belongs to any trustee appointed for the county of Mifflin, by the act herein before recited. 1790.

Passed 5th April, 1790.—Recorded in Law Book No. IV. page 117. Mifflin county.

CHAPTER MDV.

An ACT *to reform the penal laws of this state.*

SECT. 1. WHEREAS, by the thirty-eighth section of the second chapter of the constitution of this state, it is declared, "That the penal laws, as heretofore used, should be reformed by the legislature as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes," and by the thirty-ninth section, "That to deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary, houses ought to be provided for punishing, by hard labour, those who shall be convicted of crimes not capital, wherein the criminal shall be employed for the benefit of the public, or for reparation of injuries done to private persons."* And whereas the laws heretofore made for the purpose of carrying the said provisions of the constitution into effect have in some degree failed of success, from the exposure of the offenders employed at hard labour to public view, and from the communication with each other not being sufficiently restrained within the places of confinement; and it is hoped that the addition of unremitted solitude to laborious employment, as far as it can be effected, will contribute as much to reform as to deter:

*[*Constitution of 28th Sept'r, 1776.]

SECT. 11. *Be it therefore enacted, and it is hereby enacted by the Representatives of the Freemen of the commonwealth of Pennsylvania in General Assembly met, and by the authority of the same,* That the pains and penalties herein after mentioned shall be inflicted upon the several offenders, who shall, from and after the passing of this act, commit and be legally convicted of any of the offences herein after enumerated and specified, in lieu of the pains and penalties which by law have been heretofore inflicted; that is to say, every person convicted of robbery, burglary, sodomy or buggery, or as accessary thereto before the fact, shall forfeit to the commonwealth all and singular the lands and tenements, goods and chattels, whereof he or she was seized or possessed at the time the crime was committed, and at any time afterwards, until conviction, and be sentenced to undergo a servitude of any term or time, at the discretion of the court passing the sentence, not exceeding ten years, in the public gaol or house of correction of the county or city, in which the offence shall have be committed, and be kept at such labour, and fed and cloathed in such manner, as is herein after directed: *Provided always, and be it further enacted by the authority aforesaid,* That no person accused of any of the aforesaid crimes shall be admitted to bail but by the Judges of the Supreme Court,* or some or one of them, nor shall he or she be tried but in the Supreme Court, or

Punishment in cases of robbery burglary, &c. or as accessary before the fact.

Such offenders, by whom to be bailed, and where tried.

*[By the Presidents of

1790. in a court of Oyer and Terminer or General Gaol Delivery, held in and for the county wherein the offence shall have been committed; and that peremptory challenges shall be allowed in all such cases wherein they have been heretofore allowed by law:† But no attainder hereafter shall work corruption of blood in any case, nor extend to the disinherison or prejudice of any person or persons other than the offender.‡

the Common Pleas, by act of 21st of March, 1806, chap. 2687, sect. 4.]

Of challenges.

Of attainder.

†[So sect. 15 of the act of 22d of April, 1794, chap. 1766, and see act of 4th of April, 1809.]

‡[See 19 sect. of the 9th article of the constitution.]

SECT. III. *And be it further enacted by the authority aforesaid*, That every person convicted of horse-stealing, or as accessary thereto before the fact, shall restore the horse, mare or gelding, stolen, to the owner or owners thereof, or shall pay to him, her or them, the full value thereof, and also pay the like value to the commonwealth; and moreover undergo a servitude for any term, not exceeding seven years, in the discretion of the court before which the conviction shall be, and shall be confined, kept to hard labour, fed and cloathed in manner hereinafter mentioned.‖ Every person convicted of simple larceny to the value of twenty shillings and upwards, or as accessary thereto before the fact, shall restore the goods or chattels so stolen to the right owner or owners thereof, or shall pay to him, her or them, the full value thereof, or of so much thereof as shall not be restored; and moreover shall forfeit and pay to the commonwealth the like value of the goods and chattels stolen, and also undergo a servitude for any term of years, not exceeding three, at the discretion of the court before which the conviction shall be, and shall be confined, kept to hard labour, fed and cloathed, in manner hereinafter directed.§

Punishment in case of horse-stealing, or as accessary before the fact.

‖[See vol. 1, pa. 273, 501.]

Punishment for simple larceny to the value of twenty shillings, or as accessary before the fact.

§[See act of 21st of March, 1806, chap. 2687.]

SECT. IV. And whereas, by the ninth section of the first chapter of the constitution, it is declared "That in all prosecutions for criminal offences, a man has a right to be heard by himself and his counsel, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial by an impartial jury of the county, without the unanimous consent of which jury he cannot be found guilty."¶ Since which declaration, it is not proper that persons accused of small or petty larcenies should be tried and convicted before two Magistrates or Justices of the peace without the intervention of a jury: *Be it therefore enacted by the authority aforesaid*, That the act of Assembly, entitled "An Act for the trial and punishment of larceny under five shillings," be, and the same is hereby repealed; and that if any person or persons shall hereafter feloniously steal, take and carry away any goods or chattels, under the value of twenty shillings, the same order and course of trial shall be had and observed as for other simple larcenies, and he she or they, being thereof legally convicted, shall be deemed guilty of petty larceny, and shall restore the goods and chattels so stolen, or pay the full value thereof, to the owner or owners thereof, and also forfeit and pay the like value to the commonwealth, and be further sentenced to undergo a servitude for a term not exceeding one year, in the discretion of the court before which such conviction shall be, and be confined, kept to hard labour, cloathed and fed, in manner as hereinafter direct-

¶[Constitution of 28th of September, 1776.]

Repeal of the act for the trial of larceny under five shillings.

Larceny under twenty shillings to be tried as other simple larcenies.

How punished.

ed: And every person convicted of bigamy, or of being an accessary after the fact in any felony,* or of receiving stolen goods, knowing them to have been stolen, or of any other offence not capital, for which, by the laws in force before the act,† entitled "An Act to amend the penal laws of this state," burning in the hand, cutting off the ears, nailing the ear or ears to the pillory, placing in and upon the pillory, whipping, or imprisonment for life, is or may be inflicted, shall, instead of such parts of the punishment, be fined, and sentenced to undergo in the like manner, and be confined, kept to hard labour, fed and cloathed, as is hereinafter directed, for any term not exceeding two years,‡ which the court, before whom such conviction shall be, may and shall in their discretion think adapted to the nature and heinousness of the offence.

Punishment in cases of bigamy; being accessary after the fact in any felony; receiving stolen goods knowingly; or committing any other offence not capital; for which corporal punishment was formally inflicted.

*(See act of 23d of September, 1791, chap. 1572.)

†(15th September, 1786.)

‡(See the act of 4th of April, 1807, chap. 2905.)

SECT. V. *And be it further enacted by the authority aforesaid*, That robbery or larceny of obligations or bonds, bills obligatory, bills of exchange, promissory notes for the payment of money,‖ lottery tickets, paper bills of credit, certificates granted by or under the authority of this commonwealth, or of all or any of the United States of America, shall be punished in the same manner as robbery or larceny of any goods or chattels.

Punishment in cases of robbery or larceny of paper securities.

‖(See the act to punish stealing of bank notes, 30th of January, 1810.)

