.

BEFORE I proceed to thefe Matters I think proper to premife a few Things.

1. IN every Charge of Murder, *the Fact of Killing being firft proved*, all the Circumftances of Accident, Neceffity, or Infirmity are to be fatisfactorily proved by the Prifoner, unlefs they arife out of the Evidence produced againft Him: for the Law prefumeth the Fact to have been founded in Malice, until the Contrary appeareth. And very right it is that the Law fhould fo prefume. The Defendant in this Inftance ftandeth upon juft the fame foot that every other Defendant doth: the Matters tending to Juftify, Excufe, or Alleviate, muft appear in Evidence before He can avail himfelf of them.

2. IN every Cafe where the Point turneth upon the Queftion, Whether the Homicide was committed Willfully and Malitioufly, or under Circumftances Juftifying, Excufing, or Alleviating; the Matter of Fact, viz. *whether the Facts alledged by way of Juftification, Excufe, or Alleviation are True*, is the proper and only Province of the Jury. But whether upon a Suppofition of the Truth of Facts fuch Homicide be Juftified, Excufed, or Alleviated, muft be fubmitted to the Judgment of the Court. For the Conftruc-

tion

tion the Law putteth upon Facts ftated and agreed, or Found by a Jury is in This, as in all Other Cafes, undoubtedly the proper Province of the Court. In Cafes of Doubt and real Difficulty it is commonly recommended to the Jury to ftate Facts and Circumftances in a fpecial Verdict. But where the Law is Clear, the Jury, under the Direction of the Court *in Point of Law*, Matters of Fact being ftill left to their Determination, May, and if They are well advifed always Will find a general Verdict conformable to fuch Direction.

Ad Quæftionem Juris non refpondent Juratores.

3. WHEN the Law maketh ufe of the Term *Malice aforethought* as defcriptive of the Crime of Murder, it is not to be underftood in that Narrow Reftrained Senfe to which the Modern Ufe of the Word *Malice* is apt to lead one, *a Principle of Malevolence to Particulars.* For the Law by the Term *Malice* in this Inftance meaneth that the Fact hath been attended with fuch Circumftances as are the ordinary Symptoms of a Wicked, Depraved, Malignant Spirit.

IN the Cafe of an Appeal of Death, which was antiently the ordinary Method of Profecution, the Term *Malice* is not, as I remember, made ufe of as defcriptive of the Offence of Murder in Contradiftinction to fimple Felonious Homicide. The Precedents charge that the Fact was done *Nequitèr & in Feloniá*, which fully taketh in the Legal Senfe of the Word *Malice.* The Words *per Malitiam* and *Malitiofè* our oldeft Writers do indeed frequently ufe in fome other Cafes; and They conftantly mean an Action flowing from a Wicked and Corrupt Motive, a Thing done *Malo Animo*, *Malá Confcientiá*, as They exprefs themfelves. Of which many Inftances might be given. I will mention One or Two.

THE Method of Proceeding in antient Times in a Cafe of Robbery or Larceny where the ftolen Goods were found upon the Defendant was, that if He alledged that He bought them of Another whom He named and vouched to Warranty, the Vouchee, if He appeared and entered into Warranty, was to ftand in the Place of the Defendant *pro Bono & Malo*. *Bracton* fpeaking of this Matter faith, *Intrat quandoque in Defenfionem & Warrantum aliquis* Malitiosè *& per Fraudem & per Mercedem, ficut Campio Conductitius.*—*Fleta*, on the fame Subject, after ftating the Cafe of the

De Coronâ cap. 32. S. 7.

Lib. 1. cap. 38. S. 8. 9.

the Hired Champion in *Bracton*'s Words, putteth another ſimilar to it. A Perſon in Holy Orders entereth into Warranty for Hire, but refuſeth to take his Trial before Lay Judges *propter Privilegium Clericale*. In this Caſe, ſaith He, the Warranty availeth Nothing, "*Et Clericus Gaolæ* "*pro* Malitiâ *committetur & redimatur*."

THE Legiſlature hath likewiſe frequently uſed the Terms *Malice* and *Malitiouſly* in the ſame general Senſe, as denoting a Wicked, Perverſe, and Incorrigible Diſpoſition.

THE Statute *de Malefactoribus in Parcis* reciteth that those Treſpaſſers did frequently refuſe to yield Themſelves to Juſtice; "*Immo ad* Malitiam *ſuam exequendum & con*"*tinuandum*" did Fly or ſtand upon their Defence.

21. Ed. 1.

THE 4. and 5. *Ph.* and *M.* Enacteth, "That if any Per"ſon ſhall *Malitiouſly* Counſel, Hire, or Command any "Perſon to do any Robbery — and being Arraigned ſhall "ſtand mute of *Malice*" — The Word in both Parts of the Act plainly importeth in general a Wicked, Perverſe, and Incorrigible Diſpoſition.

c. 4.

NUMBERLESS Inſtances of the like Kind might be produced, which I doubt not every attentive Reader hath obſerved. But theſe are ſufficient.

IN the ſame Latitude are the Words *Malice aforethought* to be underſtood in the Statutes which Ouſt Clergy in the Caſe of Wilful Murder. The *Malus Animus*, which is to be collected from all Circumſtances, and of which, as I before ſaid, the Court and Not the Jury is to judge, is what bringeth the Offence within the Denomination of Wilful Malicious Murder, whatever might be the immediate Motive to it; whether it be done, as the old Writers expreſs themſelves, "*Irâ vel Odio, vel Cauſâ Lucri*," or from any other Wicked or Miſchievous Incentive.

AND I believe Moſt, if not All the Caſes which in our Books are ranged under the Head of *Implied Malice* will, if carefully adverted to, be found to turn upon this ſingle Point, that the Fact hath been attended with ſuch Circumſtances as carry in them the plain Indications of an Heart regardleſs of Social Duty and fatally bent upon Miſchief. *

* The Word *Malitia* is uſed in the ſame general Senſe in the beſt Roman Authors and in the Civil Law. (See *Calvin*'s Lexicon Jurid. or indeed any other approved Dictionary. Verb. *Malitia.*) But I think it much ſafer to conſult our own Books for the Senſe of Terms made uſe of in our Law. See Lord *Raym.* 1487. and *Keil.* 126. 127.

I pro-

I proceed now to the ſeveral Species of Homicide as they fall under the Diſtinctions before mentioned.

CHAP. I.

Homicide occaſioned by Accident which Human Prudence could not foreſee or prevent, improperly called Chance-medley.

THIS Species of Homicide is where a Man doing a Lawful Act without Intention of bodily Harm to any Perſon, and uſing proper Caution to prevent Danger, unfortunately happeneth to Kill. A Variety of Caſes coming within this Deſcription of Homicide Involuntary and meerly Accidental have been put by the Writers on the Subject, which it is not neceſſary for Me to repeat in this Place. It will be of more general Service to ſtate the ſeveral Reſtrictions and Limitations under which this Rule is to be conſidered, which will make the true Extent of it better underſtood.

SECT. I.

SECT. I. IN order to bring the Caſe within this Deſcription, the Act upon which Death enſueth muſt be Lawful. For if the Act be Unlawful, I mean if it be *Malum in ſe*, the Caſe will amount to Felony, either Murder or Manſlaughter, as Circumſtances may vary the nature of it. If it be done in Proſecution of a Felonious Intention it will be Murder, but if the Intent went no further than to commit a bare Treſpaſs, Manſlaughter. Though I confeſs Lord *Coke* ſeemeth to think otherwiſe.

3. Inſt. 56.

I do not intend to enter into a long Detail of Caſes falling within this Rule or any Others that I ſhall lay down. I will content Myſelf with a few plain Inſtances. For I have neither Leiſure nor Inclination to give the Reader a Common-Place of what other Writers have ſaid. My Deſign is, as far as I am able, to reduce every Subject I treat of to it's Principles; and the Caſes I cite are intended meerly by way of Illuſtration.

Keil. 117. 6. St. Tri. 222.

A. ſhooteth at the Poultry of *B.* and by Accident killeth a Man; if his Intention was to ſteal the Poultry, which muſt

must be collected from Circumstances, it will be Murder by reason of that Felonious Intent; but if it was done wantonly and without that Intention it will be barely Manslaughter.

THE Rule I have laid down supposeth that the Act from which Death ensued was *Malum in se*. For if it was barely *Malum prohibitum*, as shooting at Game by a Person not qualified by Statute-Law to keep or use a Gun for that Purpose, the Case of a Person so offending will fall under the same Rule as that of a qualified Man. For the Statutes prohibiting the Destruction of the Game *under certain Penalties* will not, in a Question of this kind, enhance the Accident beyond it's intrinsick Moment.

1. Hale 475.

SECT. 2. DEATH ensuing from Accidents happening at Sports and Recreations, *such Recreations being Innocent and Allowable*, falls within the Rule of Excusable Homicide. Lord *Hale* indeed seemeth to be of Opinion, that Persons playing at Cudgels or Foils, or wrestling by Consent, if Death ensueth from a Blow, Push, or Fall given in those Exercises, ought to be excepted out of this Rule. This Opinion He groundeth upon a Principle very true when properly applied. But He seemeth in this Place, I speak it with great Deference, to be mistaken in the Application of it. "He, saith the learned Judge, that voluntarily and "knowingly intendeth Hurt to the Person of a Man, though "He intend not Death, yet if Death ensueth, it excuseth "not from the Guilt of Murder or Manslaughter. As if "*A.* intendeth to Beat *B.* but not to Kill him, and Death "ensueth, it will be Murder or Manslaughter as the Cir-"cumstances of the Case may happen."

SECT. 2.

1. Hale 472. and Sum. 57.

IF *A.* intendeth to Beat *B.* *in Anger* or *from preconceived Malice*, and Death ensueth, it will doubtless be no Excuse, that He did not Intend all the Mischief that followed. For what He Did was *Malum in se*, and He must be answerable for the Consequence of it. He certainly Beat him with an Intention of doing him some bodily Harm, He had no other Intent, He could have no other; He is therefore answerable for all the Harm He did. But is this the Case of Persons who in perfect Friendship engage by mutual Consent in any of these Recreations for a Trial of

CHAP. I.

Skill or Manhood, or for Improvement in the Uſe of their Weapons? Here is indeed the Appearance of a Combat, but it is in Reality no more than a Friendly Exertion of Strength and Dexterity for the Purpoſes I have mentioned. And, which taketh the Caſe out of the general Rule laid down by the learned Judge, and entirely diſtinguiſheth it from that He putteth by way of Illuſtration, *Bodily Harm was Not the Motive on either Side.* I therefore cannot call theſe Exerciſes unlawful; They are manly Diverſions, they tend to give Strength, Skill, and Activity, and may fit People for Defence, Publick as well as Perſonal in Time of Need. I would not be underſtood to ſpeak here of Prize-fighting and Publick Boxing-Matches, or any other Exertions of Courage, Strength and Activity of the like kind which are exhibited for Lucre, and can ſerve no valuable Purpoſe; but on the contrary encourage a Spirit of Idleneſs and Debauchery. For theſe Diſorders will, I conceive, fall under a quite different Conſideration.

As to playing at Foils, I cannot ſay, nor was it ever ſaid that I know of, that it is not Lawful for a Gentleman to learn the Uſe of the ſmall Sword; and yet that cannot be learned without practiſing with Foils. The learned Judge in the Paſſages laſt referred to citeth Two Caſes againſt this Exerciſe. The Firſt is not particularly ſtated, and therefore I ſay Nothing to it. The Other, Sir *John Chicheſter*'s Caſe, doth not in My Opinion conclude to the Point in Queſtion. *For there was in Fact no Playing* AT FOILS *in that Caſe.* Sir *John* paſſed at his Servant with his Sword in the Scabbard, He parried with a Bedſtaff; and in the Heat of the Exerciſe the Chape of the Scabbard flew off, and the Servant was killed with the Point of the Sword. Sir *John* ought not to have uſed a deadly Weapon with ſo little Caution. The Chape was likely enough to be beaten off in the Violence of the Play, and if that ſhould happen, Death, or ſome great Bodily Harm muſt enſue. He did not uſe that Degree of Circumſpection which common Prudence would have ſuggeſted. And therefore the Fact *ſo circumſtanced* might well amount to Manſlaughter, though the Exerciſe itſelf with proper Weapons might have been otherwiſe Lawful.

THE

THE learned Judge mentioneth the Case of Publick Jousts and Tournaments without the Command of the King, as falling within the same Rule with the Exercises just mentioned; but the Cases differ greatly. For Publick Jousts and Tournaments drew a great Concourse of high Spirits and warm Blood into the Field, *Assemblies not always consistent with the Publick Tranquility, and seldom ending without some Bloodshed.* And for that Reason I presume it was that even in those Days of Chivalry they were deemed unlawful Assemblies, unless by special Licence from the Crown.

See Madox's Baronia Anglica Lib. 3. c. 8.

A Man at the Diversion of Cock-throwing at Shrovetide, which hath too long prevailed, missed his Aim; and a Child looking on received a Blow from the Staff, of which He soon died. I once in the Circuit Ruled it Manslaughter. It is a Barbarous Unmanly Custom, frequently productive of great Disorders, Dangerous to the By-standers, and ought to be discouraged.

SECT. 3. IF an Action unlawful in itself be done Deliberately and with Intention of Mischief or great Bodily Harm to Particulars, or of Mischief indiscriminately, fall it where it May, and Death ensue Against or Beside the Original Intention of the Party, it will be Murder. But if such mischievous Intention doth not appear, which is Matter of Fact and to be collected from Circumstances, and the Act was done Heedlesly and Incautiously, it will be Manslaughter: not Accidental Death, because the Act upon which Death ensued was Unlawful.

UNDER this Head I will mention a Case which through the Ignorance or Lenity of Juries hath been sometimes brought within the Rule of Accidental Death. It is where a Blow aimed at one Person lighteth upon Another and killeth Him. This in a loose way of speaking may be called Accidental *with Regard to the Person who dieth by a Blow not Intended against* HIM. But the Law considereth this Case in a quite different Light. If from Circumstances it appeareth that the Injury intended to *A.* be it by Poison, Blow, or any other Means of Death, would have amounted to Murder supposing *Him* to have been Killed by it, it will amount to the same Offence if *B.* happeneth to Fall by the

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ſame Means. Our Books ſay that in this Caſe the Malice *Egreditur Perſonam*. But to ſpeak more intelligibly, where the Injury Intended againſt *A.* proceeded from a Wicked, Murderous, or Miſchievous Motive, the Party is anſwerable for All the Conſequences of the Action, if Death enſueth from it, though it had not it's Effect upon the Perſon whom He intended to deſtroy. The *Malitia* I have already explained, the Heart regardleſs of Social Duty and Deliberately bent upon Miſchief, and conſequently the Guilt of the Party is juſt the ſame in the One Caſe as in the Other. On the other Hand, if the Blow intended againſt *A.* and lighting on *B.* aroſe from a ſudden Tranſport of Paſſion which in Caſe *A.* had Died by it would have reduced the Offence to Manſlaughter, the Fact will admit of the ſame Alleviation if *B.* ſhould happen to Fall by it.

SECT. 4.

SECT. 4. IT is not Sufficient that the Act upon which Death enſueth be Lawful or Innocent, it muſt be done in a proper Manner and with due Caution to prevent Miſchief. Parents, Maſters, and other Perſons having Authority *in Foro Domeſtico*, may give reaſonable Correction to thoſe under their Care; and if Death enſueth without their Fault, it will be no more than Accidental Death. But if the Correction exceedeth 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 of the Caſe. If with a Cudgel or other Thing not likely to Kill, though Improper for the Purpoſe of Correction, Manſlaughter. If with a Dangerous Weapon likely to Kill or Maim, due Regard being always had to the Age and Strength of the Party, Murder.

Comb. 408. 1. Hale 474. Keil. 64. 133. 134.

THIS Rule touching due Caution ought to be well conſidered by all Perſons following their lawful Occupations, eſpecially ſuch from whence Danger may probably ariſe.

WORKMEN throw Stones, Rubbiſh, or other Things from an Houſe in the ordinary Courſe of their Buſineſs, by which a Perſon underneath happeneth to be Killed. If They look out and give timely Warning beforehand to Thoſe below, it will be Accidental Death. If without ſuch Caution,

Caution, it will amount to Manslaughter at least. It was a Lawful Act, but done in an improper Manner.*

It is indeed said in *Keiling*,† that if this be done in the Streets of *London* or other populous Towns, it will be Manslaughter notwithstanding the Caution I have mentioned is used. But this will admit of some Limitation. If it be done Early in the Morning, when Few or No People are stirring, and the ordinary Caution is used, I think the Party is excusable. But when the Streets are full *That* will not suffice; for in the Hurry and Noise of a crowded Street few People hear the Warning or sufficiently attend to it.

*1. Hale 472. 475.
†Keil. 40.

A Person driving a Cart or other Carriage happeneth to Kill. If He saw or had timely notice of the Mischief likely to ensue, and yet drove on, it will be Murder. For it was Wilfully and Deliberately done. Here is the Heart Regardless of Social Duty, which I have already taken notice of. 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 the Driver will be excused.

1. Hale 476.

I need not state more Cases by way of Illustration under this Head, these are sufficient. But I cannot pass over one Reported by *Keiling*, because I think it an extreme hard Case, and of very extensive Influence. A Man found a Pistol in the Street, which He had reason to believe was not Loaded, *having tried it with the Rammer*; He carried it Home and shewed it to his Wife, and She standing before him He pulled up the Cock, and touched the Trigger. The Pistol went off and killed the Woman. This was ruled Manslaughter.

Keil. 41.

It appeareth that the learned Editor was not satisfied with the Judgment. It is one of the Points He in the Preface to the Report recommendeth to further Consideration.

Ch. J. Holt.

Admitting that the Judgment was strictly Legal, it was, to say no better of it, *Summum Jus*.

I cannot help saying, that the Rule of Law I have been considering in this Place, touching the Consequence of ta-

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king or not taking due Precaution, doth not ſeem to be ſufficiently tempered with Mercy. Manſlaughter was formerly a Capital Offence, as I ſhall hereafter ſhew. And even the Forfeiture of Goods and Chattles upon the Foot of the preſent Law is an heavy Stroke upon a Man guilty 'tis true of an heedleſs incautious Conduct, but *in other Reſpects perfectly Innocent*. And where the Rigour of Law bordereth upon Injuſtice, Mercy ſhould, if poſſible, interpoſe in the Adminiſtration. It is not the Part of Judges to be perpetually hunting after Forfeitures *where the Heart is free from Guilt*. They are Miniſters appointed by the Crown for the Ends of Publick Juſtice; and ſhould have written on their Hearts the Solemn Engagement His Majeſty is under to "Cauſe Law and Juſtice *in Mercy* to be executed in all His Judgments."

Coronation Oath.

THIS I have ſaid upon a Suppoſition that the Judgment Reported by *Keiling* was ſtrictly Legal. I think it was Not. For the Law in theſe Caſes doth not require the *utmoſt* Caution that *can be* uſed; it is ſufficient that a reaſonable Precaution, what is *uſual and ordinary* in the like Caſes, be taken. In the Caſe juſt mentioned of Workmen throwing Rubbiſh from Buildings, the ordinary Caution of looking out and giving Warning by Outcry from above will excuſe, though doubtleſs a better and more effectual Warning might have been given. But this excuſeth, becauſe it is what is uſually given, and hath been found by long Experience in the ordinary Courſe of Things, to anſwer the End. The Man in the Caſe under Conſideration examined the Piſtol in the Common way, perhaps the Rammer which He had not tried before was too Short and deceived Him. But having uſed the ordinary Caution found to have been effectual in the like Caſes He ought to have been Excuſed.

I have been the longer upon this Caſe, becauſe Accidents of this lamentable Kind may be the Lot of the Wiſeſt and the Beſt of Mankind, and moſt commonly fall amongſt the neareſt Friends and Relations. And in ſuch a Caſe the Forfeiture of Goods rigorouſly exacted would be heaping Affliction upon the Head of the Afflicted, and galling an Heart already wounded paſt Cure. It would even aggravate the Loſs of a Brother, a Parent, a Child, or Wife, if

ſuch

such a Loss under such Circumstances is capable of Aggravation.

I once upon the Circuit tried a Man for the Death of his Wife by the like Accident. Upon a *Sunday* Morning the Man and his Wife went a Mile or two from Home with some Neighbours to take a Dinner at the House of their common Friend. He carried his Gun with Him hoping to meet with some Diversion by the way. But before He went to 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 carried 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, whom He dearly loved. It came out in Evidence, that while the Man was at Church, a Person belonging to the Family privately took the Gun, charged it and went after some Game; but before the Service at Church was ended returned it *loaded* to the Place whence He took it, and where the Defendant, who was ignorant of all that had passed, found it, to all Appearance as He left it. I did not inquire, whether the poor Man had examined the Gun before He carried it Home; but being of Opinion upon the whole Evidence, that He had reasonable Grounds to believe that it was not loaded, I directed the Jury that if *They* were of the same Opinion They should Acquit Him. And He was Acquitted.

