ORIGINAL

SUPREME COURT OF FLORIDA

PAUL JENNINGS HILL,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.: 84,838

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DEATH PENALTY APPEAL FROM THE

FIRST JUDICIAL CIRCUIT, ESCAMBIA COUNTY
FRANK BELL, JUDGE, PRESIDING

BRIEF OF *AMICI CURIÆ* THE FRIENDS OF PAUL JENNINGS HILL IN SUPPORT OF APPELLANT

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Amici Curiæ THE FRIENDS OF PAUL JENNINGS HILL In Support of Appellant

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SUPREME COURT OF FLORIDA

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BRIEF OF *AMICI CURIÆ*

STATEMENT OF THE CASE AND FACTS

Amici curiæ adopt by reference Appellant's statement. Initial Brief of Appellant (hereinafter, IBA), pp. 1-5.

INTEREST OF *AMICI CURIÆ*

The Friends of Paul Hill are an unorganized group of individuals scattered throughout the United States who have contributed to the provision of this brief in his behalf. Counsel for the Friends has a similarity of belief and purpose to wit, an attorney admitted to practice law in the highest court of the State of California, who has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He has presented similar *Amicus Curiæ* Briefs in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989); *Ohio v. Akron Reproductive Ctr*, 497 U.S. 502 (1990); *Hodgson v. Minnesota v. Hodgson*, 497 U.S. 417 (1990); *Turnock v. Ragsdale*, 503 U.S. 916 (1992); *Bray v. Alexandria*, 113 S.Ct. 753 (1993); *Planned Parenthood v Williams*,10 Cal 4th 1009 (1994). He is a former professor of Law, University of Northern California, Lorenzo Patiño School

of Law. He is affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He has written and copyrighted one article on Abortion entitled ABORTION AND INALIENABLE RIGHTS IN AMERICAN JURISPRUDENCE: A PROSPECTIVE POLICY (© 1986). He lived four years in England where he engaged in a self directed study of the English Political System from the time of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

The Friends believe that pro-life individuals should **not** take human life without substantial justification. On the other hand, they are firmly commited to the proposition that the unborn are persons in the constitutional sense whose life ought not be taken without substantial justification either, and in that regard do not believe that Paul Hill received a fair trial as to whether, his acts on that particular occassion, in defense of the unborn were justified. They are also concerned that the unborn, in this, and other litigation, and confrontations, have not been adequately defended and under represented as to their interest in the outcome.

SUMMARY OF THE ARGUMENT

1. Because Hill was given faulty Farretta advisements, and did not qualify to represent himself, Initial Brief of Appellant, pp. 5-49, he was prejudiced by denial of a meaningful access to the courts to provide the following defenses:

a. Based on exhaustive research on the use of the

death penalty, the jury should have been instructed that the death penalty could be applied, if at all, only if the state demonstrated beyond a reasonable doubt that the state could not protect society by mere incarceration.

b. Based on new research, *Heath's* ruling that dual sovereignty allows multiple punishment is inconsistent with the common law, and therefore Hill was denied an opportunityto show, if there is a basis, the death penalty was barred under the doctrine of double jeopardy.

2. As appellate argued in the Initial Brief, pp. 49-58, one has the right to use reasonable force, and deadly force if reasonable, in the defense of other persons. It was error for the court below to refuse the defense because the unborn are members of "posterity" as used in the Preamble of the Constitution, and therefore a person entitled to such a defense. This court should reread *Roe v. Wade* which found that its decision was compelled because Texas had failed to demonstrate where in the Constitution the unborn are a person, recognize in this case, on the basis of new research and inquiry, Roe is an aberration, disregard Roe as unsound in principal and unworkable in practice, and find that the unborn were entitled to Paul Hill's defense.

ARGUMENTS

I.

BECAUSE OF FARETTA ERRORS, HILL WAS DENIED AN OPPORTUNITY TO PRESENT NEW EMERGING THEORIES AS TO THE APPLICATION OF THE DEATH PENALTY, AND A POTENTIAL PLEA OF DOUBLE JEOPARDY

A. EMERGING STANDARDS SUGGEST A JURY INSTRUCTION MUST INFORM THE JURY THAT BEFORE A VERDICT OF DEATH CAN BE RETURNED, THE STATE MUST DEMONSTRATE BEYOND A REASONABLE DOUBT IT CANNOT CONTROL DEFENDANT'S CONDUCT BY MERE INCARCERATION.

1. Introduction.

The constitutional prohibition against cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice." *McCleskey v. Kemp*, 481 U.S. 279 (1987) *citing Weems v. United States*, 217 U.S. 349 (1910), 378. "[T]he 'basic concept underlying the 8th Amendment' in this area is that the penalty must accord with the 'dignity of man.'" *Id*, *citing Trop v. Dulles*, 356 U.S. 86 (1958), 99, 100. Decisions in this area have been informed by "contemporary values concerning the infliction of a challenged sanction." *McCleskey, citing Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

A survey of "contemporary values concerning the" use of the death penalty suggests there are three evolving standards of decency which restrict its use: (i) a re-examination of the 8th Amendment in the context of the amount of force a state may use to defend its citizens from harm; (ii) a historical retreat from infliction of the death penalty in all felonies to those limited circumstances when a victim dies, and there is the requisite culpability; (iii) a historical retreat from public executions.

However, because of Faretta errors, Hill was denied an opportunity to marshal legal arguments and present them, with supporting facts, to the court. It was prejudicial, because

the emerging standards demonstrate a potentially meritorius claim the state may impose the death penalty, if at all, only on a showing the state can not control Hill's conduct by mere incarceration. As an important instruction was not given, reversal is automatic and mandatory. *Sullivan v. Louisiana*, 113 S.Ct. 2078.

2. Constitutional Premise & Framework; The People Can only Delegate Reasonable Force for the protection of society.

Sovereignty resides in the People. U.S. Constitution,[1] Preamble ["We, the People"].[2] The federal powers are ex-

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[1] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. No. 66 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 85 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938). Words and terms are to be taken in the sense in which they were used and understood at common law and at the time the constitution and the amendments were adopted. *Veazie Bank v. Fenno*, 8 Wall (75 U.S.) 533, 542 (1869); *Locke v. New Orleans*, 4 Wall (71 U.S.) 172, (1866); *Gibbons v. Ogden*, 9 Weat. (22 U.S.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15,312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 1174, Cas. No. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 314 U.S. 707 (1941).

[2] While the result in *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 347 (1982), may be correct, its

pressly recognized as being delegated powers. U.S.Const., 10th Amendment. 1 Rotunda, Treatise on Constitutional Law §§ 3.1, 3.2. By its terms, the 10th Amendment implies that State powers are also delegated by the People.[3]

It has always been recognized that a Person could only grant that estate which he possessed. Blackstone, Commentaries on the Laws of England, Vol. 2, page 290;[4] Cheshire, THE MODERN LAW OF REAL PROPERTY, p. 660 (Citing common law principles). At the time the constitution was drafted, a person could use only reasonable force for defense, and deadly force only if reasonable. If the attacker retreats or abandons the fray, then the victim can no longer use deadly force. Foster, CROWN LAW 273-277 (1762); *Brown v. United States*, 256 U.S. 335 (1921); Perkins, CRIMINAL LAW AND PROCEDURE (1972) 660-667; *Tennessee v. Garner*, 471 U.S. 1 (1986). Because a person at common

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ratio decidendi does not square with the Preamble and Article I §§ 9 & 10. Clearly, the President does not stand in the shoes of the King, because titles of nobility were abolished for an intended purpose. Farrands 28-33; Federalist Papers, ## 32, 39. The framers placed sovereignty in the People. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

[3] The United States Constitution was established in the light of the Hobbs/Locke Theory of Social Contracts wherein the Government is established to protect the welfare of its citizens at home. 1 Rotunda 3.12 n.2. This is an internationally recognized duty of Nations (Verdross, *Jus Dispositivum land Jus Cogens in International Law*, 60 AJIL 55 (1961); Verdross, *Forbidden Treaties in International Law*, 31 AJIL 571-577 (1937).), and in the Preamble and Art. I, § 8 of the U.S. Constitution.

[4] Blackstone is a recognized source of the common law in aid of interpreting the U.S. Constitution. 1 Rotunda §§ 6.1 n.2, 15.11 n.4, & 23.8; n.1, para. 5 (p. 484, left column).

law could only use reasonable force, and deadly force if reasonable [*Foster*], that is all the power the People, collectively, could delegate, hence the State may only use reasonable force, and deadly force if reasonable. *Garner*. Because of the Farretta error, Hill was denied an opportunity to bring this to the court's attention, therefore reversal is required. *Sullivan, supra.*

3. International Law Proscribes the Use of Unreasonable Force in Defense of State Interests

The rules of self defense apply to states in International Law.[5] United Nations Charter, Chapter VI [commencing with Article 33]. It is considered a rule of *jus cogens*, vis peremptory norm of international law, from which no state may derogate. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1961), 60, #3; Id, *Forbidden Treaties in International Law*, 31 AJIL 571-577 (1937) [6] The

[5] Courts are bound by the law of Nations which is part of the law of the land. *The Nereide*, 13 U.S. 388 (1815); *INS v. Cardozo-Fonesca*, 480 U.S. 421 (1987); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir., 1980).

[6] In *People v. Ghent*, 43 C.3d 739 (1987), the court rejected an argument that the United Nations Charter and Declaration on Human Rights precludes the imposition of the death penalty, observing before the documents may be utilized, they must either be implemented by Congress or self-executing. However, rules of *jus cogens* are recognized by multinational pact. The United Nations Conference on the Law of Treaties [Vienna Convention], Art. 43; [Obligations imposed independently of treaty], Art. 53 [*jus cogens* and void treaties], U.N. Doc. A/Conf. 39/11. Moreover, Verdross points out these laws, by their very nature, are self-executing. Finally, no argument is made here that the death penalty is barred; rather the argument centers on what process is due before it may be imposed.

concept is preserved in the United States Constitution, Art. I, § 1 (No State Shall, ... engage in War, unless actually invaded ... imminent Danger ...). It has been tacitly recognized by *stare decisis*. *Tennessee v. Garner*, 471 U.S. 1 [Striking down State's fleeing felon statute].

Once an individual is incarcerated, that is all the force required to protect society from further harm and the death penalty[7] therefore would be cruel and unusual punishment, unless the State shows, in a given case, beyond a reasonable doubt that society cannot protect itself by mere incarceration. Because of the Farretta error, Hill was denied an opportunity to bring this to the court's attention, therefore reversal is required. *Sullivan, supra.*

4. Where Persons are a Danger To Society, incarceration is the norm.

In *Barefoot v. Estelle*, 463 U.S. 880 (1983) it was held that it was proper for the jury to consider whether defendant would commit criminal acts in the future and thus pose a threat to society. However, the court went on to say in *Solem v. Helm*, 463 U.S. 277 (1983), "we will not assume that there is no rehabilitative opportunity." *Accord, Hitchcock v.*

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[7] The International Covenant on Civil and Political Rights, Part III, article 6(2), declares: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime ...." Ratified by the United States and 71 other countries, effective March 23, 1966. *E.g., People v. Ghent*, 43 C.3d 739 (1987) (Dissenting Opinion by Broussard and Mosk, JJ).

Dugger, 481 U.S. 393 (1987) [reversed death penalty; refusal of mitigating circumstances].

Every day we incarcerate People who pose a threat to society. Generally, NOTE, PROBATE CODE CONSERVATORSHIPS: A LEGISLATIVE GRANT OF NEW PROCEDURAL PROTECTIONS, 8 Pacific L.J. 73 (1977). Thus, the relevant inquiry is not whether the defendant poses a future threat to society, an entirely speculative and subjective opinion of what may happen, but whether society can effectively control behavior by incarceration, with a possibility of rehabilitation. That is to say, the emerging standards of decency is such that the State may not exact the death penalty unless it demonstrates beyond a reasonable doubt that it cannot protect society by mere incarceration.

Because of the Farretta error, Hill was denied an opportunity to bring this to the court's attention, therefore reversal is required. *Sullivan, supra.*

5. There has been a Gradual Withdrawal of Death Penalty As a Form of Punishment, and withdrawal from Public View When Used.

At common law, all felonies, regardless of whether death resulted, and in theft cases, regardless of the amount taken, warranted the death penalty, except mayhem for which mutilation was substituted. Perkins, Criminal Law and Procedure (Foundation press, 4th Ed., 1972), p. 4-5. Whipping was substituted for death as the penalty for petit larceny, but that was a change from the common law resulting from an early statute. Id. Statute of Westminster, 1, c. 15 (1275).

In the words of Blackstone, "the true criterion of felony is forfeiture." 4 Bl.Comm. *97. Modernly, few felonies are recognized as capital crimes. Perkins, at p. 5; *generally*, 4 Encyclopædia Britannica 847 (1971). Moreover, and notwithstanding *Apodaca v. Oregon* (1972) 406 U.S.404, there is not a single jurisdiction left which allows the infliction of the death penalty with less than a unanimous jury verdict.[8] The United States Supreme Court has recognized further restrictions upon the utilization of the death penalty. Thus in non-fatal felonies, the court held that the imposition of the death penalty was unconstitutional. *Coker v. Georgia*, 433 U.S. 584 (1977); *Eberhardt v. Georgia* (1977) 433 U.S. 917. Similarly, in *Enmund v. Florida*, 458 U.S. 752 (1982), the court held that in felony-murder cases, the death Penalty was unconstitutional where the accomplice did not commit murder, nor intend that death result. Then in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court distinguished *Enmund* on the basis that in *Enmund* "the degree of participation **was so tangential** that it could not be said to justify a sentence of death",[9] and held that "the reckless disregard for human life implicit

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[8] When *Apodaca* was decided, only two jurisdictions allowed the death penalty on less than a unanimous decision. Oregon required a 10-2 decision. Oregon has since repealed its death penalty, and Louisiana now requires a unanimous decision. ALI, MPC, p. 154.

[9] The court noted in *Tison* that in *Enmund* it conducted its own proportionality analysis. How about world wide proportionality analysis. Vis, England, Ireland, Canada, and France have all abolished death penalties. How many other countries? How many still have it? See Brennan's dissent.

in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result."[10]

Congress at one point abolished the death penalty altogether. Pub.L. 98-473, Title II, §§ 212(a), 235(a)(1), Oct. 12, 1984, 98 Stat. 1987-2020, 2031, effective November 1, 1987, adopting Chapter 227 - Sentences, 18 U.S.C. §§ 3551, et seq.[11] 10 States of the United States have abolished it. 4 Encyclopædia Britannica 847 (1971). Of 20 Latin American Countries, 10 have abolished it. Id. All but 4 Mexican States have abolished it. Id.[12]

At common law, and the early days of this Country, executions were a public affair designed as a deterrent. 3 Encyclopædia Britannica 404 (1971) [except head of state]; 4 Id 847; 6 Id 825; 11 Id 64; 18 Id 556. At the restoration, Crom-

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[10] It should be noted that *Enmund* was outside in the getaway car, hence he was not even in a position to stop the homicides by co-defendants even if he had wanted to stop the homicides. In *Tison*, on the other hand, the defendants were at the scene of the homicides, and made no effort to curb their father.

[11] While many provisions remain which purport to authorize the death penalty, the fact of the matter is there is still no statutory scheme, since the repeal, with sets out when, where, or how the death penalty shall be carried out, and it is suggested that in the absence of such a statory framework specifically authorizing the execution of a sentence of death, the United States is powerless to carry out the sentence.

[12] See footnote 6.

well's body was exhumed, and his head displayed on a spike at the gates as a warning to all. 6 Id 802. Common law displays of execution have become a relect of the past. The last public execution occurred in Kentucky in 1936. 11 Encyclopædia Britannica 64. Under modern statutes, the public is excluded, witnesses limited to those found by law necessary to be present to assure the State that the law had been obeyed. Infliction of the death penalty has steadily been withdrawn from public view.[13] Former 18 U.S.C. § 3566 [Chap. 227]; California Penal Code § 3605. Thus, much of the deterrent effect is now gone, if there ever was any deterrent effect.[14]

Thus, the emerging standards of decency has been a gradual withdrawal of the death penalty from all felonies, to those felonies in which the victim dies as a proximate result of culpable personal conduct on the part of the defendant. Where the penalty is imposed, it is hidden from the public eye, therefore lacks any significant impact on deterance.

Because of the Farretta error, Hill was denied an opportunity to bring this to the court's attention, therefore re-

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[13] We can literally say "We have swept the death penalty under the carpet and out of view."

[14] The ALI Committee set out some rather stale statistical studies which failed to conclusively prove that capital punishment was or was not a deterrent. ALI, MPC, part II, vol. I, pp 112-114. In the table hereinafter, using more current statistics, based upon the number of murders per hundred thousand, the rate remains fairly constant over the years with or without capital punishment suggesting an inelasticity for capital punishment. A statistician would be better qualified to render an expert opinion.

versal is required. *Sullivan, supra.*

6. Conclusion.

Capital punishment is no longer a universally recognized means of controlling human behavior. It has been withdrawn as a public spectacle, and its use restricted to a narrow class of cases in which a victim dies as a proximate result of the defendant's own culpable conduct. Most jurisdictions that do allow capital punishment require a unanimous verdict.

The sum total of the foregoing, implicit in *Garner*, is that the State may not use its sovereignty with any more force than is reasonably under the circumstances, and the death penalty only if it has demonstrated beyond a reasonable doubt that it cannot protect society by mere incarceration. It is consistent with the Supreme Court's insistence on objective rules which guide the decision of the jury in a reasoned manner, allowing little room for the capricious application of the death penalty.

