HOCK TUESDAY MONEY, Was a duty given to the landlord, that his tenants and bondmen might solemnize that day on which the English mastered the Danes, being the second Tuesday after Easter week. Cowell. See Hokeday.

HOGA, HOGIUM, HOCH, A mountain or hill, from the Germ. hough, altus; or from the Sax. hou. Du Cange.

HOGASTER, hagostrum.] A little hog; it also signifies a young sheep. Fleta, lib. 2. c. 79. See Hoggatus.

HOGGACIUS, HOGGASTER, A sheep of the second year. Regula computi domus de Farendon : MS. Cartular. Abbat. Glas-won. MS. And indeed in many, especially the northern parts of England, sheep, after they lose the name of lambs, are called hogs; as in Kent, tags. Cowell.

HOGGUS, HOGIETUS, A hog or swine, beyond the growth of a pig. Chart. Antig.

HOGSHEAD, A vessel of wine or oil, &c. containing in measure 33 gallons; i. e. half a pipe, and the fourth part of a tun. See stat. 1 Rich. III. c. 13.

HOGS. The keeping of hogs in any city or market town is indictable as a public nuisance. Salk. 460. Indeed it seems the keeping hogs in any neighbourhood (if they stink much, so as to be troublesome) is indictable. See tit. Nuisance, London, and the stat. 2 W. & M. st. 2. c. 8. § 20.—See, as to hogs and hogs' flesh, tit. Cattle.

HOKEDAY, Called otherwise Hock Tuesday, dies martis, quam quindecim Paschae vacant.] Was a day so remarkable in ancient times, that rents were reserved payable thereon, and in the accounts of Magdalen College in Oxford, there is a yearly allowance pro mulieribus hockantibus, in some manors of theirs in Hampshire, where the men hock the women on Monday, & contra on Tuesday; the meaning of it is, that on that day the women, in merriment, stop the way with ropes, and pull passengers to them, desiring something to be laid out in pious uses. See Hock Tuesday Money.

HOLDES, Bailiffs of a town or city, from the Sax. hold, i. e. summus imperator. Others are of opinion that it signifies a general; for hold in Saxon doth also signify summus imperator. Leges Alured. de Weregildis.

HOLDINGS, The Scotch term for Tenures. See that title.

HOLDING OVER A TERM, &c. Lands were devised to A. till 800£. raised. Resolved, that if the heir at law, or he in reversion or remainder, in case of lease or limitation for life, enters upon A. or on him to whom the lands are devised or limited, and expels him, it is in the election of him so expelled, either-to bring his action and recover the mesne profits, which shall be accounted parcel of the sum, or he may re-enter and hold over till he shall levy the entire sum, not accounting the time of his expulsion. But otherwise, if the expulsion was by a stranger. 4 Rep. 82. See tit. Term, Limitation, Estate.

The expression hath also another sense, i. e. where a term is expired, and premises are held by the tenant or person in possession, afterwards, against the will of the landlord, or person claiming the estate and possession. By stat. 4 Geo. II. c. 23. in case any tenant for years, &c. or other person claiming under or by collusion with...
such tenant, shall willfully hold over after the determination of such term, and demand made in writing for recovering possession of the premises, he shall pay, for the time he continues, at the rate of double the yearly value. See tit. Ejectment, Distress, Rent.

HOLM, Sax. halmus, insula amnica.] An isle or fenny ground, according to Bede; or a river island. And where any place is called by that name, or this syllable is joined with any other in the names of places, it signifies a place surrounded with water; as the Flatholmes and Siefholmes in the Severn near Bristol: but if the situation of the place is not near the water, it may then signify a hilly place; _holm in Saxon being also a hill or cliff. Cum duabus holmis in campo de Wedone. Mon. Angl. tom. 2. p. 262.

HOLT, Sax.] A wood; wherefore the names of towns beginning or ending with holt, as Buckholt, &c. denote that formerly there was great plenty of wood at those places.

HOLY-DAYS AND FASTING-DAYS. See stat. Westm. 1. & 3. Edw. I. c. 51. as to holding assises in Lent, and this Dict. tit. Justice of Assises. Stats. 2 & 3 Edw. VI. c. 19. 5 Eliz. c. 5. as to eating fish on fish days; now obsolete, and stat. 5 & 6 Edw. VI. c. 3. appointing those now called red letter days.

Fairs and markets not to be kept on Sundays and principal festivals, except four Sundays in autumn. 27 Hen. VI. c. 5. Shoemakers in London not to sell or fit on their goods on Sundays, &c. 4 Edw. IV. c. 7. 1 Jac. I. c. 22. § 29. (obsolete.) Penalty for not resorting to church on Sundays and holy-days, 1 Eliz. c. 2. s. 14. See tit. Nonconformists. The 5th of November to be kept as a day of thanksgiving. 3 Jac. I. c. 1. The 29th of May to be an anniversary thanksgiving. 12 Car. II. c. 14. The 30th of Jan. to be kept as an anniversary day of humiliation. 12 Car. II. c. 30. § 1. The 2d of September to be annually kept as a fast in London. 19 Car. II. c. 3. s. 28.

By 39 & 40 Geo. III. c. 42. for the better observance of Good Friday, where bills of exchange, &c. become due on that day, they shall be payable on the day before; and may be protested for non-payment, as in case of bills become due on a Sunday or on Christmas Day. By 46 Geo. III. c. 82. for the port of London 47 Geo. III. c. 1. c. 51. for the other ports in Great Britain; and 48 Geo. III. c. 56. for the ports in Ireland, all holidays are abolished at the custom-houses except Sundays, Christmas Day, Good Friday, public fasts and thanksgivings, King Charles II.'s restoration, the king's coronation, and birth-days of the king, queen, and prince of Wales.

The 29th of May (King Charles II.'s restoration) is not a holiday in any of the law offices: and no officer can take an extraordinary fee for business done on that day. The only allowed holidays are Candlemas, or the Purification; the Ascension, or Holy Thursday; and St. John Baptist. 7 Term Rep. K. B. 336.

See further tit. Sunday.

HOMAGE, homagium.] Is a French word derived from homo, because when the tenant does his service to the lord, he says, I become your man. Co. Litt. 64.

The stat. 12 Car. II. c. 24. which was made to free the subject from the burthen of knight's service, and the oppressive consequences of tenures in cafette; amongst other provisions, wholly dis-
HOMAGE. 299

charges all tenures from the incident of homage; not because homage itself was any grievance, but because, though not wholly, yet it was more properly an incident to knight's service, which that statute abolished. But, while homage continued, it was far from being a mere ceremony; for the performance of it, where due, materially concerned both lord and tenant in point of interest and advantage. See 1 Inst. 67. b. in n. at length, as also 65. a. 67. a. 68. a. in the notes, and this Dict. tit. Tenures.

Notwithstanding the law on this subject is thus become obsolete, the curious reader may not be displeased with the following short extracts relative thereto.

In the original grants of lands and tenements by way of fee, the lord did not only oblige his tenants to certain services, but also took a submission with promise and oath, to be true to him as their lord and benefactor; and this submission, which is the most honourable, being from a freehold tenant, is called homage. Stat. 17 Edw. 11. st. 3. The lord of the fee for which homage is due, takes homage of every tenant, as he comes to the land or fee; but women perform not homage but by their husbands, as homage especially relates to service in war; and a corporation cannot do homage, which is personal, and they cannot appear but by attorney; also a bishop or religious man may not do homage, only fealty; but the archbishop of Canterbury does homage on his knees to our kings at their coronation; and it is said the bishop of the Isle of Man did homage to the earl of Derby; though Fulke reconciles this, when he says that a religious man may do homage, but may not say to his lord, ego devenio homo nester, I become your man, because he has professed himself to be God's man, but he may say, I do homage, and to you shall be faithful and loyal. Britton, cap. 68.

Homage, say the ancient authors, is either, by ligeance; by reason of tenure; or homage antecedent.

Homage by ligeance is inherent and inseparable to every subject, see tit. Allegiance, Oaths. Homage by tenure is a service made by tenants to their lords according to their estate; and homage antecedent, is where a man and his ancestors have time out of mind held their land of the lord by homage; and such service draws to it warranty from the lord, and acquittal of all other services to other lords, &c. Bract lib. 3. Fitz. N. B. 269. Litt. sect. 85. But, according to Sir Edw. Coke, there must be a double prescription for homage antecedent, both in the blood of the lord and of the tenant; so that the same tenant and his ancestors, whose heir he is, is to hold the same land of the same lord and his ancestors, whose heir the lord is, time out of memory, by homage, &c. and therefore there was but little land holden by homage antecedent. Co. Litt. 100. b. Though in the manor of Whitney in Herefordshire, there was one West who held lands by this tenure. Dict.

Homage tenure is incident to a freehold, and none shall do or receive homage, but such as have estates in fee-simple, or fee-tail, in their own right, or right of another. Kitch. 131. Seisin of homage is seisin of fealty, and inferior services, &c. And the lord only shall take homage, and not the steward, whose power extends but to fealty. 4 Rep. 8.

When a tenant made his homage to the lord, he was to be ungirt, and his head uncovered, and his lord was to sit, and he should kneel, and hold his hands together between his lord's hands, and say;
HOMICIDE.

become your man from this day forward, for life, for member, and for worldly honour, and unto you shall be true and faithful, and bear you faith for the lands that I hold of you, saving the faith that I owe to our Sovereign Lord the King: And the lord, so sitting, should kiss the tenant, &c. 17 Edw. III. Litt. § 85. See 2 Comm. 53 c. 4.

When sovereign princes did homage to each other for lands held under their respective sovereignties, a distinction was always made between simple homage, which was only an acknowledgment of tenure, (7 Ref. 7.) and liege homage, which included fealty, and the services consequent upon it. Thus when Edward III. in 1329, did homage to Philip VI. of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether liege or simple homage. 1 Comm. 367. c. 10.

HOMAGE JURY, A jury in a court baron, consisting of tenants that do homage to the lord of the fee; and these by the feudists are called pares curiae: they inquire and make presentment of defaults and deaths of tenants, admittances, and surrenders, in the lord's court, &c. Kitch. See tit. Court Baron.

HOMAGER, One that does or is bound to do homage to another.

HOMAGIO RESPECTUANDO, Was a writ to the escheator, commanding him to deliver seisin of lands to the heir of the king's tenant, notwithstanding his homage not done. Fitz. N. B. 269. And the heir at full age was to do homage to the king, or agree with him for respite of the same. New Nat. Br. 563.

HOMAGIUM REDDERE, To renounce homage, when the vassal made a solemn declaration of disowning and defying his lord. For which, there was a set form and method prescribed by the feudal laws. Bracton, lib. 2. cap. 35. sect. 35. This is the meaning of a passage in Richardus Hostoldnessis de Bello Standard, p. 321. And of Mat. Paris. sub anno 1188. Cowell, edit. 1727.

HOMESOKEN, HOMSOKEN, or HAMSOKEN, AND HAM·SOCA, From the Sax. ham, i.e. domus, habitatio; and socne, libertas, immunitas.] The privilege or freedom which every man hath in his house; and he who invades that freedom is properly said facere homesoken. This we take to be what we now call burglary, a crime of a very heinous nature, because it is not only a breach of the king's peace, but a breach of that liberty which a man hath in his house, which should be his castle, and therefore ought not to be invaded. See Bracton, lib. 3. tract 2. c. 23. Du Cange. L. Canuti, cap. 39. Rastal; and this Dict. tit. Burglary.

It is also taken for an impunity to those who commit this crime. W. Thorn, p. 2030.

In the Scotch law haimsocken is defined to be the crime of beating or assaulting a person in his own house, and was anciently punishable by death. Bell's Scotch Law Diet. See 4 Comm. 223.

HOMESTALL, A mansion-house. See Frumstol.

HOMICIDE.

HOMICIDIUM.] The killing of any human creature: this is of three kinds; justifiable, excusable, and felonious. The first has no share
of guilt at all; the second very little; but the third is the highest crime against the law of nature that a man is capable of committing. 4 Comm. c. 14. from whence the plan of this title, and much of the subsequent matter is extracted.

Offences against the life of a man come under the general name of homicide, which in our law signifies the killing of a man by a man. 1 Hawk. P. C. c. 26. § 2. Bracton, lib. 3. c. 4.

I. Of Justifiable Homicide.

1. By unavoidable Necessity; under Command of the Law.
2. By Permission of Law; for Advancement of Public Justice.
3. for Prevention of Crimes, in themselves Capital.

II. Of Excusable Homicide,

Per infortunium; or Misadventure Se Defendendo.

1. Wherein these are distinct.
2. Wherein they agree.

III. Of Felonious Homicide.

1. Self-Murder; or where the Offender is Felo de se.
2. Manslaughter]{ Which two should be carefully compared
3. Murder} with each other.
4. Petit Treason.

I. 1. JUSTIFIABLE HOMICIDE may be owing to some unavoidable necessity, without any will, intention or desire, and without any inadvertence, or negligence in the party killing, and therefore without any shadow of blame; it is either of a public or private nature.

That of a public nature is such as is occasioned by the due execution or advancement of public justice. That of a private nature is such as happens in the just defence of a man's person, house, or goods. 1 Hawk. P. C. c. 28. § 3. The first of these may happen by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must require it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon, or a traitor, attainted or outlawed, deliberately, uncompeled, and extrajudicially, is murder. 1 Hale's P. C. 497. Bract. fol. 120.

There must be no malice coloured under pretence of necessity; for wherever a person who kills another, acts in truth upon malice, and takes occasion from the appearance of necessity, to execute his revenge, he is guilty of murder. 1 Hawk. P. C. c. 28. § 2. 2 Rolle. Rep. 120, 121. Kelynge, 28. Bract. lib. 3. cap. 4.

Farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder. 1 Hawk. P. C. c. 28. § 4. 1 Hale's P. C. 497. And upon this account, Sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government, (since it is necessary to decide the disputes of
civil property in the worst of times,) yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission; a distinction perhaps rather too refined, since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property.

The judgment, by virtue whereof any person is put to death, must be given by one who has jurisdiction in the case; for otherwise both judge and officer may be guilty of felony. 1 Hawk. P. C. c. 28. Dalt. cap. 98. 10 Co. 75. 22 Edw. IV. 33. a. H. P. C. 35. And therefore, if the court of common pleas give a judgment on an appeal of death, or justices of peace on an indictment for treason, and award execution, which is executed, both the judge who gives, and the officers who execute, the sentence, are guilty of felony; because the courts having no more jurisdiction over these crimes than mere private persons, their proceedings thereon are merely void, and without foundation. But if the justices of peace, on an indictment for trespass, arraign a man of felony, and condemn him, and he be executed, the justices only are guilty of felony, and not the officers who execute their sentence: for the justices had a jurisdiction over the offence, and their proceedings were irregular and erroneous only, but not void. 1 Hawk. P. C. c. 28. § 5, 6. and the authorities there cited. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy: for no one else is required by law to do it; which requisition it is that justifies the homicide. If another person does it of his own head, it is held to be murder; even though it be the judge himself. 1 Hale's P. C. 501. 1 Hawk. P. C. c. 28. Dalt. Jus. c. 150. It was formerly held, that any one might as lawfully kill a person attainted of treason or felony, as a wolf or other wild beast; and anciently a person condemned in appeal of death was delivered to the relations of the deceased, in order to be executed by them. 1 Inst. 128. b. 2 Ass. pl. 3. Staundf. P. C. 13. a. 11 Hen. IV. 12. a. Plowd. Com. 306. b. 3 Inst. 131. But at this day, it seems agreed, if the judge, who gives the sentence of death, and a fortiori if any private person execute the same, or if the proper officer himself do it without lawful command, they are guilty of felony. 27 Ass. 41. Bro. Appheal, 69. 1 Hawk. P. C. c. 28. § 8, 9. This judgment must also be executed, servato juriordine; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or vice versa, it is murder; for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but if a sheriff changes one kind of death to another, he then acts by his own authority, which extends not to the commission of homicide; and besides, this license might occasion a very gross abuse of his power. Finch's L. 31. 3 Inst. 52. 1 Hale's P. C. 501. The king, indeed, may remit part of a sentence; as in the case of treason, all but the beheading: but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is to be hanged, the king (it hath been said) cannot legally order, even a peer, to be beheaded. 3 Inst. 52. 212. See Post. 267. where it is said that if the officer varieith from the judgment, of his own head, and without warrant, or the colour of au-
HOMICIDE I. 2.

If the authority, he is guilty of felony at least, if not of murder; but not if he is authorized by custom or warrant from the crown. For although the king cannot by his prerogative vary the execution, so as to aggravate the punishment beyond the intention of the law, yet it doth not follow, that he who may remit part of the judgment, or wholly pardon the offender, cannot mitigate his punishment with regard to the pain or infamy of it. But this doctrine is more fully considered in another place. See tit. Pardon, Execution, (Criminal) Judgment, (Criminal.)

2. Homicides committed for the advancement of public justice, are:—where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 1 Hale's P. C. 494. 1 Hawk. P. C. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and in the endeavour to take him, kills him. 1 Hale's P. C. 494. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law and by the riot act. Stat. 1 Geo. L. c. 5. 1 Hale's P. C. 495. 1 Hawk. P. C. 161. And in case a stranger interposes to part the combatants in an affray, giving notice to them of his intention, and they assault him; if in the struggle he should chance to kill, this would be justifiable homicide; for it is every man's duty to interpose for the preservation of the public peace, and for the prevention of mischief. 6 Stat. 272. Where the prisoners in a gaol, or going to gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape. 1 Hale's P. C. 496. If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keepers, they may be slain, by virtue of the stat. 21 Edw. L. st. 2. de malefactoribus in foris; and 3 & 4 W. & M. c. 10. If a person having actually committed felony will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. So, if even an innocent person be indicted of a felony, where no felony was committed, yet if he will not suffer himself to be arrested by an officer who has a warrant, he may be lawfully killed, for there is a charge against him on record, to which he is bound at his peril to answer. 1 Hawk. P. C. c. 28. § 11, 12. 22 Ass. 55. Bro. Cor. 87. 89. Staundf. P. C. 13. 3 Inst. 221. Dalt. capi. 98. H. P. C. 36. Crom. 30. Where a sheriff, &c. attempting to make a lawful arrest in a civil action, or to retake one who has been arrested and made his escape, is resisted by the party, and unavoidably kills him in the affray. 1 Hawk. P. C. c. 28. § 17. 1 Roll. Rep. 189. H. P. C. 37. 3 Inst. 56. Crom. 24. a. Dalt. capi. 98. And in such case the officer is not bound to give back, but may stand his ground, and attack the party. 1 Hawk. P. C. c. 28. § 18. H. P. C. 31. But no private person, of his own authority, can arrest a man for a civil matter, as he may for felony, &c. 1 Hawk. c. 28. § 19. Crom. 30. b. Neither can the sheriff himself lawfully kill those who barely fly from the execution of any civil process. 1 Hawk. c. 28. § 20. H. P. C. 37.

And in all these cases there must be an apparent necessity on
HOMICIDE I. 8.

The officer’s side, viz. that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable.

Lastly, if the champions in a trial by battel, killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth. 1 Hawk. P. C. 71. See tit. Battel.

3. Such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton, and as it is since expressly declared by stat. 24 Hen. VIII. c. 5. See Bract. fol. 155. If any person attempts a robbery or murder of another, or attempts to break open a house in the night-time, (which extends also to an attempt to burn it,) and shall be killed in such attempt, the slayer shall be acquitted and discharged. 1 Hale’s P. C. 488. And not only the master of a house, but a lodger, or a sojourner, who kills an assailant intending to commit murder or robbery, is within the protection of the law. Cro. Car. 544. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery also. 4 Comm. c. 14.

Justifiable homicide of a private nature, in the just defence of a man’s person, house, or goods, may happen either by the killing of a wrongdoer, or an innocent person. And first, the killing of a wrongdoer in the making of such defence, may be justified in many cases; as where a man kills one who assaults him in the highway, to rob or murder him; or the owner of a house, or any of his servants or lodgers, &c. kill one who attempts to burn it, or to commit therein murder, robbery, or other felony; or a woman ‘kills one who attempts to ravish her; or a servant coming suddenly, and finding his master robbed and slain, falls upon the murderer immediately, and kills him; for he does it in the height of his surprise, and under just apprehensions of the like attempt upon himself; but in other circumstances he could not have justified the ‘killing of such a one, but ought to have apprehended him, &c. 1 Hawk. P. C. c. 28. § 21. 24 Hen. VIII. cap. 5. Dalh. cap. 98.

Neither shall a man in any case justify the killing another by a pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, in defence of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully withhold a house by force, and kill those who attack it from without, and endeavour to burn it. 1 Hawk. P. C. c. 28. § 22. Crom. 27. b. H. P. C. 35.

Neither can a man justify the killing another in defence of his house or goods, or even of his person, from a bare private trespass; and therefore he that kills another, who, claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in
breaking his hedges after he is forbidden, is guilty of manslaughter; and he who, in his own defence, kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, is guilty of manslaughter; and he who, in his own defence, kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, is guilty of homicide se defendendo, for which he forfeits his goods, but is pardoned of course; yet it seems that a private person, and, a fortiori, an officer of justice, who happens unavoidably to kill another endeavouring to defend himself from, or suppress dangerous rioters, may justify; the fact, inasmuch as he only does his duty in aid of public justice. 1 Hawk. P. C. c. 28. § 23. H. P. C. 40. 57. Cro. Car. 538. Dall. cap. 98.

