Exhibit 72

To Defendants' Memorandum in Support of Motion for Summary Judgment

Commentaries *on the* Laws *of* England

A Facsimile of the First Edition of 1765-1769
With an Introduction by Thomas A. Green

Volume 4

William Blackstone

COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE FOURTH.

BY

WILLIAM BLACKSTONE, Esq.
SOLICITOR GENERAL TO HER MAJESTY.

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from the miniſtration of his office during pleaſure. And, if any perſon in ſuch church or church-yard proceeds to ſmite or lay violent hands upon another, he ſhall be excommunicated *ipſo facto*; or if he ſtrikes him with a weapon, or draws any weapon with intent to ſtrike, he ſhall beſides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. *Two* perſons may be guilty of an affray: but,

6. RIOTS, *routs*, and *unlawful aſſemblies* muſt have *three* perſons at leaſt to conſtitute them. An *unlawful aſſembly* is when three, or more, do aſſemble themſelves together to do an unlawful act, as to pull down incloſures, to deſtroy a warren or the game therein; and part without doing it, or making any motion towards it[f]. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way; and make ſome advances towards it[g]. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cauſe or quarrel[h]: as if they beat a man; or hunt and kill game in another's park, chaſe, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuſance, in a violent and tumultuous manner. The puniſhment of unlawful aſſemblies, if to the number of twelve, we have juſt now ſeen may be capital, according to the circumſtances that attend it; but, from the number of three to eleven, is by fine and impriſonment only. The ſame is the caſe in riots and routs by the common law; to which the pillory in very enormous caſes has been ſometimes ſuperadded[i]. And by the ſtatute 13 Hen. IV. c. 7. any two juſtices, together with the ſheriff or under-ſheriff of the county, may come with the *poſſe comitatus*, if need be, and ſuppreſs any ſuch riot, aſſembly, or rout, arreſt the rioters, and record upon the ſpot the nature and circumſtances of the whole tranſaction;

[f] 3 Inſt. 176.
[g] Bro. *Abr. t. Riot.* 4. 5.
[h] 3 Inſt. 176.
[i] 1 Hawk. P. C. 159.

which

which record alone ſhall be a ſufficient conviction of the offenders. In the interpretation of which ſtatute it hath been holden, that all perſons, noblemen and others, except women, clergymen, perſons decrepit, and infants under fifteen, are bound to attend the juſtices in ſuppreſſing a riot, upon pain of fine and impriſonment; and that any battery, wounding, or killing the rioters, that may happen in ſuppreſſing the riot, is juſtifiable[j]. So that our antient law, previous to the modern riot act, ſeems pretty well to have guarded againſt any violent breach of the public peace; eſpecially as any riotous aſſembly on a public or general account, as to redreſs grievances or pull down all incloſures, and alſo reſiſting the king's forces if ſent to keep the peace, may amount to overt acts of high treaſon, by levying war againſt the king.

7. NEARLY related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by ſtatute 13 Car. II. ſt. 1. c. 5. it is enacted, that not more than twenty names ſhall be ſigned to any petition to the king or either houſe of parliament, for any alteration of matters eſtabliſhed by law in church or ſtate; unleſs the contents thereof be previouſly approved, in the country, by three juſtices, or the majority of the grand jury at the aſſiſes or quarter ſeſſions; and, in London, by the lord mayor, aldermen, and common council[k]: and that no petition ſhall be delivered by a company of more than ten perſons: on pain in either caſe of incurring a penalty not exceeding 100 *l*, and three months impriſonment.

8. AN eighth offence againſt the public peace is that of a *forcible entry* or *detainer*; which is committed by violently taking or keeping poſſeſſion, with menaces, force, and arms, of lands and tenements, without the authority of law. This was for-

[j] 1 Hal. P. C. 495. 1 Hawk. P. C. 161.