Because of the Farretta error, Hill was denied an opportunity to bring this to the court's attention, therefore reversal is required. *Sullivan, supra.*

B. HILL WAS DENIED AN OPPORTUNITY TO ENTER A PLEA OF DOUBLE JEOPARDY

It is not clear whether there is a factual basis for a plea, but that can be explained by the fact Hill was denied appropriate Ferrata considerations, and thus denied meaningful access to the Courts. Assuming arguendo a potentially meritorious defense, in view of Hill's conviction and sentence of

life in federal court, if the case involves the same set of facts necessary for guilt or death were litigated in the federal case, then double jeopardy would apply, absent *Heath v. Alabama,* 474 U.S. 82, 96 (1985). However, more current scholarly research suggests that the court erred in *Heath.*

In *Heath*, D was tried, convicted, and given life in Georgia, then tried and given the death penalty for the same homicides in Alabama. On certiorari in the Supreme Court, the court held that Dual Sovereignty does not bar second trial. *Heath v. Alabama*, 474 U.S. 82, 96 (1985). The court readily conceded had Georgia attempted a second shot to get the death penalty, it could not. The Court relied on *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), 20; *United States v. Wheeler*, 435 U.S. 313, 317 (1978). The court over-looks the fact that it rejected the concept of Dual sovereignty in *Elkin v. United States*, 364 U.S. 206 (1960). The very concept is flawed in the United States because sovereignty is vested in the People. U.S. Constitution, Preamble; *Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L.Ed. 69 (1857); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876). As the people of each State are a part of the whole, it is the Peace and Dignity of the People violated, where ever situated, and it can be punished but once. The concept was understood at Common Law to bar punishment for the same offenses committed abroad. *Rex v. Hutchingson*, 2 Keb 785, 84 E.R. 1011 (1677);[15] *Hughes v. Cornelius*, 2

[15] A reading of *Hutchingson's Case* itself shows it to be on a writ of habeas corpus on the grounds that the court lacked

Show. KB 232, 89 E.R. 907, 89 E.R. 907 (1664) [Admiralty; Captain charged with piracy on the high seas pleaded in abatement he was found by an admiralty court in another country to have taken a prize according to articles of war; plea held to be good]; *Beake v. Tyrrell*, 3 Mod. 194, S.C. 1 Show 6, 89 E.R. 411 (1794); *Rex v. Roche*, 1 Lench 134, 168 E.R. 169 (1775) [Plea withdrawn]; *Rex v. Sawyer*, 2 Car. & Kir. 101, 175 E.R. 41, 44 (1815); *Rex v. Elrington*, 9 Cox, Crim Cases 86, 1 B&S 688, 121 E.R. 870 (1861); *In re Thompson*, 9 W.R. 203 (19); *Rex v. Sheen*, 2 Carr. & P. 634, 172 E.R. 287 (1827); *Rex v. Walker*, 2 Moo & Rob 446, 174 E.R. 345, 347 (1843). Support for this common law tradition is found in the Constitution: Sovereignty vested in People (Preamble); limits on federal power (Art. I, § 9); limits on State Power (Art. I, § 10; Art. VI [supremacy; full faith and credit], 9th, 10th & 14th Amendments); limits on government powers (1st [speech, petition, religion], 2nd [quartering of soldiers], 4th through 7th [rights of "people", "person", and "accused"]. By 28 U.S.C. §§ 1738 and 1739, Congress has made the full faith and credit clause applicable to federal courts. *Davis v. Davis*, 305 U.S. 52 (1938). 26, 118 ALR 1518. *Heath* should be *overruled* as

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jurisdiction because the crime occurred in another country. Nonetheless all courts of record who quote the case cite it for double jeopardy. Buller's Law of Nisi Prius, 254 shows that it was in fact a celebrated case with a number of hearings in which ultimately the bar was held to be good. In *Roche's Case*, *Beake v. Tyrrell* is *cited* as *Beak v. Thyrwhit*. In *Rex v. Sawyer* (1815) 2 Car. & Kir. 101, 175 E.R. 41, 44, at least one of the justices questioned *Hutchinson's Case*, but the bar was held good in any event.

being inconsistent with the warp and wolf of common law and American notions of double jeopardy *jurisprudence*. Copies of English Law are set forth in the Appendix.

The point here is that as an important defense was withdrawn from **consideration**, therefore reversal is automatic and mandatory. *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993).

II.

HILL WAS DENIED AN OPPORTUNITY TO SHOW THAT HE WAS DEFENDING A PERSON IN THE CONSTITUTIONAL SENSE

The court below denied Hill an opportunity to justify his conduct as defense of third persons. IBA, pp 53. If in fact the unborn are persons in the Constitutional sense, then Hill was privileged to use reasonable force in their defense. *Roe v. Wade*, 410 U.S. 113 (1973), is an aberration and should be discarded as unsound in principal and unworkable in practice because, in light of scolarly research, it appears that the court overlooked where in the Constitution the unborn are persons in the constitutional sense, and thus entitled to the same protections as others.

Neither the 5th nor the 14th Amendment defines person. The 14th Amendment defines citizenship.[16] In other contexts, the court has held that aliens (*E.g., Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); Const., Art. VI, (Treaty Clause).[17]) and

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16 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, ..."

17 McKechnie, *MAGNA CARTA*, Art. 41 (aliens). McKechnie is **the** scholar on the Magna Carter. 10 Halsburys Statutes of England (4th ed) Constitutional Law, 25 Edw. 1 (*Magna Carta*) (1297), Notes, § 3.5

non-natural persons are persons entitled to Constitutional protection. *E.g.*, *Land v. Dollar*, 330 U.S. 731 (1947) (*Replevin*; Stock taken under color of federal law). Not to recognize the unborn as a person is therefore an anomaly. As "Person" is used without qualification, the most logical place to look for meaning is the Preamble[18] because, while its purpose is not to create right,[19] it does define for whom the rights were created.[20] The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing.[21] The Preamble creates two classes of sovereignty: "ourselves" and "our Posterity."[22] Its purpose appears to be to include

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18 The first record that a sovereign rules with consent of the governed appears to be I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. The elders of Israel met with David at Hebron, and they made a contract for David to rule Israel. Other written codes, i.e. Code of Hammurabi, were unilateral acknowledgments of human rights. The *Magna Carta*, *infra*, appears to be the first written document executed by both sovereign and subject. The Constitution abolished traditional sovereignty, placed sovereignty in the People, signed by their representatives, and ratified according to their respective state procedures.

19 *United States v. Boyer*, 85 F.425 (D.C., Mo., 1898) (Quoting Justice Storey on the Constitution, Section 462). *Cf.*, *Hockett v. State Liquor Licensing Board*, 110 N.E. 485, L.R.S. 1971B, 7 (1915).

20 *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857); *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 549 (1875). The 13th & 14th Amendments do not *overrule Scott*, but repeal the limitations, thus enlarging the class of persons who are citizens. *E.g.*, *United States v. Wong Kim*, 169 U.S. 676 (1898).

21 *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857); *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

22 ABORTION AND INALIENABLE RIGHTS, etc, supra, at footnote 1, pp 11-12.

"Posterity"[23] on an equal footing with, and the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, "Posterity," as to those who are lives in being, is synonymous, if not with "citizen,"[24] surely with "person."[25] This understanding is consistent with the meaning of posterity in 1776.[26] In 1644, it was argued that "Parliament could no more censure the issue of the mind than it could the issue of the womb."[27] At common law, certain members of future generations, fetuses,[28] were a life in being for the purposes of the Rule Against Perpetuities.[29] Moreover, prenatal injuries were, to a limited extent, recognized at Common Law,[30] and it does not appear that tort actions for the

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23 "Posterity" is capitalized in the original. As a noun is capitalized only if it identifies a particular person, place, or thing, it implies the framers considered the word important.

24 See footnote 9, *supra*. It is probably more accurate to say the unborn is a person, who, upon birth becomes a citizen (§ 1, 14th Amendment), except (26th Amendment), for the right to vote.

25 See footnotes 17 and 24.

26 ABORTION AND INALIENABLE RIGHTS, etc, supra, at footnote 1.

27 Milton, John, AEROPAGITICA (1644).

28 Aristotle, *Politics*, VII, 1335b, 24-26; Acquinas, *Summa Theologiæ*, 1, q. 76, a. 5 and q. 118; Noonan, Contraception, 86-88 (Harv. U. Press, 1965); 21 Exodus 22. It is not repugnant to the 1st Amendment Establishment Clause merely because civil law corresponds to the tenants of some religious beliefs. *E.g., Witters v. Washington Dept of Social Svcs for the Blind*, 474 U.S. 481 (1986).

29 Gray, *The Rule Against Perpetuities* (4th Ed.); *Alamo School Dist. v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

30 "To kill a child in its mother's womb is now no murder,

injuries were barred.[31] Had the framers used "and our heirs",[32] it would have created the equivalent of a fee simple absolute with powers of alienation, a concept clearly inconsistent with the concepts of "unalienable rights" found in the Declaration of Independence[33] and the "indestructible and perpetual union" in the Preamble, whereas if construed as a fee tail,[34] it would be consistent with an intent to create

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but a great misprision: but if the child be born alive and death by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198. His reasoning may have been influenced by: (1) "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Art. 54. As the fetus is not her husband, naturally, there is a failure of evidence. (2) medical knowledge as to a fetus was quite primitive when compared to modern medical practices.

31 *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill*, *supra*, 205 P. 917 (1922); Halbury's Laws of England (1st ed, 1911) Infants §§ 132, 135.

32 *White v. Hart*, 80 U.S. (13 Wall.) 646, 650 (1872). Other constructions result in a power of alienation inconsistent with **unalienability**: contingent remainder, Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960); the rule in Shelly's Case, 31 *Corpus Juris Secundum*, Estates § 4.

33 "We hold these truths to be self-evident, that all men ... are endowed ... with ... **unalienable** Rights, ..., Governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of Independence, ¶ 2; Schwartz, The Bill of Rights, A documentary history.

34 *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409 (1900); *Haward v. Howe*, 12 Gray (Mass.) 49 (1858); *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates*, 37 Pa 31 (1860); *Larew v. Larew*, 146 Va. 134, 135 S.E. 819 (1926). The Constitution concerns estates and interests in lands. Art. I, § 8, cl. 17 (District of Columbia; Places purchased); Art. III, § 3, cl. 2 (forfeitures); Art. IV, § 2, cl. 1 (privileges

"unalienable rights" and "a perpetual union,"[35] for the protection of future generations, including the unborn.

The Constitution was submitted to the People for ratification.[36] Implicit in the Preamble is the concept of a social contract[37] wherein society promises the individual inalienable rights, in return for which the individual promises to conform to the laws of society which do not derogate[38] from inalienable rights. Mutual promises have always been considered sufficient consideration for enforceability.[39] As persons under the age of capacity[40] could not consent,[41] the intent is that adults are members of "ourselves," and all others members of

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and immunities), § 3, cl. 2 (property of the United States); Amendment III (Quartering of soldiers); Amendment IV (Secure in ... houses); Amendment V (nor be deprived of ... property ...; nor shall private property be taken ....).

35 28 American *Jurisprudence*, Second, Estates, § 53. *Cf., Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 164 (1911) (recognizing by *dictum* common law rule).

36 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651; 3 Rotunda, op cit, p. 663, note 1.

37 E.g., Hobb, *Leviathan* (1651); Locke, Second Treatise of Government (1690); Laqueur, THE HUMAN RIGHTS READER (1979).

38 Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966).

39 Chitty on Contracts (23rd ed, 1968) 134; Restatement, Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909 (1703).

40 "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." 26th Amend., § 1.

41 Chitty, op. cit.

"Posterity,"[42] to include lives in being, i.e., the unborn.

Taking the approach that the unborn are members of 'Posterity' answers a number of theoretical problems. First, it is a further development of constitutional theory which recognizes there is not just one right, or more precisely-life, at stake, but two, the mother's, a member of ourselves, and the unborn, a member of Posterity. Second, it answers why the State cannot force a woman to terminate pregnancy or engage in eugenics, because the life of the unborn cannot be taken absent justification or excuse. Third, it assures that a woman's right to terminate pregnancy is not abridged where to carry to term would be an undue burden, i.e. mother has a right to self-defense where fetal life endangers her life. Fourth, it sets a standard of preserving both lives, if possible, guarding against undue state influence. Finally, it does justice by respecting the Constitutional guarantee to protect human life, removing from the discussion a word, abortion, which is inflammatory, ending, hopefully, the carnage done to women, Posterity, and others.

The point here is that an important defense was withdrawn from **consideration**. Properly charged, a jury could well have found that Hill acted with a bona fide good faith belief that he acts were necessary for the protection a life protected by the jury, and reasonable, therefore not guilty, or unreasonable, and therefore guilty only of voluntary

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42 2 Stephens Commentaries 342 (1841)

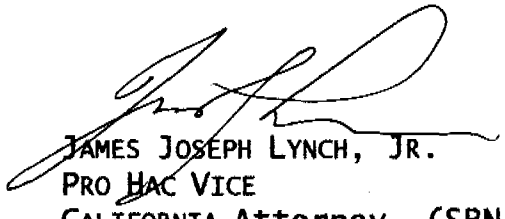
manslaughter. The failure to give the jury a third option is constitutional error. (*Beck v. Alabama*, 447 U.S. 625 (1980).) Moreover it is not for this court to speculate what the jury might have done in a hypothetical case never presented to it, therefore reversal is automatic and mandatory. *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993).

CONCLUSION

WHEREFORE, Appellant prays, for all of the reasons and arguments set forth herein, that this court reverse the judgment, or modify the sentence, remand for further proceedings not inconsistent with this Court's opinion, and such other and further relief as the court deems just and proper under the circumstances.

Dated: February 3, 1996

Respectfully submitted,



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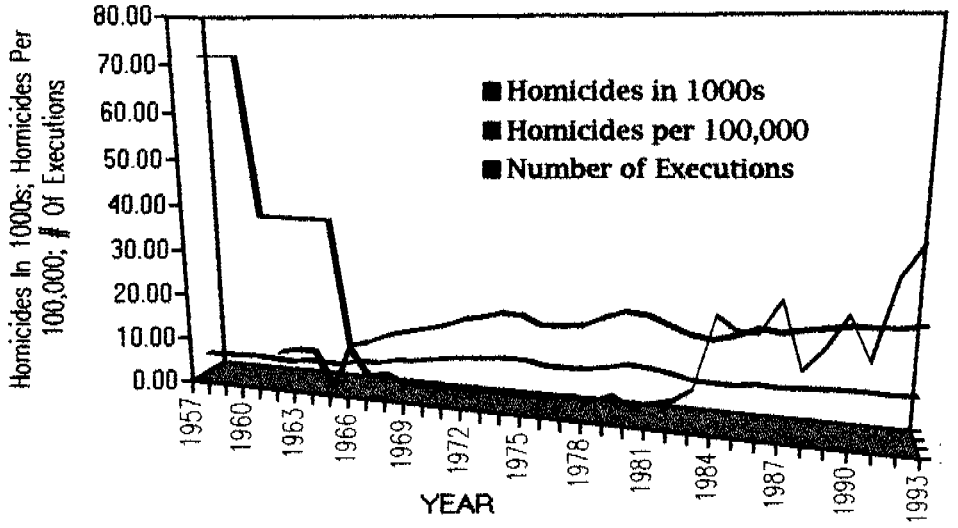
Amici Curiæ THE FRIENDS OF PAUL JENNINGS HILL In Support of Appellant

CORRELATION BETWEEN HOMICIDES AND EXECUTIONS, IF ANY

	75										
	70				x						
	65										
	60										
	55										
	50										
E	45										
x	40										
e	35					x					
c	30										
u	25										
t	20								x		
i	15										
o	10										
n	5	x	x			x					
s				x				x	x	x	
		1.0	2.0	3.0	4.0	5.0	6.0	7.0	8.5	9.0	
	Homicides per thousand population										

COMPARATIVE CHART OF HOMICIDES & EXECUTIONS IN U.S. - 1954 - 1993



THE
LAWS OF ENGLAND

BEING

A COMPLETE STATEMENT OF THE WHOLE LAW OF ENGLAND

BY THE LATE
THE RIGHT HONOURABLE THE
EARL OF HALSBURY
LORD HIGH CHANCELLOR OF GREAT BRITAIN
1885–86, 1886–92 AND 1895–1905

AND OTHER LAWYERS

Third Edition

UNDER THE GENERAL EDITORSHIP OF
THE RIGHT HONOURABLE THE
VISCOUNT SIMONDS
LORD HIGH CHANCELLOR OF GREAT BRITAIN, 1951–54

VOLUME 10

COMPULSORY ACQUISITION OF LAND
AND COMPENSATION
CRIMINAL LAW AND PROCEDURE

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taken at any time, after verdict in arrest of judgment, and after judgment in arrest of execution (*t*).

736. Autrefois convict or acquit. The plea of *autrefois convict* or *autrefois acquit* avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned. The pleas of *autrefois convict* or *autrefois acquit* may be pleaded orally, but must be afterwards reduced to writing (*u*). It is sufficient for the defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment (*a*).

If the defendant pleads *autrefois convict* or *autrefois acquit*, the prosecution replies or demurs. If the prosecution replies, which is the usual course, a jury is sworn to try the issue (*b*).

737. Proof of plea of autrefois convict or acquit. The onus of proving the plea is on the defendant. The defendant must prove that judgment of conviction or acquittal has been legally given (*c*). A judgment of conviction that has been reversed as erroneous in law is no bar to a subsequent indictment (*d*); nor is an acquittal before a court that had no jurisdiction to try the offence charged (*e*). If a judgment of conviction has been reversed on the facts under the Criminal Appeal Act, 1907 (*f*), the reversal would support a plea of *autrefois acquit* (*g*). A discharge of a jury without a verdict being given is no bar to a subsequent indictment (*h*). An acquittal before a court of competent jurisdiction in a foreign country is a bar to a subsequent indictment here (*i*).

The accused may prove the plea by producing a certified copy of the record or proceedings of the alleged previous conviction or acquittal (*k*),

(*t*) 2 Hawk. P. C. c. 37, ss. 58, 59, 67. For the form of plea, see 3 Co. Inst. 234; Tremaine, P. C. 311; 2 Hale P. C. 391. As to pardon, see title CONSTITUTIONAL LAW, Vol. 7, p. 243.

(*u*) For an instance of a plea of *autrefois acquit*, see *R.* v. *Sheen* (1827), 2 C. & P. 634, at p. 635, and 4 Chitty's Criminal Law (2nd Edn.) 528. The court, if necessary, will assign counsel to the defendant to draw the plea in a proper form (*R.* v. *Chamberlain* (1833), 6 C. & P. 93).

(*a*) Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 28.

(*b*) In *R.* v. *Sheen* (1827), 2 C. & P. 634, at p. 638, counsel for the prosecution replied *ore tenus*. For the form of replication, see *R.* v. *Sheen*, *supra*.

(*c*) *R.* v. *Marsham, Ex parte Pethick Lawrence*, [1912] 2 K. B. 362. As to the effect of an entry of *nolle prosequi*, see p. 399, *ante*.

(*d*) *R.* v. *Drury* (1849), 18 L. J. M. C. 189.

(*e*) 2 Hawk. P. C. c. 35, ss. 3, 4; see *R.* v. *Bitton* (1833), 6 C. & P. 92; *R.* v. *Simpson*, [1914] 1 K. B. 66.

(*f*) 7 Edw. 7 c. 23, s. 4.

(*g*) *R.* v. *Barron*, [1914] 2 K. B. 570, C. C. A. It has been held in Ireland that an order quashing on certiorari a conviction by justices on the ground that it was bad on its face for want of jurisdiction is not an acquittal entitling the defendant to plead *autrefois acquit* in subsequent proceedings, but it would seem to be otherwise if the conviction were quashed as being made on insufficient evidence (*Conlin* v. *Patterson*, [1915] 2 I. R. 169).

(*h*) *R.* v. *Charlesworth* (1861), 1 B. & S. 460.

(*i*) *R.* v. *Roche* (1775), 1 Leach 134; *R.* v. *Hutchinson* (1677), 3 Keb. 785; see *Beak* v. *Thyrwhit* (1688), 3 Mod. Rep. 194; and *R.* v. *Aughet* (1918), 118 L. T. 658, C. C. A. (foreign court martial). See also the Visiting Forces Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 67), s. 4. As to the admissibility in evidence of a copy of the record in such a case, see the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 7; and title EVIDENCE. The dismissal of a charge "without prejudice" is a bar to subsequent proceedings for the same offence (*Great Southern and Western Rail. Co.* v. *Gooding*, [1908] 2 I. R. 429).

(*k*) Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 13. It is sufficient to support a plea of *autrefois convict* that though he has not been sentenced, he has been convicted by the court (*R.* v. *Sheridan*, [1937] 1 K. B. 223. C. C. A.; [1936] 2 All E. R. 883), or by his own plea of guilty (*R.* v. *Grant*, [1936] 2 All E. R. 1156, C. C. A.). These cases were distinguished in *R.* v. *Briggs*, [1938] 1 All E. R. 529, C. C. A. (where the accused had not been asked if he consented to his case being dealt with summarily). A conviction is

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ENGLISH REPORTS

VOLUME CLXVIII

CROWN CASES

I

CONTAINING

FOSTER; LEACH, VOLS. 1 AND 2; RUSSELL AND RYAN; LEWIN, VOLS. 1 AND 2; MOODY, VOL. 1.

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the letter s; and they insisted that this being a variance in the material part [134] of the charge, viz. in the assignment of the perjury itself, was fatal and could not be cured by verdict, and cited 2 Salk. 660; Hutton, 56; Cro. Jac. 133; 5 Co. 45; Ld. Raym. 1224.