According to the opinion of Mr. Serjeant Hawkins, a person who, without provocation, is assaulted by another, in any place whatsoever, in such a manner as plainly shows an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, &c. may justify killing such an assailant, as much as if he had attempted to rob him. 1 Hawk. P. C. c. 28. § 24. &c. N. Bendlo, 47. 1 And. 41. Crom. 27. b. 28. b. Dall. cap. 98. Stand. P. C. 15. a. 3 Inst. 57. Bacon, 33. For other cases, vide Cro. Car. 338. March, 5.

The Roman law also justifies homicide, when committed in defence of the chastity either of one's self or relations. The English law also justifies a woman killing one who attempts to ravish her. Bac. Elem. 34. 1 Hawk. P. C. c. 38. § 21. And so too, the husband or father may justify killing a man who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. 1 Hale's P. C. 485, 486. And there seems no doubt but the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the uniform principle that runs through our own, and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. 4 Comm. c. 14.

In these instances of justifiable homicide, it may be observed, that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is, therefore, to be totally acquitted and discharged, with commendation rather than blame. 1 Hawk. P. C. c. 28. § 3.

But that is not quite the case in excusable homicide, the very name whereof imports some fault, some error, or omission; so trivial, however, that the law excuses it from the guilt of felony, though, in strictness, it judges it deserving of some little degree of punishment. See the next division.

II. 1. Homicide per infortunium; or misadventure, is where a man doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man: for the act is lawful, and the effect is merely accidental. 1 Hawk. P. C. c. 29. So where a person is moderately correcting a child, a master his apprentice or scholar, or an officer punishing a criminal, (as by whipping,) and happens to occasion his death, it is only misadventure; for the act of correc-
tion was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least; and in some cases (according to circumstances) murder; for the act of immediate correction is unlawful. 1 Hale's P. C. 473, 474. Where an officer of the impress service in the navy, fires at a boat in order to bring her to, and kills a man, it is impossible that the offender should be made guilty of more than manslaughter, especially if he fires in the manner usual upon such occasions. Comp. 832, per Ld. Mansfield.

A tilt or a tournament, the martial diversion of our ancestors, was however an unlawful act; and so age boxing and sword-playing, the succeeding amusements of their posterity: and therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But if the king command or permit such diversion, it is said only to be misadventure; for then the act is lawful. 1 Hale's P. C. 473. 1 Hawk. P. C. c. 29. § 8. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental death in the-rider, for he has done nothing unlawful; but it is manslaughter in the person who whipped him; for the act was a trespass, and at best a piece of idleness of inevitably dangerous consequence. 1 Hawk. P. C. c. 29. § 3.

Where one lawfully using an innocent diversion, as shooting at butts, or at a bird, &c. by the glancing of an arrow, or such like accident, kills another, this is only homicide by misadventure. Keitt. 108. Bro. Cor. 148. See Kelynge, 41. So where a person happens to kill another in playing a match at foot-ball, wrestling or such like sports, which are attended with no apparent danger of life, and intended only for the trial, exercise, and improvement of the strength, courage and activity of the parties. Keitt. 108. 156. Crom. 29. a. 11 Hen. VII. 23. a. 1 Hawk. P. C. c. 29. § 6, 7, 8.

In general, if death ensues in consequence of an idle, dangerous, and unlawful sport, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts. 1 Hawk. P. C. c. 29. § 9. 1 Hale's P. C. 472. Post. 261. Thus, if a man kills another by shooting at a deer, &c. in a third person's park, in the doing whereof he is a trespasser; or by shooting of a gun, or throwing stones in a city or highway, or other place where men usually resort, by throwing stones at another wantonly, in play, which is a dangerous sport, and has not the least appearance of any good intent; or by doing any other such idle action as cannot but endanger the bodily hurt of some one or other; or by tilting or playing at hand-sword without the king's command; or by parrying with naked swords, covered with buttons at the points, or with swords in the scabbards, or such like rash sports, which cannot be used without the manifest hazard of life, he is guilty of manslaughter. 1 Hawk. P. C. 29. § 9. H. P. C. 31, 32, 58. Hob. 134. But see post, III.

Where the defendant came to town in a chaise, and before he got out of it, fired his pistols, which by accident killed a woman, King, Ch. J. ruled it to be manslaughter. Str. 481.

Homicide, in self-defence, or se defendendo, upon a sudden affray,
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is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that already mentioned, ante; I. 3, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse; but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the words chance-medley, or (as some rather choose to write it) chaud-medley; the former of which, in its etymology, signifies a casual affray, the latter an affray in the heat of blood or passion, both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the stat. 24 Hen. VIII. c. 5, and our ancient books, (Stannulf. P. C. 16,) that it is properly applied to such killing as happens in self-defence, upon a sudden rencontre. 3 Inst. 55. 57. Post. 275, 276. This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice: they cannot therefore legally exercise this right of preventive defence except in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide, by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide (upon chance-medley, in self-defence) from that of manslaughter, in the proper legal sense of the word. 3 Inst. 55. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter: but if the slayer hath not begun to fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. Post. 277. For which reason the law requires, that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his antagonist: and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects, the law countenances no such point of honour: because the king and his courts are the vindices injuriarum, and will give to the party wronged all the satisfaction he deserves. 1 Hale's P. C. 481. 483. The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him, for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, he may kill his assailant instantly. 1 Hale's P. C. 483. And as the manner of the defence, so is also the time to be considered: for if the person assaulted does not fall upon the aggres-
sor till the affray is over, or when he is running away, this is revenge and not defence. Neither under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons A. and B. agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A. this is murder; because of the previous malice and concerted design. 1 Hale’s P. C. 479. But if A. upon a sudden quarrel assaults B. first, and upon B.’s returning the assault, A. really and bona fide flees, and being driven to the wall, turns again upon B. and kills him; this may be se defendendo, according to some of our writers. 1 Hale’s P. C. 482. Though others have thought this opinion too favourable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. 1 Hawk. P. C. c. 29. § 17.

And it is now agreed, that if a man strike another upon malice forethought, and then fly to the wall, and there kill him in his own defence, he is guilty of murder. 1 Hawk. P. C. c. 29. § 17. Staun dre. P. C. 15. a. Crom. 28. a. Dalt. cap. 98. Kelbye, 53. H. P. C. 42. See post, III. 3.

Under this excuse, of self-defence, the principal, civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself. 1 Hale’s P. C. 484.

Homicide se defendendo, or by self-defence, says Hawkins, seems to be, where one who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempts be made upon him in his own house,) kills the person by whom he is reduced to such an inevitable necessity. 1 Hawk. P. C. c. 22. § 13. &c. H. P. C. 40. Staudre. P. C. 15.

And not only he who on an assault retreats to a wall, or some such strait, beyond which he can go no further before he kills the other, is adjudged by the law to act upon unavoidable necessity: but also he who being assaulted in such a manner, and in such a place, that he cannot go back without manifestly endangering his life, kills the other without retreating at all. 1 Hawk. P. C. c. 29. § 14. Bro. Coro. 125. 43 Ass. 31. 3 Inst. 56. H. P. C. 41.

And notwithstanding a person, who retreats from an assault to the wall, give the other divers wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide se defendendo only. 1 Hawk. P. C. c. 29. § 15. H. P. C. 41. Crom. 28. Staudre. P. C. 15. a.

And an officer who kills one who resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact without ever giving back at all. 1 Hawk. P. C. c. 29. § 16. H. P. C. 41. 3 Inst. 56. Crom. 28. a.

There is one species of homicide se defendendo, where the party slain is equally innocent as he who occasions his death; and yet this homicide is also excusable from the great universal
principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon, where two persons being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man’s, is excusable, through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent attempt upon, and endangering of each other’s life. See Bac. Elem. c. 5. 4. Comm. c. 14.

2. The circumstances wherein these two species of homicide, by misadventure and self-defence, agree, are in the blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who is, therefore, not altogether faultless. And as to the necessity which excuses a man who kills another se defendendo, Lord Bacon entitles it necessitas culpabili, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. Bac. Elem. c. 5. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed; and since, in quarrels, both parties may be, and usually are, in some fault, and it scarcely can be tried who was originally in the wrong, the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original fault can never be upon my side. The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment, by ordaining that he who slays his neighbour, without an express warrant from the law, so to do, shall in no case be absolutely free from guilt.

The penalty inflicted by our laws in these cases, is said, by Sir Edward Coke, to have been anciently no less than death; 2 Inst. 248. 315. which, however, is with reason denied by later and more accurate writers. 1 Hale’s P. C. 425. 1 Hawk. P. C. c. 29. § 20. Fast. 282. &c. It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or weregild; which was probably disposed of, in fios usus, according to the humane superstition of the times for the benefit of his soul, who was thus suddenly sent to his account, “with all his imperfections on his head.” Fast. 287. But that reason having long ceased, and the penalty (especially of a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach, a pardon, and a writ of restitution of his goods as a matter of course and right, only paying for suing out the same. Fast. 283. 2 Hawk. P. C. c. 37. § 2. And indeed to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges permit (if not direct) a general
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verdict of acquittal. *Post.* 288. As they do now in all cases where the homicide does not amount to murder or manslaughter.

It seems clear that neither of these homicides, by misadventure or *se defendendo*, are felonious, because they are not accompanied with a felonious intent, which is necessary in every felony. 1 *Hawk.* *P. C.* c. 29. § 19. *3 Inst.* 56. *2 Inst.* 149.

And from hence it seems plainly to follow, that they were never punishable with loss of life; and the same also farther appears from the writ *de odio et atid* by virtue whereof, if any person committed for killing another, were found guilty of either of these homicides, and no other crime, he might be bailed; and indeed it seems to be against natural justice to condemn a man to death, for what is owing rather to his misfortune than his fault. 1 *Hawk.* *P. C.* c. 29. § 20.

It is true, indeed, that some of our best authors have argued from the statute of Marlbridge, c. 26. which enacts, that *murdruum de sestero non adjudicetur*, *ubi infortunium tantummodo adjudicatum est*, &c. that, before this statute, homicides by misadventure, or *se defendendo*, were adjudged murder, and consequently punished by death. 1 *Hawk.* *P. C.* c. 29. § 21. *2 Inst.* 56. *Staundf.* *P. C.* 16.

But to this it may be answered, that murder in those days signified only the private killing of a man, by one who was neither seen nor heard by any witness; for which the offender, if found, was to be tried by ordeal, and if he could not be found, the town in which the fact was done, was to be amerced sixty-six marks, unless it could be proved that the person killed was an Englishman: otherwise it was presumed he was a Dane or Norman, who in those days were often privately made away with by the English.

And it being a doubt whether homicide by misadventure, &c. were to be esteemed murder in this sense, it seems to have been the chief intent of the makers of this statute to settle this question, 1 *Hawk.* *P. C.* c. 29. § 22. *Bract.* 134. b. 135. a. *Kelynge*, 121.

However it is certain, that notwithstanding neither of these offences be felonies, yet a person guilty of them is not bailable by *justices of peace*, but must be committed till the next coming of the justices of eyre or gaol delivery. 1 *Hawk.* *P. C.* c. 29. § 23. *H. P.* *C.* 98, 99. *2 Inst.* 315. *Dalt.* *cagt.* 98. But such offender may be brought up by *habeas corpus*, before any of the twelve judges, and bailed.

Indeed, anciently a person committed for the death of a man, might sue out the writ *de odio et atid*, which by *Magna Charta*, c. 16. is grantable without fee; and if thereon, by an inquest taken by the sheriff, he were found to have done the fact by misadventure, or *se defendendo*, he might be mainprised by twelve men, upon the writ *de ponendo in balitum*. But such writs and inquirys were taken away by the statute of Gloucester, c. 9. and stat. 28 *Edw.* III. c. 9. and though perhaps they were again revived by stat. 42 *Edw.* III. c. 1. which makes all statutes contrary to *Magna Charta* void, yet at this day they seem to be obsolete, and, indeed, useless; inasmuch as the party may probably be sooner delivered in the usual course, by the coming of the justices of gaol delivery. 1 *Hawk.* *P. C.* c. 29. § 24. *Staundf.* *P. C.* 77. g. *2 Inst.* 43, 315. *9 Co.* 56. *Co.* *Bail and Mainprize*, c. 10.
It is also agreed, that no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or se defendendo, but that he must plead “not guilty,” and give the special matter in evidence. And that wherever a person is found guilty of such homicide, either by a special indictment for the same, or by a verdict setting forth the circumstances of the case on a general indictment of murder or homicide, he shall be discharged out of prison upon bail, and forfeit his goods: But, that upon removing the record by certiorari into chancery, he shall have his pardon of course, without staying for any warrant from the king to that purpose. Hawk. P. C. c. 29. § 25. 4 Hen. VII. 2. a. Keittw. 53. a. 108. b. 2 Inst. 316. Staundf. P. C. 15. b. 16. b. Datt. cap. 96. 98. Fitz. N. B. 246. C. H.

III. Felonious Homicide, is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one’s self or another person.

1. Self-Murder is ranked among the highest crimes, being a peculiar species of felony; a felony committed on one’s self. The party must be in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners’ juries are too apt to carry it, viz. that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal non compos, as well as the self-murderer. The law, very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong, and, therefore, if a real lunatic kills himself in a lucid interval, he is felo de se as much as another man. Hale’s P. C. 412.

As to the punishment which human laws inflict on this crime; they can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by the forfeiture of all his goods and chattels to the king.

In this, as well as all other felonies, the offender must be of the age of discretion, and compos mentis; and therefore, an infant killing himself under the age of discretion, or a lunatic during his lunacy, cannot be a felo de se. 1 Hawk. P. C. c. 27. § 1. Crom. 30. a. b. 31. a. H. P. C. 28. Datt. cap. 92. 3 Inst. 54.

Our laws have always had such an abhorrence of this crime, that not only he who kills himself with a deliberate and direct purpose of so doing, but also in some cases, he who maliciously attempts to kill another, and in pursuance of such an attempt unwillingly kills himself, shall be adjudged in the eye of the law a felo de se; for wherever death is caused by any act done with a murderous intent, it makes the offender a murderer. 1 Hawk. P. C. c. 27. § 4. Datt. cap. 92. 144. 44 Edw. III. 44. 44 Ass. 55. Bro. Cor. 12. 14. Staundf. P. C. 16. H. P. C. 29, 29. Pult. 119. b. Crom. 28.

He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head; and the person killed is not looked upon as a felo de se, inasmuch as his assent was merely void, being

Further as to what a *felo de se* shall forfeit, it seems clear, that he shall forfeit all chattels real or personal which he hath in his own right; and also all chattels real whereof he is possessed either jointly with his wife, or in her right; and also all bonds and other personal things in action, belonging solely to himself; and also all personal things in action, and, as some say, entire chattels in possession to which he was entitled jointly with another on any account, except that of merchandise. But it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator. 1 Hawk. P. C. c. 27. § 7. However, the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower.

Not any part of the personal estate is vested in the king, before the self-murder is found by some inquisition; and consequently the forfeiture thereof, is saved by a pardon of the offence before such finding. 5 Co. 110. b. 3 Inst. 54. 1 Sound. 362. 1 Sid. 150. 162. But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time of the act done by which the death was caused, and all intermediate alienations and titles are avoided. Plowd. Comm. 260. H. P. C. 29. 5 Co. 110. Finch's L. 216. And such inquisitions ought to be by the coroner super visum corporis, if the body can be found; and an inquisition so taken, as some say, cannot be traversed. H. P. C. 29. 3 Inst. 55. See 1 Hawk. P. C. c. 27. § 9, 10, 11. But see 3 Mod. 238.

But if the body cannot be found, so that the coroner, who has authority only super visum corporis, cannot proceed, the inquiry may be by justices of peace; (who by their commission have a general power to inquire of all felonies;) or in the king's bench, if the felony were committed in the county where that court sits; and such inquisitions are traversable by the executor, &c. 1 Hawk. P. C. c. 27. § 12. 3 Inst. 55. H. P. C. 29. 2 Lev. 141.

Also all inquisitions of this offence being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact; and in the conclusion add that the party in such manner murdered himself. 1 Hawk. P. C. c. 27. § 13. 3 Lev. 140. 3 Mod. 100. 2 Lev. 152. Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form. 1 Sid. 225. 259. 3 Mod. 101. 1 Keb. 907. 1 Hawk. P. C. c. 27. § 15.

If a person is unduly found *felo de se*, or on the other hand found to be a lunatic, when in fact he was not so, and therefore *felo de se*, although a writ of melius inquirendum will not be granted, yet the inquisition is traversable in the king's bench. 3 Mod. 238.

By the rubrick in the common prayer, before the burial office, (confirmed by stat. 13 & 14 Car. II. c. 4.) persons who have laid violent hands upon themselves, shall not have that office used at their interment. See further on this subject, this Dict. tit. *Felo de se*. 
The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into manslaughter and murder. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles; and principally consists in this, that manslaughter (when voluntary) arises from the sudden heat of the passions; murder from the wickedness of the heart.

2. Manslaughter is therefore thus defined: *The unlawful killing of another, without malice, either express or implied:* which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. 1 Hale's P. C. 466. And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

As to the first, or voluntary branch; if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they, upon such an occasion, go out and fight in a field; for this is one continued act of passion, and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. 1 Hawk. P. C. c. 31. §. 29, 30. So, also, if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable se defendo, since there is no absolute necessity for doing it, to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter. 1 Hale's P. C. 486. It is however the lowest degree of it, and therefore in such a case, the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation. 4 Comm. c. 14.

The second branch, or involuntary manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other, this is manslaughter, because the original act is unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. 3 Inst. 56. So where a person does an act, lawful in itself but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street,
and kills a man; this may be either misadventure, manslaughter or murder, according to the circumstance under which the original act was done; if it were in a country village where few passengers are, and he calls out to all the people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. Kel. 43. 3 Inst. And in general when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter. 4 Comm. c. 14. See post, 3. more at large.

Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by stat. 10 Geo. II. c. 31. if any waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony; and shall be transported as a felon.

Next, as to the punishment of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels, and may be imprisoned not exceeding 12 months. See stat. 18 Eliz. c. 7. and this Dict. tit. Clergy, Benefit of.

But there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally stabbing another, though done upon sudden provocation. For by stat. 1 Jac. I. c. 8. when one thrusts or stabs another, who hath not then a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbing with short daggers, between the Scotch and the English, at the accession of James the first; and being, therefore, of a temporary nature, ought perhaps to have expired with the mischief which it meant to remedy. 1 Lord Raym. 140. It was however continued indefinitely by stat. 3 Car. I. c. 4. and by stat. 16 (or 17) Car. I. c. 4. till some other act shall be made touching the continuance or discontinuance thereof. It seems, that in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt; unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the statute so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same footing, as it did at the common law. Post. 299, 300. Thus, (not to repeat the cases before mentioned, of stabbing an adulteress, &c. which
are barely manslaughter, as at common law,) in the construction of the statute it hath been doubted, whether if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and it seems to be the better opinion, that this is not within the statute. Fost. 301. 1 Hawk. P. C. c. 30. § 6. Also it hath been resolved, that the killing a man by throwing a hammer or other blunt weapon is not within the statute; and whether a shot with a pistol be so or not, is doubted. 1 Hale’s P. C. 470. And if the party slain had a cudgel in his hand, or had thrown a pot or bottle, or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute. 1 Hawk. P. C. c. 30. § 8.

It is generally holden, that this statute is but declarative of the common law, and in the construction thereof, the following points have been also resolved. 1 Byst. 87. Kelype, 55.

That he who actually gives the stroke, and not any of those who may be said to do it by construction of law, as being present, and aiding and abetting the fact, are within the statute; and from whence it follows, that it cannot be proved by whom the stroke was given, none can be found guilty within the statute. 1 Hawk. P. C. c. 30. § 7. H. P. C. 58. Aleyen, 44.

That there is no need to lay the conclusion of the indictment contra formam statuti, because the statute makes no new offence, but only takes away the privilege of clergy from an old one, and leaves it to the judgment of the common law; from whence it follows, that a person indicted on the statute, may be found guilty of manslaughter generally. Also from the same ground it hath been resolved, that if an indictment lay, and a verdict also find, a fact to be contra formam statuti; which cannot possibly be so, as that A. and B. aided and abetted C. contra formam statuti, yet neither such indictment nor verdict are void; but A. and B. shall be dealt with in the same manner as they should have been, if these words contra formam statuti had been wholly omitted, because the substance of the indictment being found, they may be rejected as senseless and surplusage: And, a fortiori, therefore it is certain, that they shall do no hurt to an indictment or verdict containing a fact which may be within the statute. 1 Hawk. P. C. c. 30. § 9. H. P. C. 58. 266. Allen, 47. Cro. Jac. 283.

That, as these words, contra formam statuti, do not vitiate an indictment which would be good without them; so also, they will not supply a defect in a vicious one, which does not specially pursue the statute. 1 Hawk. P. C. c. 30. § 10. H. P. C. 58.

A prisoner whose case may be brought within the statute, is commonly arraigned upon two indictments, one at common law for murder, and the other upon the statute. Fost. 299. But the same circumstances which at common law will serve to justify, excuse or alleviate a charge of murder, have always had their due weight in prosecutions grounded on this statute. Fost. 298. As where a husband stabs an adulterer whom he seizes in the act. 1 Vent. 158. Raym. 212. Or where a man is assaulted by thieves in his house, the thieves having no weapon drawn, nor having struck him; and he stabs one of them. Stra. 469. Or where an officer entering violently into the chamber of a gentle-
man to arrest him; but without announcing the purpose for which he came, is stabbed by the gentleman with his sword. Kel. 136. 1 Hale, 470. Sty. 467. Of where upon an outcry of thieves, a person who had innocently hidden himself in a closet, was mistaken for the thief, and stabbed in the dark. See 1 Hale, 43. Cro. Car. 538. W. Jones, 429. Kely. 136 c. and many other instances of this kind, which were held not to be within the statute 1 Hawk. P. C. c. 30. in n. See post, division 3. for the particulars of the statute. 43 Geo. III. c. 58. relative to killing or attempting to kill, by shooting, stabbing, poisoning, &c.