SECT. VI. And whereas by the eighth section of the act of Assembly, entitled "An Act for the advancement of justice, and more certain administration thereof," it is enacted, that if any woman shall endeavour privately to conceal the death of her child, which, by being born alive, should by the law be deemed a bastard, so that it may not come to light whether it was born alive or not, and be convicted thereof, shall suffer death as in case of murder, "except such mother can make proof, by one witness at the least, that the child, whose death was by her so intended to be concealed, was born dead," whereby the bare concealment of the death is almost conclusive evidence of the child's being murdered by the mother, or by her procurement: *Be it therefore declared and enacted by the authority aforesaid*, That from and after the publication of this act, the constrained presumption that the child, whose death is concealed, was therefore murdered by the mother, shall not be sufficient evidence to convict the party indicted, without probable presumptive proof is given that the child was born alive.

Of the proof, in case of the murder of a new born bastard.

(See vol. 1, page 113, and the act of 22d of April, 1794, chap. 1766, sect. 17, 18.)

SECT. VII. *And be it further enacted by the authority aforesaid*, That every other felony, or misdemeanor, or offence whatsoever, not specially provided for by this act, may and shall be punished as heretofore.§

Crimes not punishable by this act to be punished as heretofore.

§[But now see the act of 22d of April, 1794, chap. 1766.]

SECT. VIII. *Be it enacted by the authority aforesaid*, That the commissioners for the county of Philadelphia, with the approbation of the Mayor and two of the Aldermen of the city of Philadelphia, and two of the Justices of the Court of Quarter Sessions for the county of Philadelphia, shall as soon as conveniently may be, cause a suitable number of cells to be constructed in the yard of the gaol of the said county, each of which cells shall be six feet in width, eight feet in length, and nine feet in heighth, and shall be constructed of brick or stone, upon such plan as will best prevent danger from fire; and the said cells shall be separated from the common

Cells to be erected in the gaol yard.

1790. yard by walls of such height, as, without unnecessary exclusion of air and light, will prevent all external communication, for the purpose of confining therein the more hardened and atrocious offenders, who, by the act, entitled "An Act for amending the penal laws of this state," have been sentenced to hard labour for a term of years, or who shall be sentenced thereto by virtue of this act.

Expense of erecting the cells, how to be defrayed.

SECT. IX. *Be it enacted by the authority aforesaid*, That, for the purpose of defraying a proportionable part of the expense of erecting such cells and walls, the President and Supreme Executive Council shall be, and they are hereby authorized to draw orders on the State Treasurer for the sum of five hundred pounds, to be paid out of the funds especially appropriated for claims and improvements, when the same shall be sufficiently productive; and for defraying the residue of the expense, it shall be lawful for the commissioners of the said county, or a majority of them, to assess, levy and collect, within the said county, so much money, as they, with the concurrence and approbation of the said Mayor, Aldermen and Justices, shall judge necessary, provided the same does not exceed the sum of one thousand pounds.

Such cells declared to be a part of the gaol.

SECT. X. *Be it enacted by the authority aforesaid*, That the said cells shall be and are hereby declared to be part of the gaol of the city and county of Philadelphia; and the residue of the said gaol shall be appropriated to the purposes of confining as well such male convicts sentenced to hard labour, as cannot be accommodated in the said cells, as female convicts sentenced in like manner, persons convicted of capital offences, vagrants and disorderly persons committed as such, and persons charged with misdemeanors only, all which persons are hereby required to be kept separate and apart from each other, as much as the convenience of the building will admit, and to be subject to the visitation and superintendance of the Inspectors, hereinafter appointed.*

Who shall be confined in the gaol.

Vagrants and disorderly persons may be committed to hard labour.

SECT. XI. *And be it further enacted by the authority aforesaid*, That it shall be lawful for the Mayor or any Alderman of the city of Philadelphia, and any Justice of the peace of the said county, to commit any vagrant or idle and disorderly person (being thereof legally convicted before him, as by law is directed) to the said gaol, to be kept at hard labour for any term not exceeding one month, any law of this state to the contrary notwithstanding.*

** (See the act of 2d of April, 1803, chap. 2377.)

Provision for preventing contagious disorders.

SECT. XII. *Be it enacted by the authority aforesaid*, That, in order to prevent the introduction of contagious disorders, every person who shall be ordered to hard labour in the said gaol shall be separately lodged, washed and cleansed, and shall continue in such separate lodging, until it shall be certified by some physician that he or she is fit to be received among the other prisoners: and if such person be a convict, the clothes in which he or she shall then be cloathed shall either be burnt, or, at the discretion of two of the said inspectors, be baked, fumigated and carefully laid by, until the expiration of the term for which such offender shall be sentenced to hard labour, to be then returned to him or her.

Convicts how to be fed, cloathed,

SECT. XIII. *Be it enacted by the authority aforesaid*, That all such convicts shall, at the public expense of such county, during the

term of their confinement, be cloathed [in habits of coarse materials, uniform in colour and make, and distinguishing them from the good citizens of this commonwealth,] and the males shall have their [heads and] beards close shaven at least once in every week, [and all such offenders shall, during the said term, be sustained upon bread, Indian meal, or other inferior food, at the discretion of said Inspectors, and shall be allowed one meal of coarse meat in each week, and shall be kept, as far as may be consistent with their sex, age, health and ability, to labour of the hardest and most servile kind, in which the work is least liable to be spoiled by ignorance, neglect or obstinacy, and where the materials are not easily embezzled or destroyed;] and if the work to be performed is of such a nature as may require previous instruction, proper persons for that purpose, to whom a suitable allowance shall be made, shall be provided by order of any two of the Inspectors hereafter named; during which labour the said offenders shall be kept separate and apart from each other, if the nature of their several employments will admit thereof; and where the nature of such employment requires two or more to work together, the keeper of the said gaol, or one of his deputies, shall, if possible, be constantly present.

1790.

and kept at labour.

(Those parts of the section between crotchets repealed by act of 18th of April, 1795, chap. 1650.)

SECT. XIV. *Be it enacted by the authority aforesaid*, That such offenders, unless prevented by ill health, shall be employed in work every day in the year, except Sundays: and the hours of work in each day shall be as many as the season of the year, with an interval of half an hour for breakfast, and an hour for dinner, will permit, but not exceeding eight hours in the months of November, December and January, nine hours in the months of February and October, and ten hours in the rest of the year; and when such hours of work are passed, the working tools, implements and materials, or such of them as will admit of daily removal, shall be removed to places proper for their safe custody, until the hour of labour shall return.

Times of working.

SECT. XV. *Be it enacted by the authority aforesaid*, That the keeper of the said gaol shall, from time to time, with the approbation of any two of the Inspectors, hereafter mentioned, provide a sufficient quantity of stock and materials, working tools and implements, for such offenders, for the expense of which the said Inspectors, or any two of them, shall be, and they are hereby, authorized to draw orders, to be countersigned by the commissioners of the county, on the Treasurer of the county, if need shall be, specifying in such orders the quantity and nature of the materials, tools or implements wanted, which orders the said Treasurer is hereby required to discharge out of the county stock, for which materials, tools and implements, when received, the said keeper shall be accountable; and the said keeper shall, with the approbation of any two of the said Inspectors, have power to make contracts with any person whatever, for the cloathing, diet, and all other necessaries for the maintenance and support of such convicts, and for the implements and materials of any kind of manufacture, trade or labour, in which such convicts shall be employed, and for the sale of such goods, wares and merchandizes, as shall be there wrought and manufactured; and the said keeper shall cause all accounts con-

Materials for working, how to be provided.