Lord Mansfield, C. J. This is an application for a new trial in an indictment for perjury, upon the ground of a material variance between the affidavit and the indictment: the letter s being left out in the word understood. We have looked into all the cases on the subject; some of which go to a great degree of nicety indeed, particularly the case in Hutton, where the word *indicari* was written for *indictari*; but that case is shaken by the doctrine laid down in 2 Hawkins, P. C. p. 239. The true distinction seems to be taken in the case of *The Queen* v. *Drake*, 2 Salk. 660, which is this: That where the omission or addition of a letter does not change the word, so as to make it another word (as "air" for "heir." And see *Hart's* case, Worcester Assizes 1776, *post*, p. 145), the variance is not material. To be sure, a greater strictness is required in criminal prosecutions than in civil cases: and in the former a defendant is allowed to take advantage of nicer exceptions. But this is a case where the matter has been fairly tried, and where the omission of the letter s certainly does not change the word. Therefore we are all of opinion, That the Jury did very right in reading it "understood," and the rule for arresting the judgment must be discharged (Douglas, 194).

Note.—The introductory words in the indictment in this case were, "to the tenor and effect following."

Case LXXII.

The King *v.* Captain Roche.

(The Jury cannot be charged at the same time to try the two issues of *Autrefois acquit* and Not guilty. See 33 Hen. VIII. c. 23, and 43 Geo. III. c. 113, s. 6; 2 Hawk. P. C. c. 35, *passim*, and p. 276, 283, 563; Hobart, 270; 1 Bulst. 141; Yelv. 204; Cro. Jac. 283; 4 Co. 45; Staund. 82; Cro. Eliz. 495; Moor. 457.)

[Referred to, *R.* v. *Sawyer*, 1815, 2 Car. & Kir. 101.]

At the Old Bailey December Session 1775, David Roche was tried before Mr. Baron Burland, on a special commission, present Mr. Justice Aston, and Mr. Serjeant Glynn, Recorder, for the wilful murder of John Ferguson, at the Cape of Good Hope, on the coast of Africa.

To this indictment Captain Roche pleaded *Autrefois acquit* before Olaff Martini Berg, provincial Fiscal of the supreme Court of Criminal Jurisprudence there.

[135] Mr. Serjeant Davy for the prosecution moved, that the Jury might be charged at once with this issue, and that of Not guilty.

The Court. In pleas in abatement there are two issues, and they are always tried upon separate charges to the Jury. Besides, charging them with both issues at once would lead to this absurdity, that being charged with both, they would be obliged to find upon both: and yet if the first finding was for the prisoner, they could not go to the second, because that finding would be a bar.(*a*) They are distinct issues, and the Jury must be separately charged with them.

The Counsel for the prosecution was therefore ordered to put in a replication; but the prisoner withdrew the plea in bar, and the case was tried on the general issue.

The prisoner was acquitted.

(*a*) It is a bar, because a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction: therefore if A., having killed a person in Spain, were there prosecuted, tried and acquitted, and afterward were indicted here, at Common Law, he might plead the acquittal in Spain in bar. Bull. N. P. 245, as in the case of *Mr. Hutchinson*, who had killed Mr. Colson in Portugal, and was acquitted there of the murder: and being afterwards apprehended in England for the same fact, and committed to Newgate, he was brought into the Court of King's Bench by *Habeas Corpus*, where he produced an exemplification of the Record of his acquittal in Portugal; but the King being very willing to have him tried here for the same offence, it was referred to the consideration of the Judges, who all agreed, that as he had been already acquitted of the charge by the law of Portugal, he could not be tried again for it in England. See *Beak* v. *Thyrwhit*, 3 Mod. 194; S. C. 1 Show, 6. And the statute 33 Hen. VIII. c. 23.

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VOLUME LXXXIV

KING'S BENCH DIVISION

XIII

CONTAINING

KEBLE, 2 AND 3; KELYNG; JONES, T.

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[785] 34. DOMINUS REX AND HUTCHINSON.

Coron.

On habeas corpus it appeared the defendant was committed to Newgate on suspition of murder in Portugal, which by Mr. Attorny being a fact out of the Kings dominions, is not triable by commission, upon 35 H. 8, cap. 2, § 1, n. 2, but by a constable and marshal, and the Court refused to bail him, &c.

35. BUTTS AND PENNY.

Trover.

Special verdict in trover of 10 negroes and a half find them usually bought and sold in India, and if this were sufficient property, or conversion, was the question. And Thomson, on 1 Inst. 116, for the defendant, said here could be no property in the plaintiff more than in villains; but per Curiam, they are by usage tanquam bona, and go to administrator untill they become Christians; and thereby they are infranchised: and judgment for the plaintiff, nisi, and it lieth of moety or third part against any stranger, albeit not against the other copartners.

36. INGRAM AND BRAY, BAILIFF OF TREVILL. *Monday, June* 25.

Heriot.

Error of judgment in C. B. in replevin, where the defendant avowed for rent and heriot: in bar of the heriot, the plaintiff pleaded a former distres taken by A. and B. and conusance made by them in the name of the defendant (not said by his privity) and that a recovery was had against them; to which the avowant demurred; & per Curiam, this is no bar without assent of Trevil, but the plaintiff could not aver it was not by assent. 2. As to the rent, the plaintiff replied by release of all demands, which by Twisden is an extinguishment of the rent, on Lit. sect. 510, but in 2 Cr. 286, 300, its agreed it was no extinguishment: which Twisden said was against his opinion, 2 Cr. 480, 170. But judgment for the avowant affirmed, nisi.

[786] 37. HANCOCKE AND HANCOCKE.

Surrender.

Debt by the plaintiff as administrator of Tydbury against the defendant executor of another Hancock, conditioned that if the obligor pay 200l. by the 1st of December 1634, that then the surrendree Hancock the testator should reconvey, on request; the plaintiff alledgeth request 1644; to which the defendant demurred, & per Curiam the surrender being absolute and trust only for paiment, there being no paiment at the day, this mortgage is irredeemable. And judgment for the defendant, nisi.

38. DUTTON AND POOL.

[S. C. 2 Lev. 210; 1 Ventr. 318; T. Ray. 302. Questioned, *Tweddle* v. *Atkinson*, 1 B. & S. 399.]

Assumpsit.

Action upon the case by the husband of the daughter of Sir Edward Pool tenant for life without impeachment of wast, who was about to fell trees for rasing portions for his children; and Nevil Pool the defendant (the heir at law) promised to the father Sir Edward Pool in consideration of forbearance to pay 1000l. to the plaintiff. Tinder on 3 Cr. *Rippon and Norton*, praied judgment, the defendant having benefit, albeit he be not alledged heir: but the release of Sir Edward Pool would be a discharge, and therefore the plaintiff is a meer stranger, as 1 Roll. 30, and its not

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VOLUME LXXXVII

KING'S BENCH DIVISION

XVI

CONTAINING

MODERN, 3 TO 7

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1908

in the *quo warranto*, and the re-grant(*a*), and that the defendant, not being of the said fellowship, did unlade one hundred quarters of malt, &c.

Thompson, Serjeant, took many exceptions to this bye law, but the most material were,

First, it appears upon the return, that the City of London has assumed an authority to create a fellowship by Act of Common Council, which they cannot do; for it is a prerogative of the Crown so to do; and they have not averred or shewed any special custom to warrant such an authority.

Secondly, they have made this bye-law too general; for if a man should carry and unlade his own goods there, he is liable to the forfeiture; in which case he ought to be excepted.

Thirdly, this Act of Common Council prohibits *burgenen*, not being free of the fellowship of *porters*, to unlade any coals or grain arriving there, and they have not averred that the malt unladed did arrive, &c. so they have not pursued the words of the bye-law.

Fourthly, they say, in this law, that the person offending "shall have no essoign, or wager of law," which is a Parliamentary power, and such as an inferior jurisdiction ought not to assume (*b*).

Adjournatur (*c*).

[194] CASE 119. BEAK *against* THYRWHIT.

If a ship illegally trading in the East Indies be seized at sea and condemned as forfeited before a Court of Admiralty of competent jurisdiction, *trover* will not lie to recover her back after such sentence; but it must be shewn that the Court of Admiralty had competent jurisdiction.—S. C. Carth. 31. S. C. 1 Show. 6. S. C. Comb. 120. S. C. Bro. Ent. 69. S. C. Holt, 47. 1 Vern. 21. 10 Mod. 78. 12 Mod. 16, 134, 143, 216. 2 Stra. 1078. 3 Term Rep. 311.

There was a sentence in the Court of Admiralty concerning the taking of a ship; and afterwards an executrix brought an action of trover and conversion for the same.

The defendant, after an imparlance, pleads, that, at the time of the conversion, he was a servant to King Charles the Second, and a captain of a man of war called "The Phœnix," and that he seized the said ship for the Governor of the East-India Company, she going in a trading voyage to the Indies contrary to the King's prohibition, &c.

And, upon a demurrer, these exceptions were taken to this plea.

First, the defendant sets forth that he was a servant to the King, but has not shewed his commission to be a captain of a man of war.

Secondly, that he seized the ship going to the Indies contrary to the King's prohibition, and has not set forth the prohibition itself.

It was argued by the counsel *contra*, that it may be a question, whether it was a conversion for which this action is brought? for it was upon the sea, and the defendant might plead to the jurisdiction of this Court, the matter being then under the cognizance of the Admiralty. But as to the substance of this plea, it is not material for the defendant either to set forth his *commission* (*a*) or the King's *prohibition*; he has shewed enough to entitle the Court of Admiralty to a jurisdiction of this cause, and therefore this Court cannot meddle with it; for he expressly affirms that he was a captain of a man of war, and seized this ship, &c. which must be intended upon the sea; so that the conversion might afterwards be upon the land; yet the original cause arising upon the sea, shall and must be tried in the Admiralty (*b*); and

(*a*) 3 St. Trials, 545. 2 Show. 263.

(*b*) Godb. 107.

(*c*) See *Barnardiston's case*, 1 Lev. 14, 15; *Cuddon* v. *Prevost*, 6 Mod. 123. 1 Salk. 143; *The Frame Knitters* v. *Green*, 1 Ld. Ray. 113.

(*a*) See the case of *Berryman* v. *Wise*, 4 Term Rep. 366, and the case of *W. and T. Gordons*, Cases in Crown Law, 2d edit. 416.

(*b*) Cro. Eliz. 685.

it having already received a determination there, shall not again be controverted in an action of trover. The case of *Mr. Hutchinson* (*c*) was cited to this purpose. He had killed Mr. Colson in Portugal, and was acquitted there of the murder; the exemplification of which acquittal he produced under the Great Seal of that kingdom, on his being brought from Newgate by an *habeas corpus* to this Court: but, notwithstanding his acquittal there, the King was very willing to have him tried here for the fact; and he referred the **[195]** consideration thereof to the Judges, who all agreed, that he, being already acquitted by their law, could not be tried again here.

Adjournatur (*d*).

CASE 120. SMITH *against* PIERCE.

Trinity Term, 3 Jac. 2, Roll 1160.

If a term for years be devised for the payment of debts, with remainder over in tail, and he in remainder enters and levies a fine and settles the land upon his wife for life and dies: *quære*, if the wife survive and the debts be not paid, whether this term is barred by the fine and non-claim?—S. C. 1 Show. 72. S. C. Comb. 145. S. C. Carth. 100. 5 Co. 124. Cro. Eliz. 15. 3 Leon. 156. 1 Vern. 132, 296. 2 Vern. 189, 368, 662. 9 Mod. 103, 181, 196, 210. 10 Mod. 179, 245, [illegible] 11 Mod. 103, 181, 196, 210. 12 Mod. 32, 38, 513. Gil[illegible]R. 17, 18[illegible] Comy. 119, 369; [illegible]s T. [illegible]4, 237. 1 [illegible]er. Wms. [illegible]0. 777. 146, 535. 3 B[illegible] 171, [illegible]310, 372; [illegible]d. 12[illegible]79, 72[illegible] Dig. 357. 3 B[illegible]. 446, [illegible]0.

A special verdict was found in ejectment, the substance of which was, that Robert Basket was seized in fee of the land in question; and by his will devised it to Philip Basket and others for ninety-nine years, with power to grant estates for the payment of the debts and legacies of the testator; the remainder in tail to John Basket his brother; but that if he gave security to pay the said debts and legacies, or should pay the same within a time limited, that then the trustees should assign the term to him, &c. John Basket entered after the death of his brother, with the assent of the said trustees, and received the profits, and paid all the legacies and all the debts except eighteen pounds.

The jury find, that John had issue a daughter only by his first wife, after whose death he married another woman, and levied a fine, and made a settlement in consideration of that marriage upon himself for life, and upon his wife for life, with divers remainders over; that he died without issue by his second wife; that the second wife entered, and five years were past without any claim, &c.; and now the heir at law, in the name of the trustees brought this action.

The questions were,—First, whether the term for ninety-nine years, thus devised to the trustees, was bound by this fine and non-claim, or not?—Secondly, whether it was divested and turned to *a right* at the time of the fine levied? for if it was not, then the fine could not operate upon it.

It was agreed, that as *a disseisin* is to a freehold, so is *a divesting* to a term; and that a fine and non-claim is no bar, but where the party at the time of the levying

(*c*) 3 Keb. 785. Bull. N. P. 245.

(*d*) This case was argued again in Easter term 1 Will. & Mary, and judgment given by the whole Court in favour of the plaintiff, S. C. 1 Show. 6, upon the insufficiency of the defendant's plea, S. C. Carth. 32, because he did not shew by what authority he seized the ship, or before whose Court of Admiralty, or by what Judge she was condemned: but they held, that the stating himself *captain* generally was sufficient, and that there was no necessity to shew his commission, S. C. Comb. 120; but if the plea had been good, the sentence in the Admiralty Court would have been final, and the taking not triable in trover, S. C. 1 Com. Dig. 274, fo. edit.; for a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction. Bull. N. P. 245. See also the case of *Ludbroke* v. *Cricket*, 2 Term Rep. 649; *Lord Camden* v. *Howe*, 4 Term Rep. 382. H. Bl. Rep. 476.

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VOLUME XC

KING'S BENCH DIVISION

XIX

CONTAINING

SKINNER; COMBERBACH; CARTHEW; HOLT, K.B.

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a contract, and let the contract be either expressed or in law, the action ought to be brought against all.

The owners are not chargeable at all, for the master of the ship is not like a common servant, and therefore the cases before cited are nothing to the purpose, for the master hath power over the ship, and may charge it. Hob. 17.

It was doubted in the case of *Morse and Slew*, whether a hoyman, who is not owner of the ship, be chargeable, or not? (but Holt said the doubt there was, whether it lay against the master, for it was agreed, that it would lie against the owners) that prima facie it ought to be brought against the master, and the owners are not to be charged till it appears that the master is not answerable.

Holt Ch. J. Here it is found, that the profits came to the owners, and therefore they are chargeable. In Justin. Inst. tit. Exercita Navis. An action doth not lie against a man as owner, but as he hath the benefit of the freight; for where there are several owners, and one dissent from the voyage, he shall not be liable to an action afterwards for a miscarriage, &c.

That the master or owners may have an action for the freight, and for the same reason, either the one or the others are liable.

Obj. That the action ought to be brought against all. I agree that this is the great doubt of the case.

If it be an action grounded on the contract, all ought to be charged, as in an assumpsit, otherwise, if it be grounded on the tort, and here is a charge by a contract in law, and not by an express contract (as the master is answerable for the ship robbed by felons); the plea in this case is not to the contract but non cul', but the ground of the action is the contract, and [118] so it is mix'd. Debt for not setting forth tithes against one occupier, where there are two, is ill.

Dolben. If a carrier's porter receives goods, the carrier shall be liable.

Eyre. A water carrier is answerable as well as another carrier. Sid. 36. And a master shall be answerable for the receipt of his servant.

But it was adjourned on the two last points.

Cos. R. Mynshul, by letter 21 Oct. 99, informs me, it was adjudged in this case: 1. That the action would lie, either against the master or part-owners.

2. That the part-owners ought all to have been joined, for the benefit being to all, all ought to be charged, tho' the action were grounded upon a tort, because it is a tort arising ex contractu.

King and Dillison.

Lutw. 765, 779. Show. 31, 83. 3 Mod. 221. Salk. 386. Infant not bound by custom of a manor.

Error out of C. B. in ejectment, where it was found that the lands were copyhold-lands of such a manor, in which there is a custom, that, if the party to be admitted doth not come in, on three proclamations to be made at three several courts, after the surrender, that then the lord may seize the land for a forfeiture; and they found that J. S. was tenant for life of this land, the remainder in fee to J. D. and that J. S. and J. D. surrender'd to the use of F. G. F. G. died before admittance, his heir being an infant, three proclamations were made, and the heir did not come in; the lord seized, and whether this seizure be good, was the question.

Treby. The custom is good notwithstanding the infancy, for else the lord will lose his time, for he hath no other remedy. That such a custom is good to bar one of full age. 3 Cro. 879. Yelv. 1. Noy 42. I agree, that this is not an absolute forfeiture, for an infant shall have the same privilege, as a man beyond the seas. 8 Co. *Sir R. Lechford's case;* but if the lord may seize as for a temporary forfeiture, that is sufficient in this case, which seems to be allowed by implication in the case of *Sir R. Lechford*, 2 Cro. 227, otherwise it would be inconvenient, for there may be several discents to infants or persons beyond the seas.

This custom ought to be construed to be an absolute forfeiture, if there be no impediment; but if there be any impediment, as infancy, &c. then a seizure quousq; &c. 3 Cro. *Baspole's case.* 1 Cro. 7. Latch, 199.

[119] In the case of a cessavit, or if an infant marries himself, yet the lord shall have the double value; and altho' those cases are by statute, yet they shew that it is not unreasonable at the common law.

Obj. 1 Leon. 100. 3 Leon. 221. Answ. Those cases were where the ancestor was a copyholder.

Baldock contra.

That this custom doth not bind an infant, and he cited 1 Leon. 103, to be in point. The cases of penalties on the statute do not come up to our case, and, as to the loss of the fine, the estate before admittance is in the surrenderor, and he shall pay the services.

Holt Ch. J. The infant hath no right or estate before admittance, and therefore can't keep the lord out: the infant can't take the profits before admittance, and therefore can't hinder the lord from taking 'em.

The forfeiture (because the surrendree doth not *come in*) is *in the surrenderor*, for he only hath the estate; and it is not a peremptory forfeiture, but he shall have the estate, when he doth come in; otherwise if there be several discents to infants, the lord will never have his fine.

Infancy shall never take away another's right, altho' it may delay it, and there is no mischief by this construction; *Lechmere's case* admits that the lord may seize quousq; and so is 2 Cro. 277, admitted by all the Judges, it is an incident to the tenure, and as reasonable in the case of a copyhold, as in the case of a freehold.

Dolben J. By the general opinion, and practice of the nation, an infant is not bound by such a custom, and the verdict finds, that the lands are forfeited; it would perhaps be otherwise, if the verdict had found, that the lands were seised.

Holt, North, and others, five great lawyers, were for a seizure, quousq; in such case.

Dolben, *Ashfield's case* in Latch is, that an infant is not bound by such custom.

Eyres. Noy 93. Jones 157, that it is *no forfeiture*, but the case is not so well reported by Latch, 199.

Holt. An infant, tenant for life, makes a feoffment in fee, the lord may enter for the forfeiture; but the infant, when he attains his full age, shall enter on the lord.

Eyres. Here is no forfeiture.

Gregory agreed, and said that he remember'd a custom of a *manor*, that if the fine should not be paid, the land should be forfeited to the lord for a year.