[k] This may be one reaſon (among others) why the corporation of London has, ſince the reſtoration, uſually taken the lead in petitions to parliament for the alteration of any eſtabliſhed law.

merly allowable to every perſon diſſeiſed, or turned out of poſſeſſion, unleſs his entry was taken away or barred by his own neglect, or other circumſtances; which were explained more at large in a former volume[l]. But this being found very prejudicial to the public peace, it was thought neceſſary by ſeveral ſtatutes to reſtrain all perſons from the uſe of ſuch violent methods, even of doing themſelves juſtice; and much more if they have no juſtice in their claim[m]. So that the entry now allowed by law is a peaceable one; that forbidden is ſuch as is carried on and maintained with force, with violence, and unuſual weapons. By the ſtatute 5 Ric. II. ſt. 1. c. 8. all forcible entries are puniſhed with impriſonment and ranſom at the king's will. And by the ſeveral ſtatutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more juſtices of the peace, taking ſufficient power of the county, may go to the place, and there record the force upon his own view, as in caſe of riots; and upon ſuch conviction may commit the offender to gaol, till he makes fine and ranſom to the king. And moreover the juſtice or juſtices have power to ſummon a jury, to try the forcible entry or detainer complained of: and, if the ſame be found by that jury, then beſides the fine on the offender, the juſtices ſhall make reſtitution by the ſheriff of the poſſeſſion, without inquiring into the merits of the title; for the force is the only thing to be tried, puniſhed, and remedied by them: and the ſame may be done by indictment at the general ſeſſions. But this proviſion does not extend to ſuch as endeavour to maintain poſſeſſion by force, where they themſelves, or their anceſtors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding.

9. The offence of *riding* or *going armed*, with dangerous or unuſual weapons, is a crime againſt the public peace, by terrifying the good people of the land; and is particularly prohibited

[l] See Vol. III. pag. 174, &c. [m] 1 Hawk. P. C. 141.

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by the ſtatute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and impriſonment during the king's pleaſure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour[n].

10. SPREADING *falſe news*, to make diſcord between the king and nobility, or concerning any great man of the realm, is puniſhed by common law[o] with fine and impriſonment; which is confirmed by ſtatutes Weſtm. 1. 3 Edw. I. c. 34. 2 Ric. II. ſt. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and *pretended prophecies*, with intent to diſturb the peace, are equally unlawful, and more penal; as they raiſe enthuſiaſtic jealouſies in the people, and terrify them with imaginary fears. They are therefore puniſhed by our law, upon the ſame principle that ſpreading of public news of any kind, without communicating it firſt to the magiſtrate, was prohibited by the antient Gauls[p]. Such falſe and pretended prophecies were puniſhed capitally by ſtatute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the ſtatute 5 Eliz. c. 15. the penalty for the firſt offence is a fine of 100 *l.* and one year's impriſonment; for the ſecond, forfeiture of all goods and chattels, and impriſonment during life.

12. BESIDES actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the ſame denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of ſuch challenge, are puniſhable by fine and impriſonment, according to the circumſtances of the offence[q]. If this challenge ariſes on account of any mo-

[n] Pott. Antiqu. b. 1. c. 26.

[o] 2 Inſt. 226. 3 Inſt. 198.

[p] "*Habent legibus ſanctum, ſi quis quid de "republica a finitimis rumore aut fama acceperit, "uti ad magiſtratum deferat, neve cum alio "communicet: quod ſaepe homines temerarios "atque imperitos falſis rumoribus terreri, et "ad facinus impelli, et de ſummis rebus conſi- "lium capere, cognitum eſt.*" Caeſ. *de bell. Gall. lib.* 6. *cap.* 19.

[q] 1 Hawk. P. C. 135. 138.

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ney won at gaming, or if any aſſault or affray happen upon ſuch account, the offender, by ſtatute 9 Ann. c. 14. ſhall forfeit all his goods to the crown, and ſuffer two years impriſonment.