SECT. 5. Deodands.

SECT. 5. ACCIDENTAL Death which happeneth without the Intervention of Human Means induceth a Forfeiture which the Ignorance and Superstition of antient Times called a *Deodand*. These Forfeitures were part of the Casual Revenues of the Crown; and the Value, when found by the Coroner's Inquest, was put in Charge to the Sheriff, in order to be levied on the Ville where the Accident happened; and was paid into the Hands of the King's Almoner to be applied to Pious Uses for the Soul of the Deceased.

THIS Forfeiture, which is not now applied to Superstitious Uses, is still Part of the Revenue of the Crown, unless

CHAP. I.

where Lords of Franchises are intitled to it by Grant. For no Man can prescribe to it, or to the Goods of Felons of Themselves, or other Felons, or Outlaws happening within his Royalty.

1. Inst. 114. 1. Hale 419.

I have nothing to add to what other Writers have said touching Deodands more than to observe, that as this Forfeiture seemeth to have been originally founded rather in the Superstition of an Age of extreme Ignorance than in the Principles of sound Reason and true Policy, it hath not of late Years met with great Countenance in *Westminster-Hall*. And when Juries have taken upon them to use a Judgment of Discretion, not strictly within their Province, for reducing the *Quantum* of the Forfeiture, (I wish the Temptation to it was taken out of their way) the Court of King's Bench hath refused to interpose in Favour of the Crown or Lord of the Franchise.

IT hath frequently interposed it's Authority as Sovereign Coroner in this Case, and also in the Case of Suicide, *in Favour of the Subject and to save the Forfeiture*, but will not do it in either Case *to his Prejudice*. And herein it proceedeth upon the same Principle of equitable Justice, that the Courts of *Westminster-Hall* constantly do in refusing to set aside a wrong Verdict given in *Favour* of the Defendant in a Criminal Case, or in an hard Action, though it is done every Day where a wrong Verdict goeth against Him.

IN the Case of the King and *Rolfe* Coroner of *Kent*, which came on in *Mich.* and *Hill.* the 5th of the King, the Coroner's Inquest found, that *A. B.* sitting on his Waggon accidentally fell to the Ground, and that the Horses drawing the Waggon forward, one of the Forewheels crushed his Head, of which He instantly Died, and then concluded that the Wheel, on which they set a small Value, *only* moved to his Death. A Motion was made in behalf of Mr. *Mompesson* Lord of the Franchise for quashing this Inquisition, upon Affidavits tending to shew that the Cart and Horses were equally instrumental; which indeed the Finding of the Jury did sufficiently imply. But the Court was very clear that neither this Court nor the Coroner can oblige the Jury to conclude otherwise than They have done, and would not suffer the Affidavits for quashing the Inqui-

sition

fition to be read. A like Cafe came on in *Mich.* the 29th of the King, the King againft *Drew* Coroner of *Middlefex.* The Coroner's Jury upon view of the Body of a Perfon killed by the like Accident, found that one Wheel of the Waggon *only* moved to the Death. The Court, on Motion in behalf of the Lord of the Franchife, granted a Rule for fhewing Caufe why the Inquifition fhould not be quafhed for this Mifbehaviour of the Jury. On the Day for fhewing Caufe Mr. *Hume Campbel,* Council for the Lord of the Franchife, informed the Court that upon looking into Precedents He was fatisfied He could not fupport the Rule, and thereupon it was difcharged. The Cafe of the King and *Rolfe* was mentioned on this Occafion, and greatly relied on.

CHAP. II.

Homicide founded in Juftice.

SECT. 1. THE Execution of Malefactors under Sentence of Death for Capital Crimes hath been confidered by former Writers as a Species of Homicide founded in Neceffity. I think it hath with Propriety enough been fo confidered. For the Ends of Government cannot be anfwered without it. Lord *Hale* hath treated this Subject pretty much at large: and as it is not a Matter of very general Concernment, and as few Queftions are likely to arife upon it, I refer the Reader to what the learned Judge hath faid upon the Subject. One of his Rules indeed feemeth to want fome Explanation; *That the Execution ought not to vary from the Judgment; for if it doth, the Officer will be guilty of Felony at leaft, if not of Murder.*

SECT. 1.

1. Hale 496. --- 502.

1. Hale 501. 2. Hale 411.

THIS is a good general Rule, but not univerfally true. If the Officer of his own Head, and without Warrant, or the Colour of Authority, varieth from the Judgment, He may be Criminal to that Degree the learned Author mentioneth. For He Wilfully and Deliberately acteth in Defiance of Law, and in fo doing fheddeth the Blood of a Man, whofe Perfon, 'till Execution is done upon Him in a due Courfe of Juftice, is equally under the Protection of

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the Law with every other Subject. But if the Officer hath a Warrant from the Crown for Beheading a Person under Sentence of Death for Felony, or a Woman for Treason of any kind, and payeth Obedience to it, this I conceive would not be Criminal. Lord *Coke* indeed doth say that a Warrant from the Crown for an Execution *totally varying from the Judgment* is Illegal, because the King cannot *alter* the Judgment, though He may by His Prerogative *remit* one Part, and leave the Offender open to the Other. As, saith He, in the Case of High Treason, Decapitation *being Part of the Judgment*, the Law is satisfied, the Judgment is substantially executed, if That be done, though every Other Part is omitted. And *Hale* seemeth to agree with Him.

3. Inst. 52. 211.

THAT the Crown may remit Part of the Judgment is certainly True, and would silence every Doubt in the Case of High Treason at least, if Hanging and Beheading were Ingredients in every Judgment for that Offence. But in the Case of Women, Beheading is no Ingredient in the Judgment, and yet Ladies of Distinction have been for many Ages past by Warrant from the Crown Beheaded for that Offence. The Execution in this Instance *totally* varieth from the Judgment, and yet I do not know that those Executions have been esteemed Illegal. Nor can I recollect a single Instance where a Lady of Distinction hath been Burnt for High Treason. And with regard to those of inferior Rank who have been Burnt, it is well known They have generally been Strangled at the Stake by the Executioner before the Fire hath reached Them; though the Letter of the Judgment is that They shall be Burnt in the Fire *till They are Dead*. This the Sheriff doth or knowingly permitteth without Warrant from the Crown, Custom alone having given a kind of Sanction to a Practice founded in Humanity and not repugnant to any Rule of substantial Justice. I remember One and but One Instance to the contrary which will be mentioned in it's proper Place. Beheading is likewise no Ingredient in the Judgment for Felony, and yet Persons of Distinction have for Ages past been by the like Warrants Beheaded for that Offence; and Nobody hath complained or thought the Execution Illegal.

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THE Distinction therefore between a total Alteration and a Remission of Part of the Judgment will not wholly solve the Difficulty, if any Difficulty there be. Though a partial Solution may sometimes serve to save Appearances. But this Matter seemeth to lie in a very narrow Compass. The King cannot by His Prerogative vary the Execution, so as *to Aggravate the Punishment beyond the Intention of the Law.* Thus far the Rule that The King cannot alter the Judgment is true. But it doth not follow from thence that He, *who undoubtedly can wholly pardon the Offender*, cannot Mitigate his Punishment with Regard to the Pain or Infamy of it. Will it be said that because the Crown cannot go beyond the Letter of the Law *in point of Rigour* it's Mercy is likewise so bounded? by no Means. For the Law proceedeth in Both Cases with a perfect Uniformity of Sentiment and Motive. The Benignity of the Law hath set Bounds to the Prerogative in One Case, and the same Benignity hath left it Free and Unconfined in the Other.

IN the Cases just mentioned it cannot perhaps be said with strict Propriety that *the Judgment is Substantially executed*; but surely the Ends of Publick Justice are effectually answered if the Offender suffereth Death, the *Ultimum Supplicium*, though the Circumstances of Infamy or extreme Rigour which the Judgment importeth are Dispensed with. And whenever that hath been done, it hath in all Ages been esteemed a Matter of Royal Grace, and granted at the Prayer of the Party or his Friends.

THE Writ of Escheat, grounded on the Common-Law, in the Case of an Attainder for Felony alledgeth that the Party was Hanged, whether, say the Books, *He was* BEHEADED *or died before Execution*, which Averment is not Traversable. This, saith the Note on the Register, was adjudged in Parliament in the 8th of *Edw.* the 3d. And in the Statute stiled *Articuli Cleri* one Grievance complained of is, "That Persons flying to Sanctuary and Abjuring" (a Privilege never allowed but in Cases of Felony) "had been "taken by Force from the Publick Highway and then "Hanged or *Beheaded*." Lord *Coke* in his Comment at the Word [*decapitantur*] saith, "This is mistaken in the Peti-"tion, for no Man can be Beheaded but for Treason." The Mistake if any there be was in a meer Matter of Fact of

Regist. 165. a. F. N. B. 144. H. 4° Edit. 339. Stanf. 198. A.

9. Ed. 2. c. 10.

CHAP. II. Great and Publick Notoriety at that Time. And therefore, where the Miſtake upon the whole moſt probably lieth, whether in the Petition or in the Comment, the Reader muſt judge.

THESE Authorities, in My Opinion, prove to a Demonſtration that in thoſe early Ages the Judgment for Hanging was the Legal Ordinary Judgment in the Caſe of Felony, and that Execution was commonly done in that Manner. They ſhew likewiſe that Beheading in ſome ſpecial Caſes upon a Judgment in Felony hath been practiſed in all Ages.

I therefore conclude, 'till I ſhall be better informed, that the Prerogative now under Conſideration, founded in Mercy, and never in any Age complained of, is Part of the Common-Law.

3. Inſt. 211. LORD *Coke* in one of the Paſſages I have cited, after admitting that in the Caſes He mentioneth the Execution did vary from the Judgment, concludeth, but "*Judicandum eſt* "*Legibus non Exemplis.*" The Rule is true, but the Miſtake lieth in the Application of it. For immemorial Uſage founded in Mercy and never complained of is undoubtedly Sufficient in this, as in every other Caſe, to determine what is or is not Part of the Common-Law.

SECT. 2. SECT. 2. HOMICIDE in Advancement of Juſtice may likewiſe be conſidered as founded in Neceſſity. For the Ends of Government will be totally defeated unleſs Perſons can in a due Courſe of Law be made Ameſnable to Juſtice. And therefore where Perſons having Authority to Arreſt or Impriſon, uſing the proper Means for that Purpoſe, are Reſiſted in ſo doing, and the Party making Reſiſtance is Killed in the Struggle, this Homicide is juſtifiable. And on the other Hand, if the Party having Authority to Arreſt or Impriſon, uſing the proper Means, happeneth to be Killed, it will be Murder in All who take a Part in ſuch Reſiſtance. For it is Homicide committed in Deſpite of the Juſtice of the Kingdom.

THE Rule I have laid down ſuppoſeth that Reſiſtance is made. And upon that Suppoſition it will, I conceive, hold in all Caſes, whether Civil or Criminal. For in the Caſe of Reſiſtance in either Caſe the Perſon having Authority to Arreſt

Arreſt or Impriſon may repel Force with Force, and if Death enſueth in the Struggle He will be juſtified. This is founded in Reaſon and Publick Utility. For few Men would quietly ſubmit to an Arreſt, if in every Caſe of Reſiſtance the Party impowered to Arreſt was obliged to Deſiſt and leave the Buſineſs undone. I think the Opinion in 1. *Rolle*'s Report is too ſevere.

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f. 189.

SECT. 3. THE Caſe of bare Flight in order to avoid an Arreſt in a Civil Proceeding, and likewiſe in ſome Caſes of a Criminal Nature, will fall under a different Conſideration. A Defendant in a Civil Suit being apprehenſive of an Arreſt flyeth, the Officer purſueth, and in the Purſuit Killeth Him, *This*, ſaith Lord *Hale*, *will be Murder*.

SECT. 3.

1. Hale 481.

I rather chooſe to ſay, it will be Murder or Manſlaughter as Circumſtances may vary the Caſe. For if the Officer in the Heat of the Purſuit, and meerly 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, I cannot think that this will amount to more than Manſlaughter, if in ſome Caſes even to that Offence. The Blood was heated in the Purſuit, his Prey, *a lawful Prey*, juſt within his Reach, and no ſignal Miſchief was intended. But had He made uſe of a deadly Weapon, it would have amounted to Murder. The miſchievous vindictive Spirit, the *Malitia* I have already explained, which always muſt be collected from Circumſtances, determineth the Nature of the Offence.

SECT. 4. WHAT hath been ſaid with Regard to bare Flight in a Proceeding meerly Civil is equally true in the Caſe of a Breach of the Peace, or any other Miſdemeanour ſhort of Felony. But where a Felony is committed, and the Felon flyeth from Juſtice, or a dangerous Wound is given, it is the Duty of every Man to uſe his beſt Endeavours for preventing an Eſcape. And if in the Purſuit the Party flying is Killed, *where He cannot be otherwiſe overtaken*, this will be deemed Juſtifiable Homicide. For the Purſuit was not barely Warrantable, it is what the Law re-

SECT. 4.

See the Caſe of Guiſcard. Stat. 9 An. c. 16.

1. Hale 489. 490.

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quireth and will punish the *wilful* Neglect of. I may add that it is the Duty of every Man in these Cases quietly to yield Himself up to the Justice of his Country. And for this Reason it is that Flight alone upon a Charge of Felony induceth a Forfeiture of Goods, though the Party upon his Trial may be acquitted of the Fact. For He hath done what in him lay to stop the Course of Publick Justice.

SOME Writers have thought that this Forfeiture is founded on a Legal Presumption of the Guilt of the Party *grounded on his Flight*; but in the Case of an Acquittal all Presumption of that kind must be at an End. It is Presumption against Fact.

THESE Rules are founded in Publick Utility, *ne Maleficia remaneant impunita.*

AND if in the Cases last mentioned the Felon, or Person giving a dangerous Wound turneth upon the Pursuers, and in the Scuffle any one of them is Killed, this will be Murder in the Person so Resisting, and all his Adherents present and knowingly Abetting, for the Reason given in the second Section.

AND even in the Case of a sudden Affray where no Felony is committed or Wound given, if a Person interposing to part the Combatants, *giving Notice to them of his friendly Intention*, should be Assaulted by them or either of them, and in the Struggle should happen to Kill, this, I take it, will be Justifiable Homicide. And on the other Hand, if the Party so interposing, *giving such Notice*, should be Killed by either of the Combatants, it will be Murder in the Person so Killing. For it is the Duty of every Man to interpose in such Cases for preserving the Publick Peace and preventing Mischief.

Keil. 66. 115.

Stanf. 13. 2. Inst. 52.

THIS Rule is founded in the Principles of Social Duty and Political Justice.

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Homicide founded in Neceſſity.

SECT. 1. SELF-DEFENCE naturally falleth under the Head of Homicide founded in Neceſſity, and may be conſidered in Two different Views.

SECT. 1.

IT is either that Sort of Homicide *Se & Sua defendendo* which is perfectly Innocent and Juſtifiable, or that which is in ſome Meaſure Blameable and barely Excuſable. The Want of attending to this Diſtinction hath, I believe, thrown ſome Darkneſs and Confuſion upon this Part of the Law.

THE Writers on the Crown-Law, who I think have not treated the Subject of Self-Defence with due Preciſion, do not in Terms make the Diſtinction I am aiming at, yet All agree that there are Caſes in which a Man may without retreating oppoſe Force to Force, even to the Death. This I call Juſtifiable Self-Defence, They Juſtifiable Homicide.

THEY likewiſe agree that there are Caſes in which the Defendant cannot avail Himſelf of the Plea of Self-Defence without ſhewing that He retreated as far as He could with Safety, and then meerly for the Preſervation of his own Life Killed the Aſſailant. This I call Self-Defence Culpable, but through the Benignity of the Law Excuſable.

IN the Caſe of Juſtifiable Self-Defence the injured Party may repel Force with Force in Defence of his Perſon, Habitation, or Property, againſt one who manifeſtly intendeth and endeavoureth with Violence or Surprize to commit a known Felony upon either. In theſe Caſes He is not obliged to retreat, but may purſue his Adverſary 'till He findeth himſelf out of Danger, and if in a Conflict between them He happeneth to Kill, ſuch Killing is Juſtifiable.

Keil. 128. 129.

THE Right of Self-Defence in theſe Caſes is founded in the Law of Nature, and is not nor can be ſuperſeded by any Law of Society. For before Civil Societies were formed, one may conceive of ſuch a State of Things though it

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is difficult to fix the Period when Civil Societies were formed, I say before Societies were formed for mutual Defence and Preservation, the Right of Self-Defence resided in Individuals; it could not reside elsewhere. And since in Cases of Necessity, Individuals incorporated into Society cannot resort for Protection to the Law of the Society, that Law with great Propriety and strict Justice considereth them as *still in that Instance* under the Protection of the Law of Nature.

I will by way of Illustration state a few Cases which I conceive are reducible to this Head of Justifiable Self-Defence.

WHERE a known Felony is attempted upon the Person, be it to Rob or Murder, here the Party assaulted may repel Force with Force, and even his Servant then attendant on Him, or any Other Person present may interpose for preventing Mischief; and if Death ensueth, the Party so interposing will be Justified. In this Case Nature and Social Duty cooperate.

A Woman in Defence of her Chastity may lawfully Kill a Person attempting to commit a Rape upon Her. The Injury intended can never be Repaired or Forgotten. And Nature to render the Sex amiable hath implanted in the Female Heart a quick Sense of Honour, *the Pride of Virtue*, which kindleth and enflameth at every such Instance of Brutal Lust. Here the Law of Self-Defence plainly coincideth with the Dictates of Nature.

AN Attempt is made to commit Arson or Burglary in the Habitation; the Owner, or any Part of his Family, or even a Lodger with Him may lawfully Kill the Assailants for preventing the Mischief intended.* Here likewise Nature and Social Duty cooperate.

Keil. 128.

IN *Mawgridge*'s Case, He upon Words of Anger between Him and Mr. *Cope* threw a Bottle with great Violence at the Head of Mr. *Cope*, *and immediately drew his Sword*, Mr. *Cope* returned the Bottle with equal Violence. "It was," saith Lord *Holt*, "Lawful and Justifiable in Mr. "*Cope* so to do. *For*," as He argueth a little afterwards,

Ibid. 129.

* See *Keil.* 51. a much stronger Case. Persons rudely forcing Themselves into a Room in a Tavern against the Will of the Company in Possession, one of the Assailants is Killed in the Scuffle, Ruled Justifiable Homicide. But Qu.

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"*He that hath ſhewn that He hath Malice againſt Another* "*is not fit to be truſted with a dangerous Weapon in his* "*Hand.*"

It was upon this Principle I preſume, and poſſibly too upon the Rule already laid down touching the Arreſt of a Perſon who had given a dangerous Wound, that the Legiſlature in the Caſe of the Marquis *de Guiſcard* who ſtabbed Mr. *Harley* ſitting in Council, diſcharged the Party who was ſuppoſed to have given Him the mortal Wound from All manner of Proſecution on that Account; and declared the Killing to be *a Lawful* and *Neceſſary Action*.

9. An. c. 16.

SECT. 2.

SECT. 2. I will now proceed to that Sort of Self-Defence which is Culpable and through the Benignity of the Law Excuſable. And this Species of Self-Defence, I chooſe upon the Authority of the Statute of *Hen.* the 8th, to diſtinguiſh from the Other by the Name of Homicide *ſe Defendendo upon Chance-medley.* The Term *Chance-medley* hath been very Improperly applied to the Caſe of Accidental Death, and in Vulgar Speech we generally affix that ſingle Idea to it. But the Antient Legal Notion of Homicide by Chance-medley was when Death enſued from a Combat between the Parties upon a ſudden Quarrel.* How upon the ſpecial Circumſtances of the Caſe the Species of Homicide *ſe Defendendo* which I am now upon is diſtinguiſhable from that Species of Felonious Homicide which we call Manſlaughter will be preſently conſidered.

24. H. 8. c. 5.

3. Inſt. 55. 57. Keil. 67.

The Difference between Juſtifiable and Excuſable Self-Defence appeareth to Me to be plainly ſuppoſed and pointed out by the Statute I have juſt mentioned. For after reciting, that it had been *Doubted* whether a Perſon Killing another attempting to Rob or Murder Him under the Circumſtances there mentioned ſhould Forfeit Goods and Chattles, "As," proceedeth the Statute, "Any other Perſon "ſhould do that by *Chance-medley* ſhould happen to Kill "or Slay any other Perſon *in His or Their Defence,*" it enacteth, That in the Caſes firſt mentioned the Party Killing ſhall Forfeit Nothing, but ſhall be Diſcharged in *like manner as if He were Acquitted of* the Death.

* See *Skene* — *De Verborum Significatione. Verb.* Chaud-melle.

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I will make an Obſervation or two upon this Act.

1. THOUGH it expreſly provideth againſt a Forfeiture in the Special Caſes therein mentioned, *upon which*, ſaith the Preamble, *Doubts had ariſen*, That expreſs Proviſion doth not imply an Excluſion of any Other Caſes of Juſtifiable Homicide which ſtand upon the ſame Foot of Reaſon and Juſtice. For the Statute was plainly made in Affirmance of the Common-Law, and to remove a Doubt that had been entertained in the Caſes ſpecially provided for.