3. The term of murder (as a crime) was anciently applied only to the secret killing of another; Dial. de Sacch. l. 1. c. 10. which the word moerda signifies in the Teutonic language; and it was defined, "homicidium quod, nullo vidente, nullo sciente, clam perpetratur; Glanv. lib. 14. c. 3. for which the vill wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated murdrum. Bract. lib. 3. tract. 2. c. 15. § 7. Stat. Mart. c. 26. Post. 281. The word murdr in our old statutes also signifies any kind of concealment or stifling: So in the stat. of Exeter, 14 Edw. I. "je viens ne celerai ne suffrerais erre celé ne murdrés;" which is thus translated in Fleta, lib. 1. c. 18. § 4. "nul­lam veritéatem celabo, nec celeri permittam, nec murdravi." And the words "jur murdr le droit," in the articles of that statute, are rendered in Fleta, ibid. § 3. "pro jure aliquous murdrando;" The word murdrum, (by some derived from the Sax. morth, whence (as it is said) comes the barbarous Latin mortrum and murdrum, in French meurtre; though the word murdrum derives evidently comes from the Latin morti dare,) was a word in use long before the reign of King Canutus, which some would have to signify a violent death; and sometimes the Saxons expressed it by mort d#d and mort weore, a deadly wound: But the Sax. morth relates generally to mors.

The usage of fining the vill or the hundred was common among the ancient Goths, in Sweden and Denmark, who supposed the neighbourhood, unless they produced the murderer, to have perpetrated, or at least connived at, the murder; and, according to Bracton, it was introduced into this kingdom by King Canute to prevent his countrymen the Danes from being privately murdered by the English; and was afterwards continued by William the Conqueror, for the like security of his own Normans. Bract. lib. 3. tract. 2. c. 15. 1 Hale’s P. C. 447. And therefore if upon inquisition had, it appeared the person slain was an Englishman, (the present whereof was denominated Englescherie,) the county seems to have been excused from the burthen. Bract. ubi supra. See this Dict. lit. Englecery. But this difference being totally abolished by stat. 14 Edw. III. c. 4. we must define murder in quite another manner; without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction. See Staudif. P. C. lib. 1. c. 10. as also 1 Hawk. P. C. c. 31: where it is said, that in the ancient times above alluded to, the open killing of a man through anger or malice was not called murder; but voluntary homicide. Bract. 121. a. 134. b. 155. a. Kel. 121.
The law concerning *englescherie* having been abolished by stat. 14 Edw. III. c. 4, the killing of an *Englishman* or foreigner through malice *frequente*, whether committed openly or secretly, was by degrees called *murder*; and stat. 13 Rich. II. c. 1, which restrains the king's pardon in certain cases, does in the preamble, under the general name of *murder*, include all such *homicide* as shall not be pardoned without special words; and, in the body of the act, expresses the same by *murder*, or killing by *avertissement*, or malice *frequente*. And doubtless the makers of stat. 23 Hen. VIII. cap. 1, which excluded all wilful murder of malice *frequente* from the benefit of clergy, intended to include open, as well as private *homicide*, within the word *murder*. 1 Hawk. P. C. c. 31. § 2. Staunf. P. C. 18. b. 19. a.

By *murder*, therefore, says Hawkins, at this day, we understand the wilful killing of any subject whomsoever, through malice *frequente*, whether the person slain be an *Englishman* or foreigner. 1 Hawk. P. C. c. 31. § 3.

*Murder* is thus defined, or rather described, by Sir Edward Coke: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." 3 Inst. 47. The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, murder must be committed by a *person of sound memory and discretion*; for lunatics or infants, as was formerly observed, are incapable of committing any crime, unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil.

One under the age of discretion, or *non composit mentis*, cannot be guilty of *murder*; though, if it appears by circumstances that the infant did hide the body, &c. it is felony. H. P. C. 43. 3 Inst. 46. 54.

If an infant under twelve years old, hath an extraordinary wit, that it may be presumed he knows what he does, and he kill another, it may be felony and *murder*, otherwise it shall not. 3 Hen. VII. 13. Plowd. 191.

See the case of William York, at Bury summer assizes, in 1748, Foster's Rep. 70, and this Dict. tit. Infant. I.

Next, murder happens when a person of such sound discretion unlawfully killeth. The unlawfulness arises from the killing without warrant or excuse; and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder. See 1 Hale's P. C. 425.

A person indicted for intending to *murder* the master of the rolls, Term Mich. 16 Car. II.; and for offering a sum of money to another person to do it, saying at the same time, that "if he would not perfetrate the crime, he would do it himself;" upon his conviction, the court declared that this was a heinous offence, and not only indictable, but finable; and the offender was fined *one thousand marks*, committed to prison for three months, and ordered to find sureties for his good behaviour during life. 1 Lev. 146.

The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of kill-
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ing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting with a pistol, or starving. But where they only differ in circumstances, as if a wound be alleged to be given by a sword, and it proves to have arisen from a staff, an ax, or a hatchet, this difference is immaterial. 3 Inst. 319. 2 Hale's P. C. 185. Of all species of deaths, the most detestable is that of poison; because it can, of all others, be the least prevented either by manhood or forethought. 3 Inst. 48. And therefore, by the stat. 22 Hen. VIII. c. 9. it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death; but this act did not live long, being repealed by stat. 1 Edw. VI. c. 12. which declares, that all wilful killing by poisoning of any person, shall be adjudged wilful murder, of malice prepensed.

There was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day, as there hath not been an instance wherein it has been held to be murder, for many ages past; namely, by bearing false witness against another, with an express, premeditated design to take away his life, so as the innocent person be condemned and executed. Mirror, c. 1. § 9. 19. Brit. c. 52. Bracton, l. 3. c. 4. There is no doubt but this is equally murder in foro conscientia, as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the perils of their own lives) has not yet punished it as such. See 3 Inst. 48. Fost. 131. and this Dict. tit. Perjury.

A gaoler knowing a prisoner to be infected with an epidemic distemper, confines another prisoner against his will in the same room with him, by which he catches the infection; the gaoler had notice, and the prisoner dies, this is a felonious killing. Str. 856. 9 St. Tr. 146. So to confine a prisoner in a low, damp, unwholesome room, not allowing him the common conveniences, which the decencies of nature require, by which the habits of his constitution are so affected as to produce a distemper of which he dies, this is also a felonious homicide. Str. 884. Lord Raym. 1578. For, though the law invests gaolers with all necessary powers for the interest of the commonwealth, they are not to behave with the least degree of wanton cruelty to their prisoners, Q. B. 1784, p. 1177. And those were deliberate acts of cruelty, and enormous violations of the trust the law reposeth in its ministers of justice. Post. 382.

In some cases a man shall be said, in the judgement of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress of imprisonment compels a man to accuse an innocent person, who, on his evidence, is condemned and executed; or where one incites a madman to kill himself or another; or where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another who dies thereof. 1 Hawk. P. C. c. 31. § 7. Staundf. P. C. 36. 3 Inst. 91. Dalt. eaf. 93. Plowd. Comm. 474.

If a man, however, does such an act, of which the probable consequence may be, and eventually is death, such killing may be murder, although no stroke be struck by himself; and though
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no killing may be primarily intended; as was the case of the unnatural son, who exposed his sick father to the air against his will, by reason whereof he died. 1 Hawk. P. C. c. 31. § 5.; of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it. 1 Hale's P. C. 432.; and of the parish officers, who shifted a child from parish to parish, till it died for want of care and sustenance. Palm. 545. So also, in general, any one who, assuming to take care of another, refuses them necessary subsistence, or by any other severity, though not of a nature to produce immediate death, as by putting the party in such a situation as may possibly be dangerous to life or health, if death actually and clearly ensues in consequence of it, it is murder. And this mode of killing is of the most aggravated kind, because a long time must unavoidably intervene before the death can happen, and also many opportunities of deliberation and reflection. O. B. 1784, pt. 455. R. v. S. Soff. O. B. 1784, Feb. Sess. 1776.

If a man hath a beast that is used to do mischief, and he, knowing it, suffers it to go abroad, and it kills a man, even this is manslaughter in the owner; but if he had purposely turned it loose, though barely to frighten people and make what is called sport, it is as much murder as if he had incited a bear or dog to worry them. See 1 Hale's P. C. 431.

Hawkins says, that he who wilfully neglects to prevent a mischief, which he may and ought to provide against, is, as some have said, in judgment of the law, the actual cause of the damage which ensues; and, therefore, if a man have an ox or horse, which he knows to be mischievous, by being used to gore or strike at those who came near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted as having himself killed him; and this is agreeable to the Mosaical law. However, it is agreed by all, such a person is guilty of a very gross misdemeanor. 1 Hawk. P. C. c. 31. § 1. Fitz. Corone, 311. Staudf. P. C. 17. a. Crom. 24. b. Dallt. cap. 93. Pult. 123. b. H. P. C. 53. Exodus, c. 2. v. 29.

If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action, for neglect or ignorance. Mirror, c. 4. § 16. But it hath been held, that if he is not a regular physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least. Brit. c. 5. 4 Inst. 251. Yet Sir Matthew Hale very justly questions the law of this determination. 1 Hale's P. C. 430.

In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first. 1 Hawk. P. C. c. 31. § 9.

But if a person hurt by another, die thereof within a year and a day, it is no excuse for the other, that he might have recovered, if he had not neglected to take care of himself. 1 Hawk. P. C. c. 31. § 10. 3 Inst. 53. Kelynge, 26. 1 Keb. 17.
If one dies within a year and a day, through disorderly living, it shall be no excuse, the wound will be judged the principal cause of his death; but if one wounded die after that time, the law will presume he died a natural death. 3 Inst. 53. H. P. C. 55. Kel. 26. If a man receive a wound that is not mortal, but either for want of help, or by neglect, it turns to a fever, &c. which causes the party's death, it is murder; so it is where a man has some disease, which possibly would terminate his life in half a year, and another wounds him, that it hastens his end, &c. But if, by ill applications of the party, or those about him, of unwholesome medicines, the wounded person dies; if this plainly appears, it is not murder, by Hale, Hist. P. C. 428.

By stat. 43 Geo. III. c. 58. (which extends to England and Ireland) if any person shall wilfully, maliciously, and unlawfully shoot at any of his majesty's subjects, or shall present, point, or level any kind of loaded fire-arms at any such subject, and attempt by drawing a trigger, or in any other manner, to discharge the same at or against the person of any such subject, or shall stab or cut any subject with intent in so doing, or by means thereof, to murder, rob, maim, disfigure, or disable such subject, or with intent to obstruct, resist, or prevent the lawful apprehension and detention of the person stabbing, or if any accomplice of such person in any offence, or shall administer or cause to be administered to, or taken, by any subject any deadly poison, or other noxious and destructive substance or thing, with intent such his majesty's subject to murder, or thereby to cause and procure the miscarriage of any woman then being quick with child; all persons so offending, their counsellors, aiders and abettors, knowing of and privy to such offence, shall be felons, and suffer death as in cases of felony, without benefit of clergy. Provided, that if it shall appear on the trial of the parties indicted for such malicious shooting or stabbing, that such acts were committed under such circumstances, as that if death had ensued thereon, the same would not in law have amounted to the crime of murder, the person so indicted shall be deemed not guilty, and shall be acquitted.

As to the place where such killing is within the consecrance of the law, it seems that the killing of one who is both wounded and dies out of the realm, or wounded out of the realm and dies here, cannot be determined at common law, because it cannot be tried by a jury of the neighbourhood where the fact was done. But it is agreed, that the death of one who is both wounded and dies beyond sea, and it is said, by some, that the death of him who dies here of a wound given him there, may be heard and determined before the constable and marshal, according to the civil law, if the king please to appoint a constable. And it seemeth also to be clear, that such a fact being examined by the privy council, may, by force of stat. 33 Hen. VIII. cap. 23. be tried (in relation to the principal of offenders, but not as to the accessories) before commissioners appointed by the king, in any county of England. 1 Hawk. P. C. c. 34. § 11. 3 Inst. 48. 2 Inst. 51. Co. Litt. 75. Stawnd. P. C. 65. a. Bro. Appeal, 153. Cro. Car. 247. 1 And. 195. A commission was issued against Captain Rocke for killing Mr. Ferguson at the Cape of Good Hope.

A murder at sea was anciently cognisable only by the civil law; but now, by force of stats. 27 Hen. VIII. c. 4. 28 Hen. VIII. c
15. It may be tried and determined before the king’s commissioners in any county of England, according to the course of the common law; yet the death of one who is at land, of a wound received at sea, is neither determinable at common law, nor by force of either of these statutes; but it seems, that it may be tried by the constable and marshal, or before the commissioners appointed in pursuance of the aforesaid statute of 33 Hen. VIII. c. 23. Under the statute 43 Geo. III. c. 113. § 6. the jury may find a verdict of manslaughter. 1 Hawk. P. C. c. 31. § 12. 3 Inst. 48, 49. 1 Leon. 270. H. P. C. 54. 3 Inst. 48. See post, stat. 2 Geo. II. c. 21.

The commissioners to be appointed under stats. 27 & 28 Hen. VIII. are the admiral, or his deputy, and three or four more; (among whom two common law judges are constantly appointed, who in effect try all prisoners;) the indictment being first found by a grand jury of 12 men, and afterwards tried by another jury. This is now the only method of trying marine felonies in the court of admiralty. The judge of the admiralty still presiding therein, just as the lord mayor presides at the sessions, in London. 4 Comm. 269. See this Dict. tit. Admiralty.

And it is said by some, that the death of one who died in one county, of a wound given in another, is not indictable at all at common law, because the offence was not complete in either county, and the jury could inquire only of what happened in their own county. But it hath been held by others, that if the corpse were carried into the county where the stroke was given, the whole might be inquired of by a jury of the same county. And it is agreed, that an appeal might be brought in either county, and the fact tried by a jury returned jointly from each. And at this day, by force of stat. 2 & 3 Edw. VI. c. 24. the whole is triable by a jury of the county wherein the death shall happen, on an indictment found, or appeal brought, in the same county. 1 Hawk. P. C. c. 31. § 13. 3 Inst. 48, 49. Bro. Coro. 140, 141. 143. Indictm. 3. Staudf. P. C. 90. c. 6 H. VII. 10. a. Finch’s Law, 411. Staudf. P. C. 182. Bro. Appeal, 3. 80. 83. 85. 149.

Also by force of stat. 26 H. VIII. cap. 6. a murder in Wales may be inquired of in an adjoining English county, but appeals must still be brought in the proper county. 1 Hawk. P. C. Cro. Car. 247. 1 Jones, 255. 1 Lev. 118. Latch. 12. 118. Wils. 320.

By stat. 2 Geo. II. cap. 21. it is enacted, that where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of England, and shall die of the same in England; or where any person shall be feloniously stricken or poisoned within England, and shall die of such stroke or poisoning upon the sea, or out of England, an indictment thereof found by jurors of the county in England, in which such death, stroke or poisoning shall happen, whether it be found before any coroner, upon view of such dead body, or before justices of peace, or other justices who shall have authority to inquire of murders, shall be as effectual, as well against the principals as the accessories, as if such stroke or poisoning and death, and the offence of such accessories, had happened in the same county; and every such offender shall have the like defences, (except challenges for the hundred,) as if such stroke or poisoning and death, and the like offence of such acce-
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saries, had happened in the same county where such indictment shall be found. See tit. Indictment II.

Farther, the person killed must be "a reasonable creature in being, and under the king's peace," at the time of the killing; therefore, to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder, as to kill the most regular born Englishman, except he be an alien enemy in time of war. 3 Inst. 50. 1 Hale's P. C. 433. To kill a child in its mother's womb, was formerly not held murder, but a great misprision. 3 Inst. 50. 1 Hawk. P. C. c. 31. § 16. But see 1 Hale's P. C. 433. In this case, as also in the case of the murder of bastard children by the mother, special provisions are enacted by stat. 43 Geo. III. c. 58. which repeals 21 Jac. I. c. 37. See tit. Bastard II. 2.

It seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards kills it in pursuance of such advice, he is an accessory to the murder. 1 Hawk. P. C. c. 31. § 17. Dyer, 186. 3 Inst. 51.

Lastly, the killing must be committed with malice aforethought, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing, and this malice pre­ pense, malitia praecogitata, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart. Post. 255. Un disposition a faire un male choie; 2 Rolls Rep. 461. and it may be either express, or implied in law. Express is, when one with a sedate, deliberate mind, and formed design, doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention; as lying in wait, antecedent grudges, and concerted schemes, to do him some bodily harm. 1 Hale's P. C. 451. This takes in the case of deliberate dwelling, where both parties meet avowedly, with an intent to murder; thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives, and those of their fellow creatures, without any warrant or authority from any power, either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder on them, and on their seconds also. 1 Hawk. P. C. c. 31. § 21. et seq.

As to the first instance of this kind, it seems agreed, that wherever two persons in cold blood meet and fight, on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased, or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation, or that he meant not to kill, but only to disarm his adversary; for since he deliberately engaged in an act in defiance of the laws, he must at his peril abide the consequences thereof. 1 Hawk. P. C. c. 31. § 21. 1 Bulst. 88, 87. 2 Bulst. 147. Crom. 22. b. 1 Roll. Rep. 360. 3 Bulst. 171. H. P. C. 48.

From hence it clearly follows, that if two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning, and agree to fight in the afternoon, or such a considerable time after, by which, in common intendment, it must be presu-
med that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder. 1 Hawk. P. c. c. 31. § 22. 3 Inst. 51. H. P. C. 48. Kelynge, 56. 1 Lev. 180.

And wherever it appears, from the whole circumstances of the case, that he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon; or perhaps, if he has so much consideration as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c. 1 Hawk. P. C. c. 31. § 23. Kelynge, 56. 1 Sid. 177. 1 Lev. 180.

If A. on a quarrel with B. tells him that he will not strike him, but that he will give B. a pot of ale to strike him, and thereupon B. strike, and A. kills him, he is guilty of murder; for he shall not elude the justice of the law by such pretence to cover his malice. 1 Hawk. P. C. c. 31. § 24. H. P. C. 48.

In like manner, if B. challenge A. and A. refuse to meet him; but, in order to evade the law, tells B. that he shall go the next day to such a town about his business, and accordingly B. meet him the next day in the road to the same town, and assault him, whereupon they fight, and A. kills B., he is, in the opinion of Hawkins, guilty of murder, unless it appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting. 1 Hawk. P. C. c. 31. § 25. Crom. 22. b. H. P. C. 48.

And at this day it seems to be settled, that if a man assaults another with malice prepense, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder in respect of his first intent. Hawk. P. C. c. 31. § 26. Crom. 22. b. Dalt. cap. 93. H. P. C. 47. Kelynge, 58. Mawgridge’s case.

And it hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another, as to make a push at him with a sword, or to strike at him with any other such weapon as manifestly endangers his life before the other’s sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that, by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he showed that he intended not to fight with him, but to kill him, which violent revenge is no more excused by such a slight provocation, than if there had been none at all. 1 Hawk. P. C. c. 31. § 27. Crom. 23. a. b. Dalt. cap. 93. Kelynge, 61. Mawgridge’s case.

But it is said, that if he who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him, he is guilty of manslaughter only; because that, by neglecting the opportunity of killing the other, he was on his guard, and in a condition to defend himself, with like hazard to both, he showed that his intent was not so much to kill, as to combat with the other; in compliance with those common notions of honour, which, prevailing over reason during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice
And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kills the other, he is guilty of manslaughter only, because he did it in the heat of blood. 1 Hawk. P. C. c. 31. § 28. H. P. C. 48. 3 Inst. 51.

And such an indulgence is shown to the frailties of human nature, that where two persons, who have formerly fought on malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the fact. 1 Hawk. P. C. c. 31. § 30. Crom. 23. a. Dalt. cap. 93. H. P. C. 49. 1 Roll. Reph. 360.

But the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his seconds are guilty of murder, whether they fought or not; and some have gone so far as to hold, that the seconds of the persons killed are also equally guilty, in respect of that countenance which they give to their principals in the execution of their purpose, by accompanying them therein, and being ready to bear a part with them: but perhaps the contrary opinion is the more plausible; for it seems too severe a construction to make a man, by such reasoning, the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in his quarrel. 1 Hawk. P. C. c. 31. § 32. H. P. C. 51. Dalt. cap. 93.

Any formed design of doing mischief may be called malice; and therefore not only such killing as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that show the heart to be perversely wicked, is adjudged to be of malice pressence or aforesaid, and consequently murder. 1 Hawk. P. C. c. 31. § 18. Kelynge, 127. Stra. 766.

If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other; he shall be adjudged guilty of murder. 1 Hawk. P. C. c. 29. § 10. H. P. C. 52. 57. Kelynge, 117.

A fortiori, he shall come under the same construction, who, in the pursuance of a deliberate intention to commit a felony, chances to kill a man, as by shooting at tame fowl with an intent to steal them, &c. for such persons are by no means favoured, and they must at their peril take care of the consequence of their actions; and it is a general rule, that wherever a man, intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 Hawk. P. C. c. 29. § 11. 3 Inst. 56. Kelynge, 117. H. P. C. 52.

If any one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is misadventure; for it was not unlawful to shoot at the
wild fowl: but if he had shot at a cock or hen, or any tame fowl of another man's, and the arrow by mischance had killed a man; if his intention was to steal the poultry, (which 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. *Post. 258, 259.*

The rule before 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 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 its intrinsic moment. *Post. 259.*

If upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia.* As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died, these were justly held to be murders; because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. 1 *Hale's P. C.* 454. 473, 474. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shows him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. Lord *Raym. 143.* 1 *Hawk. P. C.* c. 29. § 12.