Contracts to be formed, to supply food, cloathing, &c. to the convicts.

1790. cerning the maintenance of such convicts and other prisoners to be entered regularly in a book or books, to be kept for that purpose, and shall also keep separate accounts of the stock and materials so wrought, manufactured, sold and disposed of, and the monies for which the same shall be sold, and when sold, and to whom, in books to be provided for those purposes, all which books and accounts shall be at all times open for the examination of the said Inspectors, and shall be regularly laid before them, at their quarterly or other meetings, as herein after is directed, for their approbation and allowance.

Accounts of materials bought, and work done, to be kept.

How frauds in such accounts may be investigated.

SECT. XVI. *Be it enacted by the authority aforesaid*, That, if the said Inspectors, at their quarterly or other meetings, shall suspect any fraudulent or improper charges, or any omissions in any such accounts, they may examine, upon oath or affirmation, the said keeper, or any of his deputies, servants or assistants, or any person of whom any necessaries, stock, materials, or other things, have been purchased for the use of the said gaol, or any persons to whom any stock or materials wrought or manufactured therein have been sold, or any of the offenders confined in such gaol, or any other person or persons concerning any of the articles contained in such accounts, or any omission thereout, and in case any fraud shall appear in such accounts, the particulars thereof shall be reported by the said, Inspectors, in writing, to the Mayor of the said city, for the purposes herein after mentioned.

Separate accounts to be kept with the convicts;

SECT. XVII. *Be it enacted by the authority aforesaid*, That, in order to encourage industry as an evidence of reformation, separate accounts shall be opened in the said books for all convicts sentenced to hard labour, for six months and upward, in which such convicts shall be charged with the expenses of cloathing and subsistence, and such proportionable part of the expenses of the raw materials upon which they shall be employed, as the Inspectors at their quarterly or other meetings shall think just, and shall be credited with the sum or sums from time to time received by reason of their labour, and if the same shall be found to exceed the said expenses, one half of the said excess shall be laid out in decent raiment for such convicts at their discharge, or otherwise applied to their use and benefit, as the said Inspectors shall upon such occasions direct; and if such offender, at the end or other determination of his term of confinement, shall labour under any acute or dangerous distemper, he shall not be discharged, unless at his own request, until he can be safely discharged.

If the balance is in their favour, how to be applied and paid.

Who shall be admitted to visit the gaol.

SECT. XVIII. *Be it enacted by the authority aforesaid*, That, no person whatever, except the keeper, his deputies, servants or assistants, the said Inspectors, officers and ministers of Justice, Counsellors or Attornies at law, employed by a prisoner, ministers of the gospel, or persons producing a written licence signed by two of the said Inspectors, shall be permitted to enter within the walls where such offenders shall be confined; and that the doors of all the lodging rooms and cells in the said gaol shall be locked, and all lights therein extinguished at the hour of nine, and one or more watchmen shall patrol the said gaol at least twice in every hour, from

that time, until the return of the time of labour in the morning of the next day. 1790.

Provision for cleaning the apartments and cells;

SECT. XIX. *Be it enacted by the authority aforesaid*, That the walls of the cells and apartments in the said gaol shall be white-washed with lime and water, at least twice in every year, and the floors of the said cells and apartments shall be washed once every week, or oftener, if the said Inspectors shall so direct, by one or more of the said prisoners, in rotation, who at the discretion of the said keeper shall have an *extra* allowance of diet for so doing; and the said prisoners shall be allowed to walk and air themselves for such stated time as their health may require, and the said keeper shall permit; and if proper employment can be found, such prisoners may also be permitted, with the approbation of two of the said Inspectors, to work in the yard, provided such airing and working in the yard be in the presence, or within the view, of the said keeper, or his deputies or assistants.

and for the exercise of the prisoners.

An infirmary to be fitted up in the gaol; regulations respecting the same.

SECT. XX. *Be it enacted by the authority aforesaid*, That one or more of the apartments in the second story of the said gaol, and at the extreme end of the west wing, shall be fitted up as an infirmary, and in case any such offender, being sick, shall, upon examination of a physician, be found to require it, he or she shall be removed to the infirmary, and his or her name shall be entered in a book to be kept for that purpose, and when such physician shall report to the said keeper, that such offender is in a proper condition to quit the infirmary and return to his or her employment, such report shall be entered by the said keeper in a book to be kept for that purpose, and the said keeper shall order him or her back to his or her former labour, so far as the same shall be consistent with his or her state of health, and the said Mayor, Aldermen and Justices shall from time to time, appoint a physician to attend at said gaol.

Prisoners guilty of assaults, &c. how to be punished.

(Quere.)

SECT. XXI. *Be it enacted by the authority aforesaid*, [That the keeper of the said gaol] shall have power to punish all such prisoners guilty of assaults within the said gaol, when no dangerous wound or bruise is given, profane cursing and swearing, or indecent behaviour, idleness, or negligence in work, or wilful mismanagement of it, or of disobedience to the orders and regulations herein after directed to be made, by confining such offenders in the dark cells or dungeons of the said gaol, and by keeping them upon bread and water only, for any term not exceeding two days; [and if any such prisoner shall be guilty of any offence within the said gaol, which the said keeper is not hereby authorized to punish, or for which he shall think the said punishment is not sufficient, by reason of the enormity of the offence, he shall report the same to two of the said Inspectors, who, if upon proper enquiry they shall think fit, shall certify the nature and circumstances of such offence, with the name of the offender, to the Mayor of the said city, and the Mayor shall thereupon order such offences to be punished by moderate whipping, or repeated whippings, not exceeding thirteen lashes each, or by close confinement in the said dark cells or dungeons, with bread and water only for sustenance, for any time not exceeding six days, or by all the said punishments.]

[That part of the section between crotchets is repealed by the act of 18th of April, 1795, chap. 1860.]

1790.

Keeper of the gaol, how and when to be appointed. [Those parts between crotchets, repealed and supplied by the act of 18th of April, 1795, (chap.) 1850.]

His compensation.

Deputies how to be appointed.

Gaoler to give bond;

to be recorded,

Inspectors how to be appointed, and for what term. [See the 17th section of the act of 23rd September, 1791 (chap. 1572.) but the mode of appointment is changed by an act passed 23rd of February, 1809.]

Penalty on refusing to serve as inspector.

Inspectors when and where to meet; and appoint acting inspectors.