2. TWO Caſes of Self-Defence are ſuppoſed. In the One a Forfeiture of Goods was incurred, in the Other not. What therefore is the true Import of the Words *Self-Defence upon Chance-medley*, which the Statute uſeth as deſcriptive of that Offence which did incur the Forfeiture? Homicide *per Infortunium*, which hath been ſtiled Chance-medley, cannot poſſibly be meant, for in that Caſe the Party Killing is ſuppoſed to have no Intention of Hurt; whereas in the Caſe the Statute mentioneth He is preſumed to have an Intention to Kill or to do ſome great bodily Harm *at the Time the Death happened at leaſt*, but did it for the Preſervation of his own Life. The Word *Chance-medley* therefore, as it ſtandeth in this Statute connected with Self-Defence, muſt be underſtood in the Senſe *Coke* and *Keiling*, in the Paſſages already cited, ſay was the Original Import of it, a ſudden caſual Affray Commenced and Carried on in heat of Blood. And conſequently *Self-Defence upon Chance-medley* muſt, as I apprehend, imply that the Perſon when engaged in a ſudden Affray quitted the Combat before a Mortal Wound given, and retreated or fled as far as He could with Safety, and then urged by meer Neceſſity Killed his Adverſary for the Preſervation of his own Life. *

THIS Caſe bordereth very nearly upon Manſlaughter, and in Fact and Experience the Boundaries are in ſome Inſtances ſcarce perceivable: but in Conſideration of Law

* It may be thought Time miſpent to enter into an Etymological Diſpute touching the Term *Chance-medley*, ſince the Statute I have cited ſeemeth to have fixed the Legal Notion of it. The Word *Medley* is derived from *Medleta*, *Meſleta*, or *Meſleia* barbarous Latin Terms which ſignified an Affray. And whether the Compound *Chance-medley* be written *Chaud-medley* or *Chaud-melle* an Affray in the Heat of Blood, or *Chance-medley* a Sudden Caſual Affray, the Difference in Point of Senſe is very ſmall. And if Any there be, the Definition I have given of the Thing taketh in both. The Word is written both Ways in different Gloſſaries, all of eſtabliſhed Reputation.

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they have been fixed. In Both Cases it is supposed that Passion hath kindled on each Side, and Blows passed between the Parties. But in the Case of Manslaughter it is either presumed that the Combat on both Sides hath 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.

He therefore who in the Case of a mutual Conflict would excuse Himself upon the Foot of Self-Defence must shew, that before a Mortal Stroke given He had declined any further Combat and retreated as far as He could with Safety: and also that He Killed his Adversary through meer Necessity, and to avoid immediate Death. If He faileth in Either of these Circumstances He will incur the Penalties of Manslaughter.

The Authorities I shall cite will serve to explain these Principles, and in some Measure fix the Boundaries between the Cases of Manslaughter and Excusable Self-Defence.

A. being Assaulted by *B.* returneth the Blow, and *a Fight ensueth. A.* before a Mortal Wound given declineth any further Conflict, and retreateth as far as He can with Safety, and then in his own Defence Killeth *B.*; this is Excusable Self-Defence; though, saith *Stanford*, *A.* had given several Blows *not Mortal* Before his Retreat.

1. Hale 479.

Stanf. 15.

But if the Mortal Stroke had been first given, it would have been Manslaughter.

Ibid.

The Cases here put suppose that the first Assault was made upon the Party who Killed in his own Defence. But as in the Case of Manslaughter upon sudden Provocations, where the Parties fight on equal Terms, all Malice apart, it mattereth not Who gave the first Blow; so in this Case of Excusable Self-Defence, I think the First Assault in a sudden Affray, all Malice apart, will make no Difference, if *either Party quitteth the Combat and retreateth before a Mortal Wound be given.* But if the First Assault be upon Malice, which must be collected from Circumstances, and the Assailant, to give himself some colour for putting in Execution the wicked Purposes of his Heart retreateth and then turneth and Killeth, this will be Murder. If He had Killed

1. Hale 479. 480.

 ed without Retreating it would undoubtedly have been ſo; and the Craft of Flying rather Aggravateth than Excuſeth, as it is a freſh Indication of the *Malitia* already mentioned, the Heart deliberately bent upon Miſchief.

Keil. 58. 128.

THE other Circumſtance neceſſary to be proved in a Plea of Self-Defence is, that the Fact was done from meer Neceſſity, and to avoid immediate Death. To this Purpoſe I will cite a Caſe adjudged upon great Deliberation. It was the Caſe of one *Nailor*, which came on at *O. B.* in *Apr.* 1704. before *Holt*, *Tracy*, and *Bury*.

MSS. Tracy and Denton.

THE Priſoner was Indicted for the Murder of his Brother, and the Caſe upon Evidence appeared to be, that the Priſoner on the Night the Fact was committed came Home drunk. His Father ordered Him to go to Bed, which He refuſed to do; whereupon a Scuffle happened betwixt the Father and Son. The Deceaſed, who was then in Bed, hearing the Diſturbance got up, and fell upon the Priſoner, threw Him down, and beat Him upon the Ground; and there kept Him down, ſo that He could not Eſcape, nor avoid the Blows. And as They were ſo ſtriving together the Priſoner gave the Deceaſed a Wound with a Penknife: of which Wound He died.

THE Judges preſent Doubted, whether this was Manſlaughter or *ſe Defendendo*, and a Special Verdict was Found to the Effect before ſet forth.

AFTER *Michaelmas* Term, at a Conference of All the Judges of *England*, it was Unanimouſly held to be Manſlaughter. For there did not appear to be *any Inevitable Neceſſity ſo as to Excuſe the Killing in this Manner*.*

* The Deceaſed did not appear to aim at the Priſoner's Life, but rather to Chaſtiſe Him for his Miſbehaviour and Inſolence towards his Father.

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HAVING considered the Cafes of Homicide Juftifiable and barely Excufable, I will fubmit to the Judgment of the Learned what hath occurred to Me touching the Behaviour of the Petit Jury, and what Verdict They are to give in thofe Cafes, and likewife upon Criminal Profecutions in the Cafes of Infancy and Infanity.

SECT. 1. THOUGH the Jury may, and have been formerly directed in the Cafes of Infancy and Infanity to find the Special Matter, whereupon the Court is to give Judgment of Acquittal, yet, *under the Direction of the Court*, They may find a general Verdict of Acquittal without this Circuity.

SECT. 1. 1. Hale 28. 2. Hale 303.

THIS Rule is founded in found Reafon and fubftantial Juftice. For undoubtedly *Crimen non contrahitur nifi Voluntas nocendi intercedat.*

SECT. 2. IN all Cafes of Juftifiable Homicide, which have been already confidered, the antient Practice was to find the Special Matter, and to leave the Court to give Judgment of Acquittal. But the later Authorities agree that in thefe Cafes the Jury may, *under the Direction of the Court*, find a general Verdict of Acquittal. For, fay the Books, here is neither Felony nor Forfeiture. This Rule is likewife founded in found Reafon and fubftantial Juftice, for *Crimen non contrahitur*, &c.

SECT. 2. 3. Inft. 220. 1. Hale 492. 2. Hale 303. 304.

SECT. 3. IN the Cafe of Homicide by Mifadventure, improperly ftiled *Chance-medley*, it hath been generally holden, that the Jury ought not to Find a general Verdict of Acquittal, but fhould Find the Special Matter and fubmit the whole to the Judgment of the Court. In this Rule the Modern Writers agree with the Antient, unlefs *Hale* for the Reafon I fhall mention prefently, may be excepted. For this two Reafons have been affigned.

SECT. 3.

1. THE Jury are Judges of the meer Matter of Fact, and the Court is to judge upon the Special Matter Found by

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by Them, whether the Fact was done *per Infortunium* or Feloniously.

2. THOUGH in this Case no Felony is committed, yet the Party at Common-Law did Forfeit his Goods, and must expect the King's Grace under the Statute of *Gloucester*, to restore them.

I am very free to confess, that I am not at all satisfied with Either of these Reasons. That the Matter of Fact is the proper Province of the Jury I have already premised, and will never depart from it. But it was never said that a Jury may not, *under the Direction of the Court*, very properly Find a general Verdict comprehending both Law and Fact. Every general Verdict, in whatsoever Case it is given, doth so. It is now admitted that They may, *under the Direction of the Court*, give a general Verdict in all Cases of Justifiable Homicide; and why not in the Case of Misadventure? a Point seldom so complicated and embarrassed as the other.

2. Hale 302. --- 304.

LORD *Hale* having at large considered the Question touching the Verdict as well in the Cases of Excusable as Justifiable Homicide, not I doubt with his usual Precision, nor with perfect Uniformity of Sentiment, concludeth thus, "Notwithstanding this that I have said, where the Matter "itself appeareth *not to be Felony* the Prisoner upon Not "Guilty pleaded may be Found Not Guilty without Find-"ing the special Matter." I dare not say that his Lordship *intended* to bring the Case of Misadventure, which He had mentioned before in this Passage, and doth not now except, within this general Rule; because in the Passages cited above, and in others that might have been cited, He delivereth a Contrary Opinion. But certainly the Rule as laid down by Him is large enough to comprehend it. For in that Case it is admitted on all Hands, and cannot be gainsaid, that no Felony is committed.

1. Hale 476. 2. Hale 303. MS. Denton.

GENERAL Verdicts have been taken upon great Consideration in Cases of Misadventure, particularly in *Pretty*'s Case, and in One at the *Old Bayly* in *December* 1689. But it must be observed that in those Cases the Coroner's Inquest had found the special Matter and concluded *per Infortunium*; *which Presentments the Defendants confessed upon Record, in order to their suing out their Pardons under the Statute*

Statute of Glouceſter. Whether that Circumſtance altered the Caſe *in Point of Subſtantial Juſtice* will be preſently conſidered.

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THE ſecond Reaſon againſt a general Verdict of Acquittal in the Caſe ſeemeth to be founded upon a groſs Miſtake, *That at Common-Law He that Killed a Man per Infortunium or ſe Defendendo* was to be Hanged and Forfeit his Goods; and that the Statute of *Glouceſter* though it ſaved his Life, yet left his Goods to the Mercy of the Crown.

THIS Doctrine is laid down in the Year-Book of *Edw.* 3. and in ſome other Places. And ſome learned Men, * not ſufficiently attending to the ſpecial Import of the Term MURDER, as it is uſed in the Statute of *Marlbridge*, nor to the Occaſion of making that Statute, have adopted it.

21. Edw. 3. 17. b.

THE Statute of *Marlbridge* runneth thus, "Murdrum *de* "cætero *non adjudicetur coram Juſticiariis, ubi per Infortu-* "*nium adjudicatum eſt, ſed Locum habeat* Murdrum *de In-* "*terfectis per* Feloniam *tantum, & non aliter.*"

BY the Term *Murdrum*, as it ſtandeth here, is not meant the Offence, but an Amerciament antiently exacted from the Townſhip, where a Perſon was privately Murdered, and the Murderer not Apprehended; or the dead Body of an unknown Perſon appearing to have been Murdered happened to be found. This Amerciament they called *Murdrum*. †

See Spelm. Verb. Engleſheria.

BRACTON, who wrote before the Statute of *Marlbridge*, ſpendeth a whole Chapter upon the Subject, and ſtateth a Variety of Caſes, in which the Townſhip was excuſed from this Burden. I will mention One, becauſe it letteth Us into the true Senſe of the Statute, and alſo into the Occaſion of making it. "*Item de iis qui Mortui ſunt*

De Coron. c. 15.

§. 6.

* *Stanf.* Prærog. 45. Placit. Cor. 16. C. *Coke* on the Stat. of *Marlbridge* c. 26. and on the Stat. of *Glouceſter* c. 9.

† In this Senſe the Word is uſed in the Charters of *Hen.* 1. and K. *Stephen*; which the Reader will meet with in Mr. *Blackſtone*'s excellent Diſcourſe Introductory to his *Magna Charta.*

The Charter of *Hen.* 1. runneth thus, "Murdra *etiam retro ab illo Die quo in Regem co-* "*ronatus fui* OMNIA *condono. Et ea quæ amodo facta fuerint juſtè emendentur ſecundum Le-* "*gem Regis* Edvardi."

King *Stephen*'s is thus, "*Omnes Exactiones & Injuſtitias ---- funditus extirpo. Bonas Le-* "*ges & antiquas & juſtas Conſuetudines in* Murdris *& Placitis ---- obſervabo & obſervari præ-* "*cipio.*"

It cannot be underſtood in any other Senſe in antient Charters of Exemption to Cities, Towns and other Aggregate Bodies, "*Quieti ſint de* Murdro."

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"*per Infortunium nullum erit* Murdrum, licet in quibuf-"dam Partibus DE CONSUETUDINE aliter obfervetur." The Reader here feeth, that at Common-Law no Amerciament, to which they gave the Name of *Murdrum*, was due in Cafe of Death *per Infortunium*, but that *in fome Places a contrary Cuftom had prevailed*. The Statute therefore did not correct the Rigour of the Common-Law, as the learned Authors juft cited conceived. It's only View was to extend a Rule of Law founded on Natural Juftice to thofe Parts of the Kingdom, where a contrary Cuftom had prevailed. This clearly accounteth for the Word *de cætero*, which, together with the annexing a wrong Idea to an equivocal Expreffion, led thofe Authors into their Miftake.

IT is difficult to conceive upon what Principles the Court delivered the Opinion I have ftated from the Year-Book of *Edw.* 3.; fince it would be a Reproach to the Juftice of the Kingdom to imagine that the Law ever proceeded upon a Principle fo repugnant to Nature, to Reafon, and to the Common-Senfe and Feeling of Mankind.

BUT the Common-Law never did lie under this Reproach. For nothing is plainer than that no Man was in Danger of a Capital Punifhment in Cafe of Death by Mifadventure or *fe Defendendo*, or in any Cafe where the Fact was not Felonioufly done.

De Coron. c. 4.

BRACTON, fpeaking of the Cafe of Homicide *fe Defendendo*, faith, "*Non tenetur ad Pœnam Homicidii.*" And of Homicide *per Infortunium*, "*Non imputatur ei.*" And again fpeaking of the fame Cafe, "Abfolvi debet, *quia Cri-"men non contrahitur nifi Voluntas nocendi intercedat*;" and He there compareth the Cafe to that of an Infant or Madman, as ftanding clearly upon the fame Foot of Reafon and Juftice. *Fleta* fpeaking of the Cafe of Self-Defence ufeth Expreffions of the like Import; *Jufté*, faith He, *interficit*. And even the Statutes of *Marlbridge* and *Gloucefter* plainly intimate that at Common-Law no Felony was fuppofed to be committed. The Words of the former I have already cited; the latter expreffeth the Matter thus, "*Par Mifadventure ou foy defend, ou en auter Manner* SANS "FELONY." And the Pardons hereafter cited from the Patent Rolls are exprefs to the fame Purpofe.

c. 17.

Lib. I. c. 23. S. 14. 15.

BUT

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But it is said that though the Statute of *Gloucester* saved the Life of the Party, it left the Forfeiture of his Goods, incurred at Common-Law, to the Mercy of the Crown. The Mercy of the Crown, or the King's Grace, or Words of the like Import serving to impress on the Mind a due Reverence for the Regal Character, no good Subject can object to. This Statute speaketh in still an higher Strain. "The King will take him to his Grace, *if it pleaseth Him.*" But it must not be concluded from this Manner of Expression, "*if it pleaseth Him,*" that the Pardon grounded on the Statute is a Matter of meer Grace grantable or Not at the Pleasure of the Crown, though some of the older Writers thought it was. For it is now a settled Point, and long hath been, that the Pardon issueth of Course, and *ex Debito Justitiæ*, the Requisites of the Statute being performed. And the Author of *Fleta* who flourished about the Time the Statute was made, seemeth to consider the Royal Grace as a Matter founded rather in common Right than in meer Will and Pleasure. For speaking of the Statute He saith, "*Et cum Regi super Facti Veritate certioretur*, Gratiosè "dispensabit *cum tali*, *salvo Jure cujuslibet.*"

Stanf. Prærog. 45. b.

See Coke on the Statute. Lib. 1. c. 23. S. 15.

In My Opinion the true Scope and Intent of this Statute hath been greatly mistaken. It hath been considered as a Law intitling the Subject to the Grace of the Crown in Cases of Homicide by Misadventure or *se Defendendo*, *to which He was not before intitled*; but the Fact appeareth to Me to be quite otherwise. For the Subject had in these Cases the Benefit of the Royal Grace long before the making of this Statute; as appeareth by many antient Charters of Pardon,* in which the King reciting that it appearing to Him, sometimes upon the Representation of Persons *Fide dignorum*, at other Times by the Certificate of the Sheriff and Coroners of the County where the Fact was committed, that it was done in the necessary Defence of the Party, *& non per Feloniam aut Malitiam excogitatam* concludeth, "*Nos ergo Pietate moti perdonavimus prædicto* "A. B. *Sectam Pacis nostræ quæ ad Nos pertinet pro Morte* "*prædictâ*, *& firmam Pacem ei inde concedimus. Ita tamen*

* See the Patent Rolls in the Time of *H.* 3. and *Edw.* 1. Anterior to the Statute of *Gloucester*.

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"*quòd stet recto in Curiâ Nostrâ si aliquis versus eum inde*
"*loqui voluerit.*"

THIS last Clause saved to the Relations of the Party deceased their Remedy by Way of Appeal of Death, or, to speak more properly, recognized the Subject's Right to this Method of Prosecution; and is I presume what *Fleta* in the Passage just cited meaneth by the Words, *Salvo Jure cujuslibet.*

THE Royal Grace in these Cases seemeth to Me to be founded in the Benignity of the Common-Law, and to have been specially regarded in framing the Coronation Oath, which was nothing more than a Recognition of the Constitutional Rights of the Subject and a Solemn Engagement on the Part of the Crown to Maintain them. The Words, as the Oath standeth at present, I have already cited: and Words of the like Import were inserted in that antiently taken by our Kings, Importing that Mercy as well as Justice is one of the Constitutional Attributes of the Crown. And I the more readily give into this Opinion, by Reason of the Provision made by the Statute of *Edw.* 3. when the Frequency of Pardons from the Ease with which they were obtained was considered as a Publick Mischief. "No Pardon shall be granted for Manslaughters—and other "Trespasses against the Peace, but where the King may "do it *by his Oath*, viz. where a Man slayeth another *in his* "*own Defence or by Misfortune.*" These Words* expresly referring to the Coronation Oath seem to imply that in the excepted Cases, Mercy was due of common Right. Sure I am it is founded in Natural Justice.

2. Edw. 3. c. 2.

BUT the Mercy of the Crown in Cases of Homicide was liable to great Abuse. The King was sometimes misled by a false or partial Representation of Facts, against which Abuse the Statute of 27. *Edw.* 3. was levelled. The Abuse the Statute of *Gloucester* probably had in Contemplation was the careless or partial Manner in which the Sheriff and Coroners executed the Writ *de Odio & Atiâ.*

27. Edw. 3. St. 2. c. 1.

THIS Writ was founded on the Common-Law, and was rendered more effectual by the Great Charter, which provided that it should issue *Gratis* and of Course without

c. 26.

* See 4. *Edw.* 3. 13. 10. *Edw.* 3. 3. 14 *Edw.* 3. 15. Words of the like Import referring to the Coronation Oath.

Fine

Fine to the King. Upon the Return of this Writ, if it appeared either that the Party was Acquitted by the Inquest, or that the Fact was done by Misadventure or *se Defendendo*, the Writ *de ponendo in Ballium* issued of COMMON RIGHT. But the Sheriff and Coroners were no longer thought worthy of a Trust of this high Importance, which they had probably abused. And therefore in order to vest it in the Justices Itinerant, who generally were at the Head of the Profession, and with that View alone as I conceive, was this Branch of the Statute made. Not to intitle the Subject to the Royal Grace in Cases in which He was not admissible to it before, as hath been imagined; but to remedy some Inconveniencies, which had been seen and felt in the Method of admitting Him to it.

See Coke on Mag. Ch. c. 26.

TO that End the Statute Enacteth, "That from thenceforth no Writ shall issue for the Death of a Man to inquire whether He was slain by Misfortune or *se Defendendo*, or in any other Manner *without Felony*. But the Party accused shall remain in Prison 'till the coming of the Justices Errants or Assigned to deliver the Goal. And if it be found by the Country that He did it in his own Defence or by Misadventure, *the Justices* shall certify the same to the King who will take him to His Grace &c."

Stat. Glouc. c. 9.

THIS was plainly pointed at the Writ *de Odio & Atiâ*, and abolished it. And in the Room of the Return made to that Writ by the Sheriff and Coroners substituted the Certificate of the Justices in Eyre. And this I apprehend was all it did in regard to that Matter.