And it is no excuse that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c. *H. P. C.* 32. 44. 3 *Inst. 57.* 1 *Dalt. cap.* 93. 97. 11 *Hen. VII.* 23. a. *Bro. Coro.* 229.

So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed, as to beat a man, to commit a riot, or to rob a park, and one of them kill a man, it is murder in them all, because of the unlawful act, the *malitia prae cogitata,* or evil intended before hand. 1 *Hawk. P. C.* c. 31. § 46.

Murder occasioned through an express purpose to do some personal injury to him who is slain, is properly said to be of express malice: such as happens in the execution of an unlawful action, principally intended for some other purpose, and *not expressed in its nature to do a personal injury* to him in particular that is killed, is most properly malice implied. *Kel. 129, 130.*

In many cases where no malice is expressed, the law will imply it: as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved. 1 *Hale's P. C.* 455. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies
malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gesture only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. 1 Hawk. P. C. c. 31. § 33. 1 Hale’s P. C. 455, 456. But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise, and not to kill him, the law so far considers the provocation of contumelious behaviour as to judge it only manslaughter, and not murder. Foot. 291. In like manner, if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray; or apprehends a felon, knowing his authority, or the intention with which he interposes; the law will imply malice; and the killer shall be guilty of murder. 1 Hale’s P. C. 457. Foot. 308, &c.

And if one intends to do another felony, and undesignedly kill a man, this is also murder. 1 Hale’s P. C. 465. Thus if one shoots at A. and misses him, but kills B, this is murder; because of the previous felonious intent which the law transfers from one to the other. The same is the case where one lays poison for A. and B. against whom the poisoner had no malicious intent, takes it, and it kills him; this is likewise murder. 1 Hale’s P. C. 466. So also if one gives a woman with child medicine to procure abortion, and it operates so violently as to kill the woman, this is likewise murder. 1 Hale’s P. C. 429.

As to such murder as happens in killing another without any provocation, or but upon a slight one; it is to be observed, that wherever it appears that a man killed another, it shall be intended prima facie that he did it maliciously, unless he can make out the contrary, by showing that he did it on a sudden provocation, &c. 1 Hawk. P. C. c. 31. § 32. Kelynge, 27.

Also it seems to be agreed, that no breach of a man’s word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such assault, whether the person slain did at all fight in his defence or not; for so base and cruel a revenge cannot have too severe a construction. 1 Hawk. P. C. c. 31. § 33. Kelynge, 131. 133. 2 Roll. Rep. 460, 461. Dalh. cap. 93. Cro. Eliz. 779. Noy, 171. 1 Sid. 277. 1 Levinez, 180. Hob, 121. con. 1 Jones, 432. a.

But if a person so provoked had beaten the other only in such a manner, that it might plainly appear that he meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his guard, and then, in fighting with him, had killed him, he had been guilty of manslaughter only. 1 Hawk. P. C. c. 31. § 34. Kelynge, 55. 61. 131.

And of the like offence shall he be adjudged guilty, who seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other.
If two having malice fight, and the servant of one of them, not knowing of the malice, killeth the other, this is murder in the master, and manslaughter in the servant: though if there be a conspiracy to kill a man, but no malice against his servant; if the servant be slain, the malice against the master shall be construed to extend to his servant; and the killing the servant is murder. Dyer, 128.

He cannot be thought guilty of a greater crime than manslaughter, who, finding a man in bed with his wife, or being actually struck by him, or pulled by the nose, or fell upon the forehead, immediately kills him, or who happens to kill another in a contention for the wall; or in the defence of his person from an unlawful arrest; or in the defence of his house from those who, claiming a title to it, attempt forcibly to enter it, and to that purpose shoot at it, &c. or in the defence of his possession of a room in a public house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case, the killing the assailant hath been held by some to be justifiable; but it is certain that it can amount to no more than manslaughter. 1 Hawk. P. C. c. 31. § 36. H. P. C. 57. 3 Inst. 57. Kelynge, 51. 137. Crom. 27. a.

Nor was he judged criminal in a higher degree, who, seeing his son's nose bloody, and being told by him that he had been beaten by such a boy, ran three quarters of mile, and having found the boy, beat him with a small cudgel, whereof he afterwards died. 1 Hawk. P. C. c. 31. § 48. Cro. Jac. 296. 12 Co. 87.

Nor was he thought more criminal who, duped and encouraged by a concourse of people, threw a pick-pocket into a pond adjoining to the road, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pick-pocket was drowned; for although this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, where certain provocations are given. O. B. 85, No. 751. So also where three Scotch soldiers were drinking together in a public house, one of them struck some strangers that were drinking in another box, with a small rattan; they having used several opprobrious epithets, reviling the character of the Scotch nation: an altercation ensued, and one of the strangers laid hold of the soldier who had stricken, and threw him against the settle. The altercation increased, and when the soldiers had paid the reckoning, the strangers again shoved him from the room into the passage; upon this the soldier exclaimed, that "he did not mind killing an Englishman more than eating a mess of crowdy:" the stranger, assisted by another person, then violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged manslaughter. 5 Burr. 2799. But in every 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. Post. 278. 296. 1 Hale, 486. 1 Vent. 158. Raym. 212. Leach's Hawk. P. C. 1. c. 31. § 37. in n.

When one executes his revenge, upon a sudden provocation, in
such a cruel manner, with a dangerous weapon, as shows a malicious intention to do mischief; and death ensues, it is express malice and murder from the nature of the fact. Kle. 55. 61. 65. 130.

A man chided his servant, and upon some cross answer given, he, having a hot iron in his hand, ran it into the servant's belly, of which he died, this was adjudged murder. Kle. 64.

If a person is trespassing upon another, by breaking his hedges, &c. and the owner, upon sight thereof, take up a hedge-stake, and give him a stroke on the head, whereof he dies, this is murder, because it is a violent act beyond the proportion of the provocation. H. P. C. And where a boy was upon a tree in a park cutting of wood, and the keeper bids him come down, which he did; and then the keeper struck him several blows with a cudgel and afterwards, with a rope tied him to his horse's tail, and the horse ran away with him and killed him; this was held to be murder out of malice, the boy having come down at the keeper's command. Cro. Car. 139. H. P. C.

As to such murder as happens in killing one whom the person killing intended to hurt in a less degree; it is to be observed, that wherever a person in cool blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. 1 Hawk. P. C. c. 31. § 38. Kelynge, 119. Maswridge's case, H. P. C. 49—52.

Also it seems, that he who, upon a sudden provocation, executeth his revenge in such a cruel manner, as shows a cool and deliberate intent to do mischief, is guilty of murder, if death ensue; as where the keeper of a park, finding a boy stealing wood, tied him to a horse's tail, and beat him, whereupon the horse ran away with him and killed him. 1 Hawk. P. C. c. 31. § 39. Cro. Car. 131. 1 Jones, 198. Palm. 545. H. P. C. 49.

As to the cases where such killing shall be adjudged murder, which happen in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain, they are as follow: and first, such killing as happens in the execution of an unlawful action, whereof the principal intention was to commit another felony; it seems agreed, that wherever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as where a person shooting at tame fowl, with an intent to steal them, accidentally kills a man; or where one sets upon a man to rob him, and kills him in making resistance; or where a person shooting at, or fighting with, one man, with a design to murder him, misses him and kills another. 1 Hawk. P. C. c. 31. § 40, 41. Kelynge, 117. H. P. C. 46. 50. Dalt. cap. 93. Moore, 87.

And not only in such cases, where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also where it any way occasionally causes such a misfortune, it makes him guilty of murder; and such was the case of the husband who gave a poisoned apple to his wife, who eat not enough of it to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child, who died thereof; such also was the case of the wife who mixed ratsbane in a potion
sent by an apothecary, to her husband, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. Neither is it material in this case, that the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for insomuch as such a murderous intention, which of itself perhaps, in strictness, might justly be made punishable with death, proves now, in the event, the cause of the king’s losing a subject, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power. 1 Hawk. P. C. c. 31. § 42. Plow. Com. 474. 9 Co. 91.

But if one happened to be poisoned by rausbane laid in order to destroy vermin, the person by whom he is so killed is guilty of homicide per infortunium only, because his intentions were wholly innocent. 1 Hawk. P. C. c. 31. § 43.

Also if a third person accidentally happen to be killed by one engaged in a combat with another upon a sudden quarrel, it seems that he who kills him is guilty of manslaughter only; but it hath been adjudged, that if a justice of peace, constable, or watchman, or even a private person, be killed in the endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; and that he cannot excuse himself by alleging that what he did was in a sudden affray in the heat of blood, and through the violence of passion; for he who carries his resentment so high as not only to execute his revenge against those who have affronted him, but even against such as have no otherwise offended him but by doing their duty, and endeavouring to restrain him from breaking through his, shows such an obstinate contempt of the law, that he is no more to be favoured than if he had acted in cool blood. 1 Hawk. P. C. c. 31. § 44. H. P. C. 45. 50. 3 Inst. 52. Dalt. caf. 93. Savil, 67. Kelynge, 66. 22 Ass. 71. 4 Co. 40. b. 9 Co. 68. Crom. 25. a. b.

Yet it hath been resolved, that if the third person slain in such a sudden affray, do not give notice for what purpose he, comes, by commanding the parties in the king’s name to keep the peace, or otherwise manifestly showing his intention to be not to take part in the quarrel, but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary. 1 Hawk. P. C. c. 31. § 45. Kelynge, 66. If the officer be within his proper district, and known, or but generally acknowledged to have the office he assumeth, the law will presume that the party killing had due notice of his intent, especially if it be in the day-time. Fost. 135. 311.

As to such killing as happens in the execution of an unlawful action, where the principal design is to commit a bare breach of the peace, not intended against the person of him who happens to be slain; it seems clear, that where divers persons resolve generally to resist all opposers in the commission of any such breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers of people, hunting in a park &c. and in so doing happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions, who wilfully engage in such bold disturbances of the public peace, in open

The fact however must appear to have been committed strictly in prosecution of the purpose for which the party was assembled. Prim. P. L. 234. Therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, finding an opportunity, kills him, the rest are not concerned in the guilt of that act; Kel. 112. because it hath no connection with the crime in contemplation. Prim. P. L. 235. So where two men were beating another man in the street, a stranger made some observations upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife. Both the men were indicted as principals in the murder; yet, although both were doing an unlawful act in beating the man, as the death of the stranger did not ensue upon that act, and it appearing that only one of them intended any injury to the person killed, the judges were of opinion that he could not be guilty either as principal or accessory; and upon the case of R. v. Thompson, Kel. 66, 77. he was acquitted. 8 Mod. 629. Yet see 12 Mod. 236. Leach's Hawk. P. C. i. e. 31. § 46. in n.

Where divers rioters, having forcible possession of a house, afterwards killed the person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to drive the house, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury; perhaps for this reason, because the person slain was so much in the fault himself. 1 Hawk. P. C. c. 31. § 47. Crom. 28. b. H. P. C. 56.

But if in such, or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable or watchman, or even a private person, be slain in endeavouring to keep the peace, and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy as to go on in it to the hazard of the lives of those who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems to be in this respect equal in criminal, as if his intention had been to commit a felony. 1 Hawk. P. C. c. 31. § 48. H. P. C. 45. Dalt. cap. 93. 3 Inst. 52. Kel. 66. 22 Ass. 71. & Co. 40. b. 9 Co. 68. Crom. 25. See supra.

If one attack another to rob him, and by the resistance of the party kills him, this is murder. 3 Inst. 52. Dalt. 344. A person who, stands by and encourages or commands another to murder a man; or if he come with others on purpose to kill him, and stand by while the other persons commit the fact; it will be murder in them all. Plowd. 98. 11 Rep. 5. And if two or more persons come together to do an unlawful act, as to beat a man, rob a park, &c. and one of them kills a person, this is murder in all present aiding or assisting, or that were ready to aid and assist, all will be said to intend the murder. 3 Inst. 56. Dalt. 347. H. P. C. 31. And such persons will be judged to be present who are in the same house, though in another room, or in the same park, although half
Several persons having conspired to enter the king's park, and to hunt and carry away deer, with design of killing any one that should oppose them; though the keeper's servant began the assault, and required them first to stand, whereupon they fled, and one of the keeper's men discharged a piece at them, and they continued their flight until he laid violent hands upon one of the offenders, and then, and not before, they killed one of the keeper's servants, this was held to be murder; as they were doing an unlawful act, the law implies malice, and they ought not to have fled, but to have surrendered themselves. Roll. Ref. 20.

As to such killing, as happens in the execution of an unlawful action, the principal motive whereof was to assist a third person; it seems clear, that if a master, maliciously intending to kill another, takes his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him, and the servants, seeing their master engaged, take part with him, and kill the other, they are guilty of manslaughter only, but the master of murder. Pl. Com. 100, 101. a. Crom. 23. Dalt. cap. 93. H. P. C. 51, 52. Hawk. P. C. c. 31. § 49. Though if the master have malice, and he tells his servants of it, and that his intention is to kill the party, and they go with the master, if they kill another, it is murder both in master and servant. Dyer, 26. 9 Ref. 66. Plowd. 100.

And therefore it follows, a fortiori, that if a man's servant or friend, or even a stranger, coming suddenly, see him fighting with another and side with him, and kill the other; or seeing his sword broken lend him another, wherewith he kills the other, he is guilty of manslaughter only. 1 Hawk. P. C. c. 31. § 50. Crom. 26. b. H. P. C. 57. Dalt. cap. 94. 1 Roll. Ref. 407, 408. 3 Bulst. 266. H. P. C. 52.

Yet in this very case, if the person killed were a bailiff, or other officer of justice resisted by the master, &c. in due execution of his duty, such friend or servant, &c. are guilty of murder, whether they knew the person slain were an officer or not. Kyngge, 67. 86, 87. But perhaps it may be objected, that in this last case there seems to be no more malice than in the former; and such third person being wholly ignorant that the party killed was an officer, seems to be no more in fault than if he had been a private person. To this it may be answered, that all fighting is highly unlawful, and that he who on a sudden seeing persons engaged in it, is so far from endeavouring to part them, as every good subject ought, that he takes part with one side, and fights in the quarrel, without knowing the cause of it, shows a high contempt of the laws and a readiness to break through them on a small occasion, and must at his peril take heed what he does; and consequently might perhaps in strict justice be adjudged in the foregoing cases to act with malice, which doth not always signify a particular ill-will against the person killed, as appears by many of the above-mentioned cases; and though such persons be favoured in respect of the suddenness of the occasion where both the quarrel and the persons are private, yet he must not expect such indulgence, where the fight, in which he so rashly engages, was begun in opposition to the justice of the nation, and a person happens to be killed thereby who engaged
in the maintenance thereof, and on that account is under its more particular care; and it may be justly challenged, that his opposers be made examples to deter others from joining in such unwarrantable quarrels. 1 Sid. 160. Noy, 50. Plow. Com. 100. See 1 Hawk. P. C. c. 31. § 51—53.

But if a man seeing another arrested, and restrained from his liberty, under colour of a press warrant or civil process, &c. by those who in truth have no such authority, happen to kill such trespassers in rescuing the person oppressed, he shall be adjudged guilty of manslaughter only, notwithstanding the injured person submitted to them, and endeavoured not to rescue himself; and the person who rescued him did not know that he was illegally arrested; for since in the event it appears, that the persons slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril. Kelynge, 66. 157. Crom. 27. a. Dent's case. 1 Hawk. P. C. c. 31. § 54. But the principles upon which this case was determined, are very elegantly and warmly controverted by M. Justice Foster, p. 315—318.

There were two men in an inner chamber quarrelling, and together by the ears; a brothel of one of them standing at the door, that could not get in, cried to his brother to make him sure, and presently after he gave the other a mortal wound; this was held manslaughter in him that stood at the door. Shef. Abr. 493.

As to such killing as happens in the execution of an unlawful action, whereof the direct design was to escape from an arrest, it seems to be agreed that whoever kills a sheriff, or any of his officers, in the lawful execution of civil process, as on arresting a person upon a capias, &c. is guilty of murder. 1 Hawk. P. C. c. 31. § 55. Dalt. cap. 93. H. P. C. 45. Crom. 24. a.

Neither is it any excuse to such a person, that the process was erroneous, (for it is not void by being so,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court; (which is not necessary when prevented by the party's resistance;) or that the officer did not show his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one. 9 Co. 66. 68. Cro. Jac. 280. 486. 6 Co. 68. b. 69. a. 1 Hawk. P. C. c. 31. § 56.

Yet the killing of an officer in some cases will be manslaughter only; as, where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests J. S. a baronet, who never was knighted, by force of a warrant to arrest J. S. knight. 1 Hawk. P. C. c. 31. § 57. Cro. Car. 372. 1 Jones, 346. 12 Co. 49. So where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arrest a man; or perhaps if he arrest one on a Sunday since stat. 29 Car. II. cap. 7, by which all such arrests are made unlawful. H. P. C. 46. 1 Hawk. P. C. c. 31. § 58.

If a bailiff is killed in executing a lawful warrant, &c. it is murder; nor is it any excuse to the person, that the process was erroneous; or that the arrest was in the night; that the officer did not tell him
for what cause he arrested him; or that he did not show his warrant, &c. being a bailiff commonly known. 9 Rep. 68, 69. Cro. Jac. 280. 486. But if a bailiff who is not executing his office is killed, it is not murder; for he ought to be duly executing his office, by serving the process of the law, wherein he is assisted cum postestate regis et legis. Cro. Car. 537. 2 Litt. Abr. 212. Therefore, where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests a wrong person, or J. S. a baronet, by force of a warrant to arrest J. S. knight; or if a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door, or window, to arrest a man; or perhaps if he arrest one on a Sunday; since the stat. 29 Car. II. c. 7. by which all such arrests are made unlawful, and he is slain; malice shall not be implied to make it murder, but it shall be manslaughter only. H. P. C. 46. Cro. Car. 372. 12 Rep. 49. 1 Hawk. c. 31. § 58. If bailiff’s come to a house to arrest a person, and the house being locked they attempt to break in, whereupon the son of the person intended to be arrested, shoots and kills one of them, it is not murder. Jones, 429. See Hunter’s Rep. 135. 138. 270. 308. 312. 318. 321.

A person was arrested, and another not knowing the cause of the struggle, but seeing swords drawn, and to prevent mischief, came and defended the party arrested, and in the scuffle the bailiff was killed; it was resolved to be no murder in the person doing it, but that all that were present and assisting, knowing of the arrest, were principal murderers. Kel. 86. Though it has been held in such a case, that the person offending is guilty of murder, whether he knew that the person slain were an officer or not; for all fighting is unlawful, and he who, seeing persons engaged in it, takes part with one side, and fights in the quarrel without knowing the cause of it, especially where the fight is begun in opposition to the justice of the nation, shows a readiness to break through the laws on a small occasion, and must at his peril take heed what he doth. 1 Sid. 160. Noy, 50. See ante.

As to such killing as happens in the execution of an unlawful action, whereof the principal purpose was to usurp an illegal authority; it seems clear, that if persons take upon them to put others to death, either by virtue of a new commission wholly unknown to our laws, or by virtue of an unknown jurisdiction, which clearly extends not to cases of this nature; as if the court of common pleas cause a man to be executed for treason or felony; or the court-martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder. 1 Hawk. P. C. c. 31. § 59. H. P. C. 46.

But where persons act by virtue of a commission, which, if it were strictly regular, would undoubtedly give them full authority, but which happens to be defective only in some point of form, it seems that they are no way criminal. 1 Hawk. P. C. c. 31. § 60.

As to such killing as happens in the execution of an unlawful action, where no mischief was intended at all, it is said, that if a person happen to occasion the death of another, in doing any idle wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick, among a multitude of people, by which he means no more than to
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divert himself by putting them in a fright, he is guilty of murder. 1 Hawk. 87.

It has been already mentioned to have been anciently holden, that if a person not duly authorized to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony: but inasmuch as the books wherein this opinion is holden were written before the statute of 23 Hen. VIII. c. 1, which first excluded such felonious killing, as may be called wilful murder or malice aforehand, from the benefit of clergy, it may be well questioned, whether such killing shall be said to be of malice aforehand, within the intent of that statute; however, it is certainly highly rash and presumptuous for unskilful persons to undertake matters of this nature; and indeed the law cannot be well too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those who have to do with them.

but surely the charitable endeavours of those gentlemen who study to qualify themselves to give advice of this kind, in order to assist their poor neighbours, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure. 1 Hawk. P. C. c. 31. § 62. Stain. P. C. 16. b. Pult. 32. b. Cron. 27. 43 Edw. III. 33. b. Fitz. Coron. 163. See Dalt. cap. 93.

It were endless to go through all the cases of homicide, which have been adjudged, either expressly or impliedly, malicious; the above, therefore, may suffice as a pretty ample specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where, 1. Justified by the command or permission of the law; 2. Excused on the account of accident or self-preservation; or 3. Alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appeareth upon evidence. Post. 255.

The punishment of murder, and that of manslaughter were formerly one and the same; both having the benefit of clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. 1 Hale's P. C. 450. But by several statutes the benefit of clergy is taken away from murderers through malice aforehand, their abettors, procurers, and counsellors. See stats. 23 Hen. VIII. c. 12. 1 Edw. VI. c. 12. 4 & 5 P. & M. c. 4. And tit. Clergy, Benefit of.