The Court being divided, it was adjourned.

[120] Beake and Tirrell.

3 Mod. 194. 1 Show. 6. Trover lies for a ship after sentence in the Admiralty.

Trover for a ship and goods brought by an executor, the defendant (after a special imparlance) pleads to the jurisdiction, that *tempore quo*, &c. he was a captain of a man of war, and that he seized the ship super altum mare, within the jurisdiction of the Admiralty, per mandatum domini Regis ut prisam, and carried her into Sally, where she was condempned by the Court of Admiralty, as prize, and sold ad commodum domini Regis, to which the plaintiff demurr'd, and a respondeas ouster was awarded, because the Common Law Courts have a concurrent jurisdiction with the Admiralty, and the plaintiff hath his election. Then the defendant pleaded the same matter in bar, and the plaintiff demurred.

Thompson took two exceptions to the plea.

1. Because the defendant hath not shewn any commission, whereby he was made captain.

2. For that he pleads he took the ship, ut prisam, and doth not shew that she was a prize, or how she became prize, nor alledges any offence, for which she was condempned as prize.

Trevor *contra*. Where a Court hath jurisdiction, there, while their sentence is in force, all, who act under such sentence, are indempnified, and the captain is under no necessity of shewing his commission here, for that matter had been consider'd by

the Admiralty before their sentence, and our law gives credit to the sentence of a Court, that hath jurisdiction, and can examine matters, which relate only to the jurisdiction, and not to the sentence. 7 Co. 17, *Ken's case*. 8 Co. 68. 29 Car. 2, *Hutchinson's case*, who killed a man in Spain, and was tried and acquitted there; and afterwards being indicted here, he pleaded that acquittal in bar, and it was held a good bar; and another case 34 Car. 2, in B. R. Cornelius brought trover for a ship, and it was found that the ship belonged to the plaintiff at such a time, but that afterwards she was taken and condemn'd in the Admiralty, and sold to the defendant; and it was adjudged that by that sale the property was alter'd: and as to the exception, that no commission is shewn, he answer'd, that the authority to be captain, &c. need not be by matter of record, but it is sufficient, if it be under the King's hand, and that is a matter of fact triable; and the other side might have replied, that he was not captain, &c. As to the second exception, there is no occasion to shew a cause of seizure, because it is not a matter traversable here, and he need not shew the proceedings in the Admiralty, because it is not a Court of Record; but otherwise if it had been a Court of Record, for then the matter **[121]** so pleaded, is triable by the record; he agreed, that in case of a sentence in the Ecclesiastical Court, the proceedings ought to be shewn, for that may be tried by the certificate of the Judge; otherwise in the case of the Admiralty, for that Court can't write to them.

Holt Ch. J. The pleading that he was captain generally is good; but as to the other exception, it is not well pleaded, because 'tis not shewn for what cause the ship was taken as prize. In the case of Cornelius, an English ship was seized by a Dutch man, there being war between Holland and France, but not with England, and the ship was condemned by sentence in the Admiralty, which sentence bound the property, because it was grounded on a good foundation; and this Court would not permit it to be examined, whether the ship was English or Dutch: and moreover, it is not pleaded, whose Court this was, in which the ship was condemned, nor before what Judges.

And afterwards, in this term, judgment was given for the plaintiff.

THOMPSON *versus* HARVEY.

1 Show. 2. Bond in restraint of trade.—See 2 Show. 345 to 364.

Debt on bond, part of the condition was, that the defendant should not buy sheeps trotters of any person, of whom the plaintiff had or should buy, &c. on demurrer.

It was moved, that the declaration and bond were good, altho' it seemed to be restrictive of trade.

1. Because it is not such a trade, whereof the law takes any notice.

2. It is not an absolute and universal restraint, but a special one, and limited to the plaintiff's customers, which is allowed for law. 2 Cro. 596, *Broad and Jolliffe*, assumpsit for using his trade in Newport. Palm. 175, 198. 2 Bul. 137. Litt. sect. 360, 361 a. A condition, which restrains the alienation of lands in fee generally, is void, but that he shall not alien to J. S. or J. N. is good. March 191.

Selby for the defendant. A condition that is against law, is void; this condition is against law, because it restrains trade, for we are obliged not to buy of any person, of whom the plaintiff buys but one single sheep's trotter, which he may easily do of every person that sells them, and so we shall be wholly excluded.

We are likewise obliged by this condition, not to buy of several persons, of whom the plaintiff had bought, and if he will not buy of any of them, we can't exercise our trade, and that tends to a monopoly. *Rice* versus *Cusack*, 2 Roll. Rep. 113.

[122] If the condition of it self be not against law, yet we have made it so by our averment. March 158, otherwise of simony. Vide 1 Cro. 180, 425. 1 Leon. 203, *Jones's case*. Mo. 641. 2 Cro. 249.

Holt Ch. J. That don't aid this case: it's agreed, that where an Act of Parliament makes a bond void, there an averment that it is against the statute (altho' it doth not appear in the bond) shall be admitted, and shall make it within the statute; but it ought to be such an averment, as consists with the condition of the bond, and not such a one, as is contrary to it.

But this bond seems to be very much in restraint of trade, for it not only binds the defendant, but his executors and administrators also (for they are included in the condition) which is contrary to the publick good; and in the case of *The Taylors of Exeter* lately adjudged in the Exchequer-Chamber, no difference was made between a restraint of trade in a particular place, and where it is in general, and the case of *Broad and Jolliff* is not impeached thereby, for there the person restrained had a good consideration.

Dolben J. In the last case the consideration is not material, for we are only to take care of the common-wealth, and not of the party, whether he hath made a good bargain, or not? And a man may restrain himself from trading in a particular place; and so is the common practice, where an apprentice gives his master more for the goods in his shop than they are worth, and the master gives him a bond to trade no more there. Ow. 143. Noy, 38. Mo. 119, 242. Adjourn'.

Now this term Holt held the bond was void, and said, that in the case of *The Taylors of Exeter* versus *Clarke*, the condition of the bond being not to exercise a trade in Exeter was adjudg'd good; but that judgment was reversed in the Exchequer-Chamber on solemn argument against the opinion of Jones C.J.

It is usual to restrain a lessee from such a trade in the house let, for I can chuse whether I will let the house, or not?

Dolben J. Against the judgment given in the Exchequer-Chamber, in the case of *The Taylors of Exeter*. 1 Saund. 311, *Denham and Hemlock's case*. A bond not to use a trade in such a street, good.

A valuable consideration will make such a bond good.

An other part of the condition was, that he should not buy more than he had done before, which by Eyres is ill, because it restrains him from inlarging his trade.

The Court was clearly of opinion, that it tended to a monopoly, and gave judgment for the defendant.

[123] LECHMERE AND THOROWGOOD.

[Disapproved, *Giles* v. *Grover*, 1832, 6 Bli. N. S. 302.]

1 Show. 12. 3 Mod. 236. After judgment executed, the goods, &c. are in custodia legis, and not liable to Exchequer-process, or commission of bankrupts.

Trespass by the assignees of the commissioners of bankruptcy against the Sheriffs of London, and others, for taking his goods: it was found by special verdict, that one Toplady was a vintner, and a judgment had against him, and a fieri facias awarded, tested 27th of April, and afterwards, viz. the 28th of April, he became a bankrupt; the 29th of April the sheriff took the goods by vertue of the fieri facias; afterwards an extent issued out of the Exchequer, whereby the goods are taken out of the sheriff's hands: afterwards the commissioners of bankruptcy make an assignment to the creditors, and the assignee brings trespass against the officers, who took the goods by vertue of the extent: and whether the defendants be guilty, or not, is the question?

Pollexfen for the plaintiff. That the fieri facias being after the bankruptcy comes too late by the statute 21 Jac. c. 10.

Vide *Perry and Bowyer's case*, that an inrollment is good ab initio. *Baily and Bunning's case*, Sid. 271, that an action lies against the sheriff on an execution after the bankruptcy.

Thompson contra. That this is not for the King's debt, but a process in aid; that such extent in aid shall not take the goods taken in execution by the fieri facias. Vide *Baily and Bunning's case*.

And Shower said, that the extent came time enough before the assignment; and so is the practice of the Exchequer. ——— versus *Lewis* in the Exchequer 20 Car. 2. Vide *Sish and Bunton's case* there accordingly.

Holt C. J. The property of the goods is vested by the delivery of the fieri facias,

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XLVIII

CONTAINING

ELLIS AND BLACKBURN, VOLS. 4 TO 7

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self, the sidings, and the turntables on which the carriages
of the land at the side as is occupied for the necessary
ery sense, part of the railway; and I think that so much of
the same width as the side of the railway adjacent is, like
the railway.

t the rest of the property is liable to the full rate. As to
cely contended that they could be considered part of the
exemption. As to the other premises, we have not to
in the words of the case, "necessary for the use and
ich, and connected and used therewith," which no doubt
ords of the Act, whether they are "used" "as a railway."
distinction is made between the railway and the station.
the exceptions I have stated, are ancillary to the working
rt of it. I think therefore that, on a fair interpretation
Legislature, those things are not intended to fall within
s just; for, though the railway companies do not derive
s for which the district rate is levied, yet the stations and
ive benefit, in perhaps a greater degree than any other
chief expenditure of the rate; and it would be unjust
ted equally with other property.

of opinion that all the subjects mentioned in the case are
e exception of the sidings, the turntables and the plat-
the latter put by my Lord.

whether these things come within the proviso subjecting
rate. In the ordinary practice of rating railways to the
on is made between the line of the railway and stations
d as ancillary to the traffic on the railway, but not being
s of the Act in question are very concise: but I think that
consider the offices in the present case as no part of the
or the traffic on the railway, and used for the purposes of
that they are rateable at their full value.

to the same conclusion. We are applying the provisions
s. 88, to the case of a railway and buildings ancillary to
district of a Local Board of Health.

the enactment is, that the occupiers of the classes of
the expenditure of the district rates shall be liable to be
occupiers of the classes less benefited at the lower rate; and
benefited is that which is occupied immediately for the
he kinds of property not so occupied are not to be rated
neral object of the Act: and we are now to apply its
ase.

lway is named amongst the kinds of property favoured.
nsolidation Act, 1845, 8 & 9 Vict. c. 20, s. 15, it is enacted
e from the line delineated in [198] the plans, provided that
tend to a greater extent than one hundred yards from the
ich the words line of railway used in that Act have been
construction of the present Act. I believe that there has
(a), that the Company are authorized to move the centre
rds, though the consequence may be that the extremity of
gs necessary for the new line may deviate more than one
xtremity of those necessary for the old line, but that the
powers of the company to take lands for stations or other
of the line; and that such stations and ancillary works
of railway. And it seems to me that the word "railway,"
understood in a similar sense. I think all land supporting
it be embankment or slope, is land used as a railway, and,
urpose only, is favoured within this Act. But it does not
lands are within the exemption if they be converted into

The Bristol and Exeter Railway Company, 6 M. & W. 320.
d v. *North Staffordshire Railway Company*, 16 Q. B. 526.

sites for warehouses, or used for some other purpose, as then they would not be used for the purpose of a railway only.

I think also that sidings having rails on which the carriages go, and turntables, are in every sense part of the railway; and I do not think they cease to be so merely because a roof is put over them.

[199] But stations and all those buildings for which under their statutable powers the Company may take land beyond that necessary for the line of railway are not within the exemption; such stations and buildings being, in general, as proximate as may be to the densest habitations of a town. I believe, in practice, in rating railways for the relief of the poor, a distinction is made between the land occupied as railway, which is rated according to its value as part of the whole line, and such ancillary buildings, which are rated according to their separate value. Such a practice has not, as I remember, been the subject of judicial decision: but its existence may facilitate the making of the rate in this case.

On the materials before us, I agree that it is better to hold that so much of the platform as rests on the land taken for the line of railway is within the favouring clause.

(No fourth Judge was present.)

Rate to be amended accordingly.

[200] THE QUEEN *against* WILLIAM HUTCHINSON. Saturday, November 11th, 1854. By a turnpike Act it was enacted that the moneys to be received by virtue of the Act should be applied "in the first place" in discharging the expences of obtaining the Act, "and the remainder of such moneys shall" (after payment of the expences of erecting toll gates, &c.) "from time to time be applied in keeping down the interest of the principal moneys" borrowed on the credit of the Act, "and in" repairing the turnpike road, "and lastly, in repaying the principal moneys." The road being out of repair, an order of justices, under stat. 5 & 6 W. 4, c. 50, s. 94, was made on the trustees to pay a sum to the surveyor of the highways to be applied to its repair. On appeal to the Sessions, a case was stated by which it appeared that the trustees, after the road was out of repair, and before the order was made, had applied all their funds to paying the annual interest on the money borrowed, and the arrears of interest due in previous years, and that the amount applied to the payment of arrears exceeded the amount in the order.—Held: that the words "keeping down the interest," in the Act, meant paying the annual interest as it accrued, and did not include paying arrears, which the Act left to be provided for in the same way as the principal; and consequently that the payment of interest, though the road was out of repair, was a legitimate appropriation of the funds, but that the payment of arrears of interest when the road was out of repair was not a legitimate appropriation.—Held, also, that the order ought not to be made unless the trustees had funds in their hands applicable to the order; but that the trustees, not being entitled to take credit for the improper payment of the arrears of interest, must in this case be considered as having so much of the funds in hand.—Order confirmed.

[S. C. 3 C. L. R. 104; 24 L. J. M. C. 25; 18 Jur. 1116; 3 W. R. 70. Distinguished, *Bruton Turnpike Trustees* v. *Wincanton Highway Board*, 1870, L. R. 5 Q. B. 442. Applied, *Market Harborough Trustees* v. *Kettering Highway Board*, 1873, L. R. 8 Q. B. 311.]

Three justices of the county of Cumberland made an order, under stat. 5 & 6 W. 4, c. 50, s. 94, whereby, reciting that a highway in the parish of Penrith was out of repair, that it was part of the turnpike road made under stat. 3 & 4 W. 4, c. lxxx. (*a*),

(*a*) Local and personal, public. "An Act for more effectually repairing the road from the east end of a close called Lord's Close, in the parish of Brougham in the county of Westmoreland, by way of Brougham Bridge, into the town of Penrith in the county of Cumberland."

Sect. 1, after a recital of the passing of stat. 52 G. 3, c. cxxii. (post, p. 203, note (*a*)), and a further recital as follows, "And whereas the trustees acting in the execution of

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CROWN CASES

I

CONTAINING

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LEWIN, VOLS. 1 AND 2; MOODY, VOL. 1.

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of the name of Edwards, very much resembling the person of the prisoner, had been recently executed for a highway robbery, and that immediately previous to the awful moment of his fate, he had communicated something to the Rev. Mr. Villette, the chaplain in ordinary of the prison, touching the commission of the identical robbery then under consideration. He therefore submitted to the Court, that as Mr. Villette's knowledge upon this subject had proceeded from the solemn declaration of a dying man, it was admissible evidence in favour of the prisoner. (See the case of *Henrietta Radburne, post*, Old Bailey, July Session 1787, and *Woodcock's* case, *post*, Old Bailey January Session 1789.)

The Court. It would be inconsistent with the rules of evidence, which are rules of justice, to examine a witness to the declaration of a person dying under the circumstances described. The principle upon which this species of evi-**[338]**-dence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath. The declarations therefore of a person dying under such circumstances, are considered as equivalent to the evidence of the living witness upon oath. But to examine a witness to the declarations of an attainted convict, would be carrying the rule of evidence beyond its possible extent, even if the person were alive; for, as an attainted convict, he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. The fact, however, that a man resembling the person of the prisoner was executed, may be given in evidence, provided it is confined within such time as to make it probable that he was the person who committed this robbery.

The prisoner's Counsel did not venture to call any witness to establish that fact; and the Jury found the prisoner Guilty.

Case CLXVI.

The King v. Thompson and Macdaniel.

(The penalties on stealing in a dwelling-house, do not extend to the case of a prisoner stealing the property of another in his own dwelling-house.)

[S. C. 2 East, P. C. 611.]

At the Old Bailey September Session 1784, Elizabeth Thompson and Mary Macdaniel were indicted on the 12 Ann. c. 7, for stealing seven guineas, the monies of Thomas Clifford, in the dwelling-house of the said Mary Macdaniel.

The statute recites, "Forasmuch as divers wicked and ill-disposed servants and other persons are encouraged to commit robberies in houses, by privilege of demanding the benefit of their clergy"; and therefore enacts, "That all and every person or persons that shall feloniously steal any money, goods or chattels, wares or merchandises, of the value of forty shillings or more, being in any dwelling-house or outhouse thereunto belonging, although such house or out house be not actually broken by such **[339]** offender, and although the owner of such goods, or any other person or persons, be or be not in such house or out-house, or shall assist or aid any person or persons to commit any such offence, shall be debarred from the benefit of clergy."

It appeared in evidence, that the house in which the larceny was committed, was in fact the house of Mary Macdaniel; and the Court held, that the meaning of the Legislature did not extend to the case of a person stealing in his own house.(*a*)

(*a*) In January Session 1780, Ann, the wife of John Gould, was tried before Mr. Justice Nares, present L. C. B. Skynner, Mr. J. Ashhurst, and Mr. S. Adair, Recorder, for stealing a leathern purse, containing six guineas, &c. the property of William Herring, in the dwelling-house of the said John Gould. The Judges were unanimously of opinion, that the prisoner could not be convicted of the capital part of the charge, inasmuch as the felony was committed in the dwelling-house of her husband, which must be construed to be her dwelling-house, and the statute evidently means the house of another. The prisoner was therefore found guilty of the simple larceny only. This point was afterwards mentioned to Mr. Justice Gould, who concurred with the Judges in this opinion. MS.

Case CLXVII.

The King v. Hutchinson and Others.

(The substantive clauses of the Smuggling Act enumerated.—There must be a deliberate assembling to bring the offenders within the penalty of the statute.)

At the Old Bailey September Session 1784, William Hutchinson, Thomas Lewis, and Daniel Wilkinson, were tried before Mr. Baron Eyre, present Mr. Justice Gould, on the statute 19 Geo. II. c. 34, upon an indictment containing three counts.

The first count charged that the prisoners, with divers other persons, with fire-arms, and other offensive weapons, feloniously did assemble themselves together in order to be aiding and assisting in rescuing and taking away from W. T. and C. S. two of the Officers of the Excise, in the due execution of their office, 150 gallons of foreign geneva, being uncustomed goods, and liable to pay duties, &c. after seizure of the same by the Officers of the Excise as aforesaid.

The second count charged, that, being thus assembled, they **[340]** assaulted the Officers of the Excise in the due execution of their office.(*a*)

The third count charged, that they hindered, obstructed, opposed, and resisted the Officers, &c.

The Officers of Excise, in consequence of an information, went to search Hutchinson's house, where they found a quantity of geneva in tubs concealed in a vault under the yard. Two of the prisoners struck the Officers, beat them from the vault after they had entered it, and prevented them from taking the tubs away. The Officers went in search of Constables and other assistance: but on their return, twelve or fourteen people had come drunk from an adjacent ale-house, and were carrying some of the tubs away. There was a great noise and riot, many brickbats were thrown at the officers, and one of them was knocked down and wounded, but the Smugglers were not seen to use any offensive weapon.

The statute upon which the present indictment is founded contains five branches.