LORD *Coke* indeed doth say that the Writ *de Odio & Atiâ* was taken away by the 28. *Edw.* 3. but in his Comment on the Statute now under Consideration He admitteth that it was restrained by this Statute, and *another Remedy provided*. And whoever will read the 28. *Edw.* 3. with Attention will see that That Act was levelled at an Abuse of quite another Kind.

Mag. Ch. c. 26.

c. 9.

IN treating this Subject I have in Conformity to the Language of Writers who have gone before Me, and to the Stile of the Statute of *Gloucester*, spoken of the Cases of Homicide *per Infortunium* or *se Defendendo* as Cases standing in need of the Grace of the Crown, though probably

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intitled to it of common Right. That Persons who in either Case had been unhappily instrumental in Homicide did sue out Charters of Pardon, as well before as since the Statute, cannot be denied. What was the peculiar Object of the Royal Grace in these Cases is not I confess so clear to Me. I am satisfied that the Life of the Party was never in Danger, and consequently as to Life He could not be considered as an Object of Royal Clemency, and standing in Need of a Pardon. It hath been generally thought that at Common-Law the Party incurred a Forfeiture of *all his Chattles*. And *Keiling* hath given us a short Note of a Case from *Fitzherbert* in the 3. *Edw.* 3. which, *as He citeth it*, would lead one to think that the Law at that Time undoubtedly was so. His Words are, "The Jurors were Amerced for putting an Undervalue upon the Goods of a "Man who had Killed another in his own Defence." This Case so cited strongly implieth that in every Case of Homicide *se Defendendo* the Party Forfeited *all* his Goods; otherwise why was the Jury charged with the Value of them, or Amerced for their Misbehaviour with regard to the Appraisment? But *Fitzherbert* goeth much further into the real State of the Case, and at the same Time letteth Us, I conceive, into the true Ground of the Forfeiture. The Defendant after He had Killed the Assailant fled for it, "Ideo," saith the Book, "*Catalla ejus confiscantur* pro Fugâ."

p. 58.

Fitz. Cor. 287.

FITZHERBERT hath Reported some other Cases where the Parties incurring this Forfeiture had Fled from Justice. And in the Case standing next before That cited by *Keiling*, and happening in the same Year, the Reporter after saying that the Party was remanded to Prison *ad Gratiam Regis expectand'*, addeth, "*Et postea compertum est per Rotulos Coronatorum quòd prædictus G. fugit*, Ideo *Catalla* "*ejus confiscantur* pro Fugâ." He was remanded to Prison, as the Practice then was, appearing then to be intitled to the Benefit of the Statute of *Gloucester*. But it *afterwards* appearing that He had Fled from Justice, his Goods were *Therefore*, for his Flight, Confiscated.

FLIGHT it is well known at this Day induceth a Forfeiture of Goods, though the Party should be wholly acquitted of the Fact. And by the antient Law a Felon Kill-

ed

ed in the Pursuit upon Hue and Cry forfeited in like manner, "*Quia*", as the old Books have it, "*Paci Regis reddere se recusavit. Quia per Legem non permisit se Justiciari.*

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Fitz. Cor. pl. 288. 289. 290.

I submit it to the Consideration of the Learned, whether in Cases of Homicide *per Infortunium* or *se Defendendo* a Forfeiture of the Whole was ever incurred. For in the early Ages nearest the Conquest, when our Law was as it were in a State of Infancy, and had not received the Improvements it did during the Reign of *Edw.* 1. and in some succeeding Reigns, the Manslayer paid to the Crown by Way of Compensation for the Loss of a Subject a Mulct or Fine, sometimes in Money, at other Times in Horses, Hounds, Hawks, and other valuable Effects. This I call a Mulct or Fine, unless we may suppose that those Payments were made and accepted in Lieu of and as a Composition for the Whole, which I leave to further Consideration.*

IT is well known to the Learned, that the *Anglo-Saxons* in Conformity to a Custom they and other Nations of *German* Extraction derived from their Ancestors, in Case of Homicide contented themselves with a pecuniary Compensation, which they called the *Wergild*, the Price of Blood. This when it came to be ascertained by Law was estimated in Proportion to the Rank and Publick Character of the Deceased, the Crown in Consideration of the Loss of a Subject, and the Lord for the Loss of his Vassal coming in for a Share of it with the Family, which likewise had suffered a Loss in the Death of it's Chief.

See Tacitus de Moribus Germanorum.

THE Community was supposed to have an Interest, as it really had, in the Life of every Member. And therefore the King as *Caput Reipublicæ* might exact a certain Mulct or Fine in Cases of Homicide, though meerly Casual. † Upon this Principle Deodands became due. The Weapon with which the Party was slain by another was a Deodand. Irrational Creatures, and even inanimate Beings, which without the Intervention of Human Means contributed to

* See *Madox*'s History of the Exchequer. Chap. 14. S. 6. Some Traces of these Payments.

† See the *Saxon* Laws throughout, with the Laws of the Conqueror and *Hen.* 1. and the Glossaries. Verb. *Freda*, *Wergild*, *Manbote*.

And see *Montesquieu*'s Spirit of Laws. Lib. 30. c. 19. 20. The like Usages among the *Franks* and other Nations of *German* Extraction.

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the Death were Deodands, and are so to this Day. And upon the same Principle the Crown shared with the Family in the Amerciament called *Murdrum* already mentioned.

BUT I will travel no further in a dark and almost untrodden Path.

I have neither Leisure nor Inclination to enter deeply into the Search of Antiquity touching these Matters. The few Things I have thrown out I offer as probable Conjectures, Hints which possibly may afford some little Light to those who have more Leisure and better Health for such Inquiries.

FOR I think it is now become a Matter rather of Historical Amusement than of real Importance to inquire, whether any Forfeiture in the Case of Homicide *se Defendendo* or *per Infortunium* was incurred at Common-Law or no. Since the Statute of *Gloucester* intitleth the Party to the Royal Grace and hath purged the Forfeiture *ab Initio*, if any Forfeiture was ever incurred.

I therefore think those Judges who have taken general Verdicts of Acquittal in plain Cases of Death *per Infortunium*, (Justifiable Self-Defence hath been already spoken to) have not been to Blame. They have, to say the worst, deviated from antient Practice in Favour of Innocence, and have prevented an Expence of Time and Money, with which an Application to the Great Seal, though in a Matter of Course, as this undoubtedly is, must be constantly attended.

Nulli vendemus, nulli negabimus, aut differemus Rectum aut Justitiam.

AND if it deserveth the Name of a Deviation, it is far short of what is constantly practised at an Admiralty-Sessions under the 28. *H.* 8. with regard to Offences not Ousted of Clergy by particular Statutes,* which had they been committed at Land would have been intitled to Clergy. In these Cases the Jury is constantly directed to Acquit the Prisoner; because the Marine-Law doth not allow of Clergy in any Case. And therefore in an Indictment for Murder on the High-Sea, if the Fact cometh out upon Evi-

* Statutes Ousting Clergy are 11. 12. *W.* 3. c. 7. 4. *Geo.* 1. c. 11. 8. *Geo.* 1. c. 24. and perhaps some others.

dence

dence to be no more than Manslaughter supposing it to have been committed at Land, the Prisoner is constantly Acquitted.

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SECT. 4.

SECT. 4. I am not so clear with regard to that Species of Self-Defence, which I have already considered as barely Excusable. *Bracton* and *Fleta* indeed, in the Passages I have cited, speak of Self-Defence in general Terms, not accurately distinguishing between that which is Justifiable and that which is barely Excusable. But in the then Infant State of our Law some Inaccuracy of Expression and a Want of due Precision in the Arrangement of Ideas may be expected, and ought to be candidly excused; though it must be confessed that in the Scale of sound Reason and substantial Justice the Cases widely differ. In the Former the Party is entirely Innocent, He hath gone no further than Nature leadeth, no further than Duty founded on the great Law of Self-Preservation, will carry the Wisest and the Best of Men. In the Latter He may be considered as Blame-worthy, having by his own Indiscretion and Inordinate Heat brought upon himself the Necessity under which He excuseth the Fact; and though not a Felon, yet, in the Estimation of the Law which looketh with a Jealous Eye on every Action which tendeth to Bloodshed and the Disturbance of the Peace of Society, far from an Innocent Man. In short, as I have already observed, his Case is sometimes attended with Circumstances so bordering upon and not easily distinguishable from that Species of Felonious Homicide which we call Manslaughter, that He may with Propriety enough be considered as an Object of the King's Grace within the Restrictions of the Statute of *Gloucester*, and consequently not intitled to a general Verdict of Acquittal.

CHAP. V.

CHAP. V.

Manslaughter.

I NOW proceed to that Species of Felonious Homicide which we call Manslaughter, which, as I before observed, the Benignity of our Law as it standeth at present imputeth to Human Infirmity. To Infirmity which though in the Eye of the Law Criminal, yet is considered as incident to the Frailty of the Human Frame.

THE Cases falling under the Denomination of Manslaughter, where Death ensueth from Actions in themselves Unlawful, but not proceeding from a Felonious Intention, or from Actions in themselves Lawful, but done without due Care and Circumspection for preventing Mischief, have been already considered under the Title of Accidental Death. And the Distinction between Manslaughter and Excusable Self-Defence hath been attempted in it's proper Place.

THE Cases falling under the Head of Manslaughter which most frequently occur are those where Death ensueth upon a sudden Affray and in Heat of Blood, upon some Provocation given or conceived.

I have already premised, that whoever would shelter himself under the Plea of Provocation must prove his Case to the Satisfaction of his Jury. The Presumption of Law is against Him, 'till that Presumption is repelled by contrary Evidence. What Degree of Provocation, and under what Circumstances Heat of Blood, the *Furor brevis*, will or will not avail the Defendant is now to be considered.

SECT. 1.

SECT. 1. WORDS of Reproach, how grievous soever, are not a Provocation sufficient to free the Party Killing from the Guilt of Murder. Nor are indecent provoking Actions or Gestures expressive of Contempt or Reproach, without an Assault upon the Person.

THIS Rule will, I conceive, govern every Case where the Party Killing upon such Provocation maketh use of a deadly Weapon, or otherwise manifesteth an Intention to Kill,

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, it had been but Manſlaughter.

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Keil. 130. 131.

THE Difference between the Caſes is plainly this. In the Former the *Malitia*, the Wicked Vindictive Diſpoſition already mentioned, evidently appeareth: in the Latter it is as evidently Wanting. The Party in the Firſt Tranſport of his Paſſion intended to chaſtiſe for a Piece of Inſolence which few Spirits can bear. In this Caſe the Benignity of the Law interpoſeth in Favour of Human Frailty; in the Other it's Juſtice regardeth and puniſheth the apparent Malignity of the Heart.

SECT. 2. AND it ought to be remembered, that in all other Caſes of Homicide upon ſlight Provocation, if it may be reaſonably collected from the Weapon made uſe of, or from any other Circumſtance, that the Party intended to Kill, or to do ſome great bodily Harm, ſuch Homicide will be Murder. The Miſchief done is irreparable, and the Outrage is conſidered as flowing rather from brutal Rage or diabolical Malignity than from Human Frailty. And it is to Human Frailty, and to that Alone, the Law indulgeth in every Caſe of Felonious Homicide.

SECT. 2.

A few Inſtances may ſerve for Illuſtration.

A. finding a Treſpaſſer upon his Land in the firſt Tranſport of his Paſſion beateth Him, and unluckily happeneth to Kill; this hath been held to be Manſlaughter. But it muſt be underſtood, that He beat him, not with a miſchievous Intention, but meerly to Chaſtiſe for the Treſpaſs, and to deter him from committing the like. For if He had knocked his Brains out with a Bill or Hedgeſtake, or had given Him an outragious Beating with an ordinary Cudgel beyond the Bounds of a ſudden Reſentment, whereof He had died, it had been Murder. For theſe Circumſtances are ſome of the genuine Symptoms of the *Mala Mens*, the Heart bent upon Miſchief, which, as I have already ſhewn, enter into the true Notion of Malice in the legal Senſe of the Word.

1. Hale 473.

Keil. 132.

Cro. Car. 131. Palm. 545. Jones (W.) 198.

A Parker found a Boy ſtealing Wood in his Maſter's Ground, He bound him to his Horſe's Tail and beat Him. The Horſe took a Fright and ran away, and dragged the Boy on the Ground ſo that he Died. This was held to be Murder.* For it was a deliberate Act and ſavoured of Cruelty.

Old Bayly Apr. 1704. MSS. Tracy and Denton.

THERE being an Affray in the Street, one *Stedman* a Foot-Soldier ran haſtily towards the Combatants. A Woman ſeeing Him run in that Manner cried out, "You "will not murder the Man will you?" *Stedman* replied, "What is that to You, you Bitch?" the Woman thereupon gave Him a Box on the Ear, and *Stedman* ſtruck Her on the Breaſt with the Pommel of his Sword. The Woman then Fled, and *Stedman* purſuing Her ſtabbed Her in the Back. *Holt* was at firſt of Opinion that this was Murder, *a ſingle Box on the Ear from a Woman not being a ſufficient Provocation to Kill in this Manner, after He had given Her a Blow in return for the Box on the Ear.* And it was propoſed to have the Matter found Special. But it afterwards appearing in the Progreſs of the Trial, that the Woman ſtruck the Soldier in the Face with an Iron Patten, and drew a great Deal of Blood, it was held clearly to be no more than Manſlaughter.

THE Smart of the Man's Wound, and the Effuſion of Blood might poſſibly keep his Indignation boiling to the Moment of the Fact.

Stra. 499. R. v. Tranter and Reaſon.

MR. *Lutterel* 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 *Lutterel* pretended, to have the Debt and Coſts paid. Words aroſe at the Lodgings about *Civility Money*, which *Lutterel* 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 Caſes of immoderate Correction, mentioned already under the Head of Accidental Death, carry this Rule much further than theſe do. For Correction with Moderation is certainly Lawful. But in theſe Caſes the leaſt Blow would have been Unjuſtifiable.

The

The Officer who had been ſent for the Attorney's Bill ſoon returned to his Companion at the Lodgings; and Words of Anger ariſing *Lutterel* 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 held Manſlaughter *by Reaſon of the firſt Aſſault with the Cane.*

THIS is the Caſe as Reported by Sir *John Strange*; and an extraordinary Caſe it is, that all theſe Circumſtances of Aggravation, Two to One, He helpleſs and on the Ground begging for Mercy, ſtabbed in nine Places and then diſpatched with a Piſtol; that all theſe Circumſtances, plain Indications of a deadly Revenge or Diabolical Fury, ſhould not outweigh a ſlight Stroke with a Cane.

See Holt's Opinion in the laſt Caſe.

BUT in the Printed Trial there are ſome Circumſtances ſtated, which are entirely Dropped, and others very ſlightly mentioned by the Reporter.

6. St. Tri. 195.

1. MR. *Lutterel* had a Sword by his Side, which, after the Affray was over, was *found Drawn and Broken.* How that happened did not appear in Evidence; for Part of the Affray was at a Time when no Witneſs was preſent, Nobody ſpoke to the Whole.

2. WHEN *Lutterel* laid the Piſtols on the Table, He declared that He 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 appeared to have been wounded in the Hand with a Piſtol-Shot, (for Both the Piſtols were Diſcharged in the Affray) and ſlightly on the Wriſt with ſome ſharp-pointed Weapon: and the Other was ſlightly Wounded in the Hand with a like Weapon.

5. THE Evidence touching *Lutterel*'s begging for Mercy was not that He was on the Ground *begging for Mercy*; but that on the Ground He held up his Hands AS IF *He was begging for Mercy.*

THE Chief-Juſtice directed the Jury, that if They believed Mr. *Lutterel* endeavoured to reſcue Himſelf, which

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He ſeems to think was the Caſe, and very probably was the Caſe, it would be Juſtifiable Homicide in the Officers. However, as Mr. *Lutterel* gave the Firſt Blow *accompanied with Menaces to the Officers, and the Circumſtance of 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*.

THIS Direction of the Chief Juſtice the Reporter hath totally omitted. And therefore I have taken the Liberty to ſtate the Caſe more largely than otherwiſe I ſhould have done. And I cannot help ſaying, that the Circumſtances omitted in the Report are too Material, and enter too far into the true Merits of the Caſe to have been dropped by a Gentleman of Sir *John Strange*'s Abilities and Known Candour, if He had not been over-ſtudious of Brevity.

IMPERFECT Reports of Facts and Circumſtances, eſpecially in Caſes where every Circumſtance weigheth *ſomething* in the Scale of Juſtice, are the Bane of all Science that dependeth upon the Precedents and Examples of former Times.

I have always thought *Rowly*'s Caſe a very extraordinary one, as it is Reported by *Coke*, from whom *Hale* cites it. The Son fights with another Boy and is beaten; He runs Home to his Father all bloody; the Father takes a Staff, runs three Quarters of a Mile, and beats the other Boy, who dieth of this Beating. This is ſaid to have been ruled Manſlaughter, *becauſe done in ſudden Heat and Paſſion*.

12. Rep. 87. 1. Hale 453.

SURELY 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.

IF upon this Provocation the Father, after running three Quarters of a Mile, had ſet his Strength againſt the Child, had diſpatched him with an Hedgeſtake or any other deadly Weapon, or by repeated Blows with his Cudgel, it muſt, in My Opinion, have been Murder; ſince Any of theſe Circumſtances would have been a plain Indication of the *Malitia*, the Miſchievous Vindictive Motive before explained. But with regard to theſe Circumſtances, with what Wea-

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pon or to what Degree the Child was beaten, *Coke* is totally silent.

BUT *Croke* setteth the Case in a much clearer Light, and at the same Time leadeth his Readers into the true Grounds of the Judgment. His Words are, "*Rowly struck* "the Child with *a small Cudgel*,* of which *Stroke* He *af-* "*terwards* died."

Cro. Jac. 296.

I think it may be fairly collected from *Croke*'s Manner of speaking, that the Accident happened by *a single Stroke* with a Cudgel *not likely to destroy* and that Death did not immediately ensue. The Stroke was given in Heat of Blood, and not with any of the Circumstances which import the *Malitia*, the Malignity of Heart attending the Fact already explained, and therefore Manslaughter. I observe that Lord *Raymond* layeth great Stress on this Circumstance, *that the Stroke was with a Cudgel not likely to Kill.*

Lord Raym. 1498.

SECT. 3. THE Rule laid down in the first Section will not hold in Cases where from Words or Actions of Reproach or Contempt, or indeed upon any other sudden Provocation, the Parties come to Blows, *no undue Advantage being sought or taken on either Side.*

SECT. 3.

A. useth provoking Language or Behaviour towards *B.* *B.* striketh Him, upon which a Combat ensueth, in which *A.* is Killed. This is held to be Manslaughter, for it was a sudden Affray and They fought upon equal Terms. *And in such Combats upon sudden Quarrels it mattereth not Who gave the first Blow.*

1. Hale 456.

BUT if *B.* had drawn his Sword and made a Pass at *A.* *his Sword 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, *his Adversary's Sword undrawn*, shewed that He sought his Blood; and *A*'s Endeavour to defend himself, *which He had a Right to do*, will not excuse *B.* But if *B.* had first drawn and forborn 'till his Adversary had drawn too, it had been no more than Manslaughter.

Keil. 61. Lord Raym. 1489.

Keil. 130. Lord Raym. 1493.

MAWGRIDGE whose Case hath been already mentioned upon another Occasion, upon Words of Anger threw a

* *Godbolt* 182. calleth it a *Rod*, Meaning I suppose a small Wand.

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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*, and wounded Him. Whereupon *Mawgridge* ſtabbed *Cope*. This 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 his Blow. And it was Lawful for Mr. *Cope* being ſo aſſaulted to return the Bottle.* The Judgment in this Caſe was held to be good Law by All the Judges of *England* at a Conference in the Caſe of Major *Oneby*.

Lord Raym. 1489.

To what I have offered with regard to ſudden Rencounters let Me add, that the Blood, already too much Heated, kindleth afreſh at every Paſs or Blow. And in the Tumult of the Paſſions, in which *meer Inſtinct Self-Preſervation*, hath no inconſiderable Share, the Voice of Reaſon is not heard. And therefore the Law in Condeſcenſion to the Infirmities of Fleſh and Blood hath extenuated the Offence.

SECT. 4.

SECT. 4. But in theſe, and indeed in every other Caſe of Homicide upon Provocation how great ſoever it be, if there is ſufficient Time for Paſſion to ſubſide, and for Reaſon to interpoſe, ſuch Homicide will be Murder.

A. findeth a Man in the Act of Adultery with his Wife and in the firſt Tranſport of Paſſion killeth Him; this is no more than Manſlaughter. But had He Killed the Adulterer deliberately and upon Revenge *after the Fact and ſufficient cooling Time*, it had been undoubtedly Murder. For let it be obſerved, that in all poſſible Caſes deliberate Homicide upon a Principle of Revenge is Murder. No Man under the Protection of the Law is to be the Avenger of his own Wrongs. If they are of ſuch a Nature for which the Laws of Society will give Him an adequate Remedy, thither He ought to reſort. But be they of what Nature ſoever, He ought to bear his Lot with Patience and remember, *that Vengeance belongeth only to the Moſt High.*

* See Lord *Holt*'s Report of *Mawgridge*'s Caſe *Keil.* 119. The learned Judge in this Caſe, after a ſhort Introductory Diſcourſe wherein I cannot totally agree with Him, entereth with great Learning and ſound Reaſon into the Point upon which the Caſe turned. He doth ſo likewiſe in the Caſe of The King and *Plummer*.