The principal in murder is therefore now ousted of clergy in all cases, and the accessory before is also ousted of clergy in all cases, but the accessory after is in no case ousted of clergy. 2 Hale's H. 344.
In atrocious cases, it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place where the fact was committed; but this was no part of the legal judgment; and the like is still sometimes practised in the case of notorious thieves. But now in England, it is enacted by stat. 25 Geo. II. c. 37, that the judge before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall in passing sentence direct him to be executed on the next day but one, (unless the same shall be Sunday, and then on the Monday following,) and that his body be delivered to the surgeons to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but if no wise to be buried without dissection. See Post. 107. And during the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained only with bread and water. But a power is allowed to the judge upon good and sufficient cause to respite the execution, and relax the other restraints of the act. See tit. Execution of Criminals.

At a meeting of the judges to consider of this act, there was some doubt whether hanging in chains might be ever made part of the sentence; but on debate it was agreed by nine judges, that in all cases within the act, the judgment for dissecting and anatomizing only should be part of the sentence, and if it should be thought advisable, the judge might afterwards direct the hanging in chains by special order to the sheriff, pursuant to the power given by the act. Post. 107.

4. By the Roman law, parricide, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. But the English laws treat it no otherwise than as simple murder, unless the child was also the servant of his parent; probably under the idea of the impossibility of committing so enormous a crime.

But though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offence, no less than a species of treason, called parva proditio, or petit treason; which is, however, nothing else but an aggravated degree of murder; although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason. And thus, in the ancient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and sovereign.

Petit treason, according to the stat. 25 Edw. III. c. 2, may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. A servant who kills his master whom he has left upon a grudge conceived against him during his service, is guilty of petit treason, for the traitorous intention was hatched while the relation subsisted between them, and this is only an execution of that intention. 1 Hawk. P. C. 89. 1 Hale's P. C. 380. So if a wife be divorced à mensa et thoro, still the vinculum matrimonii subsists; and if she kills such divorced husband, she is a traitress. 1 Hale's P. C. 381.
A wife divorced causa adultery vel saevitia, is still within this law, because the bond of matrimony is not thereby dissolved, and she may again lawfully cohabit with her husband. But a divorce causa consangunitatis vel precontractus, entirely dissolves the nuptial tie, and annihilates the very character of wife. Therefore a wife de facto only, and not de jure, cannot commit this crime, for she has no lawful lord to whom she owes subjection and obedience. Neither can a husband be guilty of this crime by killing his wife de jure, for there is no reciprocity of obedience and subjection. Leach's Hawk. P. C. i. c. 32. § 7.

A clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop; and therefore to kill any of these is petit treason. 1 Hale's P. C. 381. As to the rest, whatever has been said, or remains to be observed, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder, in its most odious degree; except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William III. Post. 337. But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder. Post. 106. 1 Hale's P. C. 378. 2 Hale's P. C. 184. and in such case it should seem that two witnesses are not necessary, as in case of petit treason they are. Which crime is also distinguished from murder in its punishment. 4 Comm. c. 14.

An appeal of death will lie, and autrefois acquit or attaint in murder is a good bar, in petit treason; and the prisoner is entitled to a peremptory challenge of thirty-five. Fast. 327. Two witnesses, it is also positively stated by Foster, are required both on the indictment and at the trial. Post. 337. See stat. 1 Edw. VI. c. 12. And the stat. 5 & 6 Edw. VI. 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. Depositions therefore taken before the coroner, or informations taken by a justice of the peace, are not evidence whereon to ground a conviction of petty treason, if the party be living, though unable to travel, or kept out of the way by the prisoner, or his procurement. Post. 337. cites stat. 1 & 2 P. & M. c. 13. 1 Hale, 305. 2 Hale, 284.

The punishment of petit treason, in a man, is to be drawn and hanged, and in a woman was formerly to be drawn and burned, but which latter sentence is now changed to hanging by stat. 30 Geo. III. c. 48. See tit. Judgment in Criminal Cases. Persons guilty of
petit treason were first debarred the benefit of clergy by stat. 12 Hen. VII. c. 7, which has been since extended to their aids, abettors and counsellors, by stat. 23 Hen. VIII. c. 4 & 5 P. & M. c. 4. See tit. Clergy, Benefit of; and further, tit. Petit Treason.


HOMINE CAPTO IN WITHERNAMUM. A writ to take him that hath taken any bondman or woman, and led him or her out of the country, so that he or she cannot be replevied according to law. Reg. Orig. fol. 79. See this Dict. tit. Withernam.

HOMINE ELIGENDO AD CUSTODIENDAM PECIAM SIGILLI PRO MERCATORIBUS EDITI. A writ directed to a corporation, for the choice of a new person to keep one part of the seal appointed for statutes merchant, when a former is dead, according to the statute of Acton Burnet. Reg. Orig. 178.


This writ lies where a person is in prison, (not by special commandment of the king, or his judges, or for any crime or cause irreplevisable,) directed to the sheriff to cause him to be replevied; in the same manner that chattels taken in distress may be replevied; and if the person be conveyed out of the sheriff's jurisdiction, he may return, that the defendant hath absconded the plaintiff's body, so that he cannot deliver him; then the plaintiff shall have a capias in withernam to take the defendant's body, and keep him without bail or mainprise till he produces the party. 3 Comm. 129, c. 8. And if the sheriff return non est inventus in that writ against the body, the plaintiff shall have a capias against the defendant's goods, &c. Fitz. N. B. 66. New Nat. Brev. 151, 152.

Where one takes away secretly, or keeps in his custody, another man against his will, upon oath made thereof, and a petition to the lord chancellor, he will grant a writ of replegiando, with an alias and pluries, upon which the sheriff returns an elongatus; and thereupon issues out a capias in withernam: and when the party is taken, the sheriff cannot take bail for him; but the court where the writ is returnable may, if they think fit, grant a habeas corpus to the sheriff to bring him into court and bail him. 2 Ball. 29.

In a homine replegiando it hath been adjudged, that it doth not differ from a common replevion, on which the sheriff must return a deliberari facti, or an excuse why he doth not: that where he cannot make deliverance if he return an elongatus, the defendant is not concluded by that return to plead non cepit; and after the return of an elongatus, and a capias in withernam, if the defendant pleads this plea, he shall be bailed, for the withernam is no execution; and after a defendant is bailed upon the capias in withernam, there may be a new withernam against him. And It was held, that in a homine replegiando after elongatus returned, if the defendant comes in gratia, and calls for a declaration, and pleads non cepit, he shall not be obliged to give bail, but if he come in upon the return of the capias, he must give bail, and shall not be admitted to it till he call for a declaration, and plead non cepit. 2 Ball. 381.
The sheriff returned an elongavit in a homine repiegando, and then a captius in withernam went forth; afterwards the defendant, having entered an appearance, moved for a supersedeas to the withernam, and offered to plead non captius; which was opposed, unless he would give bail to deliver the person, in case the issue was found against him: though it was ruled, that if any property had been pleaded in the party, then the defendant ought to give bail to deliver him; but he says he hath not the person, and therefore non captius is a proper plea, and he shall put in bail to appear de die in diem. In this case, the defendant shall not be compelled to gage deliverance; and a supersedeas was granted to the withernam. See 4 Mod. 183.

A homine repiegando cannot be brought either by the wife herself, or by her prochein any against her husband; and the nature and the proceedings in the writ show it to be so. Ch. Prec. 492.

This writ is now seldom used to deliver a person out of custody, being superseded by the more beneficial effects of the writ of habeas corpus. See that title.

HOMINES, A term applied to a sort of feudatory tenants, who claimed a privilege of having their causes and persons tried only in the court of their lord; and when Gérard de Canvil, anno 5 Rich. I. was charged with treason and other misdemeanors, he pleaded that he was homo comitis Johannis, &c. and would stand to the law and justice of his court. Paroch. Antiq. 152.

HOMIPLANUM, Is used in the law of Hen. I. cap. 80. for the maiming a man. Si quis in domo vel curia regis fecerit homicidium vel. homiplagium.

HOMO. This Latin word includes both man and woman, in a large or general understanding. 2 Inst. 45.

HOMOLOGATION, Is when a man either expressly or impliedly ratifies a deed that formerly was null or invalid. Scotch Dict.

Implied homologation is admitted only from some act which clearly and expressly implies a knowledge and approbation of the deed. The effect of it on the person homologating, is to give the deed the same validity against him and his heirs, as if it had been a perfectly legal deed from the first; but against third parties who do not represent the person homologating, the deed is liable to all its original objections. Bell's Scotch Law Dict.

HOMSTALE, A homestall, or mansion-house. As in a charter granted about the 5 Edw. I. Cowell.

HOND-HABEND, See Hand-Habend. It also signifies the right which the lord hath of determining the offence in his court.

HONEY. All vessels of honey are to be marked with the name of the owner, and be of a certain content, under penalties; and if any honey sold, be corrupted with any deceitful mixture, the seller shall forfeit the honey, &c. Stat. 23 Eliz. c. 8.

HONOUR, Is, besides the general signification, used especially for the more noble sort of seigniories, on which other inferior lordships or manors depend, by performance of some customs or services to those who are lords of them; (though anciently honour and baronia signified the same thing.) See Sleiman, in v. Honor. The manner of creating these honours by act of parliament, may in part be collected out of the statute of 33 Hen. VIII. c. 37, 38.
In the early times of our legal constitution, the king’s greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves; which do now therefore continue to be holden under a superior lord, who is called in such cases the lord paramount over all these manors: and his seigniory is frequently termed an honour, not a manor; especially if it hath belonged to an ancient feudal baron, or hath at any time been in the hands of the crown. 2 Comm. 91. c. 6. See tit. Tenures.

An honour ought to consist of lands, liberties, and franchises. 4 Blunt. 197. 2 Roll. 72. l. 48. And it is the most noble seigniory. Co. Litt. 108. a. One or more manors may be parcel of an honour. 2 Roll. 72. l. 43. So a forest may be appendant to it. 1 Roll. 73. l. 3.

An honour originally shall be created by the king. Co. Litt. 108. a. Every honour must be holden of the king. R. 1 Bul. 195. And if it be assigned, or granted over to another, it shall not be holden of a subject. For it may be granted by the king to a subject. A man may claim an honour by grant, or by prescription. But the king at this day cannot make an honour by grant, without an act of parliament. R. 1 Bul. 195, 196. Co. Litt. 108. a. See Cowell, tit. Honour.

The following is a list of honours within the realm, viz. Amphill, (by stat. 33 Hen. VIII. c. 37.) Aquila, (formerly Pevensey,) Arundel, (See post.) Abergavenny, Bolowe, Berkhamstead, Beaulieu, Bardard’s Castle, Baulingsbrooke, Barstable, Bononia, Brecknock, Brember, Bedford, Clare, Crewe, Clun, Christchurch, Cockermouth, Cormayle, Candicut, Carisbrook, Clifford Castle, Chester, Carmarthen and Cardigan, Donnington Castle, (by stat. 37 Hen. VIII. c. 18.) Dudley, and Dover Castle, Ely, and Egremont.


The Honour of Montgomery, Mowbray, Middleham, and Maidstone, Nottingham, Newclun or Newen, Oakhampton, St. Osith, (by stat. 37 Hen. VIII. c. 18.) Oxford.


The king granted to a subject a great manor, called an honour, and passed it by the name of an honour, and well. Jenk. 277. pl. 99.

It is illegal to purchase honour (as a dukedom) for money. Vern. 5. See tit. Peers.

The Earl of Arundel was the only peer who held his earldom by prescription. See tit. Peers.

HONOUR-COURTS, Are courts held within the honours, or manors last noticed, mentioned in the stat. 33 Hen. VIII. cap. 37.
There is also a court of honour of the earl marshal of England, &c. which determines disputes concerning precedence and points of honour. 2 Hawk. P. C. This court of honour, which is also exercised to do justice to heralds, is a court by prescription, and has a prison belonging to it, called the White Lyon, in Southwark. 2 Nils. 935. See tit. Court of Chivalry.

HONOURARY (or HONORARY) FEUDS. Are titles of nobility, descendible to the eldest son in exclusion of all the rest. See tit. Tenures.

HONOURARY SERVICES, Are those that are incident to the tenure of grand serjeancy, and commonly annexed to some honour. Stat. 12 Car. II. 29.


This should have been written hondfangenethef, and signifies a thief, taken with hondhabend, i.e. having the thing stolen in his hand. Cowell. See Backberind.

HOPCON, Signifies a valley, in Domesday Book; so do hofte, havgh and hovgh. Cowell, edit. 1727.

HOPS AND HOP-BINDS. Penalty on importing or using corrupt hops. Stat. 1 Jac. I. c. 18. No bitter to be used in brewing but hops. Stat. 9 Ann. c. 12. § 24. No hops to be imported into Ireland from other parts but Great Britain. Stat. 5 Geo. II. c. 9. Landing foreign hops before duty paid, hops to be burnt, and ship forfeited. Stat. 7 Geo. II. c. 19. Penalty on sophisticating hops. 7 Geo. II. c. 19. § 2. Cutting hop-binds. 10 Geo. II. c. 32. § 4. By stat. 6 Geo. II. c. 37. § 6. unlawfully and maliciously cutting hop-binds is made felony without benefit of clergy. The duty upon hops is a branch of the excise, and regulated by many statutes made for the purpose. See stats. 39 and 40. § 3. c. 81. and 48. § 3. c. 134. for preventing frauds in the trade of hops: these acts regulate the mode of packing, bagging, and weighing of hops.

HORA AURORÆ, The morning bell, or what we now call the four o'clock bell, was anciently called hora aurora; as our eight o'clock bell, or the bell in the evening, was called ignitcum or covexu. Cowell.

HORDERA, from the Sax. hord, thesaurus.] A treasurer: and hence we have the hord or hoard, as used for treasuring or laying up a thing. Leg. Athelstan, cap. 2.

HORDERIUM, A hoard, a treasury, or repository. L. Cansih, c. 104.

HORDEUM PALMABLE, Beer-barley, which in Norfolk is called sprat-barley, and battledore-barley; and in the marches of Wales eymridge, it being broader in the ear, and more like a hand than the common barley, which in old deeds is called hordeum quadragesimale. Cowell.

HORNE-BEAMF. POLLENGERS, Trees so called, that have been usually lopped, and are about twenty years' growth, and therefore not tithable. Plowden, fol. 407. Soby's case.

HORNEGELD, from the Saxon word horn, cornu, and geld, solutio.] A tax within a forest, to be paid for horned beasts. Cramp. Jurisd. 197. And to be free thereof is a privilege granted,
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ed by the king unto such as he thinketh good. Cowell, edit. 1727.

HORN WITH HORN, or HORN UNDER HORN. The
promiscuous feeding of bulls and cows, or all horned beasts, that are
allowed to run together upon the same common. Shelfman.
To which may be added, that the commoning of cattle horn with
horn, was properly when the inhabitants of several parishes let
their common herds run upon the same open spacious common,
that lay within the bounds of several parishes, and, therefore, that
there might be no dispute upon the right of tithes, the bishop
ordains, that the cows should pay all profit to the minister of the
parish where the owner lived, &c. Cowell.

HORNAGIUM, Hornegeld, see that title.

HORNERS. No stranger was to buy any English horns gathered
or growing in London, or within twenty-four miles thereof, by
the stat. 4 Edw. IV. c. 8. And none may sell English horns unwor-
to any stranger, or send them beyond sea, on pain of forfeiting double

HORING, Letters of—Warrants for charging persons in
Scotland to pay or perform certain debts or duties; probably so
termed from being originally proclaimed by the horn or trumpet.

HORS DE SON FEE, Fr. i. c. out of his fee.] An exception
to avoid an action brought for rent or services, &c. issuing out of
land, by him that pretends to be the lord; for if the defendant can
prove that the land is without the compass of his fee, the action falls.
Broke. In an avowyry, a stranger may plead generally hors de son fee;
and so may tenant for years; and such stranger to the
avowyry, being made a party, is at liberty to plead any matter in abatement of
it. 9 Rep. 30. 2 Mod. 104. A tenant in fee-simple ought either
to disclaim, or plead hors de son fee. 1 Danv. Abr. 655. Vide 9
13. Co. Litt. 1. b. 2 Mod. 103, 104. & 14 Vin. Abr. tit. Hors de
son fee. See tit. Pleading.

HORSE BREAD, Innkeepers shall not make horsebread. Stats. 13 Rich. II. stat. 1. c. 8. 4 Hen. IV. c. 25. Permitted
to bake horse bread. Stat. 32 Hen. VIII. c. 41.

HORSES,

Were not to be conveyed out of the realm, without the king’s
license, &c. on pain of forfeiture, by an ancient statute, 11 Hen. VII.
c. 15. Persons having lands of inheritance in parks, &c. were or-
dered to keep two mares apt to bear foals thirteen hands high,
for the increase of the breed of horses, on pain of 40s. for every
month they are wanting; and not suffer them to be leaped by
stoned horses under fourteen hands, on a certain penalty by stat.
27 Hen. VIII. c. 6. And for the preservation of a strong breed of
horses, stone horses above two years old are directed to be
fifteen hands high, or they shall not be put into forests or com-
mons, where mares are kept, upon pain of forfeiture; and scab-
bed or infected horses shall not be put into common fields, under
the penalty of 10s. leviable by the lord of the leet. Stat. 32 Hen. VIII. c. 13. still in force.

Stealing of any horse, gelding, or mare, is felony without benefit of clergy; but accessories to this offence are not excluded clergy. Stat. 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. The first made stealing horses, geldings or mares felony; a doubt was entertained whether this extended to the stealing one horse, &c. on which the latter act was passed. And if any horse that is stolen be not sold according to the statute 2 & 3 P. & M. c. 7. the owner may take the horse again wherever he finds him, or have action of detinue, &c. To prevent horses being stolen and sold in private places, this stat. 2 & 3 P. & M. c. 7. provides, that owners of fairs and markets shall appoint toll-takers or bookkeepers, who are to enter the names of buyers and sellers of horses, &c. And to alter the property, the horses must be rid or stand in the open fair one hour; and all the parties to the contract must be present with the horse. And by stat. 31 Eliz. cap. 12. sellers of horses are to procure vouchers of the sale to them; and the names of the buyer, seller and voucher, and price of the horse, are to be entered in the toll-taker’s book, and a note thereof delivered to the buyer; and if any person shall sell a horse without being known to the book-keeper, or bringing a voucher; or if any one shall vouch without knowing the seller; or the book-keeper shall make an entry without knowing either, in either of these cases the sale is void, and a forfeiture is incurred of 5l. and the said statute provides that a horse stolen, though sold according to the direction of the act, may be redeemed and taken by the owner within six months, repaying the buyer what he shall swear he gave for the same. 2 Comm. 450.

By stat. 22 & 23 Car. II. c. 7. any person maliciously killing or destroying any horses in the night shall be guilty of felony, punishable by transportation for seven years. Maliciously hurting or wounding horses in the night, to forfeit treble damages to the owner.

By various acts duties are imposed in Great Britain and Ireland upon horses kept for drawing carriages, or for riding, or letting out to hire, for race-horses, &c.

Horse-stealing having got to a great pitch, and many of those useful animals having been stolen, merely for the purpose of selling them as dog’s meat, and for their hides, the following statute was made to put a stop to this iniquitous traffic.

By stat. 26 Geo. III. c. 71. no person shall keep any place for slaughtering any horse or other cattle, not killed for butcher’s meat, without taking out a license at the general quarter sessions, to be granted upon a certificate of the minister and churchwardens that the person applying is proper to be trusted with the carrying on such business. § 1.

Such license to be signed by the justices at sessions, and a copy entered in a book to be kept for that purpose by the clerk of the peace, and all persons so licensed shall cause to be painted over their gates, their name and the words “licensed for slaughtering horses pursuant to an act passed in the 26th year of his Majesty King George III.” § 2.

Every occupier of such licensed slaughter-house shall, six
hours previous to the slaughtering any live horse, or to the flaying any horse brought dead to the slaughtering-house, give notice in writing to the after-mentioned inspector, who is to take an exact account of the height, age, colour, and particular marks of every horse, &c. and keep the same in a book. [See sect. 5.] And no such horse shall be slaughtered or flayed but between 8 in the morning and 4 in the evening, from October to March, both inclusive, and between 6 in the morning and 8 in the evening from April to September, both inclusive. § 3.

Every person so licensed shall at the time any horse, &c. shall be brought, make an entry in a book of the name and abode, and profession of the owner, and also of the person who shall bring the same to be slaughtered or flayed, and the reason why the same is so brought; which book shall, at all times, be open for the examination of the inspector, and produced before any justice, when required. § 4.

The parishioners in vestry shall annually or oftener appoint one or more persons to be inspectors of such slaughtering-house; and in case such inspector shall, upon examination of any horse, &c. intended to be slaughtered, believe that such horse, &c. is free from disease, and in a sound and serviceable state, or that the same has been stolen, he shall prohibit the slaughtering such horse, &c. for not exceeding 8 days; and in the mean time shall cause an advertisement to be inserted in some public newspaper twice or oftener, (unless the owner of such horse shall sooner claim the same,) at the expense of the occupier of such slaughtering-house; who on refusal to pay the same, shall forfeit double the amount, to be raised by distress. § 5.

Every inspector may at all times in the day or night, but if in the night, then in the presence of a constable, enter into and inspect any place kept for slaughtering horses by licensed persons, and take an account of the horses, &c. there. § 6.

In case any person offering to sale or bringing any horse, &c. to be slaughtered or flayed, shall refuse to give an account of himself, or of the means the same came into his possession, or if there be reason to suspect that such horse, &c. is stolen; such person shall be carried before a justice of peace, who shall commit him for not more than 6 days to be further examined, and if such justice shall be satisfied that such horse, &c. is stolen, the person bringing the same is to be committed to gaol, to be dealt with according to law. § 7.