First, it enacts, "That if any persons, to the number of three or more, armed with fire-arms or other offensive weapons, shall be assembled in order to be aiding and assisting in the illegal exportation of goods prohibited to **[341]** be exported, or the carrying off such goods in order to such exportation, or in running, landing, or carrying away prohibited or uncustomed goods, or goods liable to pay any duties, which have not been paid or secured, or in the illegal relanding of any goods whatsoever which have been shipped or exported upon debenture or certificate, or in rescuing or taking away the same, after seizure, from any Officer or Officers of the Customs or Excise, or other his Majesty's revenue, or other person or persons employed by him or them, or assisting him or them, or from the place where they shall be lodged by him or them, or in rescuing any person who shall be apprehended for any of the offences made felony by this or any other Act relating to the revenues of Customs or Excise, or in preventing the apprehending any person who shall be guilty of any such offence, every person so offending shall suffer death without the benefit of clergy."

Secondly, "Or in case any persons to the number of three or more, so armed as

(*a*) In July Session 1784, John Shelley was indicted at the Old Bailey on this statute, and the indictment stated, as in the present case, that the prosecutors were Excise Officers, and the goods seized uncustomed goods. No evidence was given to prove these averments, but what was to be collected from the testimony of the prosecutors themselves; and it was submitted to the Court, that being facts positively alleged, they ought to be directly and substantially proved. In answer to the first point, the statute 11 Geo. II. c. 30, s. 22, was produced, by which it is enacted, that Excise Officers acting in the execution of their duty shall be taken to be Excise Officers until the contrary shall be made appear, for that in all cases of this kind the *onus probandi* is thrown upon the prisoner. As to the second point, it was admitted, that reasonable proof ought to be given of their being uncustomed goods, and that the circumstances under which they were seized were sufficient for the Jury to exercise their judgments upon with respect to the fact.—See, as to the first point, the *Gordons'* case, Northampton Spring Assizes 1789, *post*, and the case of *Berryman* v. *Wise*, Trinity Term, 31 Geo. III. 4 Term Rep. 366.

aforesaid, shall be so aiding or assisting, they shall suffer death without benefit of clergy."

Thirdly, "Or if any person shall have his face blacked, or wear any vizard, mask, or other disguise when passing with such goods."

Fourthly, "Or shall forcibly hinder, obstruct, assault, oppose or resist any of the Officers of the Customs or Excise, or other his Majesty's revenue, *in the seizing* or securing any such goods."

Fifthly, "Or if any person or persons shall maim or dangerously wound any Officer of the Customs or Excise, or any other his Majesty's revenue, in his attempting to go on board any ship or vessel within the limits of any of the ports of this kingdom, or shoot at, maim, or dangerously wound *him when on board such ship* or vessel, and in the due execution of his office or duty; then every person so offending shall be adjudged guilty of felony, and shall suffer death without benefit of clergy."

[342] The Court. The third branch of the Act of Parliament apparently has no regard to the number of persons, nor to their being armed with offensive weapons; and therefore an individual, *passing disguised with uncustomed goods*, would in all probability be deemed within the penalties of the Act. The fourth branch also, being coupled by the word "or" to the preceding sentence, seems to be a clause that would reach any individual who shall forcibly hinder or obstruct a Revenue-Officer in the execution of his duty. (See the concurrent Opinions of Mr. Justice Willes and Mr. Baron Perryn, *in the case of Cornelius Rose*, May Session 1784.) On this clause the third count in the present indictment is founded, and undoubtedly there is evidence to prove the fact; but by the statute of 19 Geo. III. c. 69, s. 10, this offence is reduced to a misdemeanor, punishable by corporal punishment, and the felony thereby virtually repealed. This point was settled by the Twelve Judges, in the case of *The King* v. *Davies*, reserved by Mr. Justice Gould from the Home Circuit (*vide ante*, p. 271, case 135). The second count does not appear to be supported by any of the clauses in the statute; and on the first count, which is framed on the first branch of the Act, there does not appear to be sufficient evidence to convict the prisoners. To bring offenders within the penalties of this clause, they must be armed with offensive weapons.(*a*); and the assembling must **[343]** be deliberate,

(*a*) In B. R. Trinity Term, 15 Geo. II., it appeared in a special verdict on an indictment for this offence, that all the company had fire-arms, except the defendant, who had only a common horsewhip; and the Court so strongly inclined that the defendant was not guilty, that the Attorney and Solicitor-General declined to argue it; for the Act must be taken strictly; and it is a material circumstance in each man's case, that he shall be armed with an offensive weapon. 2 Strange, 1166. *Fletcher's* case.—At Old Bailey May Session 1784, Mr. Justice Willes and Mr. Baron Perryn inclined to think that a person catching up a hatchet accidentally, during the hurry and heat of an affray, is not being armed with an offensive weapon within the meaning of this Act. The case of *Cornelius Rose*.—At the Old Bailey February Session 1785, large sticks, about three feet long, with large knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were held not to be offensive weapons; and the Court (Mr. J. Gould, Mr. B. Perryn, and Mr. Recorder), said on reading the preamble of the statute, that they must be such weapons as the law calls dangerous weapons. *Ince's* case. In the case of *George Cosans*, Old Bailey May Session 1785, it was contended, upon the authority of *Ince's* case, that very large club sticks, such as people ride with to defend themselves, are not offensive weapons; and on its being left to the Jury, *the prisoner was acquitted*: but the Court said, that although it was difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to say, that nothing but guns, pistols, daggers, and instruments of war should be so considered; but that bludgeons, properly so called, clubs, and any thing that is not in common use for any other purpose but a weapon, are clearly offensive weapons within the meaning of the Legislature. And in the case of one *Franklyn*, who was committed to Norwich gaol for that he, with others, armed, had assisted in rescuing smuggled goods, it was said by Lord Mansfield, on the prisoner's being brought up to be bailed, on the ground that he himself was not armed, that it is not necessary, to constitute a felony under this Act, that every individual assembled should be armed.—See *post* and Cald. Decisions, page 246.

and for the express purpose of assisting in the rescue of the goods.(*a*) In the present case it is quite the reverse. A set of drunken fellows come *from* an ale-house, and hastily set themselves to carry away the geneva, but whether with arms or without is not proved. It seems very questionable, whether the object which the Legislature had in view can be extended to the present case. The goods are found concealed *in a vault*; and the words of the statute manifestly allude to the circumstance of great multitudes of persons coming down upon the beach of the sea, for the purpose of escorting uncustomed goods to the places designed for their reception. (See the case of *Thomas Gray*, July Sess. 1786, who was acquitted upon the authority of this opinion.)

The Court offered Mr. Attorney-General a special verdict upon this case; but he declined to take it, and the prisoners were acquitted.

[344] CASE CLXVIII.

THE KING v. WILLIAM MURRAY.

(If a banker's clerk be sent to the money room for money on a particular occasion, and he takes that opportunity of secreting money for his own use, he is guilty of felony.)

[S. C. 2 East, P. C. 683. Referred to, *R.* v. *Thompson*, 1862, 32 L. J. M. C. 53.]

At the Old Bailey October Session 1784, William Murray was indicted for stealing one canvas bag value 2d. and nine hundred and fifty-two guineas, value £999, 12s. 0d. and eight shillings in monies numbered the property of Robert, Henry, and George Drummonds, Esqrs. and Andrew Barclay, Esq. in their dwelling-house. There was a second count for stealing the same in the house of the said George Drummond.

The prisoner was a clerk to Messrs. Drummonds the bankers, and his department was to keep the cash book; but he had nothing at all to do with the strong room where the money is kept. The keys however of this strong room were deposited in the shop, and all the persons concerned in the house had access to the keys, and were occasionally employed to bring bags of money from the strong room. On the 5th April a bag of £1000 was discovered to be missing from the strong room; and from some circumstances relating to some leaves which were found to have been torn from the waste book, a suspicion fell on the prisoner, and he at length confessed that he had taken the bag of £1000 from the iron chest in the strong room, in the month of March, and also *other* sums at different times. It appeared that he might have been intrusted with the keys to fetch money from the strong room for the use of the shop.

It was contended on the part of the prosecution (Mr. Pigott), that a clerk or servant to a banker or merchant who embezzles his master's property is guilty of felony, and not, as it was generally conceived, of a breach of trust only. In the present case the prisoner was employed to keep the cash-book only, and was not trusted with either the receipt or payment of money. He had no charge whatever of the money of the house, or even the care and oversight of it. He may have been sent occasionally to the strong room to deposit writings or plate, or to fetch a bag of money when wanted for a particular purpose, but that will not alter the nature of his guilt, for where a clerk has only the care of or access to money for particular and special pur-**[345]**-poses, as paying a bill, and at the time he secretly and clandestinely converts it to his own use, he is as much guilty of a felony as if he had no access to that drawer. If I send my servant to my library for one book, and he takes another; or if I send him for my hat and sword, and he steals my cane, he is guilty of felony. In all such cases there can be no question of his guilt.

The Counsel for the prisoner (Mr. Fielding) admitted that the law had been correctly stated by the Counsel for the Crown; and

The Court (Lord Loughborough) directing the Jury to the same effect, the prisoner was found Guilty.

(*a*) Old Bailey December Session 1785, Mr. Justice Willes and Mr. Baron Hotham adopted the same opinion, and the prisoner was acquitted. The case of *B. Spice*.—And at July Session Thomas Gray was tried before Mr. Justice Heath, and acquitted upon the same construction of the statute.

THE

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VOLUME CLXXV

NISI PRIUS

VI

CONTAINING

CARRINGTON AND KIRWAN 2-3; FOSTER AND FINLASON 1-2

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over foreigners only arises from consent; however, it may be otherwise in time of war. It has been asked, in the course of this argument, if a Frenchman were kidnapped and put ashore in this country, and committed a crime here, would he be triable in this country? That is a question difficult to answer; but on high principle he ought to be sent to his own country to be tried. It has been stated, that the learned Baron, at the trial, laid it down, that the mere fact of the vessel being in the possession of her Majesty's officers was *sufficient to make these parties* triable here; but I submit that that is not sufficient, unless that possession was a legal one.

[97] Dr. Harding, in reply.—The first part of the argument of the Queen's advocate that I have to answer is, that, after the slave trade was declared to be at an end, there was no limit to the right of search. By the terms of the Portuguese treaty, vessels are not to be detained, unless upon the visit there is undeniable proof that there have been slaves on board. It is said that the equipment of the vessel shews an unlawful purpose, and it may be that she has violated the treaty, but the Crown should have shown some municipal law of Brazil that has been violated. The fact of equipment may shew that the vessel was engaged in an untreaty-like act, but not in an unlawful act. It has also been said that "The Echo" was captured by "The Wasp," because the boat took her. In the case stated by the learned Baron, the boat is not identified as the boat of "The Wasp," and it ought not to be presumed that she was so. It does not follow, that, because British subjects would be triable here *for offences committed by them on board the "Felicidade,"* that aliens would be so. Depardo might be said to be in some degree within the *ligeantia localis*, as he had of his own accord entered on board an English ship.

Pollock, C. B.—His offence was committed on land in a foreign country.

Dr. Harding.—With respect to the cases that have been cited as to claims to restitution in time of war, they only shew that you must come with clean hands; and, unless you were engaged in a lawful traffic, you are not entitled to restitution. Chancellor Kent says (Kent's Comm., part 1, lecture ix, p. 200), "The final decision of the question in this country has been the same as in the case of 'The Louis.' In the case of 'La jeune Eugénie' (2 Mason's Rep. 409), **[98]** it was decided, in the Circuit Court of the United States, in Massachusetts, after a masterly discussion, that the slave trade was prohibited by universal law. But, subsequently, in the case of 'The Antelope' (10 Wheaton's Rep. 66), the Supreme Court of the United States declared that the slave trade, though contrary to the law of nature, had been sanctioned in modern times by the laws of all nations who possessed distant colonies; and a trade could not be considered as contrary to the law of nations which had been authorized and protected by the usages and laws of all commercial nations." It is admitted, that, by this seizure, the property did not pass: then, can it be contended, that a mere capture brings all the parties within the English criminal law? Brazil had not abandoned these persons, and they had not come voluntarily into British jurisdiction.

Coltman, J.—If you proceed in the Admiralty Court against a neutral, which has rescued herself,—I mean in the case of an illegal capture—what is the result?

Dr. Phillimore referred to the cases of "The Mary" (*a*) and the "The Dispatch" (cited, *ante*, p. 93).

Sir J. Dodson, Ad.-G.—The usual mode is to bring in the ship's papers, and examine the master and two or three of the crew on standing interrogatories and some special ones, and then the Court decides.

Dr. Jesse Addams.—That is in time of war, when the *right of search and capture* is, that one may bring in friend or foe, subject only to costs and damages; but that is only in **[99]** time of war. In time of peace there is no right of search except by treaty.

The case was afterwards considered by the Judges, before whom it was argued; and a majority of their Lordships were of opinion that the conviction was wrong, on the ground of want of jurisdiction in an English Court to try an offence committed on board the "Felicidade"; and that, if the lawful possession of that vessel by the British Crown, through its officers, would be sufficient to give jurisdiction, there was no evidence brought before the Court at the trial to shew that the possession was lawful.

(*a*) 5 Robs. Adm. Rep. 200. In that case, "The Mary" had been taken, and her crew, who where put on board "The Matilda," a cartel vessel, got the boat of "The Matilda" and retook "The Mary." It was *held* that this was not a legal recapture, and that, being illegal, it did not revest the interest of the owners of "The Mary."

Tindal, C. J., Pollock, C. B., Parke, B., Alderson, B., Patteson, J., Williams, J., Coltman, J., Maule, J., Rolfe, B., Wightman, J., and Erle, J., held the conviction to be wrong.

Lord Denman, C. J., and Platt, B., held the conviction right.

Lord Denman's opinion was as follows: "I thought the conviction right. It appeared to me that the possession of the Brazilian vessel by the British officers was a lawful possession, under a seizure made by them of the said ship while employed by Brazilian subjects in the slave trade; and I thought the vessel so in possession of British officers, under the general authority from the Crown, was a British vessel, for the purpose of founding the jurisdiction of the Court of Admiralty; and, of course, since the late act (the stat. 7 & 8 Vict. c. 2), of the court of oyer and terminer and gaol delivery at Exeter, to try crimes on board such vessel."

Baron Platt's opinion was as follows:—"The 22nd **[100]** section of the stat. 4 & 5 Will. 4, c. 36, gave to the justices of oyer and terminer and general gaol delivery at the Central Criminal Court, and a subsequent statute (*a*) to the Judges before whom the assizes at Exeter were holden, jurisdiction to try the prisoners, if the alleged offence had been committed within the jurisdiction of the Lord High Admiral. The question, therefore, was, whether the act which caused the death of Mr. Palmer was committed within that jurisdiction. Upon this subject I have always thought, and still think, that, as Captain Usher commanded her Majesty's ship of war 'The Wasp,' and was stationed with that vessel off the coast of Africa for the prevention of the slave trade, the compact entered into between the British and Brazilian governments by the then subsisting Brazilian treaty justified him in directing, and Lieut. Stupart in effecting under such direction of his superior officer, the capture of the 'Felicidade' and of 'The Echo,' and their detention during such time as might be necessary for the purpose of submitting the circumstances attending their capture to the judgment of the Mixed Court; and that, during such detention of the 'Felicidade,' she was in the lawful possession and *dominion* of her Majesty, and her deck as much within her Majesty's Admiralty jurisdiction as the deck of 'The Wasp'."

The prisoners were discharged.

[101] Old Bailey April Session, 1815, before Lord Ellenborough, C. J., Mr. Justice Chambre, and Mr. Baron Wood.

April 7th, 1815.

REX v. WILLIAM SAWYER.

(Under the stat. 33 Hen. 8, c. 23, a British subject was triable in this country for the murder of another British subject, committed on land within the territory of a foreign independent kingdom. In such a case, the indictment sufficiently shewed the parties to be British subjects, by stating, in the usual manner, that the deceased was in the peace of the king, and concluding against the peace of the king. Such an indictment need not conclude *contrà formam statuti*.)

[Subsequent proceedings with annotations, Russ. & Ry. 294.]

Murder.—The prisoner was indicted for the murder of Harriet Gaskett, at Lisbon, in the kingdom of Portugal, on the 27th day of April, 1814, and was tried under a special commission issued under the stat. 33 Hen. 8, c. 23 (*b*). The indictment was as follows:—"London, to wit. The jurors for our Lord the King upon their oath present, that William Sawyer, late of London, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, heretofore, to wit, on the 27th day of April, 54 Geo. 3, with force and arms, at Lisbon, in the kingdom of Portugal, in parts beyond the sea without England, in and upon one Harriet Gaskett, in the peace of God and our said Lord the King then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said William Sawyer a certain pistol of the value of five shillings then and there loaded with gunpowder and a leaden bullet, which pistol he the said William Sawyer then and there had and held in his right hand to, at, and against the said Harriet Gaskett, did then and there, to wit, at Lisbon aforesaid, in parts beyond the sea without England, feloniously, wilfully, and of his malice aforethought, shoot off and discharge," by which the said William Sawyer gave to the said Harriet Gaskett one

(*a*) The stat. 7 & 8 Vict. c. 2. As to the laying of the venue under this statute, see the case of *Regina* v. *Jones*, *post*, p. 165.

(*b*) That stat. was repealed by the stat. 9 Geo. 4, c. 31, and other provisions substituted for it by sect. 7 of that Act.

mortal wound (describing it), of which mortal wound the said Harriet Gaskett "then and there, to wit, on the said 27th day of April in the year aforesaid, at Lisbon aforesaid, in parts beyond the sea without England, did instantly die. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said William Sawyer, her the said Harriet Gaskett, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of our said Lord the King, his crown and dignity."

Before the prisoner pleaded to the indictment, Alley, for the prisoner, objected, that he could not be tried in this country for an offence committed in a foreign independent kingdom.

[102] Lord Ellenborough, C. J., said that it would be best to hear the evidence before discussing any of the legal questions.

It was proved, that, on the 27th of April, 1814, several persons in a house at Lisbon heard the report of two pistols, which were fired in the garden belonging to that house, and that, on their going there, they found that Harriet Gaskett had been shot by the prisoner, who had also shot himself. Harriet Gaskett died of the wound thus given, but the prisoner recovered.

Verdict—guilty.

Alley and Curwood objected, in arrest of judgment, first, that an offence committed within a foreign independent kingdom was not triable in this country; secondly, that it did not sufficiently appear, by the indictment, that either the prisoner or the deceased were British subjects; and, thirdly, that the indictment did not conclude *contrà formam statuti*, as it ought to have done.

Lord Ellenborough, C. J., said that he would reserve the case for the consideration of the twelve Judges.

Garrow, A. G., Knapp and Abbott, for the Crown.

Alley and Curwood, for the prisoner.

Before Lord Ellenborough, C. J.; Gibbs, C. J.; Thompson, C. B.; Heath, J.; Le Blanc, J.; Chambre, J.; Graham, B.; Wood, B.; Bayley, J.; Dampier, J.; Dallas, J.; and Richards, B.