SECT. 5. UPON this Principle, deliberate Duelling if Death enſueth, is in the Eye of the Law Murder. For Duels are generally founded in deep Revenge. And though a Perſon ſhould be drawn into a Duel, not upon a Motive ſo criminal, but meerly upon the Punctilio of what the *Swordſmen falſly call Honour*, That will not Excuſe. For He that Deliberately ſeeketh the Blood of another upon a private Quarrel acteth in Defiance of all Laws Human and Divine, whatever his Motive may be.

BUT if, as I ſaid before, upon a ſudden Quarrel the Parties fight upon the Spot, or if they preſently fetch their Weapons and go into the Field and fight, and One of them falleth, it will be but Manſlaughter; becauſe it may be preſumed the Blood never cooled.

IT will be Otherwiſe if they appoint to fight the next Day, or even upon the ſame Day at ſuch an Interval as that the Paſſion might have ſubſided: or if from any Circumſtances attending the Caſe it may be reaſonably concluded, that their Judgment had actually controuled the Firſt Tranſports of Paſſion before they engaged. The ſame Rule will hold if after a Quarrel they fall into other Diſcourſe or Diverſions, and continue ſo engaged a reaſonable Time for cooling.

Keil. 27.

Oneby's Caſe. Stra. 773. Lord Raym. 1489.

CHAP. VI.

Of the Statute of Stabbing.

THAT particular Species of Manſlaughter which is Ouſted of Clergy by the Act of 1. *Jac.* 1. commonly called *The Statute of Stabbing* cometh now in Courſe to be conſidered.

1. Jac. 1. c. 8.

THIS Statute was made at a Critical Time, and as Tradition hath it, upon a very ſpecial Occaſion. It is ſuppoſed to have been principally intended to put an effectual Stop to Outrages then frequently committed by Perſons of inflammable Spirits and deep Reſentment; who wearing ſhort Daggers under their Cloaths were too well prepared

Farreſly 133. Lord Raym. 845.

CHAP. VI.

to do quick and effectual Execution upon Provocations extremely ſlight.

SECT. I. Keil. 55.

IT was agreed by the Judges in Lord *Morley*'s Caſe that this Statute is declaratory of the Common-Law, and was made for preventing the Inconveniences ariſing from the Forwardneſs or Compaſſion of Juries; who were apt to conſider That to be a Provocation for extenuating Murder, which in Law was Not. Whether it was meerly a declaratory Statute or No, I will not take upon Me to Determine. But certain it is, that though the Words deſcriptive of the Offence are very general, probably *in Terrorem*, yet in the Conſtruction of the Statute the 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, "If any Perſon ſhall *Stab* or *Thruſt* "any Perſon, ſuch Perſon not having then a Weapon "*drawn*, nor having *firſt* ſtruck the Party killing, and the "Party die in ſix Months; except in Caſes of Self-De-"fence, Miſchance, or for preſerving the Peace or Chaſti-"zing his Child or Servant, ſuch Offender ſhall &c."

BUT general as the Words are, yet Caſes coming within the Letter of the Act, and not covered by any of the Exceptions, have very rightly been adjudged not to be within the Meaning of it; the Juſtice or Benignity of the Law over-ruling the rigorous Penning of the Statute.

I will by way of Illuſtration mention a few Caſes, ſome of which have been already cited to other Purpoſes.

THE Caſe of an Adulterer ſtabbed by the Huſband in the Act of Adultery lately cited is not within the Act, it is Manſlaughter at Common-Law. For the Provocation is greater than Fleſh and Blood in the firſt Tranſport of Paſſion can bear.

Sti. 469.

A Man is aſſaulted by Thieves in his Houſe, the Thieves having no Weapon drawn nor having ſtruck Him; He ſtabbeth one of them, This is not within the Act, it is Juſtifiable Homicide.

1. Hale 470.

AN Officer puſhed abruptly and violently into a Gentleman's Chamber early in the Morning in order to arreſt Him, *not telling his Buſineſs nor uſing Words of Arreſt*: the

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. It was ruled Manslaughter at Common-Law, though the Defendant was Indicted on the Statute, and the Officer had no Weapon drawn, nor had He struck the Defendant: who not knowing the Officer's Business might from his Behaviour reasonably conclude that He came to Rob or Murder him.

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UPON an Outcry of Thieves in the Night-Time a Person who was concealed in a Closet, but no Thief, was, in the Hurry and Surprize the Family was under, Stabbed in the Dark. This was held to be an Innocent Mistake, and ruled Chance-medley.

1. Hale 42. 474. Cro. Car. 539. Jones (W.) 429.

POSSIBLY it might have been better ruled Manslaughter at Common-Law; due Circumspection not having been used, but it was not Manslaughter within the Statute.

CASES of this Kind are very numerous. Many of them have been already stated to other Purposes under the Head of Justifiable or Excusable Homicide. And more there are which cannot have escaped the Observation of any attentive Reader. In all such Cases the Justice or Benignity of the Common-Law hath over-ruled the Rigour of the Statute.

SECT. 2. A Prisoner whose Case may be brought within the Letter of the Act commonly is Arraigned upon two Indictments, one at Common-Law for Murder, the other upon the Statute. And if it cometh out in Evidence that the Fact was either Justifiable or amounted barely to Manslaughter at Common-Law, it hath been rarely known that such Person hath been convicted of Manslaughter upon the Statute.

SECT. 2.

HARD indeed it would be should He be so Convicted. For if the Tradition I hinted at above is to be depended on, this is one of those Acts which, to borrow an Expression from Lord *Bacon*, was made *upon the Spur of the Times*. Whereas the Rules of the Common-Law in Cases of this Kind may be considered as the Result of the Wisdom and Experience of many Ages.

LET Me add, that if the Outrages at which the Statute was levelled had been prosecuted with due Vigour and pro-

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per Severity upon the Foot of Common-Law, I doubt not an End would ſoon have been put to them, without incumbering our Books with a ſpecial Act for that Purpoſe, and a Variety of Queſtions touching the true Extent of it. This Obſervation will hold with regard to many of our Penal Statutes made upon ſpecial and preſſing Occaſions, and ſavouring rankly of the Times.

AFTER what I have ſaid it may not be thought extremely neceſſary to enter minutely into the Circumſtances which will bring particular Caſes within the Statute, or take them out of it. But ſomething very briefly ſhall be ſaid.

SECT. 3.

SECT. 3. THE Statute in deſcribing the Offence ſaith, "If any Perſon ſhall *Stab* or *Thruſt*." Under theſe Words Shooting with any Sort of Fire-Arms, or Thruſting with a Staff or any other blunt Weapon, have been brought within the Act. The Caſe of Thruſting with a blunt Weapon muſt be ſuppoſed to have been in the Contemplation of the Legiſlature. Otherwiſe it will not be eaſy to account for the Exception with regard to the Correction of Children or Servants.

1. Hale 470.

THE Caſe of Shooting with Fire-Arms will govern the Caſes of ſending an Arrow out of a Bow or a Stone from a Sling, or uſing any Device of that kind *held in the Hand of the Party at the Inſtant of diſcharging it.* But throwing at a Diſtance and wounding the Party, whereby Death enſueth, the Weapon be it what it may, *being delivered out of the Hand* * at the Time the Stroke was given, hath not been thought with ſtrict Propriety to come under the Notion of Stabbing or Thruſting.

1. Hale 469.

SECT. 4.

SECT. 4. THE Statute hath likewiſe theſe Words further deſcriptive of the Offence, "Such Perſon" [the Perſon Stabbed or Thruſt] "not having then a Weapon *drawn*, nor "having *firſt* ſtruck the Perſon killing."

1. Hale 470. Godb. 154.

AN ordinary Cudgel, or other Thing proper for Defence or Annoyance in the Hand of the Party hath been conſider-

* *Holt* in *Keil.* 131. and by the Court in *Newman*'s Caſe at *Old Bayly* in *Oct.* 8. *An.* where the Point of a Sword was thrown at 20 Yards Diſtance. MSS. *Denton* and *Chapple.*

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ed as a Weapon drawn, ſo as to take the Caſe out of the Statute; though the Words a *Weapon drawn* ſeem rather to import a Sword, or other Weapon of that Kind *drawn out of the Scabbard*. It would ſound extremely harſh to ſay, that a Sword in the Scabbard is a Weapon drawn within the Meaning of the Act. And yet I preſume there are ſome Swords yet remaining, which probably have not been *drawn* ſince the Reſtoration, as well fitted for Defence or Annoyance as an ordinary Cudgel. But the Judges have wiſely held a ſtrict Hand over this Statute. They did ſo very remarkably in the Caſes where it hath been held that Perſons preſent Aiding and Abetting, though at Common-Law Principals in the Manſlaughter, are not within the Statute, ſo as to be Ouſted of Clergy.

Allen 43. 1. Hale 468. Salk. 542.

SECT. 5. THE Judges were once divided upon the Conſtruction of the Word *Then*, "the Party killed having "*Then* no Weapon drawn." The Point in Debate was, Whether the Word *Then* was to be confined *to the Inſtant the Stab was given*, or whether it related to the whole Time of the Combat. But as I do not find that this Point received any Judicial Determination, I leave it to the Men of more Leiſure and Refinement.

SECT. 5. 3. Lev. 255.

IN another Caſe, a Queſtion aroſe upon the Conſtruction of the Word *Firſt* in the Statute. "The Perſon Killed not "having *Firſt* ſtruck the Perſon Killing." Eleven of the Judges held that the Words, "Not having *Firſt* ſtruck," meant, Not having given *the Firſt Blow in the Affray*. *Richardſon* ſingly was of Opinion that the Meaning of the Words was, not having Struck *before the Mortal Wound was given*. The Major Vote however prevailed. But in the Opinion of *Holt*, againſt the Natural Order of the Words and the obvious Meaning of the Act. The Arrangement of the Words, as they ſtand in the Statute, ſeemeth to have been Inverted, and a Conſtruction the Legiſlature never dreamt of Extorted from them.

Jones (W.) 340.

Skin. 668.

THESE are ſome of the Queſtions upon which the Ingenuity of learned Men hath been employed in the Conſtruction of this Statute. But wherever the Defendant is Indicted at Common-Law and alſo upon the Statute, the Queſtion moſt worthy of Litigation would in My Opinion

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be, Is the Fact upon Evidence Murder at Common-Law, or is it Not? especially if the Statute was declaratory of the Common-Law, as in the Passage already cited from *Keiling* it was resolved to be.

ONE general Rule however may, as I conceive, be safely laid down, That in all Cases of Doubt and Difficulty upon the Construction of the Statute the Benignity of the Common-Law ought to turn the Scale.

CHAP. VII.

BEFORE I quit the Subject of Manslaughter, I will submit to Consideration a few Things that have occurred to Me touching the Distinction between That Offence and Murder in the Light our Oldest Writers considered those Offences. And how far later Statutes have introduced the material Distinction between those Offences which at present is established.

THE Distinction between Murder and Manslaughter, as it is stated by our Oldest Writers, seemeth to have been in their Time meerly Nominal. By the One they meant an Insidious Secret Assassination, *Occulta Occisio, nullo Sciente aut Vidente*, as They express themselves. And Homicide under these Circumstances, if the Offender was not Apprehended, subjected the Township, as I have already observed, to the Amerciament to which they gave the Name of *Murdrum*.

Vid. Bract. cap. de Murdro.

EVERY other Species of Felonious Homicide they called simply *Homicidium nequitèr & in Feloniâ factum*. But Both Offences with regard to the Consequences of a Conviction were the Same, Both Capital. Unless the Privilege of Clergy interposed, and when it did, Both were treated alike.

Vid. Bract. cap. de Homicidio.

THE Legal Notion of Murder in Contradistinction to Manslaughter was afterwards enlarged, and took in every Species of Homicide, whether Openly or Privily committed, if attended with Circumstances indicating a preconceived *Malice* in the large Sense of that Term which I have already stated and explained: or to borrow a Term from the *Scotch* Law, "Slaughter of forethought Felony."

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STANFORD, the Cleareſt and Beſt Writer on the Crown-Law before *Hale*, ſtateth the old Rule from *Bracton*; but addeth, that the enlarged Idea taking in every Species of Homicide with Malice prepenſed had long obtained.

Stanf. c. 10. Id. p. 18. B.

HOW long it had Obtained is difficult to determine with Preciſion; and I think it a Point not worthy of much Inveſtigation. It had certainly obtained long before *Stanford*'s Time. For though, as I obſerved at the Entrance into this Diſcourſe, the antient Precedents and Writers on our Law do not make uſe of the Term Homicide *upon Malice forethought* in Contra-diſtinction to Simple Felonious Homicide unattended with that Circumſtance; yet it is certain that the Term, and alſo the Diſtinction between the One Offence and the Other founded in the Circumſtance of Malice was well-known and underſtood at or very near the Time thoſe Writers flouriſhed.*

THE Acts † of General Pardon from the 50. *Edw.* 3. to this Time conſtantly and uniformly except Murder of *Malice prepenſed*, or in Words tantamount, correſponding exactly with our preſent Notion of that Offence.

UNDER theſe Acts, Manſlaughter not being Excepted was always underſtood to be Pardoned.

HERE was a real Diſtinction, though Temporary and Occaſional, eſtabliſhed between the Offences of Murder and Simple Felonious Homicide: which was certainly founded on the ſuppoſed Malignity or Non-malignity of the Heart at the Time the Fact was committed. In One Caſe the Mercy of the Crown interpoſed, in the Other the Offender was left open to the Juſtice of the Law.

THE Statute of *Rich.* 2. likewiſe preſuppoſeth the Legal Diſtinction as well-known in thoſe Days; and, as far as it goeth, eſtabliſheth a Real and Laſting Difference between the Offences. It enacteth, " That no Pardon ſhall be al-" lowed for the Death of a Man ſlain by *Await*, *Aſſault*, *or* " *Malice prepenſed*—unleſs the ſame Murder &c, be ſpeci-" fied in the Charter. And if in any Pardon it be not ſo

13. Rich. 2.

* See the Patent Rolls already cited, many Pardons for Homicide under various Circumſtances reciting that the Facts were committed *Non per Feloniam aut excogitatam Malitiam*.

† See the Acts in *Raſtal* or any Edition before 1618, when *Pulton*'s Collection omitting Temporary Acts and Acts ſuppoſed to be Repealed or Obſolete, was publiſhed.

 " expreſſed,

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"expressed, the Justices shall enquire by Inquest if He be "Murdered or Slain by Assault, Await, or Malice prepensed. And if they Find that He was so Slain, the Charter "shall be disallowed."

UPON such Finding of the Jury the King was presumed to have been deceived in His Grant. And therefore the Statute provideth that no general Words in the Pardon, how comprehensive soever, shall avail the Offender. The Crown was not presumed intentionally to Pardon Premeditated Murder, unless it's Intention was plainly and clearly expressed in the Charter.

THE Statutes Ousting Clergy in the Case of Wilful Murder likewise presuppose an established well-known Distinction between that Offence and Simple Felonious Homicide; and fall in exactly with our present Notion of Homicide attended with and aggravated by the Circumstance of *Malice prepensed*.

12. *H.* 7. if any *Lay* Person *prepensedly* Murder his Lord &c.

23. *H.* 8. Ousteth Clergy in Case of Wilful Murder of Malice prepensed; but excepteth Persons in Holy Orders, *viz.* of the Order of Subdeacon or Above.

25. *H.* 8. refereth to the 23[d], and is *with regard to the present Question* meerly Auxiliary to it.

1. *Edw.* 6. which for Reasons given in another Place, I think, hath superseded Both the Acts of *H.* 8. as far as concerneth the Enumeration of Offences Ousted of Clergy, describeth the Offence by the Term Murder of Malice prepensed; but doth not extend to Accessaries before the Fact, nor to Persons standing Mute &c, as the two Acts of *H.* 8. taken together did.

4. 5. *Ph.* and *M.* is Auxiliary to the Act of *Edw.* 6. and extendeth to Accessaries before the Fact, and to Persons standing Mute &c, and the Offence is here described singly by the Words *Wilful Murder*; which in the Language of the Law *ex Vi Termini* import every Thing we now understand by Murder of Malice prepensed in Contra-distinction to Manslaughter.

Bro. Indictment pl. 7.

AND therefore in an Indictment for Murder the Word *Murdravit* is so Necessary and Essential in the Description of the Offence, that no Words however importing the same Offence,

Offence, as *ex Malitiâ præcogitatâ Interfecit*, will now bring the Case within the Statutes. And for Want of that Technical operative Word the Defendant cannot be Convicted of Murder, though He may of Manslaughter.

THESE Statutes Ousting Clergy in the Case of Murder have introduced a material and lasting Distinction between that Offence, and what we now commonly call *Manslaughter*, with regard to the Consequences of a Conviction. But the Statutes of *H.* 8. were extremely Partial and Defective, all Persons in Holy Orders, who ought Themselves to have known and taught Others their Duty, being excepted. And the Statute of *H.* 7. already cited was in like manner Defective. This Defect the Statutes of *Edw.* 6. and *Ph.* and *M.* have supplied.

BUT still, all Persons not capable of Holy Orders, as Women, who from the Delicacy of their Frame seem to be the most susceptible of Human Passions, and some Others, were left to the extreme Rigour of the Common-Law, and to the Mercy of the Crown. For at Common-Law all Felonies, except Petit Larceny, Rape and Mayhem, were considered as Capital Offences, unless in Cases where the Offender was capable of Holy Orders and qualified for them. And in those Cases, I am sorry to say it, Murders, though of the most Atrocious Kind, were not excluded. And therefore wherever I speak of the Benignity of the Law and it's Condescension to Human Infirmity in the Case of Manslaughter, I would be always understood to speak of the Law in it's present State.

BUT Light and sound Sense have at Length, though by very Slow Degrees, made their Way to Us. We now consider the Benefit of Clergy, or rather the Benefit of the Statutes, as *a Relaxation of the Rigour of the Law*, a Condescension to the Infirmities of the Human Frame. And therefore in the Case of all Clergyable Felonies We now measure the Degree of Punishment by the real Enormity of the Offence; Not as the Ignorance and Superstition of Former Times suggested, by a Senseless Dream of Sacred Persons or Sacred Functions.

THE 21. *Jac.* 1. went a little, and but a little, Way in Favour of the better Half of the Human Race. Women

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for Grand Larceny to the Value of 10*s.* were put upon the ſame Foot as Men intitled to Clergy.

It is really Aſtoniſhing that when their Caſe came ſo profeſſedly under the Conſideration of the Legiſlature more was not then done in their behalf. But here for more than Half a Century the Wiſdom of the Nation ſtopped ſhort. 'Till the 3d and 4th of *W.* and *M.* put Women in all Caſes of Clergyable Felonies upon the ſame Foot as Men intitled to Clergy.

3. 4. W. and M. c. 9.

5. An. c. 9.

The 5th of Queen *Anne* at length Aboliſhed the idle Ceremony of Reading, and ſo broke down, if I may uſe the Expreſſion, the Wall of Partition between Subject and Subject under one and the ſame Degree of Guilt. This Meaſure intitled Thoſe who before were ſuppoſed to be under a Legal Incapacity for Orders, as *Jews* and ſome Others were, and likewiſe Thoſe who in Preſumption of Law were not qualified in Point of Learning, of which Reading a Scrap* of Latin, which they called *the Neck Verſe*, was commonly made the Teſt, this Meaſure intitled all Theſe to the Indulgence of the Law in common with the Reſt of their Fellow Subjects.

From this Period the Meaſure of Puniſhment hath, as I before hinted, been governed by the Degrees of real Guilt; not by an abſurd Diſtinction between Subject and Subject, originally owing to downright Impudence on One Hand, and to meer Fanaticiſm or amazing Puſillanimity on the Other.

Thus hath the Order of Things, which the Pride and Preſumption of the *Romiſh* Clergy introduced, and the Ignorance or Enthuſiaſm of the Laiety adopted, been happily inverted. Our Anceſtors in Queſtions touching the Allowance or Non-allowance of Clergy regarded ſolely the Function or Abilities of the Offender, We the real Demerit of the Offence.

* *Miſerere mei Deus.*

CHAP.

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Of Murder.

I HAVE already obſerved, that our Oldeſt Writers made uſe of the Term *Murder* in a very narrow limited Senſe; and that in ſucceeding Ages the Definition of this Offence, in Contra-diſtinction to Simple Felonious Homicide, was enlarged ſo as to take in all the Caſes which appeared to have been attended with Circumſtances indicating a prepenſed Malice in the Party Killing. And that this enlarged Idea hath long obtained, and exactly falleth in with our preſent Notion of Murder of Malice prepenſe.