SECT. XXII. *Be it enacted by the authority aforesaid*, That it shall be lawful for the Mayor and two Aldermen of the said city, and two of the Justices of the peace of the said county, on the first day of May annually, to appoint a suitable person to be keeper of the said gaol, who shall, however, be liable to be removed by the said Mayor, Aldermen and Justices aforesaid, when occasion may require, in which case another shall, from time to time, be appointed in like manner, who shall receive, as a full compensation for his services, and in lieu of all fees and gratuities by reason or under colour of the said office, so much *per annum*, as the said Mayor, Aldermen and Justices, at the time of such appointment, shall direct, to be paid in quarterly payments, by orders drawn on the Treasurer, of the said county, by the said Mayor, and also five *per centum* on the sales of all articles manufactured by the said criminals;] and such keeper shall have power, [with the approbation of the Mayor, Aldermen and Justices aforesaid,] to appoint a suitable number of deputies and assistants at such reasonable allowances [as the Mayor, Aldermen and Justices aforesaid, shall think just,] which allowances shall be paid quarterly, in like manner; and before any such gaoler shall exercise any part of the said office, he shall give bond to the Treasurer of the county, with two sufficient sureties, to be approved by the said Mayor, in the sum of five hundred pounds, upon condition, that he, his deputies and assistants, shall well and faithfully perform the trusts and duties in them reposed, which bond, the due execution thereof being proved before, and certified by, any of the Aldermen of the said city, shall be recorded in the office of the Recorder of Deeds for the county of Philadelphia, and copies thereof, exemplified by the said Recorder of Deeds, shall be legal evidence in all courts of law, in any suit against such gaoler, or his sureties.

SECT. XXIII. *Be it enacted by the authority aforesaid*, [That it shall be lawful for the said Mayor, Aldermen and Justices aforesaid, on the first Monday in May next, to appoint twelve Inspectors, six of whom shall be in office until the first Monday in November next, and six until the first Monday in May following, and so, from time to time, six Inspectors shall be appointed in manner aforesaid, on the first Mondays in May and November annually;] and if any person so appointed, not having a reasonable excuse, to be approved of by the said Mayor, Aldermen and Justices, shall refuse to serve in the said office, he shall forfeit and pay the sum of ten pounds, to be recovered by action of debt, as debts of like value are recoverable by the laws of this commonwealth, the one half thereof to the use of the person suing, the other half to be paid to the Treasurer of the said county, to be applied to the purposes herein before mentioned.

SECT. XXIV. *Be it enacted by the authority aforesaid*, That the said Inspectors, seven of whom shall be a quorum, shall meet once in three months, in an apartment to be provided for that purpose in the said gaol, and may be specially convened by the two acting Inspectors, when occasion shall require, and they shall, at their first meeting, appoint two of their members to be acting Inspectors, who shall continue such, for such time as shall be directed by the said

Inspectors, or a majority of them when met together. And the acting Inspectors shall attend at the said gaol at least once in each week, and shall examine into and inspect the management of the said gaol, and the conduct of the said keeper and his deputies, so far as respects the said offenders employed at hard labour and the directions of this act, and shall do and perform the several matters and things herein before directed by them to be performed. 1790. The acting Inspectors when to meet, and their duty.

SECT. XXV. *Be it further enacted by the authority aforesaid*, That the board of Inspectors, at their quarterly or other meeting, shall make such further orders and regulations, for the purpose of carrying this act into execution, as shall be approved of by the Mayor and Recorder of the said city, and such orders and regulations shall be hung up in at least six of the most conspicuous places in the said gaol; and if the said keeper, or any of his deputies or assistants, shall obstruct or resist the said Inspectors, or any of them, in the exercise of the powers and duties vested in them by this act, such person shall forfeit and pay the sum of twenty pounds, to be recovered as aforesaid, and shall moreover be liable to be removed, in manner aforesaid, from his respective office or employment in the said gaol. The board of Inspectors to make orders and regulations. [On the same subjects, See the act of 23rd September, 1791, (chap. 1872,) and see also, the rules and regulations in the note to this act.]

SECT. XXVI. *Be it further enacted by the authority aforesaid*, That the present house of correction in the city of Philadelphia shall be reserved for the exclusive reception and confinement of debtors, and persons committed to secure their appearance as witnesses in criminal prosecutions, and not charged with any misdemeanor or higher offence, which witnesses, if bound in recognizances for their appearance in favour of the prosecution, shall be allowed the sum of six-pence *per diem*, to be paid out of the county stock. And the commissioners of the said county are hereby authorized to make such alterations in the same, not exceeding the sum of sixty pounds, as shall be necessary to accommodate all such prisoners; and to distinguish the said house of correction by a proper title ,henceforward it shall be called and known by the name of "The Debtors' Apartment." The house of correction to be converted into "The debtors apartment." [See the act of 4th of April, 1792, (chap. 1625,) the debtors apartment put under the management of the inspectors of the prison.]

SECT. XXVII. *Be it further enacted by the authority aforesaid*, That the keepers of the said gaol and of the said house of correction, respectively, shall forthwith exchange the several prisoners in their respective custody, conformable to the true intent and meaning of this act, and shall be, and are hereby, indemnified for all such prisoners as shall be safely delivered into proper custody, pursuant to the directions of this act. Prisoners to be exchanged by the gaoler and keeper of the house of correction.

SECT. XXVIII. And whereas it may not at present be practicable to introduce all the above mentioned regulations into each of the counties of this state, although it is necessary that an uniformity of punishment should as much as possible prevail in all: *Be it enacted by the authority aforesaid*, That the malefactors sentenced to hard labour as aforesaid in the several counties of this state, other than the county of Philadelphia, shall be employed in the several gaols and work-houses in the respective counties, in such hard and servile labour, and fed and cloathed in such manner as is herein before directed. And the Sheriff of the proper county, to whom the said malefactors shall be committed in execution of their sentence, shall, Proceedings in the counties for confining and punishing convicts.

1790. from time to time, with the approbation of the Justices of the Court of Quarter Sessions of the proper county, in open court, appoint so many keepers of the said malefactors as shall be necessary, whose wages shall be ascertained and allowed by the said court, and paid by the Treasurer of the county, out of the monies in his hands raised for the use of the said county, by a warrant drawn by the said Sheriff, and at least one of the commissioners of the proper county, and that the duty of the said keepers shall be to superintend and direct their labours, manage and attend to their cloathing, diet and lodging, and take care that they be safely kept; and the better to effect this purpose, they shall have authority to confine in close durance, apart from all society, all those who shall refuse to labour, be idle, or guilty of any trespass, and during such confinement to withhold from them all sustenance, except bread and water; and also to put iron yokes around their necks, chains upon their leg or legs, or otherwise restrain in irons such as shall be incorrigible or irreclaimable without such severity.

Keeper of the gaol how to be proceeded against on a charge of partiality or cruelty.

SECT. XXIX. *Be it enacted by the authority aforesaid*, That the Court of Quarter Sessions of any such county shall have power, either *ex officio*, or upon information against any such keeper for partiality or cruelty, to call before them such keeper, together with the material witnesses, and enquire into his conduct, and if it shall appear that he hath been guilty of gross partiality or cruelty, it shall and may be lawful for the said court to suspend or remove him; and any of the Judges of the Supreme Court, when upon the circuit in such county, either on their own motion, or on complaint made by any other, may take original cognizance of the misbehaviour of any keeper, and remove him from office, if they see cause; and in case of suspension or removal of all or any of the said keepers, either by the Justices of the Quarter Sessions, or the Judges of the Supreme Court, the Sheriff of the proper county, with the approbation of the Justices of the Quarter Sessions of the same county, shall and he is hereby, authorized and directed to appoint another keeper or keepers, in the room of such as shall have been so suspended or removed.