Curwood, for the prisoner.—The stat. 33 Hen. 8, c. 23, enables the king, in cases of treason or murder committed "within or without" his dominions, to issue a commission to try the offender. On this statute the commission for the trial of the present case issued; and I object, first, that the court under that commission had no jurisdiction to try a person for an offence committed within the limits of a foreign independent kingdom, governed by its own laws and its own legislature; and, secondly, that, if the Court here had a power to try an offence locally so committed, the jurisdiction only extends to cases where the parties are British subjects, which these parties are not either of them averred to be in this indictment; and, thirdly, that the indictment does not conclude *contrà formam statuti*. With respect to the first objection, the statute, both by its title and preamble, appears to have reference to offences committed within the king's dominions. By the title, it appears to relate to the trial of persons who confess treason, &c., "without remanding the same to be tried in the shire where the offence was committed"; and in the preamble it is recited, that persons are brought at great expense from "divers **[103]** shires and places of this realm and other the king's dominions" to be examined before the Privy Council; and the enacting part of the 1st section of the statute gives the commissioners to be appointed under it power to try treason or murders in whatsoever "place, within the king's dominions or without, such offences" have been committed. I admit, that, if the words "within the king's dominions or without" are taken in their most extended sense, they must include any part of the world; but the fair construction of words is according to the subject-matter. In another part of this very act, the meaning of the word "persons" must be limited, because, if the same species of extended construction were put upon it that is sought to be put on the words "within or without," it will include every human being, and any foreigner committing a murder within his own country might be tried for it here; and if it be answered that the word "persons" does not extend to all persons, because, by the law of nations, every government is supposed to legislate for its own subjects, the same rule ought to apply here, and your Lordships will put that construction on the words which is consistent with the law of nations. The common law of England was so strict as to jurisdiction, that even a civil action must have been tried in the county in which the cause of action arose; and a learned authority has said, that the first case in which the law of venue

in civil cases was settled was in the 48 Edw. 3, in which a bond made in Normandy was declared on as having been made at Harflete, in Kent (*a*); but there was no relaxation of the rule as to criminal cases in any instance till the reign of Henry VIII.; and it was not until the reign of Edward VI. that a murder, where the blow was in one county and the death in another, was made triable in either; and there was no criminal case at all in which the locality of jurisdiction was departed from till the stat. 4 Hen. 8, c. 2 (which was made perpetual by the stat. 22 Hen. 8, c. 2), by which it was enacted, that, if any murderer or felon alleged that he was taken from sanctuary in a foreign country, the same jury who try the murder shall try this matter. The statutes 26 Hen. 8, c. 6, and 32 Hen. 8, c. 4, were passed to authorize the trials in other places of treasons committed in Wales; and the stat. 35 Hen. 8, c. 2, is for the trial of treasons committed out of the king's dominions; but it is stated by Mr. Serjt. Probyn, in the Appendix to the State Trials (Vol. 6), that the stat. 35 Hen. 8, c. 2, was made expressly with a view to Ireland (*b*); and all these acts of Parliament give some degree of information to the construction I am putting on the stat. 33 Hen. 8, c. 23. Lord Hale, Hawkins, and Lord Coke all give the stat. 33 Hen. 8, c. 23, without comment; and Lord Coke, in his definition of **[104]** murder, limits the commission of the offence to "within any county of the realm," and also says, that, if two of the king's subjects go to a foreign realm to fight, and the one kill the other, the murder is triable before the constable and marshal (3 Inst. 47, 48), but he does not say that a special commission could issue under this Act of Parliament. So, Lord Coke says (1 Inst. 74 a), "If a subject of the king be killed by another of his subjects out of England in any foreign country, the wife or heir may have an appeal before the constable and marshal"; and, after mentioning the case of the wife of a person slain in Scotland, he adds, "And so it was resolved in the reign of Queen Elizabeth, in the case of Sir Francis Drake, who struck off the head of Dowtie, in *partibus transmarinis*, that his brother and heir might have an appeal, *sed regina noluit constituere, constabularium Angliæ*, &c., *et ideo dormivit appellum*" (*c*). The case of Dowtie is that which is said to have inflicted the greatest infamy on the memory of Drake, as, in his first voyage round the world, he, from envy, took his rival on shore at Brazil, and then imputed mutiny to him, and beheaded him. His brother brought an appeal, but Queen Elizabeth would not grant a commission appointing a lord high constable to try it, and it was never tried. It is singular that Lord Coke should not have noticed that Sir Francis Drake might have been tried by a commission under the stat. 33 Hen. 8, c. 23, if that could have been done. There is no reported case of a trial under the stat. 33 Hen. 8, c. 23, till the year 1720, though the statute was passed in 1541: of that case, which is Ely's case, there is a short note in Mr. East's Pleas of the Crown (1 East, P. C. 370). The death of the deceased had happened at Dollars, in Sweden, and the point there taken seems to have been, that the Act of Parliament only extended to England, which would not be an available point, as the Act of Parliament clearly extends beyond England. There was another case of a murder at Barcelona (*d*), but I **[105]** have not been able to find any report of it. Governor Wall's case (28 St.

(*a*) In the case of *Sir Ralph Pole* v. *Sir Richard Tochess*, Year Book, Hil. Term, 48 Edw. 3, p. 2, pl. 6.

(*b*) The title of that stat. is, "An Act concerning the Trial of Treasons committed out of the King's Majesty's Dominions," and its provisions relate to treasons committed out of the realm of England.

(*c*) Mr. Hargrave, in his note to this passage (n. 37), says, "In the reign of Charles the First, the Lord Keeper and Judges of the King's Bench were advised with on a like occasion, and held that the earl marshal could not take an appeal without a high constable, and accordingly the king appointed the Earl of Lindsey twice to the office, once to try an appeal by Lord Rea against Mr. Ramsey, for treason committed in Germany; and a second time to try an appeal by the widow of William Wise against William Holmes, for the murder of her husband, in the island of Terra Nova, in America." Sir Richard Hutton, in his Reports (p. 3), says, "And 26 Eliz.:—Doughtie's case, petition was made to the Queen by the heir to make a constable and marshal, but she would not."

(*d*) The case of Chambers, tried in 1709: it is referred to in the case of *Rex* v. *Althoes*, 8 Mod. 144, in these terms: "And of the same opinion was the Lord Chief Justice Holt, in Chambers' case, who was tried here for a murder committed in Barcelona, in Spain, who said that trial was good by virtue of the stat. 27 Hen. 8, c. 4, though the case was not within the mischief recited by that Act,"

Tr. 51) may be cited, but that comes within the construction I am contending for, as the offence for which he was tried occurred within the king's dominions, being in a foreign settlement. Captain Roche's case was like the present. In the year 1771 he went ashore with Mr. Ferguson at the Cape of Good Hope, and killed him in duel. He was indicted in this country under the stat. 33 Hen. 8, c. 23, and wished to plead two pleas—a plea of *autrefois acquit* before a judge at the Cape of Good Hope, and not guilty. He was told by the Court that he could not plead both, and he relied on the not guilty, and was acquitted. There was also the case of Mr. Hutchinson (*a*), who was indicted for a murder in Portugal: he chose to rely on a plea of *autrefois acquit*, and succeeded on it. In these cases, therefore, the objection made in the present case was not taken. I now come to the second point, that the indictment is defective for not averring that either of these parties were British subjects, and that that was not proved.

Le Blanc, J.—It appeared so at the trial, did it not?

Curwood.—It appeared that the prisoner went from this country, and was in the service of Great Britain; but there were many Portuguese in the British service in the commissariat department. If the jurisdiction is to be supported here, I apprehend that it must be upon the ground that a British subject owes allegiance to the laws of his country wherever he goes, notwithstanding he may owe a local allegiance elsewhere; and that, a British subject being a part of the state, the British legislature can bind his acts in a foreign country. This principle received much consideration in the case of *Rex* v. *Depardo* (*b*); and I submit, that, if it be necessary that the parties should be British subjects to bring them within the jurisdiction of the Court, it is essential that that fact should appear on the face of the indictment, and that, if it does not so appear, the indictment is bad. With respect to the third objection, that the indictment should have concluded *contrà formam statuti*, I am aware that it will be answered that this was an offence at common law, and that the statute only gives a mode of trial. But I apprehend that the statute has made a material difference in the offence itself, as a conviction on this statute would be followed by all the consequences of a conviction for felony, **[106]** namely, forfeiture of lands and corruption of blood. Before this statute, offenders of this kind were in a similar situation to offenders on the high seas before the passing of the stat. 28 Hen. 8, c. 15, the latter being triable by the Lord High Admiral under the civil law, and the former by the constable and marshal, also under the civil law; there being no such thing as felony by the civil law, according to our conception of the term, felony being a penal consequence under the feudal law; and Lord Coke says (3 Inst. 112), that pardon of all felonies does not pardon piracy, and he refers to a case in the reign of Queen Elizabeth, as to the robbing on the high seas of certain merchants of Venice. I admit that Lord Coke also says (1 Inst. 391 b), that, if "piracy be tried before the Lord Admiral in the court of the Admiralty according to the civil law, and the delinquent there attainted, yet shall it work no corruption of blood nor forfeiture of his lands; otherwise it is, if he be attainted before commissioners by force of the statute 28 Hen. 8, c. 15." And Lord Hale, too, lays it down (1 H. P. C., c. 27, p. 355), that, if pirates be convicted before the Admiral, or persons be convicted of treason or murder before the constable and marshal, it works no corruption of blood; but if tried before a jury it does so. And he further says, that "it is out of the question that piracy upon the statute is robbery, and the offenders have been indicted, convicted, and executed for it in the King's Bench as for a robbery." If the offence itself is not altered by the statute, it is no felony, and an indictment charging it as a felony is bad; but if the statute makes it a felony, the indictment must conclude *contrà formam statuti*; and if it does not, it is therefore bad.

Abbott, for the Crown.—It is admitted that there may be a trial in this country for a murder committed in a foreign dominion belonging to his Majesty, but it is contended that there can be no trial for a murder committed in a foreign country not belonging to his Majesty, being, it is said, an independent state. To support this objection, the title and preamble of the stat. 33 Hen. 8, c. 23, have been referred to.

(*a*) Cited Bull. N. P. 245, and in the case of *Beake* v. *Tyrrell* (1 Show. 6), where it is said, "The Court and jurisdiction of the Admiralty reaches over the sea all the world over, and they may sit at land anywhere in the East Indies as well as here; and in 29 Car. 2, Hutchinson's case, who was accused and acquitted in Spain for killing a man there, it was held to be a good bar to any proceedings here."

(*b*) 1 Taunt. 26. See also the case of the Sussex Peerage, 11 Cl. & Fin. 85.

But it is to be observed, that every argument to be derived from the title and the preamble of that statute would equally apply to an offence committed in any foreign possession of his Majesty. Another argument is drawn from the silence of Lord Coke, who, when mentioning the trial before the constable and marshal, has not mentioned the mode of trial directed by this statute. It might not have occurred to him, and it is too much to say that an Act of Parliament is not to be construed according to its plain meaning, because even the most learned person has not noticed it. It has been said that this objection has not been taken before, but I think due weight is not given to the manner in which it was taken in Ely's case. I have the manuscript note of Lord King, who was present at the trial, and he quotes it by the name of "Ealing's case." His Lordship's note is in these words: "At the sessions of oyer and terminer in Justice Hall, at **[107]** the Old Bailey, London, namely, on the —— day of December, 7 Geo. 1, before Sir John Fryer, Knight (Lord Mayor), King, Eyres, Montague, &c. At this session, there was a special commission, founded on the 33 Hen. 8, c. 23, for the trial of Edward Ealing for the murder of Charles Bignell, at Dollars, in the kingdom of Sweden. The commission recited the said Act, and that Edward Ealing was accused for the murder of Charles Bignell in foreign parts, and had thereupon been examined by three of the Privy Council, who, upon examination, vehemently suspected him to be guilty of the murder *sciatis igitur*, &c. The indictment taken under the commission was, that he, at Dollars, in the kingdom of Sweden, without the kingdom of England, did murder the said Charles Bignell; and on his arraignment he objected, by his counsel, that the said Act of the 33 Hen. 8, c. 23, taking it to be in force still as to murder, extended only to the several shires in England, so that a murder committed in one shire may, according to the method prescribed by that statute, be tried in another shire, but not a murder committed out of the realm; but the Court, on consideration of the statute, resolved that it did extend to murder committed out of the realm. And a like commission had been granted in the late Queen's time, in the case of one John Chambers, who was indicted for a murder committed *extra hoc regnum, scil. apud Barcelona, in regno Hispaniæ*, was tried in June, 1709, and acquitted; and thereupon the Court proceeded to try this Edward Ealing, who was justly found guilty of murder, and afterwards executed for the same." That was a case in which the murder was distinctly charged to have been committed within the territory of a foreign and independent prince; and the precedent on which the Court relied is that of a murder at Barcelona, also in the territory of a foreign independent prince; and it is impossible to suppose that the Court had not the stat. 33 Hen. 8, c. 23, brought under its view with respect to the extent of its jurisdiction to try offences committed within foreign independent kingdoms. Of the case of Mr. Hutchinson there is not any report that can be much relied on. It is mentioned in Shower (1 Show. 6), in Buller's Nisi Prius (B. N. P. 245), and there is a short and hardly intelligible note of it in Keble (*a*).

Wood, B.—Have you the indictment in Ely's case?

Abbott.—It has been searched for in the Baga de Secretis, to which these indictments should be returned, but without success, as the first indictment that has been found there is that against David Roche, in the **[108]** year 1775, for the murder of Captain Ferguson at the Cape of Good Hope, which was at that time not belonging to this country. In that case, the prisoner at first pleaded a plea of *autrefois acquit*, but afterwards withdrew that plea, and submitted to the jurisdiction of the Court. The next case was that of Kenneth Mackenzie, in 1783: he was tried, convicted, and executed for the murder of Kenneth Murray Mackenzie, at Moree, on the coast of Africa. In those cases, the indictment was in precisely the same form as that in the present case. Next came the case of Governor Wall, for a murder at Goree, in Africa, which was a British settlement; and, in 1807, William Williams was tried at Chelmsford, under a special commission, for a murder at Charleston, in North Carolina; and, in 1802, Henry Rea and two others were tried for a murder at the Cape of Good Hope, then, I believe, a settlement belonging to his Majesty, and were acquitted (*b*).

(*a*) 3 Keb. 785. It is as follows:—"On *habeas corpus*, it appeared the defendant was committed to Newgate on suspicion of murder in Portugal, which (by Mr. Attorney), being a fact out of the King's dominions, is not triable by commission upon 35 Hen. 8, c. 2, s. 1, n. 2, but by a constable and marshal; and the Court refused to bail him," &c.

(*b*) The evidence in the case of *Rex* v. *Ely*, and a short abstract of the indictment, will be found in Vol. 1, p. 1, of a work in 2 vols. called "Select Trials at the Old

In the case of *Depardo* (1 Taunt. 26), it appears, from the argument of Mr. Burrough, for the prisoner, that he was satisfied on the authorities that the Court had jurisdiction to try an offence committed in an independent foreign kingdom. He therefore did not take this point, though he did not pass it over unnoticed: and when it is considered that the stat. 33 Hen. 8, c. 23, received its exposition so late as the year 1803, it seems impossible to contend with any effect that it does not extend to an offence committed in a foreign and independent state; for, by the stat. 43 Geo. 3, c. 113, s. 6, it is recited, that the stat. 33 Hen. 8, c. 23, is still in force as to murder, and that no provision is made therein as to the trial of accessories before the fact in murder, or for the trial of manslaughter, "whereby persons guilty of those offences, and more particularly when such murders or manslaughters happen to be committed out of the realm, and not upon the high seas, may frequently escape punishment"; and the stat. 43 Geo. 3, c. 113, then proceeds to make provision for the trial of such accessories, and the trial of manslaughter. The second objection is, that the indictment does not contain any averment that the person committing the offence was a British subject. I am to submit, that such an averment is not necessary. It is not in any of the precedents that I have referred to, and it is not in any of the indictments preferred under what is called the Admiralty Commission under the other statutes; and I do not know any reason that **[109]** would apply in one case that could not apply in the other, as it can hardly be contended, that the commission, commonly called the Admiralty Commission, for the trial of murders on the high seas, would extend to any class of persons to whom this statute does not apply. The offence of piracy may admit of a different consideration, for that is against the law of nations; but all the trials for murder under the Admiralty Commission are authorities in my favour. The indictment in the present case avers, that the party murdered was in the peace of the King, and that the offence was committed against the peace of the King, which concluding words (the *contrà pacem*) are not words of form and ceremony, but denote that the offence was an offence committed against the authority and laws of that sovereign against whose peace it is said to be; and it has been always held to be necessary to lay the offence against the peace of the king in whose reign it was committed.

Lord Ellenborough, C. J.—Have you the form of any indictment before the constable and marshal, to shew how it was laid there.

Heath, J.—They were all appeals, and not indictments (*a*).

Abbott.—I have not any of them. The present indictment alleges the party murdered to have been in the peace of the King.

Lord Ellenborough, C. J.—That is a very material allegation. It means under the protection of the King.

Abbott.—As to the effect of indictments concluding *contrà pacem*, the cases are collected in "Hawkins's Pleas of the Crown" (*b*); and in ancient times, when the palatinates existed, the indictment always concluded against the peace of the Earl or Lord Palatine (4 Inst. 205). This conclusion *contrà pacem* is an assertion that the offence was committed against the laws of the King; and, if the situation of the prisoner was such that he was not amenable to the laws of this country, that should be made matter of defence, as it was in the case of Depardo. With respect to the third objection, that the indictment does not conclude against the form of the statute, I submit that those words are only necessary where the statute creates the offence (*c*), and where, by statute, the benefit of clergy is taken away; for an offence that was felony before, it is not necessary to charge the offence *contrà formam statuti*. So, it has been held, that an indictment for murder under the statute of stabbing need not conclude *contrà formam statuti* (1 H. P. C. 468); nor an indictment for the murder of a bastard child, **[110]** though, by statute (the stat. 21 Jac. 1, c. 27, repealed by the

Bailey, from 1720 to 1724," which is in the library of Lincoln's Inn. There is also an abstract of the commission, indictment, &c. in Roche's case, in "The last part of the inventory and calendar of the Baga de Secretis," printed in Append. II. to the 5th Report of the deputy keeper of the public records (presented to the Houses of Parliament in 1844), p. 205. The like as to Mackenzie's case, *id.* 216. The like as to Governor Wall's case, *id.* 224. The like as to Williams' case, *id.* 228; and the like as to Rea's case, *id.* 225.

(*a*) As to the court of the constable and marshal, see 4 Inst. 123.

(*b*) Vol. 2, ch. 25, ss. 92, 93. See also the case of *Rex* v. *Taylor*, 5 D. & R. 422.

(*c*) See the case of *Regina* v. *Polly*, *ante*, Vol. 1, p. 77.

stat. 43 Geo. 3, c. 58), the concealment of the death of the child would have been evidence of the murder (2 H. P. C. 289). So, in the case *Rex* v. *Berwick* (Fost. C. L. 12), it was objected, that the Act of Parliament for the trial of the rebels in 1746 (19 Geo. 2, c. 9) only authorized the trial of those in custody on the 1st of January, 1746, and that the indictment was bad, because there was no allegation of custody: but that objection was overruled, and it was said, that the common commission of gaol delivery only extends to persons actually in custody; and yet that is never averred (*a*).

Lord Ellenborough, C. J.—At the Admiralty Sessions, in cases of murder, the indictments state the person killed as being in the peace of the king, and use the word "feloniously."

Abbott.—And conclude against the peace of the king.

Le Blanc, J.—And not against the form of the statute.

Wood, B.—Offences there are stated to be within the jurisdiction of the Admiralty of England.

Abbott.—"Upon the high seas, within the jurisdiction of the Admiralty of England": here it is stated to be "at Lisbon, in the kingdom of Portugal."

Curwood, in reply.—The case of *Rex* v. *Ely*, as it appears in Lord King's manuscript, is in substance the same as I stated it; and it seems difficult to suppose that the omission by Lord Coke of all mention of this extensive jurisdiction could have been an oversight.

Lord Ellenborough, C. J.—Does Lord Coke, in the passage you cited, mention the trial by the constable and marshal as the only trial for such offences?

Curwood.—He does not.

Lord Ellenborough, C. J.—There is no statute which makes these offences triable before the constable and marshal.