Any person keeping such slaughtering-house, transgressing the rules before laid down by the act, shall be guilty of felony and punished by fine and imprisonment, and such corporal punishment by whipping, or shall be transported for not more than 7 years, as the court shall direct. § 8.

Any such person destroying or defacing with lime, or burying the hide or skin of any horse, &c. or being guilty of any offence against this act for which no punishment or penalty is provided, shall be adjudged guilty of a misdemeanor, and punished by fine and imprisonment and such corporal punishment by whipping; as the court shall direct. § 9.

Making false entries subjects the party to a forfeiture not exceeding 20l. nor less than 10l. to be levied by distress; half to the
informer and half to the poor; and in case the offender shall not have effects to the amount of the penalty, he may be committed to hard labour in the house of correction for not more than three months, nor less than one. § 10.

The book of the inspector shall be produced at every general quarter sessions. § 12.

If any person shall occasionally lend any barn or place for slaughtering any horse, &c. without taking out such license, he shall forfeit not more than 20l. nor less than 10l. half to the informer and half to the poor; or be committed to gaol for not more than three months nor less than one, unless the penalty is sooner paid. § 13.

This act does not extend to curriers, &c. nor to farriers, nor persons killing horses, &c. to feed their own dogs. § 14.

If any currier, tanner, &c. shall under colour of their trades, knowingly kill any sound horse, or boil the flesh thereof to sell, such tradesman becomes an offender under the act, and shall forfeit not more than 20l. nor less than 10l. § 15.

[The forms of the several convictions are specified in the act.]

HORSES HIRED. Action of trespass on the case lies for abusing a horse hired, by immoderate riding, &c. And a difference has been made in our law between hiring a horse and borrowing one to go a journey; for in the first case the party may set his servant, &c. upon the horse, but not in the second. 1 Mod. 210. See tit. Bailment.

HORSES, FOR THE KING’S SERVICE. None shall take the horse of any person to serve the king without the owner’s consent, or sufficient warrant, on pain of imprisonment, &c. Stat. 20 Rich. II. c. 5. See tit. Pourvoyance.

HORSE-RACES. For small sums, having encouraged idleness, and impoverished the meaner sort of people; it is enacted, that no person shall run any horse at a race, unless it be his own, nor enter more than one horse for the same plate, upon pain of forfeiting the horses; and no plate is to be run for under 50l. on the penalty of 500l. Also, every horse-race must be begun and ended in the same day, &c. Stat. 13 Geo. II. c. 19. 13 Geo. II. c. 19. Horse-racing with horses carrying small weights, prohibited. 1b. Horses may run for the value of 50l. with any weight and at any place. 18 Geo. II. c. 34. § 11.

A plaintiff shall not be allowed to recover a wager on such a horse-race, as is illegal within the statute. 4 Term Rep. 1. A match for 25l. a side is a match for 50l. See this Dict. tit. Gaming.

HORSTILERS, Fr. hostillers.] Is used for innkeepers: and in some old books the word hostlers is taken in the same sense. Stat. 31 Edw. III. c. 2. The executors of hostlers are not chargeable for their faults. 1 Krk. 682.


HOSPITALLERS, hospitalarii.] Were the knights of a religious order, so called because they built an hospital at Jerusalem, wherein pilgrims were received. To these Pope Clement transferred the Templars, which order, by a council held at Vienne in
France, he suppressed for their many and great offences. The institution of their order was first allowed by Pope Gelasus the Second, anno 1118; and confirmed in this kingdom by parliament, and had many privileges granted them, as immunities from payment of tithes, &c. Their privileges were reserved to them by Magna Charta, cap. 37. and the right of the king's subjects indicated from the usurpation of their jurisdiction, by the statute of Westminster, 2. cap. 43. Their chief abode is now in Malta, an island given them by the Emperor Charles V. after they were driven from Rhodes by Solymen the Magnificent, Emperor of the Turks; and for that they are now called Knights of Malta. All the lands and goods of these knights here in England were given to the king, by 32 Hen. VIII. c. 34. See Mon. Angl. 2 part. fol. 489. Tho. Walsingham, in Hist. Edw. II. Stowe's Ann. ib. See tit. Knights Templars.

HOSPITALS.

Are either aggregate, in which the master or warden and his brethren have the estate of inheritance; or sole, in which the master, &c. only has the estate in him, and the brethren or sisters, having college, and common seal in them, must consent, or the master alone has the estate not having college, or common seal. So hospitals are eligible, donative, or presentative. 1 Inst. 342. a.

The master of the hospital, who has college, and common seal, may have a writ of right; for the right and inheritance is in him. If he has no college, or common seal, he may have a juris utrum. Co. Litt. 341. b. 342. a.

Any person seised of an estate in fee-simple may by deed enrolled in chancery erect and found an hospital for the sustenance and relief of the poor, to continue for ever; and place such heads, &c. therein as he shall think fit; and such hospital shall be incorporated, and subject to such visitors, &c. as the founder shall nominate; also such corporations have power to take and purchase lands not exceeding 200l. per annum, so as the same be not holden of the king, &c. and to make leases for twenty-one years, reserving the accustomed yearly rent; but no hospital is to be erected unless upon the foundation it be endowed with lands or hereditaments of the clear yearly value of 10l. per annum. Stat. 39 Eliz. cap. 5. made perpetual by stat. 21 Jac. I. § 1.

It has been adjudged upon this statute, that if lands given to an hospital be, at the time of the foundation or endowment, of the yearly value of 200l. or under, and afterwards they become of greater value by good husbandry, accidents, &c. they shall continue good to be enjoyed by the hospital, although they be above the yearly value of 200l. And goods and chattels (real or personal) may be taken of what value soever. 2 Inst. 722. And if one give his land then worth 10l. a year to maintain the poor, &c. and the land after comes to be worth 100l. a year, it must all of it be employed to increase their maintenance, and none of it be converted to private use. 8 Rep. 130.

If a devise be to the poor people maintained in the hospital of St. Lawrence in Reading, &c. (where the mayor and burgesses
capable to take in mortmain, do govern the hospital, albeit the poor, not being a corporation, are not capable by that name to take; yet the devise is good; and commissioners appointed to inquire into lands given to hospitals, &c. may order him that hath the land, to assure it to the mayor and burgesses for the maintenance of the hospital. Stat. 43 Eliz. c. 4. See tit. Charitable Uses. Mortmain.

A gift must be to the poor, and not to the aged or impotent of such a parish, without expressing their poverty; for poverty is the principal circumstance to bring the gift within the stat. 43 Eliz. c. 4. Although at common law a corporation may be of an hospital, that is in potestate of certain persons to be governors of the hospital and not of the persons placed therein; the safest way upon the stat. 39 Eliz. c. 5 is first to prepare the hospital, and to place the poor therein, and to incorporate the persons therein placed; and after the incorporation, to convey the lands, tenements, &c. to the said corporation, by bargain and sale, or otherwise, between the founder of the one part, and the master and brethren, &c. of the other part, in consideration of 5s. in hand paid by the master of the said hospital, &c. 2 Inst. 724, 735. And the founder cannot erect an hospital for years, lives, or any other limited time, but it must be for ever, according to the stat. 39 Eliz. c. 5. See 10 Rep. 17. 34.

The stat. 43 Eliz. c. 4. under which commissions may be awarded to certain persons to inquire of lands or goods given to hospitals; and the lord chancellor is empowered to issue commissions to commissioners for inquiring, by a jury, of all grants, abuses, breaches of trust, &c. of lands given to charitable uses, does not extend to lands given to any college or hall in the universities, &c. nor to any hospital over which special governors are appointed by the founders; and it shall not be prejudicial to the jurisdiction of the bishop or ordinary, as to his power of inquiry into and reforming abuses of hospitals, by virtue of the stat. 2 Hen. V. et. 1. c. 1. &c. See this Dict. tit. Charitable Uses.

These commissioners may order houses to be repaired by those who receive the rents; see that the lands be let at the utmost rent; and on any tenant's committing waste, by cutting down and sale of timber, they may decree satisfaction, and that the lease shall be void. Eliz. 11 Car. Where money is kept back, and not paid, or paid where it should not, they have power to order the payment of it to the right use: and if money is detained in the hands of executors, &c. any great length of time, they may decree the money to be paid, with damages for detaining it. Duke Read. 123. See 4 Rep. 104.

The hospital of St. Cross near Winchester, and several other large hospitals, were anciently founded by particular statutes or acts of parliament. And King Charles I. granted to the mayor and commonalty of London the keeping of Bethlem hospital, and the manors and lands belonging to it. Also, there is now an hospital in London for founding children, under the care of governors and guardians, who may purchase lands or tenements to the value of 4,000l. a year; and they are to receive as many such children as they think fit, which may be brought to the hospital, and shall there be bred up and employed, or placed apprentice to any trade, or
HOTCHPOT.

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the sea-service, the males till the age of twenty-four, and the females till twenty-one. They may likewise be let out or hired, &c. See stats. 13 Geo. II. cap. 29. 29 Geo. II. c. 29. § 13. 30 Geo. II. c. 26. § 14. See also stat. 13 Geo. III. c. 82. regulating lying-in-hospitals, and ordering them to be licensed. As to hospitals or asylums for lunatics in England, 48 Geo. III. c. 96. In Ireland, see, as to county hospitals and infirmaries, 5 Geo. III. c. 20. 25 Geo. III. c. 39. Acts of the Irish parliament, and the acts 45 Geo. III. c. 111. 47 Geo. III. st. 1. c. 44. and st. 2. c. 50. and 48 Geo. III. c. 115. passed since the union. See further in general, this Dict. tit. Mortmain, Corporation I. IV.

HOSPITALARIA, See Hostilaria.


HOSPELLAGIUM, A right to have lodging and entertainment, reserved by lords in the houses of their tenants. Cartular. Radinge MS. 157.

HOSTELER, hostellarius. From the Fr. hostelere, i. e. hospes.] An innkeeper. See stat. 31 Edw. III. st. 2. c. 2. and this Dict. tit. Horstlers.

HOSTLERS, Innkeepers, see stat. 9 Edw. III. st. 2. c. 2.

HOSTERIUM, A hoe, an instrument well known. Chart. Antig.

HOSTILARIUS, An hospitaller.

HOSTILARIA, HOSPITALARIA, A place or room in religious houses, allotted to the use of receiving guests and strangers; for the care of which there was a peculiar officer appointed, called hostilarius, and hospitalarius. Cart. Eccl. Ely, MSS.


HOTCHPOT, in partem positio.] A word brought from the Fr. hotchejot, used for a confused mingling of divers things together, and among the Dutch it signifies flesh cut into pieces, and sodden with herbs or roots; but by a metaphor it is a blending or mixing of lands together given in marriage, with other lands in fee falling by descent: as if a man seised of thirty acres of land in fee, hath issue only two daughters, and he gives with one of them ten acres in marriage to the man that marries her; and dies seised of the other twenty acres: now she that is thus married, to gain her share of the rest of the land, must put her part given in marriage into hotchpot, i. e. she must refuse to take the sole profits thereof, and cause her land to be mingled with the other; so that an equal division may be made of the whole between her and her sister, as if none had been given to her; and thus for her ten acres she shall have fifteen, otherwise, her sister will have the twenty acres of which her father died seised. Litt. 55. Co. Litt. lib. 3. capt. 12.
This seems to be a right of waiving a provision, made for a child in a man's life-time, at his death, though, as it depends upon frank-marriage, and gifts of lands therein, it now seldom happens. See this Dict. tit. Parceners.

But there is a bringing of money into hotchpot, upon the clauses and within the intent of the statute for distribution of intestates' estates, stat. 22 & 23 Car. II. c. 10. Where a certain sum is to be raised, and paid to a daughter for her portion, by a marriage settlement, this has been decreed to be an advancement by the father in his life-time within the meaning of the statute, though future and contingent; and if the daughter would have any further share of her father's personal estate, she must bring this money into hotchpot, and shall not have both the one and the other. 1 Eq. Abr. 283. See 2 Vern. 638. and this Dict. tit. Executor V. 8.

By the custom of London, there is likewise a term of hotchpot, where the children of a freeman are to have an equal share of one third part of his personal estate, after his death. Preced. Canc. 3. See tit. London, and tit. Executor V. 9.

There is also in the civil law collatio bonorum, answering to this, whereby if a child advanced by the father, do after his father's decease challenge a child's part with the rest, he must cast in all that he had formerly received, and then take out an equal share with the others. Cowell. See farther, Britton, c. 72. Litt. sect. 267, 268. 2 Comm. 190. 517. and this Dict. tit. Parceners.

HOVEL, mandra.] A place wherein husbandsmen set their ploughs and carts out of the rain or sun. Lex Lat. Dict.

HOUNSLOW HEATH, A large heath containing 4,293 acres of ground, and extending into several parishes; so much thereof as is in the king's inheritance, and fit for pasture, meadow, or other several grounds, shall be of the nature of copyhold lands; or the steward of the manor may let it for twenty-one years, &c. and the lessees may improve the same. Stat. 37 Hen. VIII. c. 2.

HOUR, hora.] Is a certain space of time of sixty minutes, twenty-four of which make the natural day. It is not material at what hour of the day one is born. Co. Litt. 135. See tit. Age, Fraction, Time.

HOUSAGE, A fee paid for housing goods by a carrier, or at a wharf or quay, &c. Shett. Eqit. 1725.

HOUSE, domus.] A place of dwelling or habitation; also a family or household. Every man has a right to air and light in his own house; and therefore if any thing of infectious smell be laid near the house of another, or his lights be stopped up and darkened by buildings, &c. they are nuisances punishable by our laws. 3 Inst. 231. 1 Danw. Abr. 173. But for a prospect, which is only matter of delight, no action will lie for its being stopped. 9 Recit. 58. See tit. Nuisance.

The dwelling-house of every man is as his castle; therefore, if thieves come to a man's house to rob or kill him, and the owner or his servant kill the thieves in defending him and his house, this is not felony, nor shall he forfeit any thing. 2 Inst. 316. See tit. Homicide. A man ought to use his own house, so as not to damnify his neighbour; and one may compel another to repair his house, in several cases, by the writ de domo reparanda. 1 Saik. Recit. 360. Doors of a house may not be broken open on arrest,
unless it be for treason or felony, &c. H. P. C. 137. Plowd. 5.

Several things have been resolved on the subject, as to the protection a man's house affords him, as, 1. That every man's house is as his castle, as well to defend him against injuries as for his repose; 2. Upon recovery in any real action, or ejectment, the sheriff may break the house and deliver seisin, &c. to the plaintiff, the writ being habeas factas seisinam or possessionem; and after judgment, it is not the house of the defendant in right and judgment of law; 3. In all cases where the king is party, the sheriff (if no door be open) may break the party's house to take him, or to execute other process of the king, if he cannot otherwise enter; but he ought first to signify the cause of his coming, and request the door to be opened; and this appears by the stat. Westm. 1. c. 17. which is only in affirmance of the common law; and without default in the owner, the law will not suffer a house to be broken; 4. In all cases, when the door is open, the sheriff may enter and make execution at the suit of any subject, either of body or goods; but otherwise where the door is shut, there he cannot break it to execute process at the suit of a subject; 5. Though a house is a castle for the owner himself and his family, and his own goods, &c. yet it is no protection for a stranger flying thither, or the goods of such a one, to prevent lawful execution; and therefore, in such case, after request to enter, and denial, the sheriff may break the house. 5 Rep. 91. a. to 93. a.

From the particular and tender regard which the law of England has to a man's house, arises in part the animadversion of the law upon eaves-droppers, nuisancers, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case. 4 Comm. c. 19. f. 223. cites 1 Hale's P. C. 547.

Commissioners of bankruptcy cannot break open a house to search for the bankrupt's goods, unless it be the house of the bankrupt. 2 Showw. 247. See tit. Bankrupt.

The hundred liable to damages by the burning of houses. 9 Geo. 1. c. 22. sect. 7. See tit. Arrest, Execution, Constable, Homicide, &c. as to the cases in which officers may break open a house to execute legal process. And as to felonies in or relative to houses, see tit. Arson, Burglary, Felony, Larceny, Riot, Robbery, &c.

HOUSEBOLD and HAYBOLD, See to signify housebote and hedgebote, in Mon. Angl. 2 par. fol. 633. Cowell, edit. 1727.

HOUSEBOTE, A compound of house and bote, i. e. compensation; signifies estovers, or an allowance of necessary timber out of the lord's wood, for the repairing and support of a house or tenement. And this belongs of common right to any lessee for years or for life; but if he take more than is needful, he may be punished by an action of waste. Housebote, says Co. on Litt. fol. 41. is two-fold, viz. estoveriam edificandi et ardendi. Cowell. See tit. Bote, Estoveres, Common of Estover.

HOUSE-BREAKING, or HOUSE-ROBBING, See tit. Burglary, Larceny, Robbery.
HOUSE-BURNING. See Arson, Burning.

HOUSE of CORRECTION. In every county of England, there shall be a house of correction built at the charge of the county, with conveniences for the setting of people to work, or every justice of peace shall forfeit 5l. and the justices in sessions are to appoint governors or masters of such houses of correction, and their salaries, &c. which are to be paid quarterly by the treasurer out of the county stock: these governors are to set the persons sent on work, and moderately correct them, by whipping, &c. and to yield a true account every quarter-sessions of persons committed to their custody; and if they suffer any to escape or neglect their duty, the justices may fine them. See stats. 7 Jac. I. c. 4. 14 Geo. II. c. 33.

The house of correction is chiefly for the punishing of idle and disorderly persons; parents of bastard children, beggars, servants running away; trespassers, rogues, vagabonds, &c. Poor persons refusing to work are to be there whipped, and set to work and labour; and any person who lives extravagantly, having no visible estate to support him, may be sent to the house of correction, and set at work there, and may be continued there until he gives the justice satisfaction in respect to his living; but not be whipped. A person ought to be convicted of vagrancy, &c. before he is ordered to be whipped. 2 Bulst. 351. Sid. 281. Bridewell is a prison for correction in London, and one may be sent thither. Syd. 57.

By stats. 14 Geo. II. c. 33. 17 Geo. II. c. 5. upon presentment of the grand jury, or under stat. 22 Geo. III. c. 64. on presentment of any one justice, on view, the justices at sessions may build, or purchase land for building, or enlarge, buy, or hire fit houses of correction. And the justices are to take care that the house of correction be provided with proper materials for relieving, employing, and correcting persons sent to the same: and two justices shall visit the same twice or oftener in a year, and examine into the estate and management thereof, and report the same at the sessions. The governor or master of a house of correction misbehaving himself, may be fined or turned out, at the discretion of the justices. Offenders liable to be sent to the house of correction, where the time and manner of their punishment is not expressly limited by law, may be committed until the next sessions, or until discharged by due course of law.

By the said stat. 22 Geo. III. c. 64. § 1. and the stat. 24 Geo. III. st. 2. c. 55. § 1, the quarter sessions may appoint certain justices to be visitors and inspectors of such houses. The stat. 31 Geo. III. c. 46. regulates the appointment and conduct of the governor and other officers of such houses; as also the appointment of the visiting justices. The above statutes contain also many other regulations as to such houses of correction, a schedule of rules and orders for their government, as to employing and feeding the persons therein, and which rules and orders are to be fixed up in every house of correction. See further, tit. Poor, Prison, Transportation, Vagrants.

HOUSEL. See Hostia.

HOUSEHOLDER, fator familias.] Is the occupier of a house, a housekeeper, or master of a family.
HUE AND CRY.

HREDIGE, Readily, or quickly. Leg. Athelstan, c. 16. From the Sax. herdinge, i.e. brevi, in a short time. Cowell.

HUDGE, See Hidgild.

HUDSON'S BAY COMPANY. An exclusive trade to a part of America, was granted in 1670, by Charles II. to the Governor and Company of Adventurers of England trading to Hudson's Bay: they were to have the sole trade and commerce of and to all the seas, bays, straits, creeks, lakes, rivers, and sounds, in whatsoever latitude, that lie within the entrance of the strait commonly called Hudson's Straits; together with all the lands, countries, and territories upon the coasts of such seas, bays and straits, which were then possessed by any English subject, or the subjects of any other Christian state; together with the fishing of all sorts of fish, of whales, sturgeon, and all other royal fish, together with the royalty of the sea. But this extensive charter has not received any parliamentary confirmation or sanction. Reeves's Law of Shipping. See this Dict. tit. Navigation Acts.

HUE AND CRY.

Hutesium et clamor, from two French words huer and crier, both signifying to shout or cry aloud. Manwood, in his Forest Law, cap. 19. num. 11. saith, that hue in Latin, est vox dolentis, as signifying the complaint of the party, and cry is the pursuit of the felon upon the highway upon that complaint; for if the party robbed, or any in the company of one robbed or murdered, come to the constable of the next town, and desire him to raise the hue and cry, that is, make the complaint known, and follow the pursuit after the offender, describing the party, and showing as near as he can which way he went, the constable ought forthwith to call upon the parish for aid in seeking the felon, and if he be not found there, then to give the next constable notice, and the next, until the offender be apprehended, or at least until he be thus pursued unto the sea side. Of this, see Bracton, lib. 3. tract. 2; cap. 5. Smith de Rep. Anglor. lib. 2. cap. 20. and the stat. of Winchester, 13 Edw. I. Stats. 28 Edw. III. 11. 27 Ediz. 13.

The Normans had such pursuit with a cry after offenders, which they called clamor de haro; see Grand Custumary, cap. 53. And it may probably be derived from harior, flagitare. Hue is used alone in stat. 4 Edw. I. st. 2. In the ancient records this is called hutesium et clamor. See 2 Inst. fol. 172.