The gaoler to furnish the commissioners with kalendars of the prisoners,

SECT. XXX. *Be it further enacted by the authority aforesaid*, That the keepers of the gaols and work-houses, or houses of correction, in such counties, shall, once in every three months, or oftener, if required, furnish the commissioners of their respective counties with a complete kalendar or list of all persons committed to their respective custody, under sentence of such servitude, together with the names of their crimes, the term of their servitude, in what court condemned, the ages and the description of the persons of such as shall appear to be too old and infirm, or otherwise incapable to undergo hard labour out of the gaols or work-houses, and the said commissioners shall, at the charge of the proper county, provide the cloathing and the food herein before directed for them, as also such articles and materials of labour and manufacture, as shall be most suitable for the employment of all those who are capable of labour or manufacture, and deliver the same to the said gaoler, or work-house keeper, taking a receipt therefor; and that the gaoler or work-house keeper shall render an account quarterly, or oftener,

Commissioners to make provision of cloathing, food, and materials for work.

Gaoler to render week-

if required, to the commissioners, of the work done by the said malefactors, and dispose of the same in such manner as the commissioners shall direct; and the said commissioners are hereby authorized, from time to time, to draw orders, or give their warrants on the Treasurer of the proper county, for the advance of such sums as they shall think reasonable and necessary for carrying this act into execution, and all expenses and charges incurred, or to be incurred, by virtue of this act, shall be levied and raised as other county charges are, and be accounted for in like manner, excepting the said sum of five hundred pounds, directed by this act to be paid out of the treasury of the state, towards erecting the said cells in the yard of the gaol of the county of Philadelphia.*

Yearly account of work done. Commissioners to draw for expenses: and money how to be raised.

[* See, on the subject of this section, the act of 4th of April, 1807, (chap. 2805.) which enforces it by penalties.]

SECT. XXXI. *Be it enacted by the authority aforesaid*, That the said keepers of any of the gaols and houses of correction within this commonwealth, their deputies and assistants, in case any of the said offenders shall escape from confinement without the knowledge or consent of the said keepers, deputies or assistants, shall forfeit and pay the sum of ten pounds,† to be recovered and applied in manner aforesaid; provided that nothing in this act contained shall be deemed or taken to extend to escapes voluntarily suffered by any such keepers of the said gaols or work-houses.

Penalty in cases of involuntary escape.

(† 300 dollars, by act of 4th of April, 1807, chap. 2805.)

SECT. XXXII. *Be it enacted by the authority aforesaid*, That if any such offender sentenced to hard labour shall escape, he or she shall, on conviction thereof suffer such additional confinement at hard labour, agreeably to the directions of this act, and shall also suffer such additional corporal punishment, not extending to life or limb, as the court, in which such offender shall have been convicted, shall adjudge and direct; and if any such offender shall, after his or her escape, be guilty of any offence, for which he or she would have been sentenced to death by the laws in force before the passing of the act, entitled "An act for amending the penal laws of this state," [he or she shall suffer death, as if the said act, or this act had not been made.]

Punishment on convicts who escape. (See the 13th section of the act of 22d of April, 1794.)

SECT. XXXIII. *Be it enacted by the authority aforesaid*, That any such offenders who have been or shall be pardoned for the offences or crimes, of which he or she hath been or shall be convicted in pursuance of the said act, or of this act, provided such offence was by any law in force before the passing of the said act made capital, and who shall be convicted of a second offence of the like nature, shall suffer death on such conviction without benefit of clergy, and any constable who shall take up and convey to gaol any convict who shall escape from his confinement, shall be allowed mileage, at the same rate as constables are commonly allowed, to be paid by the Treasurer of the proper county.]

Punishment in case persons pardoned offend again.

[Altered to imprisonment for life by the 13th section of the act of 22d of April, 1794.]

SECT. XXXIV. *Be it enacted by the authority aforesaid*, That any felon convicted in any county in this state, other than the county of Philadelphia, of any felony or felonies,* for which he or she shall be sentenced to hard labour for the space of twelve months or upwards, may, at the discretion of the court in which such felon shall be convicted, within three months after such conviction, be removed, at the expense of the said county, under safe and secure conduct, to the gaol in the said county of Philadelphia, and therein

Felons how to be removed from other counties to the gaol of Philadelphia, and there maintained.

*[See the act of 21st of March, 1806, chap. 2687.

1790. be confined, fed, cloathed, and employed at hard labour, as is herein before directed, for the remaining part of the time for which, by such sentence, he or she shall be liable to imprisonment; and the commissioners of the said county of Philadelphia, upon the application of the said Inspectors, shall have authority, from time to time, to draw orders upon the Treasurer of the county from which such felon shall have been so removed, for the expenses of feeding and cloathing such felon, if the labour of such felon shall not be sufficient to pay the same, which orders the Treasurer of such county shall accept and pay.

and the act of 4th of April, 1807, (chap. 2805.)

Penalty on selling liquor in the gaol, except in certain cases, [Repealed by act of 4th of April, 1807, (chap. 2805.)]

SECT. XXXV. *Be it enacted by the authority aforesaid*, That if any gaoler, or other person whatever, shall introduce into, or give away, barter or sell, within any gaol or house of correction in the said city, or any of the counties of this state, any spirituous or fermented liquors, excepting only such as the gaoler or keeper of such gaol or house of correction shall make use of in his own family, or such as may be required for any prisoner in a state of ill health, and for such purpose prescribed by an attending physician, and delivered into the hands of such physician, or other person appointed to receive them, such person shall forfeit and pay the sum of five pounds, to be recovered as debts of like value may be recovered by the laws of this state, one moiety thereof to the use of the person suing, the other moiety to be paid to the said Inspectors, for the purposes in this act contained.]

Repeal of former penal laws.

SECT. XXXVI. *Be it enacted by the authority aforesaid*, That the act, entitled "An Act for amending the penal laws of this state," and the act, entitled "An Act to amend an act, entitled "An Act for amending the penal laws of this state," shall be, and they are hereby, repealed.

Limitation of this act. (Now perpetual.)

SECT. XXXVII. *Be it enacted by the authority aforesaid*, That this act shall be in force for the term of five years, and from thence to the end of the next session of the General Assembly, and no longer.]

Of convicts sentenced under the former law.

SECT. XXXVIII. *And be it further enacted by the authority aforesaid*, That the force and operation of the act herein before mentioned, entitled "An Act for amending the penal laws of this state," shall, notwithstanding the said act is herein repealed, remain valid and effectual, as to all persons convicted and sentenced to confinement, servitude and hard labour, conformably to the true intent and meaning of the said act, and of this act.

Passed 5th April, 1790.—Recorded in Law Book No. IV. page 105. *(f)*

(f) The object of this note is to exhibit the state of the criminal code of Pennsylvania, from the 5th of April, 1790, to the present time, in such a manner as to be understood by every reader, and to be useful to Grand Juries, in their chamber. For the great outline of the penal law, especially as it stood previous to the act in the text, the reader is referred to vol. 1. page 105, (chap. 236,) and the notes subjoined thereto.