Curwood.—The stat. 13 Rich. 2, c. 2, recites, that the court of the constable and marshal had incroached to itself contracts, and many other actions pleadable at the common law, to the prejudice of the king and oppression of the people; and then confines the jurisdiction of the constable to "contracts touching deeds of arms and of war out of the realm, and **[111]** also of things which touch arms or war within the realm, which cannot be determined or discussed by the common law."

Lord Ellenborough, C. J.—It gave him no new jurisdiction, but confined the jurisdiction to certain subjects.

Curwood.—The stat. 1 Hen. 4, c. 14, enacts, that "all appeals to be made of things done out of the realm shall be tried and determined before the constable and marshal of England for the time being."

Heath, J.—After the attainder of the Duke of Buckingham, in 9 Hen. 8, there was no constable, so that no appeal could have been brought between the 9th and 33rd Hen. 8.

Lord Ellenborough, C. J.—That would shew a reason for a substituted jurisdiction.

Curwood.—There is a clear distinction between those cases, such as Governor Wall's and Williams', which occurred within the king's dominions but without the realm, and the other cases which have been cited, which occurred within foreign independent states, and in which this objection was not taken, but might have been. The stat. 43 Geo. 3, c. 113, has been referred to as an exposition of the stat. 33 Hen. 8, c. 23; but it should be observed that the stat. 43 Geo. 3, c. 113, does not at all vary the original act, or extend the jurisdiction in respect of place; and the stat. 43 Geo. 3, c. 113, would have been necessary in cases like that of Governor Wall, for accessories in cases clearly within the jurisdiction of the Court, and for manslaughter committed within the king's dominions, but out of this realm. With respect to the objection, that there is no averment that the parties were British subjects, it is suggested, that, as to the deceased, that is supplied by the allegation that the deceased was within the peace of the King; but, in answer to that, I should have relied on the circumstance, that, when the palatinates existed, it was alleged to be against the peace of the lords of the franchise; and it was not till the stat. 27 Hen. 8, c. 24, that all indictments were required to be laid against the king's peace, the king alone then having the power of pardon. The inference I should deduce from the indictments stating the offence to be against the peace of the lords of the franchise, while the franchise existed, is, that the peace there alluded to is the local protection afforded by the lord of the franchise, and that, therefore, neither the prisoner nor the deceased

(*a*) See the case of *Regina* v. *Whiley*, *ante*, Vol. 1, p. 150.

was, in this case, within the peace of the King, as both were in the kingdom of Portugal.

Lord Ellenborough, C. J.—The King has an interest in the protection of his subjects in parts beyond the realm, and there is a writ known to the law of England, if subjects have suffered in their persons or goods in foreign parts; and the persons who have maltreated them there, when [112] they come into this country, are called upon by a writ out of Chancery to answer for it: so that the King's subjects are considered as under the protection of the King, even out of the realm.

Curwood.—The offender must be a person amenable to the laws of this country. That nowhere appears by this indictment, which certainly states him to be "late of London," but that merely shows that he had a residence in this country at one time; but he might be a foreigner notwithstanding that.

Lord Ellenborough, C. J.—"Against the peace of the King" applies to the offender: it relates to his capacity to commit the crime.

Curwood.—An argument has been deduced from the uniform precedents used in the Admiralty Courts, but there is a main distinction between an offence committed on the high seas and in a foreign country. To have made the offences similar, the case put should have been that of an offence committed in a foreign ship on the high seas, for the Admiralty have jurisdiction only over offences committed in British ships, and all persons on board British ships owe a local allegiance, and therefore it would be unnecessary to state them to be British subjects; but when prisoners are on foreign ground, and it is so stated in the indictment, I apprehend, that, in order to shew their liability to the laws of this country, it should be averred that they are British subjects. With respect to the third point, that the indictment does not conclude "against the form of the statute," it is said, that, where a statute takes away the benefit of clergy, it is not necessary to make this averment, but the reason of that is, that the taking away of the benefit of clergy merely takes away from the prisoner a plea in bar of the judgment which he might otherwise have pleaded. But, to make the cases similar, we must suppose that a statute had created that a felony which was before not so; and, if I am right in my reasoning from Lord Coke, this offence, though punishable with loss of life, was no felony till it became triable under this Act of Parliament, and then it was made a felony, and thus it became necessary in indictments to aver it to have been committed "against the form of the statute."

The case was afterwards considered by the Judges, who held that the judgment ought not to be arrested.

May 12th, 1815.

Le Blanc, J., now delivered the judgment of the twelve Judges, as follows:—This was an indictment and conviction under a special commission holden in April last. The indictment charged, that the prisoner, at Lisbon, in the kingdom of Portugal, in parts beyond the sea without England, upon one Harriet Gaskett, in the peace of God and our Lord the King, did make an assault: it went on to charge a murder by shooting, and concluded against the peace of our Lord the King. Three [113] objections were raised in arrest of judgment: first, that, as this offence was committed within the limits of a foreign independent kingdom, it could not be triable here; secondly, that it was not sufficiently alleged that either of the parties was a British subject; and, thirdly, that the indictment should have concluded against the form of the statute. With regard to the first objection, that depends on the words of the Act, which extends to murders committed in any place whatsoever, within the king's dominions or without, which are words plain and clear, and sufficiently large to include this offence. It was argued, that the words of the statute could not extend to places situate in the dominions of an independent foreign power, but for this no authority was cited; and, in fact, the cases are all the other way. The earliest case is that of Chambers, who was tried in 1709 for a murder at Barcelona. Then followed Ealing's case, for a murder at Dollars, in the kingdom of Sweden; and, after that, the case of Captain Roche, for a murder at the Cape of Good Hope, in 1775. These were all offences committed within the dominions of foreign states, and therefore the Judges have considered, that, as the authorities support the words of the statute, the construction contended for on the part of the prisoner cannot prevail. As to the second objection, that it is not alleged that they were British subjects, the stat. 33 Hen. 8, c. 23, nowhere requires that; but, taking it that the jurisdiction only extended to British subjects, the Judges are of opinion that sufficient is stated on the indictment to put the other party on shewing the contrary. It states the deceased to be in the peace of our Lord the King, and that the offence was against his peace;

and besides, in the indictments at the Admiralty, on the 26 Hen. 8, the parties are never stated to be British subjects. With respect to the third objection, the Judges are of opinion, that the indictment need not conclude *contrà formam statuti*, because the statute does not create the offence, but only gives a jurisdiction to try it (*a*).

The prisoner was afterwards executed.

[114] WESTERN SPRING CIRCUIT, 1846.

Winchester Assizes (Crown Side), before Mr. Justice Erle.

March 3rd, 1846.

REGINA v. WILLIAM PRIVETT AND CHARLES GOODALL.

(Servants who clandestinely take their master's oats with intent to give them to their master's horses, and without any intent to apply them to their own private benefit, are guilty of larceny, even though they are not answerable at all for the condition of the horses.)

[Subsequent proceedings with annotations, 1 Den. 193.]

Larceny.—The prisoners were indicted for stealing twenty bushels of oats, the property of James Eames, their master.

It was proved that the prisoners took from the floor of a barn of their master, five sacks of unwinnowed oats, and secreted them in a loft there for the purpose of giving to their master's horses, they being employed as carter and carter's boy, but not being answerable at all for the condition of the horses.

The jury found that the prisoners took the oats with intent to give them to their master's horses, and without any intent to apply them to their own private benefit (*b*).

Erle, J., reserved the case for the consideration of the fifteen Judges, on the point whether the prisoners were guilty of larceny.

Missing, for the prosecution.

The case was afterwards considered by the fifteen Judges, who held the conviction right.

[115] NORTHERN SUMMER CIRCUIT, 1844.

York Assizes (Crown Side), before Mr. Justice Cresswell.

REGINA v. JOHN O'BRIAN, THOMAS RYAN, DANIEL DONOVAN, DANIEL POWER, WILLIAM QUINN.

(An indictment for murder charged A. with giving a mortal wound to B. G., on the 27th of May, of which wound B. G. died on the 29th of May; and that Y. and Z., "on the day and year first aforesaid, were present, aiding and abetting A. the felony aforesaid" to do and commit. The jury found all the prisoners guilty of manslaughter; and it was objected for Y. and Z., that the felony of A. was not complete till the death of B. G., but the Judges held the conviction right. In one count of an indictment for murder, the death was stated to be by a blow of a stick, and in another by the throwing of a stone. The jury found the prisoners guilty of manslaughter generally on both counts, and the Judges held the conviction right, and that judgment could be given upon it; and, *semble*, that these are not inconsistent statements of the modes of death, but that, if they had been so, no judgment could have been given on this verdict.'

[Subsequent proceedings with annotations, 1 Den. 9.]

Murder.—The first count of the indictment charged all the parties, as principals in the first degree, with the murder of Benjamin Gott, by beating him with fists and kicking him, which was not sustained by the evidence. The indictment contained three other counts, the second of which was in the following words:—

"And the jurors aforesaid, upon their oath aforesaid, do further present, that John O'Brian, late of the parish of Bradford, in the said county of York, labourer, not having the fear of God before his eyes, on the day first aforesaid, in the year aforesaid (*c*), with force and arms, at the parish aforesaid, in the county aforesaid, in and upon [116] one Benjamin Gott, in the peace of God and our said lady the Queen then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that the said John O'Brian, with a certain stick of the value of twopence, which he the said John O'Brian in his right hand then and there, had and held, the said Benjamin Gott then and there feloniously, wilfully, and of his malice

(*a*) For the report of this case, we are indebted to the kindness of Mr. Curwood.

(*b*) See the cases of *Rex* v. *Morfit*, R. & R. C. C. 307; *Regina* v. *Handley*, C. & Mar. 547; *Rex* v. *Cabbage*, R. & R. C. C. 292; and *Regina* v. *Elizabeth Jones*, *post*, p. 236.

(*c*) The 27th of May, 1844.

AN

ANALYTICAL DIGEST

OF THE

LAW AND PRACTICE

OF THE

COURTS OF COMMON LAW, DIVORCE, PROBATE, ADMIRALTY AND BANKRUPTCY, AND OF THE HIGH COURT OF JUSTICE AND THE COURT OF APPEAL

OF

ENGLAND,

COMPRISING

THE REPORTED CASES FROM 1756 TO 1878,

WITH

REFERENCES TO THE RULES AND STATUTES.

FOUNDED ON THE

DIGESTS OF HARRISON AND FISHER.

BY

EPHRAIM A. JACOB,

OF THE NEW YORK BAR.

VOL. III.

CONTAINING THE TITLES

CRIMINAL LAW—ENTRY.

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1884.

If two encourage each other to murder themselves together, and one does so, but the other fails in the attempt upon himself, he is a principal in the murder of the other. *Ib.*

But if it is uncertain whether the deceased really killed himself, or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. *Ib.*

A person cannot be tried for inciting another to commit suicide, although that other commits suicide. *Reg.* v. *Leddington*, 9 C. & P. 79—Alderson.

If two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died. *Reg.* v. *Alison*, 8 C. & P. 418—Patteson.

If a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, whether she was quick with child or not; and a person who furnished her with the poison for that purpose, will, if absent when she took it, be an accessory before the fact only. *Rex* v. *Russell*, 1 M. C. C. 356.

Self-maiming.]—A party who maims himself, or procures another to do it for him, so that he may be better enabled to beg, or to prevent himself from being pressed for a soldier, is liable to fine or imprisonment at common law. *Rex* v. *Wright*, 1 East P. C. 396.

So is the party by whom it is effected at the other's desire. *Ib.*

5. *Indictment.*

(*a*) Jurisdiction and Venue.

Murders and manslaughters committed out of the kingdom or at sea.]—[By 24 & 25 Vict. c. 100, s. 9, *where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of her Majesty or not, every offense committed by any subject of her Majesty in respect of any such case, whether the same shall amount to the offense of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offense had been actually committed in that county or place: provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this act.* (*Former provision*, 9 Geo. 4, c. 31, s. 7, *which repealed* 33 Hen. 8, c. 23, *and* 43 Geo. 3, c. 113, *on this subject.*)

By s. 10, *where any person, being feloniously stricken, poisoned or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning or hurt in England or Ireland, or, being feloniously stricken, poisoned or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning or hurt upon the sea, or at any place out of England or Ireland, every offense committed in respect of any such case, whether the same shall amount to the offense of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in the county or place in England or Ireland in which such death stroke, poisoning or hurt shall happen, in the same manner in all respects as if such offense had been wholly committed in that county or place.* (*Former provision*, 9 Geo. 4, c. 31, s. 8.)

By 23 & 24 Vict. c. 122, *power is conferred on colonial legislatures to pass corresponding enactments.*]

A manslaughter committed in China by an alien enemy who had been a prisoner of war, and was then acting as a mariner on board an English merchant ship, could not be tried in England under a commission issued in pursuance of 33 Hen. 8, c. 23, and 43 Geo. 3, c. 113, s. 36. *Rex* v. *Depardo*, 1 Taunt. 26; R. & R. C. C. 134.

A British subject was indictable under 33 Hen. 8, c. 23, for the murder of another British subject, though the murder was committed within the dominion of a foreign independent state. *Rex* v. *Sawyer*, R. & R. C. C. 294; 2 C. & K. 101. S. P., *Rex* v. *Ealing*, Car. C. L. 105.

An indictment on 33 Hen. 8, c. 23, for the murder of one British subject by another, in a foreign state, stating that the person murdered was at the time in the king's peace, was sufficient to show that he was a British subject. *Ib.*

In an indictment on 9 Geo. 4, c. 31, s. 7, for murder committed by a British subject abroad, it must be averred that the prisoner and the deceased were subjects of his Majesty. To prove the allegation that the prisoner was a subject of his Majesty, his own declaration is evidence to go to the jury, and it will be for them to say, whether they are satisfied that he is in fact a British-born subject. *Rex* v. *Helsham*, 4 C. & P. 394—Bayley and Bosanquet.

A Spaniard, being in England, signed articles to serve in a ship "bound on a voyage to the Indian seas and elsewhere, on a seeking and trading voyage (not exceeding three years' duration), and back to the United Kingdom." On the ship's arrival at Zanzibar, an island in the Indian seas, which was under the dominion of an Arab king, the captain left the vessel (in pursuance of an understanding in England), and set up in trade, and, without the consent of the rest of the crew, engaged the Spaniard as an interpreter, the new captain of the ship not requiring him to serve on board. The ship went two or three short voyages without him, and returned to anchor a few hundred yards from the shore, in a roadstead of seven

to a caption charging the prisoner with his murder, is inadmissible in evidence on that charge, although it may be admissible as a dying declaration. *Reg.* v. *Clarke*, 2 F. & F. 2—Wightman.

A deposition made before a magistrate by a dying man, as to the cause of his death, need not, on the face of it, show that it was made under circumstances which would render it admissible in evidence as a dying declaration; but that is a fact dehors the statement, and may be proved by parol testimony. *Reg.* v. *Hunt*, 2 Cox C. C. 239.

If a declaration in articulo mortis is taken down in writing, and signed by the party making it, the judge will neither receive a copy of the paper in evidence, nor will he receive parol evidence of the declaration. *Rex* v. *Gay*, 7 C. & P. 230—Coleridge.

Parol evidence of dying declarations which have been reduced into writing cannot be received. *Rex* v. *Trowter*, 1 East P. C. 356.

When the deceased person, a constable, in the course of his duty, made, shortly before his death, and in the absence of the accused, a verbal statement in the nature of a report to his superior officer (an inspector of police), as to where the deceased was going, and what he was going to do, such report being material for the case of the crown:—Held, that such statement and report were admissible for the prosecution. *Reg.* v. *Buckley*, 13 Cox C. C. 293—Lush, J.

How admissibility of declarations may be determined.]—Whether or not dying declarations were made under an apprehension of danger, must be determined by the judge, in order to receive or reject the evidence; and not by the jury after the evidence is received. *Rex* v. *John*, 1 East P. C. 357. S. P., *Rex* v. *Wellbourn*, 1 East P. C. 358; *Rex* v. *Hucks*, 1 Stark. 523; 1 Leach 503, n.

The apprehension of danger may appear either from the express declaration of the deceased at the time, or may be inferred from the state of the wound, or illness, or other circumstances indicating the same. *Ib.*

In order to render a declaration in articulo mortis admissible in a case of manslaughter, it is not necessary to prove expressions of the deceased, that he was in apprehension of almost immediate death; but the judge will consider, from all the circumstances, whether the deceased had or had not any hope of recovery. *Rex* v. *Bonner*, 6 C. & P. 386.

On the question whether a declaration of a deceased person is admissible as a declaration in articulo mortis, the judge will consider whether the conduct of the deceased was that of a dying person, such as whether he gave directions respecting his funeral, his will, &c., and not merely the expressions he used, as to whether he thought he should or should not recover. *Rex* v. *Spilsbury*, 7 C. & P. 187—Coleridge.

A dying declaration of a deceased cannot be admitted by the judge merely from his own notion of the nature of the wound as described without any evidence that the deceased at the time, believed himself about to die; unless, at all events, the wound is shown to have been such as must necessarily have caused death in a short time, and such as all men reasonably would suppose to be so. *Reg.* v. [illegible], 2 F. & F. 850—Erle.

For what purposes declarations may be received and their effect in evidence.]—Dying declarations may be given in evidence in favour of the accused. *Rex* v. *Steele*, 1 M. & Rob. [illegible]; 2 Lewin C. C. 150—Coleridge.

A dying declaration is equal, in point of sanction, to an examination on oath, but the opportunity of investigating the truth is very different. *Ashton's case*, 2 Lewin C. C. 147—Alderson.

7. *Trial; Verdict; Conviction*

Plea of former acquittal or conviction; and its effect.]—Upon an indictment under 7 Will. 4 & 1 Vict. c. 85, ss. 3, 4, for administering poison with intent to murder, a previous acquittal on an indictment for murder founded on the same facts could not be pleaded in bar. *Reg.* v. [illegible], 6 Cox C. C. 178—Williams and Talfourd.

A plea of autrefois convict of an assault before justices, under 9 Geo. 4, c. 31, s. 27, is a bar to an indictment for feloniously stabbing in the same transaction. *Reg.* v. *Walker*, 2 M. & Rob. 446—Coltman.

But a previous summary conviction for an assault under 24 & 25 Vict. c. 100, s. 45, is not a bar to an indictment for manslaughter of the party assaulted, founded upon the same facts. *Reg.* v. *Morris*, 10 Cox C. C. 480; 36 L. J., M. C. 84; 1 L. R., C. C. 90.

A person was acquitted of an assault with intent to murder, but was convicted of an assault with intent to do grievous bodily harm, and the prosecutor having subsequently died, he was indicted for murder:—Held, that he was properly indicted. *Reg.* v. *Salvi*, 10 Cox C. C. 481, n.

A first count for murdering a male bastard child, stated that the prisoner gave and administered a large quantity of oil of vitriol, and caused the child to take into his mouth and throat a large quantity of the said oil of vitriol, the prisoner knowing that the said oil of vitriol would occasion the death of the child, whereby he became disordered in his mouth and throat, and by the disorder, choking, suffocating, and strangling occasioned thereby languished and died. The second count was for murdering the child, by administering a certain acid called oil of vitriol, and causing the child to take a large quantity of the said acid into his mouth and throat by means whereof he became injured and disordered in his mouth and throat, and incapable of swallowing his food, and died of the inflammation, injury, and disorder occasioned thereby. A plea, that the prisoner had been acquitted for murdering a base infant male child by giving and administering a certain

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COX'S

REPORTS OF CASES

IN

CRIMINAL LAW

ARGUED AND DETERMINED

IN THE COURTS OF ENGLAND.

EDITED BY

W. DE BRACY HERBERT, M.A., LL.M.,

Of the Inner Temple and Oxford Circuit,

BARRISTER-AT-LAW.