I have likewiſe endeavoured to ſtate and illuſtrate by Authorities already cited the true Legal Notion of the Term *Malice* as applied to the Caſe of Murder, which I will not now repeat. It is ſufficient to refer the Reader to what is offered by way of Preliminary to the Diſcourſe upon the Subject of Homicide in general.

I choſe to enlarge upon that Point there rather than in this Place; becauſe I thought many Things I have ſaid in treating of the lower Species of Homicide, whether Juſtifiable, Excuſable, or Alleviable, would be better underſtood by firſt fixing in the Reader's Mind the true Idea of that Degree of Malignity implied in the Term *Malice*; which, in Caſes *primâ Facie* falling within the lower Species, hath made the Fact, all Circumſtances conſidered, amount to the Crime of Murder. I have likewiſe as I went along endeavoured to ſtate the Circumſtances from which the Law inferreth the Malignity of the Heart.

THESE Matters have I confeſs in a manner exhauſted the Subject I am now profeſſedly entering upon. But as the Law concerning Murder is interwoven with the lower Species of Homicide, and ariſeth from a Variety of Circumſtances connected with *them*, this Anticipation became in ſome meaſure neceſſary. Since in treating of the Caſes which *primâ Facie* ſeem to fall under the lower Species I could not make Myſelf better underſtood than by conſidering them under every Light they will bear. I will therefore

the Retreat He is Killed, this will amount to Murder. He went in Obedience to the Law and in the Execution of his Office, and his Retreat was neceſſary in order to avoid the Danger that threatened Him. And upon the ſame Principle if He meeteth with Oppoſition by the Way, and is Killed before He cometh to the Place, *ſuch Oppoſition being intended to prevent his doing his Duty, which is a Fact to be collected from Circumſtances appearing in Evidence,* this likewiſe will amount to Murder. He was ſtrictly in the Execution of his Office, going to diſcharge the Duty the Law required of Him.

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1. Hale 463.

SECT. 3. NOR is the Protection the Law affordeth Him confined to His own Perſon. Every Man who cometh in Aid of Him (I ſpeak here principally of ſuch Officers as at Common-Law or by the Appointment of the Crown are properly Conſervators of the Peace), every Man lending his Aſſiſtance for the keeping of the Peace, or attending for that Purpoſe, whether Commanded or Not, is under the ſame Protection as the Officer Himſelf.

SECT. 3.

SECT. 4. THE Protection the Law affordeth in theſe Caſes muſt not be conſidered as Confined to the ordinary Miniſters of Juſtice or their Aſſiſtants. It reacheth, under ſome Limitations which ſhall be conſidered, to the Caſes of Private Perſons interpoſing for preventing Miſchief in Caſe of an Affray, or uſing their Endeavour for Apprehending Felons, or Thoſe who have given a dangerous Wound, and for bringing them to Juſtice. For theſe People are likewiſe in the Diſcharge of a Duty the Law requireth of them. The Law is their Warrant, and They may not improperly be conſidered as Perſons engaged in the Publick Service and for the Advancement of Juſtice, though not ſpecially Appointed to it. And upon that Account They are under the ſame Protection as the ordinary Miniſters of Juſtice are.

SECT. 4.

SECT. 5. 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 is made, and *a fortiori* if Hue and Cry be

SECT. 5.

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levied, All who join in Aid of thoſe who began the Purſuit are under the ſame Protection of the Law as the Others are, and ſtand in every Reſpect upon the ſame Foot. Otherwiſe no Man of common Prudence would join in the Purſuit; And many great Offenders would eſcape the Hands of Juſtice.

1. Hale 464.

A Robbery is committed on the Highway or elſewhere, the Country upon Notice riſeth and purſueth the Robbers, who turn and make Reſiſtance, and in the Struggle one of the Robbers is Killed, This on the Part of the Purſuers is Juſtifiable Homicide. But on the other Hand, if One of the Purſuers is Killed by the Robbers or any of them, it will be Murder in the whole Gang *joining in ſuch Reſiſtance*, whether Preſent at the Murder or at a Diſtance, *but taking a Part in ſuch Reſiſtance.* The Law is the ſame in Caſe of Hue and Cry duly levied.

SECT. 6.

SECT. 6. NOR is this ſpecial Protection of the Law confined to Caſes of a meer Criminal Nature, where the Publick Peace is broken or endangered. The Miniſters of Juſtice in Civil Suits, under proper Limitations which ſhall be conſidered, are intitled to the ſame Protection for Themſelves and Followers, and upon the ſame Principles of Political Juſtice.

BUT theſe Rules require ſome further Explanation.

SECT. 7.

SECT. 7. 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 or Affrays, it is neceſſary in order to make the Offence of Killing them amount to Murder, that the Parties concerned ſhould have ſome Notice with what Intent they interpoſe: otherwiſe the Perſons engaged may in the Heat and Buſtle of an Affray imagine They came 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 is commanded, or the Officer in any other manner declare with what Intent He interpoſeth. Or if the Officer be within his proper Diſtrict, and Known or but generally Acknowledged to bear the Office He aſſumeth, the Law will preſume the Party Killing had due Notice of his Intent, eſpecially if it be in the

Keil. 66. 115.

1. Hale 460. 461.

the Day-Time. In the Night ſome further Notification is neceſſary, and commanding the Peace, or uſing Words of the like Import notifying his Buſineſs will be ſufficient.

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I remember a Saying of a very learned Judge, *That a Conſtable's Staff will not make a Conſtable.* This is very true. But if a Miniſter of Juſtice be preſent at a Riot or Affray within his Diſtrict, and in order to keep the Peace produceth his Staff of Office, or any other known Enſign of Authority, This, I conceive, will be a Sufficient Notification with what Intent He interpoſeth. And if after this Notification Reſiſtance is made, and He or any of his Aſſiſtants Killed, it will be Murder in every Man who joined in ſuch Reſiſtance.

AND 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 is made and the Officer Killed, it will be Murder; if in Fact ſuch Notification was true *and the Proceſs Legal.* For after ſuch Notification the Parties oppoſing the Arreſt acted at their own Peril.

PRIVATE Perſons interpoſing in Caſe of ſudden Affrays for parting the Combatants and preventing Bloodſhed muſt undoubtedly give expreſs Notice of their friendly Intent, for the Reaſon given above.

SECT. 8.

SECT. 8. I have ſaid above by way of Caution, *If the Proceſs be Legal.* But I would not be underſtood to mean any thing more than, *Provided the Proceſs, be it by Writ or Warrant, be not Defective in the Frame of it, and iſſue in the ordinary Courſe of Juſtice from a Court or Magiſtrate having Juriſdiction in the Caſe.* There may have been Error or Irregularity in the Proceeding previous to the iſſuing of the Proceſs; but if the Sheriff or other Miniſter of Juſtice be Killed in the Execution of it, This will be Murder. For the Officer to whom it is directed muſt at his Peril pay Obedience to it. And therefore if a *Capias ad Satisfaciendum*, *Fieri facias*, Writ of Aſſiſtance, or any other Writ of the like kind iſſue directed to the Sheriff, and He or any of his Officers be Killed in the Execution of it, it is ſufficient upon an Indictment for this Murder to produce the Writ and Warrant, without ſhewing the Judgment or

 Decree.

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Decree. So Ruled by Lord *Hardwicke* in the Case of one *Rogers** at the Summer Assizes in *Cornwall* in the Year 1735.

MS. Chapple.

AND in the Case of a Warrant from a Justice of the Peace *in a Matter wherein He hath Jurisdiction*, the Person executing such Warrant is in like manner under the special Protection of the Law; though such Warrant may have been obtained by gross Imposition on the Magistrate, and by false Information touching Matters suggested in it. See the Case of *Richard Curtis* before Reported.

SECT. 9.

SECT. 9. BUT if the Process be Defective in the Frame of it, as if there be a Mistake in the Name or Addition of the Person on Whom it is to be executed, or if the Name of such Person, or of the Officer be inserted without Authority, and after the issuing of the Process, or the Officer exceedeth the Limits of his Authority, and is Killed, this will amount to no more than Manslaughter *in the Person whose Liberty is so invaded*.

HOW far other Persons, especially meer Strangers, interposing in Behalf of the Party whose Liberty is invaded will be intitled to the same Indulgence, deserveth great Consideration.

SECT. 10.

Lord Raym.

SECT. 10. THE Doctrine advanced in the Case of The Queen against *Tooly* and Others hath, I conceive, carried the Law in favour of Private Persons *Officiously* interposing farther than sound Reason founded in the Principles of true Policy will warrant. I say *Officiously* Interposing, because the Interposition of Private Persons in the Cases I have mentioned, for preserving the Peace and preventing Bloodshed, standeth upon a quite different Foot.

IN *Tooly*'s Case, the Imprisonment of the Woman was certainly Unjustifiable. The Constable † was out of his

* This Man by the Help of a Gang of desperate Fellows stood out a long Time in a Chancery-Suit, and kept Possession of the Premises in Question against all Manner of Process. At length the Sheriff attended by the *Posse Comitatus* endeavouring to execute the Process, Three of the *Posse* were Killed by Him or some of his Gang, He present and Abetting. For these Murders He was Tried and Convicted. In the Course of the Trials the Writ of Execution, the Injunction for delivering Possession, and the Writ of Assistance were read in Evidence, but not the Decree.

The Judge being apprehensive of a Rescus, He was by special Order executed the next Day.

† I use the Term Constable meerly for the Sake of Brevity, for the Man was no Constable in the Precinct where the Arrest and Imprisonment were

Precinct,

Preciṅct, and had no ſpecial Warrant for what He did; nor had the Woman at that Time miſbehaved. His Aſ-ſiſtant therefore was not under the ſpecial Protection of the Law I have mentioned. But whether this Illegal Impriſon-ment was in the Eye of the Law a ſufficient Provocation to the Defendants, *who were Strangers to Her and her Caſe*, is yet to be conſidered; for all Voluntary Felonious Homi-cide without a Provocation is undoubtedly Murder.

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IT was held by Seven of the Judges againſt Five, that it was a ſufficient Provocation. For, ſaid *Holt* in giving Judg-ment, "if one be impriſoned upon an unlawful Authority, "it is a ſufficient Provocation *to all People* out of Compaſ-"ſion, much more when it is done *under Colour of Juſ-"tice*; and where the Liberty of the Subject is invaded, it "is a Provocation *to all the Subjects of England*. — A Man "ought to be concerned for *Magna Charta* and the Laws. "And if any one againſt Law impriſon a Man, He is an "Offender againſt *Magna Charta*."

THE Caſes of Sir *Henry Ferrers*'s Servant and of *Hopkin Hugget* were cited by the Chief Juſtice in his Argument, and greatly relied on. But thoſe Caſes do not in My Opi-nion warrant the Doctrine in the Latitude here laid down.

IN the Former, a Quarrel ariſing between the Servant and the Officer after Sir *Henry* had ſubmitted to the Arreſt and was put into a Place of Security, They fought and the Officer in this Affray was Killed. It doth not appear up-on what Provocation the Quarrel and Affray began, and the Report maketh it highly probable that no Reſcue was thought of or attempted. The Words are, "The Servant "in ſeeking to reſcue Him AS WAS PRETENDED Killed the "Officer."

Cro. Car. 371.

IF the Matter of the Reſcue was a meer Pretence, and for aught appeareth by the State of the Caſe it was no more than a Pretence, the Caſe was clearly Manſlaughter, Ho-micide upon a ſudden Affray; without entering into the Queſtion touching the Inſufficiency of the Writ or Warrant. The Reporter doth indeed mention this Matter as an In-gredient in the Caſe; but general Rules thrown out in Argument, and carried farther than the true State of the Caſe then in Judgment requireth, have, I confeſs, no great Weight with Me.

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I do not ſay that Incompetent Reaſons, where Better might have been given, derogate from the Authority of the Judgment; but they certainly derogate from the Authority of the Rule upon which the Judgment is ſuppoſed to be founded.

1. Hale 465.

HUGGET's Caſe likewiſe as ſtated by *Hale* was clearly Manſlaughter; a ſudden Quarrel and Affray, and a Combat between Him and an Aſſiſtant of the Preſs-Maſter upon ſome Rudeneſs *offered or ſuppoſed to be offered on the Part of the Aſſiſtant*; "upon which," ſaith *Hale*, "a "Quarrel aroſe between Them," and in the End the Aſſiſtant was Killed.*

I take the Liberty of obſerving as I go on, that *Hale* who at the Conference concurred with thoſe who were of Opinion that the Caſe amounted to Manſlaughter only, doth not ſay a Syllable touching the Provocation which an Act of Oppreſſion towards Individuals might be ſuppoſed to give to the Byſtanders. And He certainly repreſenteth the Caſe in the Light it appeared to Him at that Time, *as a Sudden Quarrel upon ſome* Rudeneſs offered by the Preſs-maſter's Aſſiſtant.

Keil. 59.

THE Caſe as it is Reported by *Keiling* doth indeed turn upon the Illegality of the Impreſs, and the Provocation ſuch an Act of Oppreſſion may be preſumed to give to every Man, be he Stranger or Friend, out of meer Compaſſion *to endeavour a Reſcue.* And ſay the Major Part of the Judges, if in ſuch *Endeavour* of Reſcue they Kill any one, ſuch Killing will be Manſlaughter.

IN this Caſe the Judges were divided in Opinion, Four that it was Murder, Eight that it was Manſlaughter. †.

SECT. II.

SECT. II. WITHOUT entering at preſent into the Merits of this Caſe, I think *Tooly*'s differed widely from it. In This, Swords were drawn, and a mutual Combat enſued. The Blood was overheated in the Affray before a Mortal Wound was given. In *Tooly*'s, the Soldiers at the

* *Keiling* ſaith Swords were drawn on both Sides, and they Fought.

Keil. 60. 62.

† Theſe Judges ſaid at the Conference, *That as then adviſed They were of that Opinion; but They would not be Bound by it.* The Reporter and the other Judges of the King's Bench, after hearing Council upon the Special Verdict, adhered to their former Opinion, that it was Murder. But out of Deference to the Majority They admitted the Defendant to his Clergy.

firſt

first Meeting with the Constable drew their Swords upon Him unarmed against such Weapons; but they soon put them up appearing to be pacified, and cool Reflection seemed in some measure to have taken Place. At the second Meeting the Deceased received his Death's Wound before a Blow was given, or, for aught appeared, offered on the part of Him or any of his Party.

IN *Hugget*'s Case a Rescue seemed to be practicable at the Time the Affray began. And it is observable that the Judges who held it to be Manslaughter put the Point upon *an Endeavour to rescue*. I will not say that the Possibility of a Rescue was a sufficient Motive to endeavour at it, but still there was a Possibility which might induce the Men to attempt it. But in *Tooly*'s the Case was quite otherwise, unless the Soldiers could hope to force the Roundhouse. For the Woman was there secured before the second Encounter, and before the Deceased appeareth to have taken any Part in the Affair. So that the second Assault on the Constable seemeth rather to have been grounded upon Resentment or a Principle of Revenge for what had before passed, than upon any Hope or Endeavour to assist the Woman.

SECT. 12. I have been longer on this Case than I should have been, had not I thought the Doctrine advanced in it utterly inconsistent with the known Rules of Law touching a sudden Provocation in the Case of Homicide; and, which is of more Importance, inconsistent with the Principles upon which all Civil Government is founded and must subsist.

SECT. 12.

THE Indulgence shewn to the first Transport of Passion in these Cases is plainly a Condescension to the Frailty of the Human Frame, to the *Furor brevis*, which while the Frenzy lasteth rendereth the Man deaf to the Voice of Reason. The Provocation therefore which extenuateth in the Case of Homicide must be something which the Man is conscious of, which He feeleth and resenteth at *the Instant the Fact which He would extenuate is committed*; not what Time or Accident may afterwards bring to Light. Now what was the Case of *Tooly* and his Accomplices stript of a Pomp of Words and the Colourings of Artificial Reason-

4 K 2 ing?

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ing? They ſaw a Woman, for aught appears *a perfect Stranger to them*, led to the Roundhouſe under a Charge of a Criminal Nature. This upon Evidence at the *Old Bayly a Month or two afterwards* cometh out to be an Illegal Arreſt and Impriſonment, a Violation of *Magna Charta*; and theſe Ruffians are preſumed to have been ſeized all on a ſudden with a ſtrong Fit of Zeal for *Magna Charta* and the Laws, and in this Frenzy to have drawn upon the Conſtable and Stabbed his Aſſiſtant.

It is extremely difficult to conceive that the Violation of *Magna Charta*, a Fact *of which they were totally ignorant at that Time*, could be the Provocation that led Them into this Outrage.

But admitting for Argument ſake that it was, we all know that Words of Reproach, how grating and offenſive ſoever, are in the Eye of the Law no Provocation in the Caſe of voluntary Homicide. And yet every Man who hath conſidered the Human Frame, or but attended to the Workings of his own Heart, knoweth that Affronts of that kind pierce deeper and ſtimulate in the Veins more effectually than a ſlight Injury done to a third Perſon, though under Colour of Juſtice, poſſibly can. The Indignation that kindleth in the Breaſt in One Caſe is Inſtinct, it is Human Infirmity. In the Other, it may poſſibly be *called* a Concern for the Common Rights of the Subject, but this Concern when well founded is rather founded in Reaſon and cool Reflection than in Human Infirmity. And it is to Human Infirmity alone that the Law indulgeth in the Caſe of a ſudden Provocation.

SECT. 13.

SECT. 13. But if a Paſſion for the Common Rights of the Subject in the Caſe of Individuals muſt againſt all Experience be preſumed to inflame beyond a Perſonal Affront, let us ſuppoſe the Caſe of an upright and deſerving Man, univerſally beloved and eſteemed, ſtanding at the Place of Execution under a Sentence of Death *manifeſtly unjuſt*. This is a Caſe that may well rowſe the Indignation, and excite the Compaſſion of the wiſeſt and beſt of Men. But wiſe and good Men know, that it is the Duty of private Subjects to leave the Innocent Man to his Lot, how hard ſoever it may be, without attempting a Reſcue; for other-

wiſe

wiſe all Government would be unhinged. And yet, what Proportion doth the Caſe of a falſe Impriſonment for a ſhort Time, and for which the Injured Party may have an adequate Remedy, bear to That I have now put?

SECT. 14. WHAT I have now ſaid ſuggeſteth a Thought which I will mention, and ſubmit to further Conſideration.

I am firmly perſwaded that in Caſes ſuch as theſe, a general Submiſſion to the known Badges of Authority exacted from all Perſons Strangers to the Party ſuppoſed to be Injured or his Cauſe, would greatly conduce to the Stability of Government; in the Fate of which all private Rights are involved. On the other Hand an undue Countenance given to a Spirit of Popular Oppoſition upon the Principles of FALSE PATRIOTISM hath a fatal Tendency to looſen the Reins of Government, and to throw Matters into general Confuſion.

THIS is a Conſideration of great Importance; and if the Reader will apply it to the Caſes of *Hugget* and *Tooly* and the Reaſoning on them, He will not find it difficult to determine on which Side the Juſtice of the Caſe, that Juſtice I mean which is due to the Publick, doth preponderate.

THERE is undoubtedly a Juſtice due to the Community founded in the Intereſt every Individual hath in the Publick Tranquillity; which once deſtroyed, all private Rights will ſink and be abſorbed in the general Wreck. And if the Common Rights of the Subject are ſuppoſed to be the Object in View, (it is an Object which deſerveth the Attention of all wiſe and good Men at proper Seaſons, and under thoſe Limitations which Wiſdom and a juſt Concern for the Publick will ſuggeſt), let it be remembered, that Liberty is never more in Danger than when it vergeth into Licentiouſneſs. *Cæſar* cheriſhed a Spirit of licentious Popularity againſt the Senate, *Cromwell* cheriſhed the ſame Spirit againſt Crown and Senate; Both ſet up a Tyranny of their own ſubverſive of true Liberty, which ever muſt be founded in Law, and protected by it.

THESE Conſiderations have led Me into a free and perhaps too prolix Examination of the Opinions of learned

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Men, whose Merit I esteem, and to whose Memory I shall constantly pay a proper Regard.

SECT. 15.

SECT. 15. IN the Case of private Persons using their Endeavours to bring Felons to Justice, these Cautions ought to be observed.

Cro. Jac. 194. 2. Inst. 53. 172.

THAT a Felony hath been actually Committed. For if no Felony hath been Committed, no Suspicion how well soever grounded will bring the Person so interposing within the Protection of the Law in the Sense I have already stated and explained.

SECT. 16. 1. Hale 490.

SECT. 16. SUPPOSING a Felony to have been actually Committed, but not by the Person Arrested or pursued upon Suspicion, this Suspicion though probably well founded will not bring the Person endeavouring to Arrest or Imprison within the Protection of the Law, so far as to excuse Him from the Guilt of Manslaughter, if he Killeth, or on the other Hand to make the Killing of Him amount to Murder. I think it would be Felonious Homicide, but not Murder, in either Case. The One not having used due Diligence to be apprized of the Truth of the Fact, the Other not having Submitted and Rendered himself to Justice; since if his Case would bear it, He might have resorted to his ordinary Remedy for the false Imprisonment.