13. OF a nature very ſimilar to challenges are *libels*, *libelli famoſi*, which, taken in their largeſt and moſt extenſive ſenſe, ſignify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the ſenſe under which we are now to conſider them, are malicious defamations of any perſon, and eſpecially a magiſtrate, made public by either printing, writing, ſigns, or pictures, in order to provoke him to wrath, or expoſe him to public hatred, contempt, and ridicule[r]. The direct tendency of theſe libels is the breach of the public peace, by ſtirring up the objects of them to revenge, and perhaps to bloodſhed. The communication of a libel to any one perſon is a publication in the eye of the law[s]: and therefore the ſending an abuſive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace[t]. For the ſame reaſon it is immaterial with reſpect to the eſſence of a libel, whether the matter of it be true or falſe[u]; ſince the provocation, and not the falſity, is the thing to be puniſhed criminally: though, doubtleſs, the falſhood of it may aggravate it's guilt, and enhance it's puniſhment. In a civil action, we may remember, a libel muſt appear to be falſe, as well as ſcandalous[w]; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compenſation for himſelf, whatever offence it may be againſt the public peace: and therefore, upon a civil action, the truth of the accuſation may be pleaded in bar of the ſuit. But, in a criminal proſecution, the tendency which all libels have to create animoſities, and to diſturb the public peace, is the ſole conſideration of the law. And therefore, in ſuch proſecutions,

[r] 1 Hawk. P. C. 193.
[s] Moor. 813.
[t] 2 Brownl. 151. 12 Rep. 35. Hob. 215. Poph. 139. 1 Hawk. P. C. 195.
[u] Moor. 627. 5 Rep. 125. 11 Mod. 99.
[w] See Vol. III. pag. 125.

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the only facts to be conſidered are, firſt, the making or publiſhing of the book or writing; and ſecondly, whether the matter be criminal: and, if both theſe points are againſt the defendant, the offence againſt the public is complete. The puniſhment of ſuch libellers, for either making, repeating, printing, or publiſhing the libel, is fine, and ſuch corporal puniſhment as the court in their diſcretion ſhall inflict; regarding the quantity of the offence, and the quality of the offender[x]. By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Auguſtus, the puniſhment became corporal only[y]. Under the emperor Valentinian[z] it was again made capital, not only to write, but to publiſh, or even to omit deſtroying them. Our law, in this and many other reſpects, correſponds rather with the middle age of Roman juriſprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were eſtabliſhed in the dark and tyrannical ages of the antient *decemviri*, or the later emperors.

IN this, and the other inſtances which we have lately conſidered, where blaſphemous, immoral, treaſonable, ſchiſmatical, ſeditious, or ſcandalous libels are puniſhed by the Engliſh law, ſome with a greater, others with a leſs degree of ſeverity; the *liberty of the preſs*, properly underſtood, is by no means infringed or violated. The liberty of the preſs is indeed eſſential to the nature of a free ſtate: but this conſiſts in laying no *previous* reſtraints upon publications, and not in freedom from cenſure for criminal matter when publiſhed. Every freeman has an undoubted right to lay what ſentiments he pleaſes before the public: to forbid this, is to deſtroy the freedom of the

[x] 1 Hawk. P. C. 196.

[y] ——— *Quinetiam lex*
Poenaque lata, malo quae nollet carmine quenquam
Deſcribi: —— *vertere modum formidine* fuſtis. Hor. *ad Aug.* 152.

[z] *Cod.* 9. 36.

preſs:

of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the ſubjects, to adopt ſo contentious a ſyſtem; nor will ſuffer with impunity any crime to be *prevented* by death, unleſs the ſame, if committed, would alſo be *puniſhed* by death.

IN theſe inſtances of *juſtifiable* homicide, you will obſerve 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. 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.

II. EXCUSABLE homicide is of two ſorts; either *per infortunium*, by miſadventure; or *ſe defendendo*, upon a principle of ſelf-preſervation. We will firſt ſee wherein theſe two ſpecies of homicide are diſtinct, and then wherein they agree.