But the clamor de haro was not a pursuit after offenders, but a challenge of any thing to be his own after this manner, viz. he who demanded the thing, did, with a loud voice, before many witnesses, affirm it to be his proper goods, and demanded restitution. This the Scots call hutesium; and Skene saith, it is reduced from the French ouyer, i.e. audire, (or rather oupez,) being a cry used before a proclamation; the manner of their hue and cry he thus describeth: if a robbery be done, a horn is blown, and an outcry made, after which, if the party fly away, and doth not yield himself to the king's bailiff, he may lawfully be slain, and hanged upon the next gallows. See Skene in v. hutesium.

In Rot. Claus. 30 Hen. III. m. 5. we find a command to the
king's treasurer, to take the city of London into the king's hands, because the citizens did not, secundum legem et consuetudinem regni, raise the hue and cry for the death of Guido de Arretto, and others, who were slain. Cowell.

Hue and cry is also defined the pursuit of an offender from town to town, till he be taken, which all that are present when a felony is committed, or a dangerous wound given, are by the common law, as well as by the statute, bound to raise against the offenders who escape, on pain of fine and imprisonment. 3 Inst. 116, 117. 2 Inst. 172. Dalt. Justice, cap. 28. 109. Fitz. Coram. 395. Cro. Eliz. 654.

The raising of hue and cry is enjoined by the common law, which may be called a raising of it at the suit of the king, as well as by several acts of parliament, which may be called a raising of it at the suit of a private person. 3 New Abr. 61.

Hue and cry, says Blackstone, is the old common law process, of pursuing with horn and with voice, all felons, and such as have dangerously wounded another. Bract. l. 3. tr. 2. c. 1. § 10. Mirr. c. 2. § 6. It is also mentioned in stat. Westm. 1. 3 Edw. I. c. 9. and 4 Edw. I. c. 1. § 4. But the principal statute relative to this matter is, that of Winchester, 13 Edw. I. c. 1. § 4, which directs, that from henceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the towns and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And, that such hue and cry may more effectually be made, the hundred is bound by the same statute, c. 3, to answer for all robberies therein committed, unless they take the felon, which is the foundation of an action against the hundred, in case of any loss by robbery. By stat. 27 Eliz. c. 13. no hue and cry is sufficient, unless made with both horsemen and footmen. And by stat. 8 Geo. II. c. 16. the constable, or like officer, refusing or neglecting to make hue and cry, forfeits 5l. half to the king and half to the prosecutor, with full costs; and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein, and the felon escapes. Hue and cry may be raised either by precept of a justice of the peace, or by a peace-officer, or by any private man that knows of a felony. 2 Hale's P. C. 100. 104. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot; and in the prosecution of such hue and cry, the constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a justice of peace. But if a man wantonly or maliciously raises a hue and cry, without cause, he shall be severely punished as a disturber of the public peace. 1 Hawk. P. C. c. 12. § 5.

As to hue and cry at common law, it seems to be clearly agreed, that a private person who hath been robbed, or who knows that a felony hath been committed, is not only authorized to levy hue and
cry, but is also bound to do it under pain of fine and imprisonment.
2 Inst. 172. 3 Inst. 116. 1 Hale’s Hist. P. C. 466.

From hence it follows, that although it is a good course, as Lord Hale says, to have a precept or warrant from a justice of peace for raising hue and cry, yet it is neither of absolute necessity, nor sometimes convenient, for the felons may escape before the justice can be found; also hue and cry was part of the law before the stat. 1 Edw. III. cap. 16, which first instituted justices of the peace. 2 Hale’s H. P. C. 99.

It is incumbent upon constables to pursue hue and cry when called upon, and they are severely punishable if they neglect it; and it prevents many inconveniences if they be there; for it gives a greater authority to their pursuit, and enables the pursuer, in his assistance, to plead the general issue upon the statutes 7 Jac. I. cap. 5. 21 Jac. I. cap. 12, without being driven to special pleading; therefore, to prevent inconveniences which may happen by unruliness, it is most advisable that the constable be called; yet upon a robbery, or other felony committed, hue and cry may be raised by the country in the absence of the constable; and in this there is no inconvenience, for if hue and cry be raised without cause, they that raise it are punishable by fine and imprisonment. 2 Hale’s Hist. P. C. 99, 100.

The regular method of levying hue and cry is for the party, to go to the constable of the next town, and declare the fact, and describe the offender, and the way he is gone; whereupon the constable ought immediately, whether it be night or day, to raise his own town, and make search for the offender; and upon the not finding him, to send the like notice, with the utmost expedition, to the constables of all the neighbouring towns, who ought in like manner to search for the offender, and also to give notice to their neighbouring constables, and they to the next, till the offender be found. 3 Inst. 116. Dalt. Justice, cap. 28. Cromph. 178. 2 Hawk. P. C. 75.

The constable is not only to make search in his own vill, but also to raise all the neighbouring vills, who are all to pursue the hue and cry with horsemen as well as footmen, until the offender be taken. 2 Hale’s Hist. P. C. 101. In case of hue and cry once raised and levied upon supposal of a felony committed, though in truth there was no felony committed; yet those who pursue hue and cry may arrest, and proceed as if a felony had been really committed. 2 Hale’s Hist. P. C. 101. 5 Hen. V. a. 21 Hen. VII. 28. a. per Rede. 2 Edw. IV. 8, & 9. 29 Edw. III. 39. 2 Inst. 173. 2 Hale’s Hist. P. C. 102.

If hue and cry be raised against a person certain for felony, though possibly he is innocent, yet the constables, and those who follow the hue and cry, may arrest and imprison him in the common gaol, or carry him to a justice of the peace. 2 Hale’s Hist. P. C. 103.

If the person pursued by hue and cry be in a house, and the doors are shut, and refused to be opened upon demand of the constable, and notice given of his business, he may break open the doors; and this he may do in any case where he may arrest, though it be only on suspicion of felony, for it is for the king and commonwealth, and therefore a virtual non omittis is in the case;
and the same law is upon a dangerous wound given, and a hue and cry levied upon the offender. 7 Edw. III. 16 b. 2 Hale's Hist. P. C. 102. See tit. Constable.

It seems in this case, that if he cannot be otherwise taken, he may be killed, and the necessity excuseth the constable. 1 Hale's Hist. P. C. 102. See tit. Homicide.

Upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search in suspected places within his vill, for the apprehending of the felons. Dalt. caft. 28. 2 Edw. IV. 8 b. Cromst. de Pace, 178. 2 Hale's Hist. P. C. 103. See tit. Constable.

But though he may search suspected places or houses, yet his entry must be by open doors, for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there, and then it is true he may; therefore, in case of such a search, the breaking open the door is at his peril, viz. justifiable if he be there; but it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within, of his business, and a demand of entrance, and a refusal, before doors can be broken. 2 Hale's Hist. P. C. 103. See tit. Constable.

If the hue and cry be not against a person certain, but by the description of his stature, person, clothes, horse, &c. the hue and cry doth justify the constable, or other person following it, in apprehending the person so described, whether innocent or guilty, for that is his warrant, it is a kind of process that the law allows, (not usual in other cases,) viz. to arrest a person by description. 2 Hale's Hist. P. C. 103.

But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor described by person, clothes, or the like; yet such a hue and cry is good as hath been said, and must be pursued, though no person certain be named or described. 2 Hale's Hist. P. C. 103.

And therefore in this case, all that can be done is, for those who pursue the hue and cry, to take such persons as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like. 2 Edw. IV. 8 b. 2 Hale's Hist. P. C. 103.

There can be no doubt but that both by the common law, as also by the several statutes which enjoin the levying of hue and cry, they who neglect to levy one, (whether officers of justice or others,) or who neglect to pursue it when rightly levied, are punishable by indictment, and may be fined and imprisoned for such neglect. 2 Hale's Hist. P. C. 104.

We shall proceed to inquire more particularly, 1. On what robbery hue and cry may be raised, and how it ought to be pursued; 2. Of bringing the action; at what time; and the evidence necessary; and what shall excuse the hundred; 3. Of levying the money.

1. The levying of hue and cry is enjoined by several acts of
HUE AND CRY.

parliament; and to this purpose it is enacted by stat. Westm. 1; 3 Edw. I. cap. 9. "that all be ready and appareled at the summons of the sheriff, to pursue and arrest felons."

Though some imagined, that hue and cry was grounded on this statute; yet Lord Coke says, "that it was used long before, as appears even by this statute, which, instead of introducing a new law, enforces obedience to that which was founded on the ancient laws of the realm. 2 Inst. 171.

By the statute of 4 Edw. I. de officio coronatoris, hue and cry shall be levied for all murders, burglaries, men slain, or in peril to be slain, as otherwise is used in England, and all shall follow the hue and steps as near as they can.

Next came the stat. of Winchester, the effect of which has been already stated.

By stat. 27 Ediz. c. 13. § 2. it is enacted, "that the inhabitants and resiants of every hundred, (with the franchises within the precinct thereof) wherein negligence, fault, or defect of pursuit and fresh suit after hue and cry made, shall happen to be, shall answer and satisfy the one moiety of all such money and damages as shall be recovered against the hundred, with the franchises therein, in which any robbery or felony shall be committed, to be recovered by action of debt, &c. by and in the name of the clerk of the peace for the time being, of or in every such county, and recovery by the party or parties robbed, shall be, without naming the christian name or surname of the said clerk of the peace; which moiety so recovered shall be to the use of the inhabitants of the hundred where any such robbery, &c. shall be committed."

It seems to be admitted that no kind of robbery will make the hundred liable, but that which is done openly, and with force and violence; and that therefore the private stealing or taking any thing from the party, does not come within the statutes which make the hundred liable, because they did not apprehend the robbers, which, in private felonies, and of which they had no notice, it would be difficult, if not impossible, for them to do. 7 Co. 6, 7. 2 Salk. 614.

Also it hath been adjudged, and is admitted in all the books which speak of this matter, that a robbery in a house, whether it be by day or by night, does not make the hundred liable; the reasons whereof are, that every man's house is in law esteemed his castle, which he himself is obliged to defend, and into which no man can enter, to see what is doing there, without his leave; also being done in a house, the inhabitants of the hundred cannot be presumed to have notice of it, so as to be able to apprehend the offenders. 7 Co. 6. a. Sendil's case.

But if a person be assaulted in the highway, and carried into a house, and there robbed, it seems the hundred shall be liable; for otherwise, the provision made by the statute would be eluded. 1 Sid. 263. and see 1 Salk. 614. 7 Mod. 159. Also it does not seem necessary, that the robbery should be committed in the highway, for otherwise, the provision made by the statute would be eluded. 7 Mod. 159. It may be in a private way, or be in a coppice; and in both cases the hundred shall be chargeable, 2 Salk. 614. and vide
It is clearly agreed, that for a robbery committed in the night, the hundred is not chargeable, because they cannot be presumed to have notice thereof, so as to be able to apprehend the robbers. 7 Co. 6. b. 2 Inst. 569. 3 Leon. 550.

But yet it is not necessary that the robbery should be committed after sunrise, and before sunset; for if there be as much daylight at the time, that a man’s countenance may be discerned thereby, though it be before sunrise or after sunset, the hundred shall be liable. 7 Co. 6. a. Cro. Jac. 106. 1 And. 158. 1 Leon. 57. Savil, 33. Vide Carth. 71. Comb. 150. 3 Mod. 258. 1 Show. 60. S. P.

It hath been held, that if robbers drive or oblige the wagoner to drive his wagon from the highway by day, but do not rob or take any thing till night, that yet this is a robbery in the day-time, so as to charge the hundred. 1 Sid. 263. 7 Mod. 159. Hutton, 135.

If he that is robbed, after hue and cry, make no further pursuit after the robbers, action lies against the hundred. 4 Leon. 180. The party robbed is not bound to pursue the robbers himself, or to lend his horse for that purpose; but still has his remedy against the hundred, if they are not taken; though if any of them are taken, either within forty days after the robbery, or before the plaintiff recovers, the hundred is discharged. Sid. 11. When a man is robbed on a Sunday, on which day persons are supposed to be at church, and none ought to travel, the hundred is not liable. See stat. 27 Eliz. c. 13. But where a robbery is done on a Sunday, though the hundred is not chargeable, hue and cry shall be made by stat. 29 Car. II. c. 7. And if a person be robbed going to church in a country town or village, on a Sunday, which is a religious duty required by law, it has been held an action lies against the hundred; but not if one be robbed on that day in other travelling for pleasure, &c. which is prohibited by statute. 6 Geo. I. C. B. per King, Chief Justice.

And it was formerly ruled by three judges on the stat. of Winton, where a man was robbed on a Sunday, in time of divine service, and made hue and cry, that the hundred should be charged; for many persons are necessitated to travel on this day; as physicians, &c. 2 Cro. 496. 2 Roll. 59. Godb. 280. See 2 Nels. Abr. 937, 938. A robbery must be an open robbery, that the country may take notice of it, to make the hundred answerable. 7 Refit. 6.

A man is set upon and assaulted by robbers in one hundred, and carried into a wood, &c. in another hundred, near the highway, and there robbed; the action shall be brought against the hundred where the robbery was done, as particularly expressed in the statute, and not the hundred where the man was taken or assaulted; because the assault is not the efficient cause of the robbery, as a stroke is the cause of murder. 2 Salk. 614. 7 Mod. 157.

But where goods are taken from a man in one hundred, and opened in another; where they are first taken or seized; they are stolen, and the robbery is committed. 2 Litt. Abr. 27.

By the stat. 8 Geo. II. c. 16. no process for appearance is to be served against the hundred, &c. for a robbery committed, but on
the high constable, &c. who shall give notice of it in one of the principal market towns, &c. and then enter an appearance, and defend the action. By stat. 22 Geo. II. c. 24. no person shall recover on any of the statutes of hue and cry above 200l. unless the person or persons so robbed shall, at the time of such robbery, be together in company, and be in number two at the least, to attest the truth of his or their being so robbed.

And by stat. 30 Geo. II. c. 3. § 116. and 4 Geo. III. c. 2. § 118. no receiver-general of the land-tax, or his agents, can sue the hundred for a robbery, unless the persons carrying the money be three in company.

2. The general doctrine as to actions is as follows: Where a robbery is done on the highway, in the day-time, of any day except Sunday, the hundred where committed is answerable for it; but notice is to be given of it, with convenient speed, to some of the inhabitants of the next village, to the intent that they may make hue and cry for the apprehending of the robbers, or no action will lie against the hundred; and if any of the robbers are taken within forty days, and convicted, the hundred shall be excused.

In 3 Lev. 320. it is said, that upon search of the parliament roll it appears, that the statute of Winton gives only forty days to the county, and that the stat. 28 Edw. III. c. 11. is but a confirmation thereof; and accordingly it was adjudged good, where the plaintiff brought an action on the statute of Winton, and declared that he was robbed, and none of the robbers taken within forty days, according to the said statute; and with this the modern precedents agree, as Rast. Ent. 406. Co. Ent. 351. Hern. 215. Thes. Brev. 141. 2 Salk. 376.

If a servant be robbed in the absence of his master, of his master's money, it is clear that the master may maintain an action for it against the hundred, but then the servant must make oath that he knew not of any of the robbers. Cro. Car. 37. Also the servant being robbed in his master's absence, may himself maintain an action against the hundred, and may declare that he was possessed ut de bonis suis propria. And though the jury find that he was robbed of his master's money, yet shall he recover; for the servant is possessed ut de bonis suis propria, against all, and in respect of all, but him that hath the very right. 2 Salk. 613, 614. 3 Mod. 305. Comb. 263. 1 Sid. 45.

If a servant be robbed in the presence of the master, the master must sue, and the oath of the master is sufficient. 2 Salk. 613. Carth. 147.

There must be an oath, vide Carth. 145. 2 Salk. 613. 1 Show. 94. 3 Mod. 287.

Where a servant is robbed, he must be examined and sworn; but if the master be present, it is a robbery of him. Show. 241. 1 Leon. 323. If a Quaker be robbed, or a man's servant being a Quaker, and either refuse to take an oath of the robbery, and that he did not know any of the robbers, the hundred is not answerable; for the stat. 27 Eliz. c. 13. was made to prevent combination between persons robbed and the robbers. 2 Salk. 613.

But the master's oath where the servant is a Quaker, or otherwise, and being robbed in his presence, will maintain the action in his own name. Carth. 146. And a plaintiff had judgment on
his oath, though his servant that was robbed with him knew one of the robbers. When a carrier is robbed of another man's goods, he or the owner may sue the hundred; but the carrier is to give notice, and make oath, &c. though the owner of the goods brings the action. 2 Saund. 360.

If A. and B. travelling together are robbed of a sum of money, to which they are both jointly entitled, they may both join in an action against the hundred; but otherwise if they had separate and distinct interests. Dyer, 370. a. pl. 59.

By stat. 27 Eliz. c. 13. § 11. it is enacted, that no person that shall happen to be robbed shall maintain any action, or take any benefit of the statutes which make the hundred liable, except the person so robbed shall, with as much convenient speed as may be, give notice of the robbery so committed unto some of the inhabitants of some town, village, or hamlet, near unto the place where any such robbery shall be committed.

In the construction of this clause of the statute it hath been held, that if a person be robbed in a highway in divitis hundredorum, he need not give notice to the inhabitants of each hundred; but notice to either of them is sufficient. Cro. Jac. 675. See Cro. Car. 41. 379. 1 Show. 94.

It hath been resolved, that though the notice given be five miles from the place where the robbery was committed, that it is sufficient; the reason whereof is, because that the party, who is a stranger to the country, cannot have conusance of the nearest place or town. March, 11. and see 2 Leon. 82.

Also if the party robbed give notice with as much convenient speed as may be, though he be otherwise remiss in not pursuing the robbers, or refuses to lend his horse for that purpose, yet he shall not lose his action for this, nor the hundred be excused. March, 11. 2 Leon. 82.

Now, by stat. 8 Geo. II. cap. 16. § 1. it is further enacted, “that no person shall maintain any action against the hundred, unless he shall, (besides the notice already required by the stat. 27 Eliz. c. 13.) with as much convenient speed as may be, after any robbery committed, give notice thereof to one of the constables of the hundred, or to some constable, borsholder, headborough, or tithingman of some town, parish, village, hamlet, or titheing near unto the place where such robbery shall happen, or shall leave notice in writing of such robbery at the dwelling-house of such constable, &c. describing, so far as the nature and circumstances of the case will admit, the felon, and the time and place of the robbery, and also shall, within the space of twenty days next after the robbery committed, cause public notice to be given thereof in the London Gazette, therein likewise describing, so far as the nature and circumstances of the case will admit, the felon, and the time and place of such robbery; together with the goods and effects whereof he was robbed.”

By stat. 27 Eliz. c. 13. § 11. it is enacted, “that the party robbed shall not have any action, except he shall first, within twenty days next before such action to be brought, be examined upon his corporal oath, before some justice of the peace of the county where the robbery was committed, whether he knows the parties that committed the robbery, or any of them; and if, upon examination,
It be confessed that he knows the parties, or any of them, that then he shall, before the action be commenced, enter into sufficient bond, by recognisance, before the said justice, effectually to prosecute the same person and persons."

In the construction of this clause of the statute, the following points have been held:
That if the party does not know the robbers at the time of the robbery committed, though he happens to know them afterwards, it is not material.

It hath been adjudged, that the oath may be taken before a justice of the county, though not in the county at the time of administering it. 1 Jones, 239.

As to giving bond for payment of costs, by stat. 8 Geo. II. cap. 16, it is enacted, "that, before any action commenced, the party shall go before the chief clerk, or secondary, or the filazer of the county wherein such robbery shall happen, or the clerk of the pleas of that court wherein such action is intended to be brought, or their respective deputies, or before the sheriff of the county wherein the robbery shall happen, and enter into a bond to the high constable, or high constables of the hundred in which the robbery shall be committed, in the penal sum of one hundred pounds, with two sufficient sureties to be approved of by such chief clerk, &c. with condition for securing to such high constable or high constables, the due payment of his or their costs, after the same shall be taxed by the proper officer, in case the plaintiff in such action shall happen to be nonsuited, or shall discontinue the action, or in case judgment shall be given on demurrer, or a verdict against him."

Costs are always given in actions on the statutes of hue and cry, where damages are recovered. 1 Term Rep. 72.

By stat. 27 Eliz. c. 13. § 9. the action is to be brought within one year after the robbery committed.

In the construction of this statute it hath been held, that if a person be robbed the 9th of October, 13 Jac. and so laid that the teste of the writ be the 9th October, 14 Jac. that this is not pursuant to the statute; and that in this action, which is penal against the hundred, there is no reason to exclude the day on which the fact was done, nor to make such construction as is done in protections and the enrolment of deeds, which have always received a benign interpretation. Hob. 139, 140. Moor, 878. pl. 1233. 1 Brownl. 156. S. C. Vide 1 Sid. 139. 1 Kebr. 495.

An action was brought by the master, on the statute of Winton, for a robbery committed on his servant, in which he declared of an assault and battery done to himself; (though then 50 miles from the place;) also that he made oath that he did not know any of the persons; the issue was entered of record, and the jury appeared at the bar ready to try it; but being for other business adjourned to another day, the plaintiff observing his mistake moved to amend, by declaring of a robbery on his servant, &c. and it appearing that the year in which the action must be brought was expired, and consequently the action must be lost if not allowed, the court, after long debate and consideration of former precedents, admitted him to amend. 3 Lev. 347.
It seems that, from the necessity of the case, the party himself that was robbed is to be admitted as a witness, but then his testimony must be corroborated by collateral proof and circumstances, and such as may induce a jury to believe that a robbery was actually committed, and that the party lost what he declared for. 2 Leon. 12.