SECT. 17. Ibid.

SECT. 17. BUT if *A.* being a Peace-Officer hath a Warrant from a proper Magistrate for the Apprehending of *B. by Name* upon a Charge of Felony, or if *B.* standeth indicted for Felony, or if the Hue and Cry be levied against *B. by Name*, in these Cases if *B.* though innocent flieth, or turneth and resisteth, and in the Struggle or Pursuit is Killed by *A.* or any Person joining in the Hue and Cry, the Person so Killing will be Indemnified. And on the other Hand, if *A.* or any Person joining in the Hue and Cry is Killed by *B*, or any of his Accomplices *joining in that Outrage*, such Occision will be Murder. For *A.* and those joining with Him were in this Instance in the Discharge of a Duty the Law requireth from them, and subject to Punishment in Case of a wilful Neglect of it.

SECT.

CHAP. VIII. SECT. 18.

SECT. 18. With Regard to the Miniſters of Juſtice executing the ordinary Proceſs of the Law, and likewiſe to private Perſons endeavouring to Arreſt or Impriſon in the Caſes I have mentioned, it behoveth them 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 I have been ſpeaking of.*

One Inſtance of their Miſbehaviour, which hath been the Subject of Litigation, is that of breaking open Windows or Doors in order to Arreſt. And as this is a Matter of general Concern, I will be a little more particular, though brief, upon it.

SECT. 19.

SECT. 19. The Officer cannot juſtify the breaking open an outward Door or Window in order to execute Proceſs in a Civil Suit. If He doth He is a Treſpaſſer. But if He findeth the outward Door open, and entereth that Way, or if the Door be opened to Him from within, and He entereth, He may break open inward Doors if He findeth *that* neceſſary in Order to execute his Proceſs.

The Books ſay, that a Man's Houſe is his Caſtle for Safety and Repoſe to Himſelf and Family; and conſequently the Officer in the Caſe I have put, being a Treſpaſſer, cannot be ſaid to be acting in the Diſcharge of his Duty, at the Time and in the very Inſtance in which He is committing a Treſpaſs. Theſe Suppoſitions are inconſiſtent, and deſtroy each the other. But if He findeth the Door open, or gaineth Admiſſion from within, He having a lawful Call to the Place, as He certainly hath, cannot be a Treſpaſſer in entering the Houſe, and conſequently may remove any Obſtruction He meeteth with in proſecuting the Buſineſs He came about.

SECT. 20.

SECT. 20. The Rule that every Man's Houſe is his Caſtle, when applied to the Caſe of Arreſts upon Legal Proceſs, hath been carried as far as the true Principles of Political Juſtice will warrant. Perhaps beyond what in the Scale of ſound Reaſon and good Policy they will warrant.

* See Chap. 6. on the Statute of Stabbing, the Caſe of a Bayliff who puſhed violently and abruptly into a Gentleman's Chamber in order to Arreſt Him.

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But in Cafes of Life we muft adhere to Rules well-known and long eftablifhed.

But this Rule is not one of thofe that will admit of any Extenfion. It muft therefore, as I have before hinted, be confined to the Breach of Windows and outward Doors intended for the Security of the Houfe againft Perfons from without endeavouring to break in.

SECT. 21. 5. Co. 93.

SECT. 21. It muft likewife be confined to a Breach of the Houfe in order to Arreft *the Occupier or any of his Family* who have their Domicile, their ordinary Refidence there. For if a Stranger whofe ordinary Refidence is elfewhere, upon a Purfuit taketh Refuge in the Houfe of another, this is not *his* Caftle, He cannot claim the Benefit of Sanctuary in it.

SECT. 22. Salk. 79. 6. Mod. 173. Lord Raym. 1028.

SECT. 22. The Rule is likewife confined to the Cafe of Arrefts *in the firft Inftance*. For if a Man being legally Arrefted (and Laying Hold of the Prifoner and pronouncing the Words of Arreft is an actual Arreft) efcapeth from the Officer, and taketh Shelter though *in his own Houfe*, the Officer may upon frefh Suit break open Doors in order to retake Him, having firft given due Notice of his Bufinefs and demanded Admiffion, and been refufed.

And let it be remembered that not only in This but in every Cafe where Doors may be broken open in order to Arreft, whether in Cafes Criminal or Civil, there muft be fuch Notification, Demand and Refufal before the Parties concerned proceed to that Extremity.

SECT. 23.

SECT. 23. The Rule already mentioned muft likewife be confined to the Cafe of Arrefts upon Procefs in Civil Suits. For where a Felony hath been Committed or a dangerous Wound given, or even where a Minifter of Juftice cometh armed with Procefs founded on a Breach of the Peace, the Party's own Houfe is no Sanctuary for him; Doors may in any of thefe Cafes be forced, the Notification, Demand, and Refufal before-mentioned having been previoufly made.

In thefe Cafes the Jealoufy with which the Law watcheth over the Publick Tranquillity, (a laudable Jealoufy it is), the

the Principles of Political Justice, I mean the Justice which is due to the Community *Ne Maleficia remaneant impunita*, all conspire to supersede every Pretence of private Inconvenience; and oblige us to regard the Dwellings of Malefactors when shut against the Demands of Publick Justice, as no better than the Dens of Thieves and Murderers, and to treat them accordingly.

But bare Suspicion touching the Guilt of the Party will not warrant a Proceeding to this Extremity, though a Felony hath been actually Committed; unless the Officer cometh armed with a Warrant from a Magistrate grounded on such Suspicion.

SECT. 24. Goalers and their Officers are under the same special Protection that Other Ministers of Justice are. And therefore if in the necessary Discharge of their Duty They meet with Resistance, whether from Prisoners in Civil or Criminal Suits, or from Others in 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 happeneth to be Killed, This on the Part of the Goaler, or his Officer, or any Person coming in Aid of Him will be Justifiable Homicide. On the other Hand, if the Goaler, or his Officer, or any Person coming in Aid of Him should fall in the Conflict, This will amount to wilful Murder in all Persons joining in such Resistance. It is Homicide committed in Defiance of the Justice of the Kingdom.

SECT. 24.

SECT. 25. But in regard to the great Power these Officers have, and, while it is exercised with Moderation ought to have over their Prisoners, the Law watcheth with a jealous Eye over *their* Conduct. And therefore if a Prisoner under their Care dieth, whether by Disease or Accident, the Coroner upon notice of such Death, which notice the Goaler is obliged to give in due Time, ought to resort to the Goal, and there upon view of the Body make Inquisition into the Cause of the Death. And if the Death was owing to cruel and oppressive Usage on the Part of the Goaler or any Officer of his, or, to speak in the Language of the Law, *to Duress of Imprisonment*, it will be deemed wilful

SECT. 25.

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wilful Murder in the Perſon guilty of ſuch Dureſs. I ſay *the Perſon guilty of the Dureſs*, becauſe though in a Civil Suit the Principal may in ſome Caſes be anſwerable in Damages to the Party injured through the Default of the Deputy upon the Principle of *Reſpondeat Superior*; yet in a Capital Proſecution, the ſole Object of which is the Puniſhment of the Delinquent, Each Man muſt anſwer for his own Acts or Defaults.

THE Inſtances of Oppreſſion which may fall within the Rule of Dureſs of Impriſonment are as various as a Heart cruelly bent upon Miſchief can invent. I will mention Two which have lately come in Judgment. A Goaler 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. The ſecond Priſoner who had not had the Diſtemper, *of which the Goaler had notice*, caught the Diſtemper, and died of it. This was very rightly held to be Murder in the Goaler.

Stra. 856.

ANOTHER ſtraitly confined his Priſoner in a low damp unwholſome Room without allowing him the common Neceſſaries of Chamber-Pot &c. for keeping Things ſweet and clean about Him. The Priſoner having been long confined in this Manner contracted an ill Habit of Body, which brought on Diſtempers of which He Died. This likewiſe was very rightly held to be Murder in the Party guilty of this Dureſs.

Ibid. 884.

THESE were deliberate Acts of Cruelty, and enormous Violations of the Truſt the Law repoſeth in it's Miniſters of Juſtice.

HAVING, as I obſerved in the Beginning of this Chapter, already conſidered the Caſes of Murder which fall in and are connected with the lower Species of Homicide, I have now gone as far into the Subject of Murder in general as I propoſe at preſent. For I forbear to enter in this Place into a minute Conſideration of the Caſe of Principals in the Firſt and Second Degrees in Murder, and alſo of Thoſe who may be deemed Acceſſaries Before or After the Fact; intending to conſider thoſe Matters at large under the Head of *Accomplices*. Upon which Occaſion ſomething will be ſaid in general touching the *Participes Criminis* in the Caſe of High Treaſon and other Capital Offences.

CHAP

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Of Petit Treaſon.

HAVING ſaid as much I think neceſſary to ſay in this Place upon the Subject of Murder in general, I come now to ſpeak of that aggravated Kind of Murder which our Law hath diſtinguiſhed by the Name of *Petit Treaſon.*

FORMER Writers following the Order they found in the Statute of Treaſons have generally choſen to treat of Petit, immediately after High Treaſon, before They enter into the Conſideration of any other Species of Homicide. I ſuſpect that this Circumſtance, ſmall as it may ſeem, hath contributed to lead unwary People into an Opinion that Petit Treaſon is in Conſideration of Law an Offence of *a different kind* from Murder. I have therefore in treating on the Subject of Homicide choſen to begin with the loweſt Species, and following the Order of Law to riſe gradually to Murder. And ſhall conclude with what I take to be in Conſideration of Law the higheſt Degree of that Offence, Murder aggravated by Circumſtances of a Treaſonable kind.

I ſhall not enter into a Detail of the ſeveral Caſes provided for by that Clauſe in the Statute of Treaſons which relateth to this Offence; nor of Thoſe which by Conſtruction have been brought within it. This Part of the Subject hath been ſufficiently ſpoken to by Writers who have gone before Me, and to Them I refer the Reader.

I ſhall content Myſelf with enquiring, and ſtating with as much Preciſion as I can, in what Reſpects the Law conſidereth this Offence as meer Murder, and in what Reſpects it may fall under a different Conſideration.

SECT. 1.

SECT. I. AN Appeal of Death will lie in the Caſe of Petit Treaſon, as well as in every other Caſe of Murder; and the Appeal chargeth that the Defendant *Felonicè*, *Proditoriè & ex Malitiâ præcogitatâ Murdravit.* And in the Caſe of a Wife Killing her Huſband, the Heir ſhall have the Appeal, and She, if Convicted, ſhall be Burnt.

Jones (W.) 425. Cro. Car. 531. Stanf. 59.

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SECT. 2.

1. Hale 382.

SECT. 2. IF the Defendant on Arraignment ſtandeth Mute, or refuſeth to Plead, or peremptorily Challengeth above 35, He ſhall ſuffer the *Pain fort & dure* as in Caſe of other Felonies.

SECT. 3.

SECT. 3. PETIT Treaſon is conſidered as a Species of Felony. And therefore at Common-Law, and before the Statute of 13. *Rich.* 2. interpoſed, a Pardon of Felony without the Exception of Petit Treaſon pardoned that Offence. And at this Day a Pardon of Murder doth the ſame.

1. Hale 378.

HALE ſeemeth to have been *once* of Opinion that the Exception of Murder in a Statute-Pardon, by which all Felonies are pardoned, without an expreſs Exception of Petit Treaſon, will not except Petit Treaſon; and that That Offence will be pardoned. This He groundeth on an Opinion in *Dyer*. But afterwards upon further Conſideration He totally rejecteth that Notion.

Dyer 235. 2. Hale 340.

THE Opinion in *Dyer* is grounded on a Miſconception of the true Scope and Intent of the Act* of General Pardon of the 5. *Eliz.*, by which All Treaſons and other Offences are pardoned by very general Words with an Exception of ſome Particular Species of High Treaſon, and of ALL MANNER *of Voluntary Murders* &c. without any expreſs Exception of Petit Treaſon *eo Nomine*. But in this Reſpect there is Nothing very ſingular in this General Pardon. For except that of the 50. *Edw.* 3., which hath an Exception of All Treaſons whatſoever, there is not One before the 13. *Eliz.* which hath any general Exception applicable to the Caſe of Petit Treaſon; unleſs it be comprehended in the Exception of Voluntary Murder, *which is expreſly excepted in all of them.*

IT would be abſurd to imagine that Petit Treaſon, the moſt Aggravated Kind of Murder in the Eye of the Law, was intended to be pardoned by theſe Acts, 12 in Number, paſſed at different Times in the Compaſs of about 200 Years. And it would be equally abſurd to ſuppoſe that if it was not intended to be Pardoned, no Care was

* The Acts of General Pardon are printed at large in *Raſtal's* Statutes, and in all the Editions anteriour to that Collection.

taken

taken to except it. And yet all these Acts have pardoned Petit Treason, if it be not Excepted under the Denomination of *Wilful Murder*. From whence I think it may be safely inferred, that in the Judgment of those Parliaments the Offence of Petit Treason was Excepted under the Exception of *Wilful Murder*.

THE Exception of Petit Treason, *eo Nomine*, was first introduced by the 13. *Eliz.*, probably *ex abundanti Cautelá* and with a View to this Opinion in *Dyer*; and it hath been inserted, together with the Exception of Wilful Murder, in all the Acts of General Pardon from that Time to the present. But it cannot be inferred from these later Acts that such an express Exception was absolutely Necessary, without supposing either that our Ancestors for about 200 Years together intended to pardon Petit Treason *while they constantly excepted Wilful Murder*, or that They did not know how to Except it in a proper manner.

THERE is a Case in *Dyer* which hath been thought to favour the Opinion that the Crime of Murder is merged in Petit Treason, and that a Pardon of Treason discharged it, notwithstanding the Exception of Murder. But that Case proveth nothing like it. A Wife about the 31. *H.* 8. Poisoned her Husband; then came a General Pardon, by which Treason was Pardoned, but with an Exception of Wilful Murder. The Heir brought an Appeal of Murder, and it was adjudged that the Appeal did not lie. This Case doth not prove that Murder is merged in Petit Treason, but that both Murder and Petit Treason were merged and extinguished in the Offence of High Treason. For at that Time by virtue of the 22. *H.* 8. *all Wilful Murder was High Treason*. And being so, the Appeal* not being saved by the Act was Barred, whether the Treason had been Pardoned or No.

Dy. 50. 33 H. 8.

22. H. 8. c. 9. in Rastal.

SECT. 4. A Person guilty of Petit Treason may be Indicted of Murder, *for it is a Species of Murder*; and such Facts and Circumstances proved in the manner the Statutes hereafter Cited require, as would Convict a Man of Murder will Convict a Wife or Servant of Petit Treason. And

SECT. 4.

* Vid. 8. *Edw.* 4. an Attempt to make Sacrilege High Treason, and the Offender to be Burnt. The Appeal for Restitution expressly Saved. *Cott.* 684.

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on the other Hand, upon an Indictment for Petit Treason the Jury may Find, as the Circumstances tending to Justify, Excuse, or Alleviate, come out in Evidence, in the same manner as They do upon an Indictment for Murder.

1. Hale 378. 2. Hale 184.

WHILE the Case of the King against *Swan* Reported before was depending, and before the Second Bill was preferred, a Question was made whether *Swan* could be Convicted on the Indictment for Murder, if it should come out in Evidence that He was Servant to the Deceased at the time the Fact was Contrived or Committed; and consequently that his Offence was Petit Treason.

6. St. Tri. 224.

THERE is a Case cited in the printed Trial of *Coke* and *Woodburne*, which, *if such Case there ever was*, hath as far as the Authority of it goeth determined that Question. "At the Summer Assizes at *Dorchester* 1712. a Woman "was Indicted before Mr. Justice *Eyre** for the Murder of "another Woman; upon Evidence it appeared that the "Person Murdered was her Mistress, which made the Crime "Petit Treason. The Judge directed this Matter to be Specially Found; and upon Conference with all the Judges "it was held She ought to be Acquitted upon this Indictment, as She accordingly was, and was afterwards Indicted for Petit Treason, and Convicted and Executed." This Case is not to be found in any Report printed or MS. that I have met with, or Heard of. Nor have I upon a strict Inquiry met with any Footsteps of such Case among the Minutes of Proceedings on the Crown Side in the County where the Case is supposed to have arisen; though the Minutes from 1708 to 1722 have been carefully searched. For these Reasons and what is suggested in the Marginal Note I conclude that no such Case ever existed.

1. Hale 378.

LORD Chief Justice *Hale* is very full and express on the other side of the Question. "A Person who is guilty of "Petit Treason may be Indicted of Murder, *for it is a* "*Species of Murder*, and a Pardon of Murder pardoneth "Petit Treason."

* Justice *Eyre* did not go the Western Circuit in the Summer 1712. *Ward* and *Price* went at that Time. This Information I have from Mr. *Maddock* Clerk of Assize of the Western Circuit.

LORD

LORD Chief Justice *Coke* having cited the Opinion in *Dyer* 235 before mentioned saith, "*That Petit Treason is* "*Murder and more.*" And from thence it hath been inferred that Petit Treason and Murder are in Consideration of Law different Offences, or that the Crime of Murder is merged in Petit Treason. But this Inference will not hold, however true the Chief Justice's Doctrine may be. There is undoubtedly in Consideration of Law a greater Degree of Malignity in the One than in the Other arising from that Degree of Allegiance, however low, which the Murderer owed to the Deceased at the time the Fact was Committed or Conceived in his Heart. But certainly the difference in point of Malignity between Murder and Manslaughter is infinitely greater; and consequently in that Respect it may with equal Propriety be said that *Murder is Manslaughter and More*. And yet in Judgment of Law they are the same Offence differing only in the Degree of Malignity when considered in relation to one and the same Fact. And by a Parity of Reason Lord Chief Justice *Hale* concludeth that Petit Treason and Murder are to be considered in the same Light, as one Offence, differing only in Degree.

6. Co. 13. b.

4. R. 46. Keil. 103. 104.

2. Hale 251.

BUT though I am satisfied that the Law considereth Petit Treason and Murder as one Offence differing only in Circumstance and Degree, yet whether it may be Advisable to proceed upon an Indictment for Murder against a Person plainly appearing to be Guilty of Petit Treason is a Matter that deserveth great Consideration; and probably determined the Attorney-General to prefer a fresh Bill for Petit Treason in *Swan*'s Case. For though the Offences are to most Purposes considered as substantially the Same, yet as there is some Difference between them with regard to the Judgment that is to be pronounced upon a Conviction, and a very Material one with regard to the Trial, a Person Indicted for Petit Treason *being intitled to a peremptory Challenge of* 35, I think if the Prosecutor be apprized of the true State of the Case, as He may be if He useth due Diligence, He ought to adapt the Indictment to the Truth of the Fact.

BUT if through a Mistake on the Part of the Prosecutor, or through the Ignorance or Inattention of the Officer, a Bill be preferred as for Murder, and it should come out in

Evidence that the Prisoner stood in that sort of Relation to the Deceased which rendereth the Offence Petit Treason, I do not think it by any means advisable to direct the Jury to give a Verdict of Acquittal. For a Person charged with a Crime of so heinous a Nature ought not to have the Chance given Him by the Court of availing Himself of a Plea of *Auterfoits Acquit*. In such a Case I should make no sort of Difficulty of discharging the Jury of that Indictment, and ordering a fresh Indictment for Petit Treason. In this Method the Prisoner will have Advantage of his peremptory Challenges, and the Publick Justice will not suffer. And on the other Hand, in Case of an Indictment for Petit Treason, if it be proved that the Defendant Killed the Deceased with such Circumstances of Malice as amount to Murder, but the Relation of Servant &c. is not proved, I have no sort of Doubt that on such an Indictment the Defendant may be found Guilty of Murder and Acquitted of the Treason. For Murder is included in every Charge of Petit Treason, *Felonicè, Proditoriè & ex Malitiâ præcogitatâ* MURDRAVIT.

1. Hale 378. 2. Hale 184.

THE Treason is a Circumstance of Aggravation of which the Defendant may be Acquitted, and yet found Guilty of the Substantial Part of the Charge; just as a Man upon an Indictment of Murder may be Acquitted of That and found Guilty of Manslaughter. "Because," say the Books, "Manslaughter is included in the Charge of Murder."

I will go one Step further, I offer it as My private Opinion which is submitted to the Judgment of the learned. Put the Case that a Person is brought to his Trial upon an Indictment for Petit Treason, and that One Witness only can be produced, or that the Prosecutor is not furnished with any Evidence except the Depositions taken before the Coroner, or Informations taken on Oath before Justices of the Peace pursuant to the Statutes; and let it be supposed that those Witnesses *are living but unable to travel*, or *kept out of the way by the Procurement of the Defendant*. What is to be done in this Case? is the Defendant to be Acquitted of the whole Charge? I think not. I think this Evidence, though not sufficient to Convict of Petit Treason, is still Admissible Evidence, and proper to be left to the Jury as upon a Charge of Murder; and the Jury, if They

1. 2. Ph. and M. 13. 2. 3. Ph. and M. 10. Vid. Keil. 55. 1. Hale 305. 2. Hale 284.