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[d]: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a maſter his ſervant or ſcholar, or an officer puniſhing a criminal, and happens to occaſion his death, it is only miſadventure; for the act of correction 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 the circumſtances) murder[e]; for the act of immoderate correction is unlawful.

[d] 1 Hawk. P. C. 73, 74.

[e] 1 Hal. P. C. 473, 474.

lawful, Thus by an edict of the emperor Conſtantine [f], when the rigor of the Roman law with regard to ſlaves began to relax and ſoften, a maſter was allowed to chaſtiſe his ſlave with rods and impriſonment, and, if death accidentally enſued, he was guilty of no crime: but if he ſtruck him with a club or a ſtone, and thereby occaſioned his death; or if in any other yet groſſer manner "*immoderate ſuo jure utatur, tunc reus homicidii ſit.*"

BUT, to proceed. A tilt or tournament, the martial diverſion of our anceſtors, was however an unlawful act; and ſo are boxing and ſwordplaying, the ſucceeding amuſement 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 to be only miſadventure; for then the act is lawful [g]. In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games, authorized or permitted by the ſtate, was not held to be guilty of homicide [h]. Likewiſe to whip another's horſe, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful; but manſlaughter in the perſon who whipped him, for the act was a treſpaſs, and at beſt a piece of idleneſs, of inevitably dangerous conſequence [i]. And in general, if death enſues in conſequence of any idle, dangerous, and unlawful ſport, as ſhooting or caſting ſtones in a town, or the barbarous diverſion of cock-throwing, in theſe and ſimilar caſes, the ſlayer is guilty of manſlaughter, and not miſadventure only, for theſe are unlawful acts [k].

2. HOMICIDE in *ſelf-defence*, or *ſe defendendo*, upon a ſudden affray, is alſo excuſable rather than juſtifiable, by the Engliſh law. This ſpecies of ſelf-defence muſt be diſtinguiſhed from that juſt now mentioned, as calculated to hinder the perpetra-

[f] *Cod. l.* 9. *t.* 14.
[g] 1 Hal. P. C. 473. 1 Hawk. P. C. 74.
[h] Plato *de LL. lib.* 7. *Ff.* 9. 2. 7.
[i] Hawk. P. C. 73.
[k] *Ibid.* 74. 1 Hal. P. C. 472. Foſt. 261.

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tion 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 word *chance-medley*, or (as ſome rather chuſe to write it) *chaud-medley*; the former of which in it's 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 ſtatute 24 Hen. VIII. c. 5. and our antient books [l], that it is properly applied to ſuch killing, as happens in ſelf-defence upon a ſudden rencounter [m]. 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, but 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 means of eſcaping from his aſſailant.

IN ſome caſes this ſpecies of homicide (upon *chance-medley* in ſelf-defence) differs but little from manſlaughter, which alſo happens frequently upon *chance-medley* in the proper legal ſenſe of the word [n]. 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 farther ſtruggle, and afterwards, being cloſely preſſed by his antagoniſt, kills him to avoid his own deſtruction, this is homicide excuſable by ſelf-defence [o]. For which reaſon the law requires, that the perſon, who kills another

[l] Staundf. P. C. 16.
[m] 3 Inſt. 55. 57. Foſt. 275, 276.
[n] 3 Inſt. 55.
[o] Foſt. 277.

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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 aſſailant; 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 [p]. In this the civil law alſo agrees with ours, or perhaps goes rather farther; "*qui cum aliter tueri ſe non poſſunt*, "*damni culpam dederint, innoxii ſunt* [q]. 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 [r]: 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. And this is the doctrine of univerſal juſtice [s], as well as of the municipal law.

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 aggreſſor 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 [t]. 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 [u]:

[p] 1 Hal. P. C. 481. 483.
[q] *Ff.* 9. 2. 45.
[r] 1 Hal. P. C. 483.
[s] Puff. b. 2. c. 5. §. 13.
[t] 1 Hal. P. C. 479.
[u] 1 Hal. P. C. 482.

though others [w] have thought this opinion too favourable; inaſmuch as the neceſſity, to which he is at laſt reduced, originally aroſe from his own fault. 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 [x].