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REX v. JONES. 1918. *Indictment—Joinder of other counts with count for murder—Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), s. 4.*

charge of murder fails either at the trial or on appeal, the accused can then be tried on the second indictment.

Appeal against conviction for murder dismissed.
Sentence for robbery with violence quashed.

Counsel for the appellant instructed by the Registrar of the Court of Criminal Appeal.

Counsel for the Crown instructed by the Director of Public Prosecutions.

COURT OF CRIMINAL APPEAL.

February 25, 26, *and March* 8, 1918.

(Before A. T. LAWRENCE, AVORY, and SANKEY, JJ.)

REX *v.* AUGHET. (*a*)

Malicious wounding—Acquittal by a foreign court-martial—Plea of autrefois acquit.

Where a convention exists between this country and a foreign State as to the trial of offences committed by soldiers, the decision of a foreign court-martial in accordance with foreign law may be that of a competent court so as to enable an accused person to successfully plead autrefois convict *or* autrefois acquit *to an offence charged against him in this country.*

APPEAL on a point of law against a conviction for malicious wounding before Darling, J. at the Central Criminal Court.

The appellant was a Lieutenant in the Belgian army. While in London, where he had been sent over by his Government on a special mission, he occupied a room in Kingsway. On the 28th day of July he had an altercation with one De Dryver, a private in the Belgian army, and in the course of the dispute De Dryver used most insulting language with regard to the appellant's wife. The appellant shot at and wounded De Dryver with his revolver. Two days afterwards the appellant was handed over to the Belgian military authorities in London. In the following

(*a*) Reported by R. F. BLAKISTON, Esq., Barrister-at-Law.

September the appellant surrendered himself to the authorities at Bow-street. On a statement that he was to be tried by a court-martial in Belgium the magistrate adjourned the hearing of his case for six weeks. In October the appellant was tried by a Belgian court-martial sitting in Calais, and was acquitted. He then returned to England and was duly committed for trial at the Central Criminal Court. The indictment against him at the trial was for the following offences: Count 1, attempted murder; count 2, wounding with intent to murder; count 3, wounding with intent to do grievous bodily harm; count 4, malicious wounding. All these charges were framed under various sections of the offences against the Person Act, 1861. A plea to the indictment of *autrefois acquit* was put in on behalf of the appellant. Darling, J. directed the jury that the appellant had been *autrefois acquit* on the first three counts and they returned a verdict accordingly. On the fourth count the learned judge directed the jury that the appellant had not been *autrefois acquit* and the jury convicted him on this count of malicious wounding. He was sentenced to five months' imprisonment in the second division.

REX v. AUGHET. 1918. *Malicious wounding—Acquittal by a foreign court-martial—Plea of autrefois acquit.*

Hawke, K.C. and Sir *A. Bodkin* for the appellant.—The offence with which the appellant was charged before the Belgian court-martial at Calais was the same offence for which he was convicted in this country. The defence of irresistible impulse was open to him under Belgian law, and it is true that a defence of that kind is not available in an English court. But that does not affect the real nature of the offence charged. If the essence of the offence charged against the appellant in this country is the same as that of the offence charged against him before the Belgian court-martial the plea of *autrefois acquit* is sound. The Belgian Penal Code lays down a complete code on the subject of unlawful wounding, and the law is the same as the law of this country. The offences are therefore the same, and the plea of *autrefois acquit* is good, forming a complete bar to any proceedings here.

R. D. Muir and *Roland Oliver* for the Crown.—The following passage from Chitty's Criminal Law (2nd edit., vol. 1, p. 256) states the law on the subject of pleas of *autrefois convict* or *autrefois acquit*: "But if the former charge were such an one as the defendant could not have been convicted of the latter upon it, the acquittal cannot be pleaded. Thus, if the first charge were for a felony or stealing, and the second for a mere misdemeanour, the previous acquittal will be no bar, for a felony or larceny cannot be modified on the trial into a trespass or misdemeanour. And it often happens that after an acquittal of the felony the defendant is indicted and tried for the misdemeanour upon the same evidence, and it would be no objection, though the judge might still think that there was evidence of the felony to have gone to the jury. Thus also if a defendant be indicted for a burglarious entry and a stealing, and acquitted, he may still be tried for a burglarious entry with intent to steal; for although

the burglary be the same, it is evident the prisoner could not have been found guilty on the first, upon proof of a mere intention, and therefore may well be indicted for that offence in the second. It is, indeed, generally laid down, that an acquittal of burglary will not prejudice an indictment . . . for larceny and *vice versa*; but this must be understood of those cases, in which, like that we have just stated, the former charge did not necessarily include the latter. On the same ground, if a robbery be committed in one county, and the goods be carried into another, so as to make it larceny there, an acquittal of the larceny in the last county will not prejudice an indictment for robbery in the first." The point now before the court came up for consideration in the case of *Rex* v. *Barron* (24 Cox C. C. 83; 110 L. T. Rep. 350). During the argument in that case counsel referred to the case of *Reg.* v. *King* (75 L. T. Rep. 392), where Hawkins, J. said: "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts; the offences are practically the same, though not in their legal operation." In the case of *Rex* v. *Barron* (*sup.*) judgment was delivered by Isaacs, C.J., and, after referring to the judgment of Hawkins, J., in *Rex* v. *King* (*sup.*), he said: "It is quite plain that the learned judge did not intend to lay down, and did not lay down, as a general principle of law, that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The statement obviously refers to a case where the offences are the same—'practically the same' the words are—and as the two offences in the present case are not either exactly or practically the same it does not help the appellant." The present case is covered by the decision in *Rex* v. *Barron* (*sup.*). Reference may also be made to the case of *Reg.* v. *Gilmore* (15 Cox C. C. 85), where Huddleston, B. held that a plea of *autrefois acquit* was not good although the evidence given in each charge was the same. The court-martial held at Calais was not a competent court either to convict or acquit the appellant. The crimes charged in the two last counts of the indictment were not the same. Under the Belgian law the appellant could set up a defence of uncontrollable impulse; he could not do so under the English law. The offence under Belgian law, therefore, being subject to an exception which does not apply to English law, is not the same offence as that charged in the indictment. In order to make the plea of *autrefois acquit* successful the two crimes must be identical (see Hawkins, Pleas of the Crown, chap. 35, sect. 10, 1824). There is another difference between the offence charged against the appellant before the Belgian court-martial and the offence charged in the indictment here, which is that in English law there is no limit of time for prosecution. In Belgium a delay of three or in some cases ten years would be a bar to prosecution. If the argument used on behalf of the appellant is sound, it means that a Belgian tried in an English court would be able to benefit by the Belgian

law, while an Englishman could not. The appellant was convicted by a court-martial, not by a civil court. An acquittal by a court-martial cannot be pleaded to a charge in a civil court, according to sect. 162 of the Army Act, 1881, and the appellant cannot be placed in a better position because he was tried by a Belgian court-martial than he could have been in if tried by a court-martial in England.

The judgment of the court was read by

A. T. LAWRENCE, J.—The appellant, Aughet, is an officer in the Belgian army, and in July last was sent by his Government on a special mission to London to inquire into an alleged fraud against them. He occupied a room in Kingsway, London. Upon the 28th day of that month one De Dryver, a private in the Belgian army, entered his room and, in a dispute which arose between the two men, De Dryver used language of a most insulting and provocative character with regard to Aughet's wife. The appellant took out a revolver and shot at and wounded De Dryver.

Upon the 30th day of July, the Auditeur Militaire of the Belgian army, sitting in London, took the appellant's depositions, and the appellant was handed over to his custody as representing the Belgian military authorities. On the 21st day of September the appellant surrendered at Bow-street, and at a hearing before the magistrate it was stated that he was to be tried by court-martial by the Belgian authorities, and the magistrate adjourned the hearing for six weeks. Upon the 8th day of October the appellant was tried by the court-martial sitting at Calais.

The English and Belgian Governments had previously entered into a convention with regard to the trial of offences committed by soldiers, the material parts of which are as follows:

The Governments of their Majesties the King of Great Britain and Ireland and the King of the Belgians are agreed during the present war to recognise the exclusive right of jurisdiction of the tribunals of their respective armies in the field in regard to persons belonging to those armies, irrespective of the nationality of the accused or of the territory in which the armies are operating. . . . The two Governments also agree to recognise, during the present war, the exclusive right of jurisdiction on British territory of the British tribunals respecting all persons not belonging to the Belgian army committing acts prejudicial to the said army.

The Belgian law on the subject of the crime of wounding, so far as it is material to the present case, is contained in two Articles of the Penal Code numbered 398 and 399, which are as follows:

398. Quiconque aura volontairement fait des blessures ou porté des coups, sera puni d'un emprisonnement de huit jours à six mois et d'une amende de vingt-six francs à cent francs, ou d'une de ces peines seulement. En cas de premeditation, le coupable sera condamné à un emprisonnement d'un mois à un an et à une amende de cinquante francs à deux cents francs.

399. Si les coups ou les blessures ont causé une maladie ou une incapacité de travail personnel, le coupable sera puni d'un emprisonnement de deux mois à deux

Rex v. Aughet. 1918. *Malicious wounding — Acquittal by a foreign court-martial — Plea of autrefois acquit.*

ans et d'une amende de cinquante francs à deux cents francs. Le coupable sera puni d'un emprisonnement de six mois à trois ans et d'une amende de cent francs à cinq cent francs s'il a agi avec préméditation.

The appellant was charged under Art. 399. Under Art. 71 of the Penal Code it was open to him to set up as a defence that he was compelled to commit the acts charged against him by a force which he was unable to resist. He did set up this defence, which is one not known to English law, and the court held it to be proved and acquitted him. The appellant returned to England. The hearing at Bow-street was continued on the 2nd day of November, and he was committed for trial upon the 11th day of November. The trial came on before Darling, J. upon the 9th and 10th days of January, when the appellant was indicted on four charges, the first three of which were for felonies of the nature of wounding with intent. The fourth was for the misdemeanour of unlawfully wounding. The appellant pleaded in respect of each of the counts the plea of *autrefois acquit*. To this plea the prosecution made three answers. They said, first, that as the appellant had been acquitted by reason of a defence not open to him in our law, the crime for which he had been acquitted was not the same crime as that with which he was charged in England, and therefore he could not plead the acquittal in bar. Secondly, that the court at Calais was not a court of competent jurisdiction, and, thirdly, that the charge under Art. 399, upon which he had been acquitted, was not the same as the charge of unlawful wounding contained in the fourth count in the indictment, and therefore the appellant had never been tried upon the charge contained in that count, and could not have been acquitted of it.

Evidence was given, and the learned judge held that the first contention of the prosecution was no answer. He held, however, that the third answer of the prosecution was correct, and that the appellant had never been tried upon a charge of unlawful wounding, and therefore was not entitled to plead *autrefois acquit* in respect of the fourth count of the indictment. He so directed the jury, who found the plea of *autrefois acquit* proved in respect of the first three counts, but further found that the plea was not proved in respect of the fourth count.

In the result the appellant was tried upon the fourth count, found guilty, and sentenced to five months' imprisonment without hard labour.

He brings this appeal upon the ground that the judge misdirected the jury in telling them that the appellant had not proved the facts necessary to establish the plea of *autrefois acquit* in respect of the fourth count.

Three points fall for our decision. First, was he charged at the court-martial with, or could he have been convicted of, the crime of unlawful wounding set out in the fourth count of the indictment? Second, does the fact that a defence was open to him in Belgian law which he could not have set up under our law alter the character of the crime? Third, was the court-martial a court of competent jurisdiction?

Rex v. Aughet. 1918. *Malicious wounding — Acquittal by a foreign court-martial — Plea of autrefois acquit.*

First, the prosecution contended that, although Art. 398 of the Belgian Code described an offence equivalent to the unlawful wounding charge in the fourth count of the indictment, the appellant was not proceeded against under this article, but the *acte d'accusation* charged him with an offence under Art. 399, which was different from and a greater offence than, unlawful wounding. They further alleged that there was no power in the court-martial in a case where a man was charged with the greater offence to find him guilty of the less offence. Evidence had not been given upon this point in the court below, and we decided, at the conclusion of the first day's hearing, to allow both parties to call witnesses to settle it. The next morning, however, Mr. Muir announced that the attention of his Belgian legal expert had been drawn to a case in the Cour de Cassation which held that the court-martial had such power, and he admitted, therefore, that the appellant might have been convicted of an offence the same as our offence of unlawful wounding. The third answer made by the prosecution to the plea therefore fails.

On the second, we do not think, having regard to the view we take of this matter, that it is necessary to give a direct decision on the point.

Further, it was contended by the prosecution that the court was not a court of competent jurisdiction for the purpose of such a plea, because (*a*) it was a court-martial, and (*b*) it had no jurisdiction under the Belgian Code to try the appellant at Calais, as it is not in Belgium.

It was said that a conviction or an acquittal by an English court-martial cannot, by reason of sect. 162 of the Army Act, 1881, be pleaded in bar in a civil court in England, and that the decision of a Belgian court-martial could not place an accused in a better position before an English civil court than a decision of an English court-martial would. It was further contended that, under the Code d'Instruction Criminelle, although by Art. 7 every Belgian who committed a crime or an offence against a Belgian outside Belgium could be prosecuted in Belgium, this could only be so under Art. 12 if the accused was "found in Belgium"; that he had not been "found in Belgium," and that therefore the court had no jurisdiction. We think that the latter point proceeded upon a too technical construction of Art. 12. By Art. 59 of the law of the 15th day of June, 1899, with reference to the Belgian army, it is provided that in time of war the King of the Belgians can alter the seat of permanent courts-martial, and we are satisfied on the evidence that the court-martial was properly constituted at Calais under decree of His Majesty. We think that the words "found in Belgium" mean "found within the jurisdiction of the Belgian Courts," and that the fact that the court-martial was properly constituted at Calais and the

REX v. AUGHET. 1918

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appellant was tried at Calais, satisfies the words that he was "found in Belgium," that is to say, was found in a place where the Belgian jurisdiction was being lawfully and properly exercised pursuant to the Belgian convention with France.

We have already stated that we do not consider it necessary to decide the question whether the additional defence allowed by Belgian law alters the character of the crime, and we also do not think it necessary to decide the point whether an acquittal by a Belgian court-martial could in ordinary circumstances be pleaded as a bar in the English courts for the following reasons:—The Convention which was signed between this country and Belgium, to which reference has already been made, provided that the Belgian authorities should try Belgian soldiers for offences committed by them against other Belgian soldiers. The offence committed by the appellant was an offence committed by him against a fellow-soldier; he was handed over by the English authorities to the Belgian authorities for trial, and he submitted himself to the jurisdiction of the Belgian court-martial; the court-martial which tried him was competent to do so under Belgian law; they tried him properly under that law, and they acquitted him. We think that in these circumstances it would be contrary to the true intent and meaning of the Convention to subject the man to punishment here for an offence for which he has been in jeopardy and has been acquitted in accordance with Belgian law. It was entirely due to the fact that there was no evidence adduced at the trial to show what is now admitted to be Belgian law as established by a decision of the Cour de Cassation that Mr. Justice Darling did not hold his plea to be good to the fourth count as he had held it to be to counts one, two, and three.

The Convention does not affect or diminish the jurisdiction of the King's courts over crimes committed in this country, but where its provisions have been observed it would be unjust to the prisoner not to accept a decision of a competent court in his favour.

The provisions of our Army Act with regard to courts-martial are based upon principles of high policy which have, in our opinion, no application to decisions of Belgian courts-martial held pursuant to the Conventions existing between the Allies. It is not necessary, therefore, to consider some of the wider principles which were argued before us, but we base our decision upon the fact that as the English authorities handed over the appellant to be dealt with by his own countrymen, under their own laws, and as this has been done, the appellant is entitled to rely upon the plea of *autrefois acquit*, and that the conviction registered against him must be quashed.

Conviction quashed.

Counsel for the appellant instructed by Michael Abrahams and Sons.

Counsel for the Crown instructed by the Director of Public Prosecutions.

KING'S BENCH DIVISION.

Wednesday, April 10, 1918.

(Before DARLING, AVORY, and SHEARMAN, JJ.)

PLATT (app.) *v.* HUNTER (resp.). (*a*)

Army—Military service—Volunteer enlistment—Medical examination—Rejection—Certificate of exemption—Validity—Liability to re-examination—Military Service Act, 1916 (5 & 6 *Geo.* 5, *c.* 104), *sched.* 1, *par.* 6—*Military Service* (*Review of Exceptions*) *Act*, 1917 (7 *Geo.* 5, *c.* 12), *s.* 1, *sub-s.* 1.

P. was a man who came within the operation of the Military Service Act, 1916 (5 & 6 *Geo.* 5, *c.* 104), *on the 24th day of June*, 1916. *Two days before this date—namely, on the 22nd day of June*, 1916—*he offered himself for medical examination and was rejected as unfit for service. On the 17th day of July*, 1916, *he obtained an unlimited certificate of exemption from a local tribunal on the ground of ill-health. In* 1917 *he was called up for medical re-examination under the Military Service* (*Review of Exceptions*) *Act*, 1917 (7 *Geo.* 5, *c.* 12), *when he was classified as B1. Later on he was further examined and classified as C1. P. failed to obey his calling-up notice, and, upon being summoned as an absentee, relied upon his certificate of exemption. The justices who heard the information convicted P. as an absentee on the ground that the local tribunal had no right to grant the certificate of exemption, and that under the circumstances P. was a man who was liable to be called up under the Act of* 1917.

Held, that the certificate of exemption was invalid, and that the conviction was right.

CASE stated by the justices for the county borough of Blackpool.

An information was preferred by the respondent, William George Hunter, against the appellant, Edward Platt, for that he, the appellant, unlawfully failed without reasonable excuse to

(*a*) Reported by J. A. SLATER, Esq., Barrister-at-Law.

James Joseph Lynch, Jr.
Attorney at Law
(State Bar # 085805)

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February 9, 1996

Tanya Carroll, Deputy Clerk
Florida Supreme Court
500 S. Duval St.
Tallahassee, FL 32399-1925

Re: Paul Hill v. Florida, 84,838

Dear Ms. Carroll:

Inclosed you will find the lables, Comparative Chart Of Homicides & Execcutions in U.S. - 1954-1993 (New Chart), with the updated statistics for the appendix to the *amicus curiæ* brief.

Please turn to the first page of the appendix. You will find a Comparative Chart Of Homicides & Execcutions in U.S. - 1954-1989 (Old Chart). Please peel off the backing from a one of the lables provided and place the New Chart over the Old Chart. Do this for the original brief and each copy.

Thank you for your assistance.

I remain,

Very truly yours,

JAMES JOSEPH LYNCH JR.,
Attorney at Law

cc: All parties.

STATE OF FLORIDA
vs.
PAUL HILL

PROOF OF SERVICE

I, the undersigned, am not a party to the above action, and over the age of 18. My business address is 1917 17th Street, Sacramento, CA 95812-0336.

On February 4, 1996, I served upon each of the parties the following:

BRIEF OF *AMICI CURIÆ* THE FRIENDS OF PAUL HILL IN SUPPORT OF APPELLANT

by placing ~~two~~ true copies thereof into an envelope and thereafter placing the sealed, stamped, envelope into a facility of the United States Postal Service addressed to each of the parties as follows:

Richard Martel, Asst. A.G.
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The Capital
Tallahassee FL 32399-1050

Michael R. Hirsh
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Tom Horkon, Jr.
Florida Catholic Conference
P.O. Box 1368
Tallahassee, FL 32302-1368

I declare under penalty of perjury under the Laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 4, 1996.

JAMES JOSEPH LYNCH, JR.
Declarant