The act in the text being limited to the end of the Session of the Legislature next following the termination of five years after its passage; an act was passed on the 18th day of April 1795. (chap. 1850,) entitled "an act to continue in force the act, entitled "an act to reform the penal laws of this state, and for other purposes therein mentioned"—By this act, the Inspectors of the gaol of the city and county of Philadelphia, have full power and authority to provide necessaries for every description of persons, who may be confined in the said gaol, and to separate and class the different prisoners in such manner as they shall judge will best promote the object of their confinement.

§ 2. They have power to direct the cloathing for convicts, and to employ each in such kind of labour as their various circumstances may require; and so much of the thirteenth section of the act in the text, as directs the description of cloathing for the convicts, that their heads should be shaved, and that they should be kept at labour of the hardest and most servile kind, is repealed.

§ 3. That part of the twenty first section of the act in the text, which authorizes the Mayor of the city, on the certificate of two of the Inspectors, to order persons for offences committed in the gaol to be punished by whipping, or repeated whippings, not exceeding thirteen lashes each, or by close confinement, is repealed; and the said Inspectors may order and direct any convict, who shall commit either of the offences mentioned in the said twenty first section, to be confined in the cells, or dungeon, with bread and water, only, for sustenance, for any period not exceeding ten days for the first offence, nor fifteen days for any subsequent offence.

§ 4. The parts of the twenty second section of the act in the text, which authorizes the mayor and aldermen of the city, and two Justices of the county of Philadelphia, to appoint and to remove the keeper of the gaol, to fix the salary of the keeper, to approve of the appointment of deputies and assistants, and to ascertain their compensation, and so much thereof as empowers the mayor to draw for the salary and compensation, and to approve of the sureties offered by the Gaoler is repealed; and all the power and authority vested by the said twenty second section in the said Mayor, Aldermen and Justices, shall be exercised exclusively by the said Inspectors.

§ 5. So much of the twenty second section of the act in the text, as allows to the keeper of the gaol five *per centum* on the sales of all articles manufactured by the criminals, is also repealed.

§ 6. This act, and the act in the text declared to be, and continue in force for three years, and from thence to the end of the next session of the General Assembly, except such parts as were altered or supplied, or repealed by this, or any other act.

The people of *Pennsylvania* were satisfied with this system; and by an act, passed 4th of April 1799, (chap. 2040,) so much of the act in the text, as was continued by the act of 18th of April, 1795, and also the said continuing act, were made perpetual.

With respect to the appointment of Inspectors; by the 17th section of an act passed 23d of September, 1791, (chap. 1572,) it was made lawful for the Mayor and *two* Aldermen of the city, and *two* Justices of the county of Philadelphia, to appoint Inspectors of the prison of the city and county of *Philadelphia*. (See sect. 23d of the act in the text.)

The power of appointment, under this act, appears to have been abused, and appointments made under it, in a clandestine manner. The Mayor, in one instance, having selected *two* Aldermen, and *two* Justices, and refused to give notice to others of the hour and place of appointment, or to inform them of them, when called on for that purpose.—See the *Commonwealth*, v. *Douglas* and others, 1. Binney, 77.

By an act passed the 23d of February, 1809, entitled "an act giving additional powers to, and changing the mode of appointment of the Inspectors of the prison in *Philadelphia*, and for other purposes." The Inspectors of the prison, in addition to the powers they before possessed, shall have authority to choose out of their own body, a President, a Secretary, and a Treasurer. The Treasurer shall receive all monies belonging to the institution, and pay the same upon the orders of the Board, signed by the President, and attested by the Secretary; his accounts shall be settled every two weeks by the Board of Inspectors, who are authorized in the name of the President, to sue for, and recover possession, by ejectment or otherwise, vacant city lots, directed to be sold by the Inspectors, by act of 2d of April, 1803, *(infra.)* and also, in the same name, to sue for, and recover debts, due or hereafter to become due to the prison of the city and county of Philadelphia, as fully and effectually as any body corporate may or can do; and no suit so brought shall be discontinued or abated by any change of the said persons by the appointment of others in their stead; but the same shall continue and proceed to the final issue.

§ 2. The court of Quarter Sessions shall, at their March sessions, annually, appoint three discreet and suitable persons, as auditors, who shall, under oath or affirmation, audit and settle the accounts of the Inspectors of the prison, subject nevertheless to the revision herein after mentioned, stating at large the receipts and disbursements of all monies which may have been received and expended by them, and publish the same in two of the daily newspapers of the city.

§ 3. The Select and Common Councils of the city of *Philadelphia*, in joint meeting, annually on the first Monday in May, and on the first Monday in November, shall elect by ballot three Inspectors, on each of the said days, who shall be taxable inhabitants of the said city; and the commissioners of the township of the

1790. Northern Liberties, shall, annually, on each of the said days, elect, by ballot, two Inspectors, between the hours of two and five o'clock in the afternoon, who shall be taxable inhabitants of the township of the Northern Liberties; and the commissioners of the district of Southwark, shall, annually, on each of the said days, between the hours of two and five o'clock in the afternoon, elect, by ballot, two Inspectors, who shall be taxable inhabitants of the said district of Southwark; a majority of whom shall constitute a board of Inspectors for the prison of the city and county of *Philadelphia*.

§ 4. The treasurer shall give bond with sufficient surety, in the sum of ten thousand dollars, to the board of Inspectors, for the faithful performance of the duties of his office, to be sued for and recovered in the name of the Inspectors, on forfeiture thereof, to the use of the institution; and the said treasurer shall not be entitled to receive any compensation for his services.

§ 5. The Inspectors shall annually appoint three of their own body, whose especial duty it shall be to inspect the accounts of the institution, and who shall furnish, under oath or affirmation on the first week in January, annually, to the commissioners of such counties as may have become indebted for convicts confined in the prison of *Philadelphia*, a correct account current, accurately designing the value and amount of the weekly expenses incurred for the maintenance of said prisoners; and that in their opinion the charges therein contained are just and equitable, and also of the weekly amount and value of the labour performed by them, which account shall be certified by the President of the board of Inspectors and attested by their clerk.

§ 6. Such part or parts of any law hereby altered and supplied, is and are hereby repealed.

It is necessary merely to notice here, that by an act passed 4th of April, 1792, (chap. 1625,) the Inspectors of the prison shall likewise be inspectors of the debtor's apartment, and shall attend at the debtor's apartment, at least once in each week, and shall examine into and inspect the management thereof, and the conduct of the keeper and his deputies, and shall make such orders and regulations, with regard to the well ordering and cleanliness of the said apartment, as shall be approved of by the Mayor of the said city, and the President of the court of Common-Pleas for the city and county of *Philadelphia*, (see sect. 26, of the act in the text.)

By an act passed the 2d of April, 1803, (chap. 2377,) which states in the preamble, that the public prison of Philadelphia was found too small for accommodating the convicts from the different parts of the state, and the persons whom it may be necessary to imprison for offences committed in the city and county of *Philadelphia*, certain vacant city lots are directed to be sold by the Inspectors of the prison, or a majority of them; the proceeds of such sale to be appropriated to the erection of a new prison, or other house of confinement for the use of the said city and county, &c. and, it is *Provided*, that in consideration of the said lots being granted for the purposes aforesaid, the commonwealth reserves the right to the several counties within the same, to send their convicts to the present prison of the city and county of Philadelphia, &c.