Vid. Sect. 9.

are

are satisfied, may find the Defendant guilty of the Murder, and Acquit Him of the Treason, for the Reasons just now given.

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2. Hale 184.

Interest Reipublicæ ne Maleficia remaneant impunita.

SECT. 5. A Wife or Servant joining with a Stranger in the same Murder may be charged in one Indictment, which could not be if their Offences were not substantially the Same; and such Indictment concluding, that they *Felonicè, Proditoriè & ex Malitiâ præcogitatâ Murdraverunt* is good for both, *Reddendo singula singulis.*

SECT. 5.

Dalison 16. and Swan's Case.

SECT. 6. AUTERFOITS *Acquit* or *Attaint* upon an Indictment for Murder is a good Bar to an Indictment for Petit Treason for the same Fact, and so *è converso.*

SECT. 6. 2. Hale 246. 252. 3. Inst. 213.

SECT. 7. THE 1. *Edw.* 6., which Ousteth Clergy in the Case of Wilful Murder, extendeth to Petit Treason and Ousteth That likewise. Though Petit Treason is not *eo Nomine* Excepted, and notwithstanding the Statute restoreth Clergy to all Offences not therein enumerated which were intitled to it before the 1. *H.* 8.; *for Petit Treason is a Species of Murder.*

SECT. 7.

LORD *Hale* is clearly of this Opinion, and putteth a Case which is not provided for by Either of the Acts of *H.* 8., and yet in his Judgment cometh within the 1. *Edw.* 6. it is the Case of an Outlawry. And He saith, "In My "Opinion the Statute of 1. *Edw.* 6. taking away Clergy "from Persons *attaint* as well as from Persons *convict* of "Murder doth extend to Petit Treason, *which in Truth is* "*Murder.* And consequently a Person outlawed of Petit "Treason, though not by the Statutes of the 23. or 25. "*H.* 8., yet by the Statute of *Edw.* 6. is exempt from Cler-"gy under the Name of Wilful Murder."

2. Hale 342.

THE only use I make of this Passage, for his Lordship hath not here considered All the Statutes touching Petit Treason with his usual Accuracy, is to shew that his Lordship considered Petit Treason meerly as a Species of Murder. And whoever will read the Statute of the 12. *H.* 7. cited underneath with any Attention will see that the Le-

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gislature considered it in no other Light than as an *Aggravated Murder*.

THERE is another Case which I think is not provided for by any of the Acts anteriour to that of *Edw.* 6., and must be wholly resolved into that Act. It is the Case of Petit Treason committed by a Person in Holy Orders. The Statute of *H.* 7. is confined to Lay Persons. The Words are, "If *any Lay Person* Murder &c." The 23. *H.* 8. expresly excepteth Persons in Holy Orders, *viz.* of the Order of Subdeacon or above. And the 25. *H.* 8. is evidently confined to Persons Indicted and Arraigned according to the Statute of the 23^d. And therefore unless Petit Treason committed by a Person in Holy Orders is Ousted by the 1. *Edw.* 6. under the Name of Wilful Murder, it remaineth, for aught I see, still intitled to Clergy.

12. H. 7. c. 7.

SECT. 8.

SECT. 8. I know an Opinion hath been entertained by some learned Men, that Principals in Petit Treason may be Ousted of Clergy without supposing Petit Treason to be comprehended in the 1. *Edw.* 6. under the Denomination of Wilful Murder. For They think that the whole Act of the 25. *H.* 8. before cited is revived by the 5. and 6. *Edw.* 6. according to the Opinion of Lord *Coke* in *Powlter*'s Case, but that Opinion is Not well founded. *Hale* was Once of the same Opinion touching the Revival of the 25. H. 8. *in toto* and Grounded himself on the Authority of *Powlter*'s Case.* Who was denied his Clergy upon a Conviction for the Wilful and Malicious Burning a House at *Newmarket* whereby the greatest Part of the Town was consumed.

11. Co.

BUT in his Second Volume He resumeth the Consideration of that Case and totally rejecting *Coke*'s Opinion touching the Revival of 25. *H.* 8. *in toto*, concludeth that No part of that Act was Revived except the Clause concerning Felons convicted of Larceny in One County where the Goods came into their Possession by Robbery or Burglary in Another. And resteth the Authority of *Powlter*'s Case upon a much safer bottom.

p. 346.

* See his Summary p. 232. to 235. and History 1. Vol. 570. to 574.

I will

I will for the Reader's Satisfaction ſtate the ſeveral Acts mentioned in *Powlter*'s Caſe as ſhortly as I can, but ſo as to avoid Obſcurity.

THE 23. *H*. 8. Ouſted Clergy in certain Caſes therein enumerated, among which the Offence *Powlter* ſtood charged with is One. This Act extended to Principals and Acceſſaries Before the Fact, being Convicted by *Verdict or Confeſſion*. But did not reach the Caſe of Perſons Wilfully ſtanding Mute or Challenging Peremptorily above Twenty, or refuſing to Plead directly to the Indictment.

23. H. 8. c. 1. Sec. 3.

TO Remedy this Defect the 25. *H*. 8. Ouſteth ſuch Offenders ſtanding Mute of Malice, or Challenging Peremptorily above Twenty, or refuſing to Anſwer the Indictment, in like manner as if they had pleaded *Not Guilty*, and had been found Guilty according to the Laws of the Land.

25. H. 8. c. 3. S. 2.

THUS far this Statute was meerly Auxiliary to the former: it barely provided for Caſes falling within the ſame Rule of Diſtributive Juſtice, but omitted in the Former Act, probably through meer overſight.

IT then proceedeth in the 3^d^ Section to a Caſe of a quite different Nature and entirely New; and Enacteth that Perſons coming to the Poſſeſſion of Goods by Robbery or Burglary in One County, and taken with the *manner* in Another and there Indicted of Larceny, ſhall be Ouſted in the ſame manner as if they had been Indicted of Robbery or Burglary in the proper County: if it ſhall appear upon Examination that the Goods were Originally taken by Robbery or Burglary.

Ibid. S. 3.

THE 1st of *Edw*. 6th Ouſted Clergy in certain Caſes therein enumerated, and for the Moſt part provided for by the 23. *H*. 8. *but is totally Silent as to the Offence of Wilful Burning of Houſes*. And even with regard to the enumerated Offences, doth not extend to Acceſſaries Before the Fact. And further Enacteth, that, "In *all other Caſes of* "*Felony*, all Perſons ſhall have the Benefit of Clergy as "They might have had before the 24th Day of *April* in the "1st Year of King *Hen*. the 8th." which was the Day He began His Reign.

1. E. 6. c. 12. S. 10.

WILFUL Burning of Houſes therefore which had been Ouſted by the 23^d^ and 25th of *Hen*. the 8th was reſtored to Clergy by this Clauſe. And ſo were Acceſſaries Before the

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Fact in all the Offences therein enumerated. And Persons coming to the Possession of Goods by Robbery or Burglary in One County and Convicted of Larceny of the same Goods in Another were likewise restored to Clergy. And from this Clause and the Act next cited the Doubt in *Powlter*'s Case arose.

5. 6. E. 6. c. 10.

THE 5th and 6th of *Edw.* the 6th, Reciting that the 23d of *H.* 8. did Not extend to Persons Committing Robbery or Burglary in One County and taken with the *Manner* in Another and there Indicted of Larceny; and Reciting also the Clause in the 25th of *Hen.* the 8th already cited, which had Ousted those Offenders: and further reciting the Restoring Clause in the 1st of *Edw.* the 6th already cited, by Reason whereof, saith the Act, "*Many Persons Committing Robbery or Burglary in One County and flying into Another and there taken with the* Manner *and Convicted of Larceny, had been admitted to their Clergy, to the great Emboldening and Comforting of* SUCH OFFENDERS," therefore, *for Redress thereof* it is Enacted that the Statute of the 25 of *H.* the 8th "touching the putting SUCH OFFENDERS from their Clergy, and every Article, Clause, or Sentence contained in the same concerning Clergy, shall TOUCHING SUCH OFFENCES stand, remain, and be in full Strength and Virtue, as it did before the making the said Statute of the 1st Year of the King."

THE Point laboured by *Coke* in *Powlter*'s Case is, that this Statute revived the *whole* Act of the 25th of *Hen.* the 8th. And consequently, that Wilful Burning being named in the 1st Clause among the Offences enumerated in the Act of the 23d is Ousted, by the general Words *Every Article, Clause, or Sentence contained in the same, concerning Clergy.*

OTHERS, and among them Lord *Hale*, have been of Opinion that General as the Words may seem to be, they must in the Construction of the Statute, be restrained to that particular Mischief, which from the Preamble appeareth to have been Singly in the Contemplation of the Legislature, and for *Redress whereof* the Act was *professedly* made.

THEY have likewise concluded from the strict Penning of the Enacting Clause itself that it extendeth only to *such Offenders*, and *such Offences* as are made the special Objects of

of it and for that Purpose are named in the Preamble, that is to Persons Committing Robbery or Burglary in One County and flying into Another and there Convicted of Larceny.

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THE Statute of the 1st *Edw.* 6. did not, as I before observed, extend to Accessaries before the Fact, who frequently in a just Estimate of Things are more Criminal than the Principals. To supply this great Defect the 4th and 5th of *Ph.* and *Mary* Ousteth these Accessaries in Murder and the other Offences enumerated in the 1st of *Edw.* the 6th and some Others, and in the Enumeration of particulars nameth the Offence of *Wilful Burning of Houses.*

4. 5. Ph. and M. c. 4.

THE Operation of this Act, and what Influence it had on *Powlter*'s Case will be presently considered.

LORD *Hale* in the Passage I last cited from Him saith that the 23d *H.* 8. never was revived with regard to the Offence of Wilful Burning. This Observation suggesteth the great Absurdity of supposing the 25th *H.* 8. to have been Revived *in toto* without Reviving the 23d. For Both the Acts, as far as concerneth this Point, are to be considered as forming one entire System of *Police* with regard to the Offences which are made the Objects of them. The Former extendeth to the Cases which ordinarily Occur, *Convictions by Verdict or Confession.* The Latter to such as very seldom happen, and are omitted in the Former through meer Over-sight, the *Cases of standing Mute* &c. This being the State of the Case, it is extremely difficult to conceive that the Legislature should seriously intend to Revive the One *in toto* without Reviving the Other; that They should think of Reviving a whole Act, Part of which is meerly auxiliary to a Former, without Reviving That for the effectuating of which the Other was made.

HALE having rejected the Notion of the Revival of the 25th *H.* 8. *in toto* addeth, "Therefore the Last, and *I think* "*the surest* Answer to the Difficulty is, that the Statute of "the 3d and 4th *Ph.* and *M.* taking away Clergy in all Ca- "ses from Him that Maliciously commandeth, hireth, or "counselleth the Wilful Burning, doth by necessary Conse- "quence take away Clergy in All Cases from the Principal "Offender."

(4th and 5th.)

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This is the Bottom upon which He, upon full Consideration of the Point, thinketh it may be safely rested. And, in truth, upon this Bottom, and Former Precedents, which were carefully consulted, I think it was rested in *Powlter*'s Case. For though Lord *Coke* in his Report of that Case strongly laboureth the Point of the Revival of the 25th *H.* 8. *in toto*, and saith *the Court so resolved:* yet it is very plain from his own Report of the Case, that Others of the Judges, *how Many or Who He doth not say*, did not concur with Him in that Opinion. But when He mentioneth the Statute of *Ph.* and *M.*, as One Ground of the Resolution, He saith, "This was taken by Divers of "the Justices," *by Whom or how Many He doth not say*, to "be a good Interpretation by the whole Parliament of All "the said Acts concerning this Matter. For if the Princi-"pal should have his Clergy, it would be Absurd, and "what was never seen in our Law, that Clergy should be "taken from the Accessary before. And Secondly, it would "be in vain to take away Clergy from the Accessary, and "leave the Principal to have his Clergy. For if the Princi-"pal hath his Clergy before Judgment, the Accessary shall "not be Arraigned."

11. Co. 35. a.

This Reasoning He saith had it's Weight with Divers of the Judges: most probably it was, together with the constant Practice in like Cases, the Principal Ground of the Resolution in that Case. For if the Case of a Person pleading to the Indictment was not within the 25th *H.* 8. but stood purely on the 23d, as undoubtedly it did, then the bare Revival of the Statute of the 25th, supposing it to have been Revived *in toto*, could not have affected the Case of *Powlter*; *for He pleaded Not Guilty, and was convicted by Verdict.*

11. Co. 29. a.

Lord *Coke* admitteth that the 23d *H.* 8. is not Revived by the 5th and 6. *E.* 6., *Hale*, as I before observed, saith the same: but *Coke*, still presuming that the 25th is Revived *in toto*, supposeth that the Case of a Conviction by Verdict *or Confession* is within *the Letter* of that Act. The Words, *as He citeth them*, are, "He" [the Person Standing Mute &c.] "shall lose the Benefit of Clergy, in like "manner as if He had directly Pleaded ETC, and thereup-"on had been found Guilty, according to the Laws of the "Land."

11. Co. 30. b.

"Land." From this Clause *so cited* He concludeth that every Person Convicted by Verdict or *Confession* of any of the Crimes mentioned in the Act, is Ousted of Clergy without recurring to the Act of the 23[d].

A little more Caution in this Citation would have Overturned one Branch of his Lordship's Conclusion, I mean with regard to a Conviction upon a *Confession*. For the *&c.* here thrown in covereth some very Material Words which the learned Reporter in Justice to the Argument should not have sunk. The Words of the Act are, "Shall lose the Benefit of Clergy in like manner as if He had directly Plead-"ed NOT GUILTY, *and thereupon had been found Guilty*, "*according to the Laws of the Land.*" Is here a single Word that reacheth the Case of a Confession? or can the Clause by construction be made to reach it? quite the contrary. The learned Judge himself in the Page next before admitteth, that had the 23[d] *H.* 8. been so Worded *the Case of a Confession could not have been brought within that Act.* By what Rule of Construction therefore is it brought within This?

30. a.

AND with regard to the true Scope and Intention of the Statute, surely it was not the Intent of it *Actum agere*; it was not to Provide for the Cases of Conviction by Verdict or Confession, which the 23[d] *H.* 8., then in full force, had effectually Provided for. The plain Intent was to Provide for Cases *not Before Provided for*, the Cases of Standing Mute &c, and none Other; as any one may see who will consider the Nature of the Act, and read it with due Attention.

I was willing to enter somewhat largely into the Point of the Revival of the 25th *H.* 8., though perhaps it hath led Me a little too far from the Subject I have been pursuing: Because a great deal of the Confusion and Obscurity which hath been thrown over the Law touching Clergy, as it stood upon the Acts of *H.* 8. and *Edw.* 6., hath arisen from considering the Act of the 25th, and sometimes even the 23[d] *H.* 8., as Revived; and from Blending them with the Statutes of *Edw.* 6., as Parts of One System of Law touching the Allowance or Non-Allowance of Clergy.

IN My Opinion Both the Acts were superseded, as far as concerned the Allowance or Non-Allowance of Clergy, by

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the Reſtoring Clauſe in the 1st *Edw.* 6. already cited. 'Till the 5th and 6th *Edw.* 6. *in Part, and for the Purpoſe before mentioned*, Revived that of the 25th, and the Statute of *Phil.* and *Mary* put the Matter out of Doubt with regard to *Arſon*.

THE Judgment in *Powlter*'s Caſe was founded in ſound Senſe, and upon Legal Principles, though not upon Thoſe the learned Reporter hath choſen to found it upon.

SECT. 9.

SECT. 9. FROM the Rules here laid down with what hath been offered by way of Illuſtration of them, it appeareth that the Law conſidereth the Offences of Murder and Petit Treaſon as ſubſtantially the Same Offence, differing only in Degree. The Latter aggravated by the Allegiance, however Low, which the Murderer owed to the Deceaſed. And in conſequence of that Circumſtance of Aggravation, and of that Alone, the Judgment upon a Conviction is more grievous in One Caſe, than in the Other. Though in common Practice no material Difference is made in the manner of the Execution, unleſs in ſome very ſpecial Caſes.

I remember a Woman* for the Murder of her Huſband under Circumſtances of high and uncommon Aggravation literally *Burnt Alive*. And we are told that in a Caſe of Petit Treaſon the Priſoner was *by Order of the Court* Drawn immediately after Sentence from *Weſtminſter-Hall* to *Tyburn* without the poor Comfort of an Hurdle, or any other Thing to keep his Head and Body from the Ground. This Severity the Judgment *to be Drawn* formerly imported; though now *Drawn upon an Hurdle* is become Part of the Judgment in all Caſes of Treaſon.

Lib. Aſſ. 7. Bro. Treaſon. 15.

SECT. 10.

SECT. 10. THERE are, it muſt be admitted, ſome Inſtances in which the Law maketh a wide Difference between Petit Treaſon and Murder, with regard to the Trial and Method of Conviction. But that Difference is not founded in the different Nature of the Offences, but upon meer poſitive Inſtitutions.

THE Statute of the 22. *H.* 8. c. 14. reduced the Peremptory Challenge in the Caſe of Petit Treaſon to 20. The

* *Catharine Hayes.* Convicted at the *Old Bayly* in *April* 1726.

28. *Edw.* 3. c. 13., which extended to Petit Treaſon, introduced the Trial *per Medietatem Linguæ*. Both theſe Statutes were virtually Repealed by the 1. and 2. *Ph.* and *M.* c. 10. which provideth that *in all Caſes of Treaſon* the Trial ſhall be according to the Courſe and Order of the Common-Law. This reſtored the Peremptory Challenge of 35.

THE 1. *Edw.* 6. c. 12. expreſly requireth two Witneſſes upon the Indictment and at the Trial, as well in the Caſe of Petit as High Treaſon; and the 5. and 6. *Edw.* 6. c. 11. by general Words extending to All Treaſons, requireth that the Witneſſes, *if living*, ſhall be examined in Perſon upon the Trial in open Court. Theſe Statutes are ſtill in Force. And although ſome Improvements have been made by the Statute of King *William*, yet as that Statute extendeth only to the ſeveral Species of High Treaſon therein provided for, the Caſe of Petit Treaſon ſtandeth Solely on Thoſe of *Edw.* 6.

UPON the Foot of the 5. and 6. *Edw.* 6. Depoſitions of Witneſſes taken by the Coroner, or Informations taken before Juſtices of the Peace, and certified to the Goal Delivery purſuant to the Statute, are not Evidence *whereon to ground* a Conviction for Petit Treaſon, *if the Party be living*, though unable to travel or kept out of the Way by the Priſoner or by his Procurement.

1. 2. Ph. and M. c. 13.
1. Hale 305.
2. Hale 284.

THESE I conceive are the only Inſtances wherein the Law maketh a Difference between the Caſes of Petit Treaſon and Murder. And this Difference is plainly matter of poſitive Inſtitution, and doth not ariſe out of the Different nature of the Offences.

END OF THE DISCOURSE
ON HOMICIDE.

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fore confine Myſelf to the Circumſtances importing Prepenſed Malice which have not already fallen in my way. Though I fear the Nature of my Subject, complicated as it is, will betray Me into ſome little Repetition, which I will avoid as much as poſſible.

THE groſſer Inſtances of Wilful Murder, and where the Malignity of the Heart, the *Malitia* I have already explained, is apparent, need not to be mentioned in a Diſcourſe of this kind. The Caſes upon which Doubts have ariſen, or which may be the Subject of future Litigation, are only proper to be mentioned; and to Such I ſhall confine Myſelf.

SECT. 1.

SECT. 1. SOMETHING hath been ſaid briefly under the Head of Homicide in Advancement of Juſtice, touching the Killing of Officers in the Execution of their Offices, and of other Perſons having Authority to Arreſt or Impriſon, or acting under Colour of ſuch Authority. But this being a Matter in which the Juſtice of the Kingdom is deeply concerned, I will now ſubmit to Conſideration My Thoughts upon that Subject more at large.

MINISTERS of Juſtice while in the Execution of their Offices are under the peculiar Protection of the Law. This ſpecial Protection is founded in great Wiſdom and Equity, and in every Principle of Political Juſtice. For without it the Publick Tranquility cannot poſſibly be maintained, or private Property ſecured; nor in the ordinary Courſe of Things will Offenders of any kind be ameſnable to Juſtice. And for theſe Reaſons the Killing of Officers ſo employed hath been deemed Murder of Malice Prepenſe, as being an Outrage wilfully committed in Defiance of the Juſtice of the Kingdom; the ſtrongeſt Indication poſſible of the *Malitia*, the Malignity of Heart which I have already ſtated and explained.

SECT. 2.

SECT. 2. THIS Rule is not confined to the Inſtant the Officer is upon the Spot, and at the Scene of Action, engaged in the Buſineſs which brought Him thither; for He is under the ſame Protection of the Law *Eundo*, *Morando*, & *Redeundo*. And therefore if He cometh to do his Office, and meeting with great Oppoſition retireth, and in the