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 preferably to that of another, where one of them muſt inevitably periſh. As, among others, in that caſe mentioned by lord Bacon [y], 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 expence of another man's, is excuſable though 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 an endangering of, each other's life.

LET us next take a view of thoſe circumſtances wherein theſe two ſpecies of homicide, by miſadventure and ſelf-defence, agree; and thoſe are in their 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 therefore is not altogether faultleſs [z]. And as to the neceſſity which excuſes a man who kills another *ſe defendendo*,

[w] 1 Hawk. P. C. 75.
[x] 1 Hal. P. C. 484.
[y] Elem. c. 5. See alſo 1 Hawk. P. C. 73.
[z] 1 Hawk. P. C. 72.

lord

lord Bacon[a] entitles it *neceſſitas culpabilis*, and thereby diſtinguiſhes it from the former neceſſity of killing a thief or a malefactor. 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 ſcarce can be tried who was originally in the wrong; the law will not hold the ſurvivor intirely guiltleſs. But it is clear, in the other caſe, that where I kill a thief that breaks into my houſe, the original default 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.

NOR is the law of England ſingular in this reſpect. Even the ſlaughter of enemies required a ſolemn purgation among the Jews; which implies that the death of a man, however it happens, will leave ſome ſtain behind it. And the moſaical law[b] appointed certain cities of refuge for him "who killed his neighbour unawares; as if a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a ſtroke with the ax to cut down a tree, and the head ſlippeth from the helve, and lighteth upon his neighbour that he die, he ſhall flee unto one of theſe cities and live." But it ſeems he was not held wholly blameleſs, any more than in the Engliſh law; ſince the avenger of blood might ſlay him before he reached his aſylum, or if he afterwards ſtirred out of it till the death of the high prieſt. In the imperial law likewiſe[c] caſual homicide was excuſed, by the indulgence of the emperor ſigned with his own ſign manual, "*adnotatione principis*:" otherwiſe the death of a man, however committed, was in ſome degree puniſhable. Among the Greeks[d] homicide by misfortune was expiated by

[a] Elem. c. 5.
[b] Numb. c. 35. and Deut. c. 19.
[c] *Cod.* 9. 16. 5.
[d] Plato *de Leg. lib.* 9.

volutary baniſhment for a year [e]. In Saxony a fine is paid to the kindred of the ſlain; which alſo, among the weſtern Goths, was little inferior to that of voluntary homicide [f]: and in France no perſon is ever abſolved in caſes of this nature, without a largeſs to the poor, and the charge of certain maſſes for the ſoul of the party killed.

The penalty inflicted by our laws is ſaid by ſir Edward Coke to have been antiently no leſs than death [h]; which however is with reaſon denied by later and more accurate writers [i]. 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* [k]: which was probably diſpoſed of, as in France, *in pios 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. But that reaſon having long ceaſed, and the penalty (eſpecially if 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 [l], a pardon and writ of reſtitution of his goods as a matter of courſe and right, only paying for ſuing out the ſame [m]. And indeed, to prevent this expenſe, in caſes where the death has notoriouſly happened by miſadventure or in ſelf-defence, the judges will uſually permit (if not direct) a general verdict of acquittal [n].

III. Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any

[e] To this expiation by baniſhment the ſpirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty third Iliad, that, when a child, he was obliged to flee his country for caſually killing his playfellow; "νηπιος, ἐκ ἰθελων."

[f] Stiernh. *de jure Goth. l.* 3. *c.* 4.

[g] De Mornay on the digeſt.

[h] 2 Inſt. 148. 315.

[i] 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Foſt. 282, *&c.*

[k] Foſt. 287.

[l] Foſt. 283.

[m] 2 Hawk. P. C. 381.

[n] Foſt. 288.

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