§ 2. Immediately after the said prison shall be completed, and suitable for the admission of prisoners, the said Inspectors shall cause to be removed thereunto, all persons that may then be confined in the prison of the city and county of Philadelphia, under the denomination of prisoners for trial, vagrants, runaway or disorderly servants or apprentices, and all such other description of persons, (except convicts,) as have been heretofore confined in the county prison, and to receive into the said new prison, all persons of the aforesaid description that may hereafter be legally committed.

By an act entitled "a supplement to sundry penal laws of this commonwealth," passed 21st of March, 1806, (chap. 2687,) the court before which any person shall be convicted of felony or larceny, and sentenced to undergo an imprisonment at hard labour and confinement, for any term not exceeding three years, shall be vested with a discretionary power of directing the imprisonment, labour and confinement aforesaid, to be had and performed in the jail of any county, within this commonwealth, or in the jail and penitentiary of *Philadelphia*.

By an act entitled "a further supplement to the penal laws of this state, passed 4th of April, 1807, (chap. 3805,) sect. 2. any person convicted in any county of this state; other than the county of *Philadelphia*, of any of the offences alluded to in the 4th section of the act in the text, for which he or she shall be sentenced to hard labour for the space of two years or upwards, may, at the discretion of the court, in which such person shall be convicted, within three months after such conviction, be removed to the gaol in the county of *Philadelphia*, therein to be confined, fed, cloathed and employed at hard labour, according to law, for the remaining part of the time for which, by such sentence, he or she shall be liable to imprisonment.

§ 4. If any gaoler shall neglect or refuse to give notice, or furnish a complete kalendar or list of all persons committed under

sentence of servitude, to the commissioners of the proper county as is directed by the 30th section of the act in the text, if the courts of Quarter Sessions shall have ordered the gaoler so to do, he shall forfeit and pay for every such neglect or refusal, the sum of one hundred dollars; and if the said commissioners of any county, after the receipt of such notice or kalendar, shall neglect or refuse to procure sufficient articles and materials of labour and manufacture, or otherwise neglect the duties enjoined upon them by the said 30th section, such commissioners, or any of them, so neglecting or refusing, shall forfeit and pay the sum of one hundred dollars, for every such neglect or refusal; and if by the report of the commissioners of any county to the court of Quarter Sessions, it shall appear that there is not sufficient room or conveniences in and about the common gaol of any county for the employment and punishment of the convicts, as is directed by the said section, it shall be the duty of such commissioners, with the consent and approbation of the court and Grand Jury of the proper county, to cause to be erected such additional buildings as may be necessary for that purpose, and, if need be, to purchase ground proper and convenient for the erection of such additional buildings, at the expense of the proper county.

§ 5. If any gaoler shall sell or suffer to be sold to the prisoners, or other persons, any spirituous liquors, or shall suffer any spirituous liquors under any pretence whatever, except in cases of sickness, to be given to any of the said prisoners in any quantity or measure, such gaoler so offending, upon conviction thereof, shall forfeit and pay the sum of fifty dollars for every such offence, and shall be moreover removed from being keeper of such gaol or prison; and it shall be the duty of the court of the proper county to examine into the conduct of the gaoler in this respect, at each court of Quarter Sessions, and if necessary, to send for and examine witnesses in this behalf.

§ 6. If any gaoler shall be convicted of having by his negligence, suffered any prisoner committed to his custody to escape, he shall forfeit and pay for every such offence, a sum not exceeding three hundred dollars.

§ 7. All the penalties inflicted by this act, shall be recovered upon conviction for the offence, in the court of Quarter Sessions of the proper county, by indictment or information.

§ 8. The 35th section of the act in the text, repealed.

By the 18th sect. of the act of 23d September, 1791, (chap. 1572,) the prison Inspectors shall have power with the approbation of the Mayor, two Aldermen of the city, and two Judges of the Supreme Court, or two of the Judges of the court of Common Pleas of Philadelphia county, to make rules and regulations for the government of all convicts confined in the said prison, not inconsistent with the laws and constitution of this commonwealth, and to prescribe their allowance of provisions, ascertaining the quantity by weight and measure, and not by piece. (see sect. 25, of the act in the text.) 1790.

In pursuance of this power, the following rules and regulations have been adopted.

Regulations for the government of the debtor's prison of the city and county of Philadelphia.

1. That the division of the debtor's apartment, which is now restored to its former state, shall be constantly preserved, that is, that the south part of the house shall be for the use of the Keeper, his family, and Assistants, and that part of the house north of the division wall, shall be allotted for the use of the prisoners.

2. That the house be washed, once or twice a week during the warm weather, and at least once in two weeks, or oftener if the weather permit during winter, and the walls shall be white-washed as often as shall be deemed needful for the health of the prisoners.

3. That the women prisoners shall continue to be kept separate from the men, and at all times the most rigid prohibition of any kind of intercourse between them and the men prisoners be continued, and no men shall be admitted to their apartment, excepting the Keeper, his Assistants, the Inspectors, or a Physician; in case of any of the women being sick.

4. No woman shall be permitted to go into any room where the men are prisoners, excepting the mother or wife of one of the prisoners, and not more than one such mother or wife at a time, unless in case of the sickness of a prisoner, and the Physician orders a Nurse.

5. No game of address or hazard of any kind whatsoever, shall be permitted in the prison on any account; nor shall any implements of gaming be suffered to be in the prison at all.

6. No kind of Wines, spirituous liquors, porter, strong beer, nor cyder, nor any kind of drink stronger than small beer shall be permitted to the prisoners, in any quantity whatever, and the price charged to the prisoners for such small beer, &c. shall not exceed six cents per quart, excepting from this rule what a physician shall prescribe for any prisoner in case of such prisoner being sick, and

(*See the end of the note for preceeding rules and regulations.)

1790. then only the kind and quantity shall be admitted which is prescribed for the sick person.

7. No charge of money, or any equivalent for money under the name of Garnish, or any charge of the kind shall be suffered to be made in the prison, on account of any person lodging in any of the rooms allotted for the prisoners.

8. No prisoner shall be suffered to come without the inner gate, unless called by the Keeper, or his Assistants, or an Inspector.

9. It shall be the duty of the keeper and his assistants, to see that no female remains in the rooms where the men are prisoners, after sunset. Also to examine every visitor, and see that no kind of liquor or drink prohibited by these rules, be brought into the prison.

10. No visitor shall be permitted to come in, or remain in the prison after sunset. And if any person shall attempt to introduce into the prison, any kind of liquor or drink prohibited by these rules, such liquor or drink shall be immediately destroyed, and the person who endeavoured to bring it in, shall be instantly turned out of doors, and never suffered to come in again as a visitor.

11. That no visitor shall be admitted to the prison on the first day of the week, called the Sabbath day, unless to visit a prisoner who is sick.

12. If any prisoner behave in a disorderly manner, and on being reprimanded by the keeper or his assistant, or an inspector, does not immediately conduct himself or herself in a proper and respectful manner, such prisoner shall be confined separately from the rest, in a room appropriated for that purpose.