By stat. 8 Geo. II. c. 16. it is enacted, “that in any action against any hundred, any person inhabiting within the hundred, or any franchise thereof, shall be admitted as witness for or on behalf of the hundred.”

If an action against the hundred be discontinued on a new action brought, there must be a new oath taken within forty days before the last action brought. Sid. 139. In action upon the statute of hue and cry, the declaration is good, though the plaintiff doth not say that the justice of peace, who took the oath, lived profere locum where the robbery was committed. And oath was made before a justice of peace of the county where the robbery was done, in a place of another neighbouring county; and it was held good. Cro. Car. 211.

If a justice of peace refuse to examine a person robbed, and to take his oath, action on the statute lies against the justice. 1 Leon. 393. It is safe to say the plaintiff gave notice at such a place, near the place where the robbery was done; and though that place where notice is given be in another hundred or county, yet it is good enough; for a stranger may not know the confines of the hundred or county. Cro. Car. 41. 379. 3 Salk. 184.

If there be a mistake of the parish in the declaration where the robbery was, if it be laid in the right hundred it is well enough. 2 Leon. 212. And though the party puts more in his declaration than he can prove, for so much as he can prove it shall be good. Cro. Jac. 348.

Upon a trial in these cases, the party must file his original, and be sure to have a true copy thereof, and witnesses to prove it; and he must also have the affidavit or oath, and a witness to prove the taking it. 2 Litt. Abr. 25.

By stat. 27 Eliz. c. 13. § 8. it is enacted, “that where any robbery is committed by two, or a greater number of malefactors, and that it happen any one of the said offenders to be apprehended by pursuit, to be made according to the statutes, that then, no hundred or franchise shall in any wise incur the penalty, loss, or forfeiture mentioned in the statutes, although the residue of the malefactor’s shall happen to escape.” See 1 Vent. 118. 325. Raym. 221. 2 Lev. 4.

If hue and cry be made towards one part of the county, and an inhabitant of the hundred apprehends one of the robbers within another, this is a taking within the statute. 1 Vent. 118, 119.

By the stat. 8 Geo. II. cap. 16. it is enacted, “that no hundred, or franchise therein, shall be chargeable by virtue of any of the statutes, if any one or more of the felons, by whom such robbery shall be committed, be apprehended within the space of forty days next after public notice given in the London Gazette, as by the statute is provided.”

3. By stat. 27 Eliz. c. 13. § 14. it is enacted, “that after execution of damages by the party or parties so robbed had, it shall be
lawful (upon complaint made by the party charged) to and for
two justices of the peace (whereof one to be of the quorum) of
the same county, inhabiting within the hundred, or near unto the
same where any such execution shall be had, to assess and tax
ratably and proportionably, according to their discretions, all and
every the towns, parishes, villages, and hamlets, as well of the said
hundred where any such robbery shall be committed, as of the
liberties within the said hundred to and towards an equal contribu-
tion, to be had and made for the relief of the inhabitants, against
whom the party or parties robbed before that time had execu-
tion."

The constables, &c. are to levy the money, and pay it over to
the justices, and they are to deliver it over to the inhabitants, for
whose use it was collected.

The same taxation is to be in cases where there is default or
negligence of pursuit, and fresh suit, for the benefit of inhabitants
having damages or money levied on them, (see ante, 1.)

By the stat. 8 Geo. II. c. 16. already referred to, after judgment
against the hundred, no process shall be served on the high con-
stable or any inhabitant: but the sheriff, on receipt of the writ of
execution, shall show it gratis to two justices of the peace in or
near the hundred, who shall speedily cause an assessment to be
levied pursuant to the stat. 27 Eliz. c. 13. and also for the neces-
sary expenses of the high constable above the costs and damages
recovered, of which, on notice from the two justices, he shall give
an account and proof on oath to their satisfaction, having first
caused his attorney's bill to be taxed. § 4.

The sheriff shall pay the money levied to the parties without
fee, and endorse the day of receiving the writ of execution, and
not be called upon for a return till sixty days after. And see
stat. 22 Geo. II. c. 46. § 34.

And the like assessment shall be in case the plaintiff be nonsuit,
discontinue, or have a verdict or judgment on demurrer against
him, if by insolvency of the plaintiff or his sureties, he cannot be
reimbursed on the bond of 100l. penalty; and the money levied
shall be paid to the justices for the high constable in ten days af-
ter it is levied. § 7, 8. of said stat. 8 Geo. II. c. 16.

And the justices may limit a time not exceeding thirty days for-
levying such assessment; and the officer appointed refusing or
neglecting to levy and pay the money, &c. in such time, forfeits
double the sum. § 9, 10.

If there be judgment against the hundred; it may be levied
against the inhabitants of the same hundred by fieri facias. So it
may be levied upon any one, who has lands in his possession with-
in the hundred, though he has no house nor lodging there; for he
is an inhabitant. R. 2 Sav. 423. Upon a lessee, or purchaser
after the robbery committed. R. Noy, 155. So it may be levied
upon one or two of the inhabitants. But if a man come to inhabit
in a hundred after a robbery done, he shall not be charged. R.
Hutt. 125. - Cont. per. Barkley, Mar. pl. 28.

HUISSERIUM, A ship used to transport horses; derived, as
some will have it, from the Fr. huis, i. e. a door; because, when
the horses are put on shipboard, the doors or hatches are shut
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upon them, to keep out the water. *Bromfton, anno 1190. These ships have been termed *Uffers.*

*HUSSIER.* An usher of a court, or in the king's palace, &c.

See *Usher.*

*HULKA.* A hulk or small vessel. *Walsing.* 394.

*HULKS,* For felons. See tit. *Transportation.*


*HULLUS,* A hill. *In bullis et holmis,* i. e. in hills and dales.


*HUMAGIUM,* A moist place. *M. Angl.* 1 far. f. 628. a.


**HUNDRED.**

*Hundredum, centuria.* A part or division of a shire; so called, either because of old each *hundred* found 100 *fidcujos* of the king's peace, or a hundred able men for his wars. But more probably it is so called, because it was composed of a hundred families. It is true, *Bromfton* tells us, that a hundred contains *centum villas*; and *Giraldus Cambrensis* writes, that the Isle of Man hath 343 *villas.* But in these places the word *villa* must be taken for a country family; for it cannot mean a village, because there are not above forty villages in that island. So where *Lambard* says, that a hundred is so called, *a numero centum hominum,* it must be understood of a hundred men, who are heads or chiefs of so many families.

These were first ordained by king *Alfred,* the 29th king of the *West Saxons:* *Lambard verbo centuria.* This dividing counties into hundreds, for better government, King *Alfred* brought from *Germany:* for there *centa,* or *centena,* is a jurisdiction over a hundred towns. See 1 *Comm.* 115. *Introductory.* § 4.

In ancient times, it was ordained for the more sure keeping of the peace, that all free-born men should cast themselves into several companies by ten in each company; and that every of these ten men should be surety and pledge for the forthcoming of his fellows. For which cause these companies in some places were called *tithings* and as ten times ten makes a hundred, so because it was also appointed that ten of these tithings should at certain times meet together for matters of greater weight, therefore that general assembly was called a hundred. *Lamb. Const.*

The hundred is governed by a high constable or bailiff; and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called *wapentakes.* 1 *Comm.* *Introductory.* § 4. p. 115. and see *Comm. c.* 33.

This is the original of hundreds, which still retain the name,
but the jurisdiction is devolved to the county court, some few excepted, which have been by privilege annexed to the crown, or granted to some great subject, and so remain still in the nature of a franchise. This has been ever since the stat. 14 Edw. III. st. 1. cap. 9. whereby these hundred courts, formerly farmed out by the sheriff to other men, were all, or the most part reduced to the county court, and so remain at present.

But now, by hundred courts we understand several franchises, wherein the sheriff has nothing to do by his ordinary authority, except they of the hundred refuse to do their office. See West. part 1. Sym. lib. 2. § 228. Ad hundredum post Pascha, et ad proximum hundredum post festum St. Mich. Mon. Angl. 2 part. f. 293. a.

A hundred is to have jurisdiction or power to administer justice in 100 vills, or of 100 men, or of 100 parishes. Br. Court Baron, pl. 8. cites 8 Hen. VII. 3. per Rede.

Every ward in London is a hundred in a county, and every parish in London is a vill in a hundred. 9 Refr. 66. b.

Hundreds were either parcel of the counties, and there the sheriffs did constitute bailiffs, (viz those hundreds which were anciently parcel of the farm of the sheriffs, that the stat. 2 Edw. III. c. 12. speaks of,) or else they were such as were granted out, which the lord of the hundred sometimes held at farm, and sometimes in fee, called hundreds in fee, liberties of hundreds, franchises of hundreds. Vent. 405.

In the time of King Alfred the kingdom was in gross, and then divided into counties and hundreds, and all persons then came within one hundred or other; and then the king's relations had the government of them, and therefore they were called consangui- nec, (cousins,) and so are the earls, (comites,) lord lieutenants, styled at this day; but when the office became troublesome, there were ordained vicecomites, (sheriffs,) which name remains to this day, and the others continue to be called consanguinet, but have no power in the county, having only the honorary name of earls or comites of such or such a county, &c. For the better government of these counties, the vicecomites had two courts; but out of those the king granted petty leets and courts baron; but the tourn of the sheriff had yet a superintendant power, they being derived out of the sheriff's tourn. See Dyer, 13.

The king afterwards granted away some hundreds in fee-simple, and some franchises, and the last excluded the king utterly, but the hundreds granted in fee were not wholly exempt. On this arose some confusion, and the parliament hereon took notice, that the execution of justice was by this much interrupted, and therefore came the statute of Line. 9 Edw. II. st. 2. that sheriffs should be sufficient persons, and have lands in the county, and so be able to answer both the king and county, and that bailiffs and farmers of hundreds should be sufficient men. And at this time hundreds were grantable for years.

Then came the statute of 2 Edw. III. c. 4, 5. that sheriffs should continue but for one year. But this took not away the whole inconvenience; for the crown still granted away bailiwicks and hundreds, for lives, at rents at such excessive dear rates, that made
them endeavour to make up their money by unlawful means; and therefore came the statutes 2 Edw. III. cap. 12. 14 Edw. III. cap. 9. By the first it was enacted, that all hundreds and wapentakes granted by the king shall be annexed to the county, and not severed. And by the other statute, that all should be annexed, and the sheriff should have power to put in bailiffs, for which he will answer, and no more should be granted for the future; and one reason of this was, because the king granted away hundreds, and abated not the sheriff’s farm. Ang. 2 Show. 98, 99.

Hundreds are liable to penalty on exportation of wool. 7 & 8 Wm. III. c. 28. § 8. Liable to damages sustained by riotously pulling down buildings. 1 Geo. I. st. 2. c. 5. § 6. By killing cattle, cutting down trees, burning houses, &c. 9 Geo. I. c. 26. § 7. 29 Geo. II. c. 35. § 9. By destroying turnpikes, or works on navigable rivers. 8 Geo. II. c. 20. § 6. By cutting hop-binds. 10 Geo. II. c. 32. § 4. By destroying corn to prevent exportation. 11 Geo. II. c. 22. § 5. By wounding officers of the customs. 19 Geo. II. c. 34. § 6. Or by destroying woods, &c. 29 Geo. II. c. 36. § 9. So in cases of robbery. See tit. Hue and Cry. So for the destruction of mines or pits of coal. Burn’s Just. tit. Hundred. See this Diet. under the several titles.

Inhabitants within the hundred may be witnesses for the hundred, 8 Geo. II. 16. The word hundredor is sometimes taken for an immunity or privilege, whereby a man is quit of money or customs due to the hundreds. Cowell.

HUNDRED COURT, Is only a larger court baron, being held for all the inhabitants of a particular hundred instead of a manor. The free suitors are here the judges, and the steward the register, as in the case of a court baron. It is not a court of record, and it resembles a court baron in all points, except that in point of territory it is of a greater jurisdiction.

According to Blackstone, its institution was probably coeval with that of hundreds themselves, introduced, though not invented, by Alfred, being derived from the polity of the ancient Germans. See 1 Comm. Introd. § 4. and this Diet. tit. County Court, Court Baron, Court Leet, Constable, Hundred, &c.

HUNDREDORS, hundredarii.] Persons serving on juries, or fit to be empannelled thereon for trials, dwelling within the hundred where the land in question lies. Stat. 35 Hen. VIII. c. 5. And default of hundredors was a challenge or exception to panels of sheriffs, by our law, till the stat. 4 & 5 Ann. cap. 16. ordained, that, to prevent delays by reason of challenges to panels of jurors for default of hundredors, &c. writs of venire facias for trial of any action in the courts at Westminster, shall be awarded of the body of the proper county where the issue is triable. See tit. Jury I. II.

Hundredor also signifies him that hath the jurisdiction of the hundred, and is in some places applied to the bailiff of a hundred. See stats. 13 Edw. I. c. 38. 9 Edw. II. 2 Edw. III. Horn’s Mirror, lib. 1. HUNDRED LAGH, From the Sax. lagā, lex.] Is in Saxon the hundred-court. Manwood, par. 1. pag. 1.

HUNDRED PENNY, Was collected by the sheriff or lord of
the hundred, in oneris sui subsidium. Camd. and see Specim. Gloss. 
Pence of the hundred is mentioned in Domesday. And it is else-

HUNDRED-SETENA. Dwellers or inhabitants of a hundred. 

HUNGER. According to the present doctrine, hunger will not 
justifi stealimg food, to relieve a present necessity. 1 Hale's P. 
C. 54. And the doctrine seems just, as (on conviction) a judge 
may respite and a king hardon, an advantage which is wanting in 
many states; particularly those which are democratical. The an-
cient doctrine, (that it would justify,) if now in force, might open 
a door to many villanies. And in this commercial state, those 
who can labour need not fear starving. Those that cannot, and 
who are poor, the laws have made a provision for. See 4 Comm. 31.

HUNTING. By stat. 1 Hen. VII. c. 7. unlawful hunting, in 
any legal forest, park, or warren, not being the king's property, by 
night, or with painted faces, declared to be single felony. And by 
stat. 9 Geo. 1. c. 22. appearing armed with faces blacked, or dis-
guised, to hunt, wound, kill, or steal deer, to rob a warren, or 
steal fish, is felony, without benefit of clergy. See tit. Deer Steal-
ers, Game, Black Act.

HURDLE, A sledge or hurdle used to draw traitors to execu-
tion. See tit. Execution, (Criminal.)

HURDEREFERST, A domestic or one of the family, from the 

HURRERS. The cappers and hat-makers of London were 
formerly one division of the haberdashers, called by this name. Stow's 
Surv. Lond. 312.

HURST, HYRST, HERST, from the Sax. hyrst, i. e. a wood 
or grove of trees.] There are many places in Kent, Sussex and 
Hampshire, which begin and end with this syllable; and the rea-
son may be, because the great wood called Andrewswoold extended 
through those counties. Cowell.

HURST CASTLE, Is so called because situated near the 
woods. So hursteiga is a woody place; and probably from thence 
is derived Hursey, now Hurley, a village in Berkshire. Cowell.

HURTARDS, HURTUS, A ram or wether, a sheep. Mon. 

HUSBAND AND HANT, Words used in ancient pleadings. Hen-
ricus P. coptus per querimoniam mercatorum Flanriae et imprison-
atum, offert Domino Regi Hus et Hant in plegio ad standum recto, 
et ad respondendum praedictis mercatoribus et omnibus aliis, qui ver-
sus eum logui voluerint: et diversi veniunt quem manucaunt quod 
dicto. Hen. P. per Hus et Hant veniet ad summationem Regis vel 
Concili sui in Curia Regis a jud Shepway, et quod stabit ibi reeto, 
See commune Plegium, sicut Johannes Doe et Richardus Roe. & 
Inst. 73.

HUSBAND AND WIFE, Are made so by marriage, and be-
ing thus joined, are accounted but one person in law. Litt. 168. 
See this Dict. tit. Baron and Feme.

HUSBANDRY AND HUSBANDMAN. There having been 
great decay of husbandry and hospitality, it was enacted by stat. 39 
Eliz. c. 1. now obsolete, that one half of the houses decayed should
be erected, and forty acres of arable land laid to them, by the person, his heir, executor, &c. who suffered the decay: and they were to keep the houses and lands in repair.

The decaying of houses of husbandry prohibited; stats. 4 Hen. VII. c. 19. 6 Hen. VIII. c. 5. 7 Hen. VIII. c. 1. 27 Hen. VIII. c. 22. 2 & 3 P. & M. c. 1. 2. 39 Eliz. c. 1. all now apparently expired or obsolete. Wood not to be turned to tillage or pasture. Stat. 35 Hen. VIII. c. 17. § 3. Land to be reconverted to tillage; 5 & 6 Edw. VI. c. 5. 5 Eliz. c. 2. repealed by stat. 35 Eliz. c. 7. § 20. Who may be compelled to serve in husbandry. 5 Eliz. c. 4. § 7. How husbandmen shall take apprentices. 5 Eliz. c. 4. § 8. See tit. Labourers, Apprentices. Arable land not to be converted to pasture; 39 Eliz. c. 2. but not to extend to Northumberland. 43 Eliz. c. 9. § 22. See Heordfeste.

HUSBRECE, From Sax. hus, a house, and brice, a breaking.] Was that offence formerly which we now call burglary. Blount. See tit. Burglary.

HUSCARLE, A menial servant; it signifies properly a stout man, or a domestic; also the domestical gatherers of the Danes' tributes were anciently called huscarles. The word is often found in Domesday, where it is said the town of Dorchester paid to the use of huscarles or housecarles, one mark of silver. Domesday.

HUSCANS, Fr. hauscan.] A sort of boot, or buskin made of coarse cloth, and worn over the stockings, mentioned in the ancient stat. 4 Edw. IV. c. 7.

HUSFASTNE, Sax. huast, i.e. domus fasteest, fixus.] He that holdeth house and land. Bract. lib. 3. tract. c. 2. cap. 10. See Heordfeste.

HUSGABLE, husgablum.] House-rent, or some tax or tribute laid upon houses. Mon. Angl. tom. 3. p. 254.

HUSSELLING-PEOPLE, Communicants; from the Sax. housell, or huscel, which signifies the holy sacrament. See tit. HostilE.

HUSTINGS, hustingum, from the Sax. hustinge, i. e. concilium or curia.] A court held before the lord mayor and aldermen of London, and is the principal and supreme court of the city: and of the great antiquity of this court, we find honourable mention made in the laws of King Edward the Confessor: Debet etiam in London, qua est caput Regni et Legum, semper Curia Domini Regis singulis aetatishis diebus hustings sedere et teneri; fundata enim erat olim et aedificata ad instar, et ad modum et in memoriam veteris. Magna Trojae, et usque in hodiernum diem leges et iura et dignitates et libertates regiasque consuetudines antiquae magne Trojae, in se contineat: et consuetudines suas una semper inviolabilitate conservat, &c. Other cities and towns have also had a court of the same name; as Winchester, York, Lincoln, &c. Fleta, lib. 2. c. 55. 4 Inst. 247. Stat. 10 Edw. II. c. 1. See this Dict. tit. Court of Hustings, London.

HUTESIUM ET CLAMOR, A HUE AND CRY; See that title.


HYBERNAGIUM, The season for sowing winter corn, between Michaelmas and Christmas; as tremagium is the season for sowing the summer corn in the spring of the year: these words were taken sometimes for the different seasons; other times for the dif-
ferent lands on which the several kinds of grain were sowed; and sometimes for the different corn: as hybernagium was applied to wheat and rye, which we still call winter corn; and tremagium to barley, oats, &c. which we term summer corn: these words are likewise written iberagnium and thornagium. Fleta, lib. 2. cap. 73.

§ 18.

HYDAGE, See Hidage.

HYDE OF LAND, AND HYDEGILD. See Hide and Hidage.

HYPOTHECA, In the civil law, was where the possession of the thing pledged remained with the debtor. Inst. l. 4. c. 6. s. 7. See East. 2 Comm. 159. See tit. Bailment. In the Scotch law it is synonymous with Lien; see that title.

To hypothecate, a ship, from the Lat. hypotheca, a pledge, is to pawn the same for necessaries; and a master may hypothecate either ship or goods for relief when in distress at sea; for he represents the traders as well as owners; and in whose hands ever a ship or goods hypothecated come, they are liable. 1 Salk. 34. 2 Litt. Abr. 195. See tit. Insurance IV. Factor, Merchant, Ship, Mortgage, &c.

HYTH, A port or little haven to lade or unlade wares at, as Queen-hyth, Lamb-hyth, &c. New Book of Entries, fol. 3. De tota medietate hythe sua in, &c. cum libero introitu et exitu, &c. Mon. Angl. 2 par. fol. 142. Also a wharf, &c.

JACK, A kind of defensive coat-armour formerly worn by horsemen in war, not made of solid iron, but of many plates fastened together; which some persons by tenure were bound to find upon any invasion. Walshingham. It was called lorica, because at first it was made with leather. Cowell.

JACTITATION OF MARRIAGE, Is one of the first and principal matrimonial causes in the ecclesiastical courts; as, when one of the parties boasts or gives out that he or she is married to the other, whereby a common Jactitation of their marriage may ensue. On this ground the party injured may libel the other; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head: which is the only remedy those courts can give for this injury. 3 Comm. 93.

JACTIVUS, Lat.] He that loseth by default. Formul. Solen. 159.

JAIL, See Gaol.


JAMBEAUX, Leg armour; from jambe, tibia. Blount.

JAMPNUM, Furze or gorse, and gorsy ground; a word used in fines of lands, &c. when law proceedings were in Latin, and which seems to be taken from the Fr. jaune, i.e. yellow; be-