By order of the Board of Inspectors, &c.
Signed and approved as directed by law, Jan'y, 15th—18th, 1808.

Additional regulations for the Prison of the city and county of Philadelphia,

1st. No men shall be permitted to visit the women's apartments, unless in the company of one or more of the Inspectors of the Prison; and no women shall be permitted to visit any other part of the Prison than the women's apartments, unless it be such as desire to meet with the prisoners in the meeting-house on the first day of the week, for the purpose of communicating religious instruction.

2d. Such of the convicts as conduct themselves properly, and are diligent in their work, and such only, may be permitted to be visited by their Husbands or Wives, Parents or Children, once in three months, by orders signed by the two visiting inspectors.

3d. In all visits to prisoners by permission of the visiting Inspectors, the wooden grated door shall be shut; and all conversation with the prisoners shall be through both the grates, a keeper to be in the entry to hear all that passes in such interviews, and the interview shall not be longer than fifteen minutes.

4th. The design of the Inspectors introducing persons to view the interior of the prison, being chiefly for strangers whose object may be to introduce similar institutions elsewhere, or to improve them where already established; the Inspectors will endeavour to discourage any persons from going to view the prison, merely to gratify *idle curiosity*, as it has a bad effect on the prisoners.

5th. A separate table shall be kept, where the lazy prisoners who do not perform their proportion of work when able, shall be fed agreeably to the principle of the 25th rule established February, 26th 1792, with this difference, that such lazy prisoners shall have no animal food at all, till an amendment in their conduct has taken place.

By order of the Board of Inspectors, &c.
Signed and approved as directed by law, 26th of March, 1808.

Having thus exhibited a connected view of all the laws relating to the prison, and the duties of the officers entrusted with the care and management of it; we shall proceed to consider the laws enacted since the act in the text on the important subject of crimes and punishments.

By an act, entitled "a supplement to the penal laws of this state," passed 23d of September, 1791, (chap. 1572,) if any person who hath been, or shall be legally indicted, in any court of criminal jurisdiction within this commonwealth, of treason, felony of death, robbery, burglary, sodomy or buggery, or as accessaries before the fact to any of the same offences, did not, or will not appear to answer to such indictment, or, having appeared, shall escape before trial, and the same indictment, record and proceedings, shall be removed by writ of *certiorari* into the Supreme Court of this commonwealth, it shall and may be lawful for the same court to award a writ of *capias*, directed to the Sheriff of the county where the fact shall be charged to have been committed; and if the party indicted shall be supposed by the indictment to inhabit, or be conversant in, any other county, then also to the Sheriff of such county; which writ or writs shall be delivered to the said heriff, or sheriffs, at least two months before the day of the return thereof, commanding the said sheriff or sheriffs to take the person so indicted as aforesaid, if he or she may be found in his or their Bailiwicks, and him or her safely keep, so that he may have his or

her body before the Justices of the said Supreme Court, at the next Supreme Court, to be holden for the said commonwealth, to answer to the said indictment, or prosecute his or her traverse thereupon, as the case may be, and to be further dealt with as the law shall direct; and if the same Sheriff or Sheriffs shall make return to the same writ or writs of *capias*, that the person indicted as aforesaid cannot be found in his Bailiwick, then, after such return, a second writ of *capias* may issue out of the said Supreme court, and be delivered, at least three months before the return day thereof, to the Sheriff of the county where the fact shall be charged to have been committed; and in case the party shall be supposed by the indictment to inhabit, or be conversant in any other county, then another writ of *capias* shall also issue, and be delivered, at least three months before the return day thereof, to the Sheriff of such county; which writ or writs of *capias* shall be returnable before the Justices of the same court, on the first day of the second term next after the *teste* of the said second writ of *capias*, so that a term shall intervene between the *teste* and return days of the same writ or writs, whereby the said Sheriff or Sheriffs shall be commanded to take the said person, so indicted as aforesaid, if he or she may be found in his or their Bailiwicks, and him or her safely keep, so that he may have his or her body before the Justices of the said Supreme Court, at the day of the return thereof, to answer or prosecute his or her traverse as aforesaid; but if he or she cannot be found in his or their Bailiwicks, then to cause public proclamation to be made on three several days in one of the courts of Quarter Sessions of the peace to be held for the said counties, respectively, between the *teste* and return days of the same writ or writs, that the party so indicted shall appear before the said Justices of the said Supreme Court, at a Supreme Court to be holden at the time and place contained in the same writs, to answer such indictment, or prosecute his or her traverse thereof, as the case may be, or through default thereof, he or she will, at the return of the same writ or writs be outlawed and attainted of the crime whereof he or she was indicted as aforesaid; and the said second writ of *capias*, directed to the Sheriff of the county where the crime hath been, or shall be charged to have been committed, shall contain a further clause, commanding the same Sheriff, in case the person indicted as aforesaid, cannot be found in his bailiwick, to cause public advertisement to be made in one or more of the public newspapers of this state, once a week, in six succeeding weeks between the *teste* and return of the said second writ of *capias*, specifying therein the coming of the said second writ of *capias* to his hands, with the *teste* thereof, and the time and place of return to be made thereof, naming the person indicted as aforesaid, with his or her addition of degree, mystery and place of abode, as contained in the writ, stating the nature of the offence charged against him or her, and commanding him or her to appear before the Justices of the said Supreme Court, at the day and place directed by the said second writ of *capias*, to answer to the said indictment, or prosecute his or her traverse thereof, as the case may be, or, through default thereof, at the return of the said second writ of *capias*, he or she will be outlawed and attainted of the crime whereof he or she shall have been indicted as aforesaid; and if upon the return of the same writ or writs last mentioned by the said Sheriff or Sheriffs, that the directions of the said writ or writs had been fully complied with and pursued, and the person indicted as aforesaid, shall not yield himself or herself to one of the said Sheriffs, so that he may have his or her body before the Justices of the said Supreme Court, at the day and place as directed by the said writ or writs, or, having surrendered himself or herself, shall escape from his custody, or having been bailed on his or her surrender or caption, shall not appear, so that, through want of his or her appearance at the time and place the said Supreme court shall appoint for his or her trial, no trial of his or her offence can be had, the Justices of the said Supreme Court shall, in either of these cases, pronounce and declare the said person indicted as aforesaid, and not appearing at the time and place appointed for his or her trial as aforesaid, to be outlawed, and attainted of the crime whereof he or she shall have been indicted as aforesaid, the same Supreme Court taking care to pronounce and declare the judgment of outlawry against the principal offender, previously to the declaration of outlawry against the accessary, against whom, in all other respects, it shall be lawful to carry on the proceedings together; and at the same time the said Supreme Court shall declare the legal punishment for the same crime: and wherever imprisonment shall be part of the sentence for any of the said offences, the term thereof shall commence from the time the person outlawed shall, subsequent to his or her outlawry, actually be in the custody of the Sheriff of the county where the offence was, or shall be committed, which sentence shall be fully and particularly entered upon the records of the Supreme Court; and the said sentence of outlawry shall have the legal effect of a judgment upon verdict or confession, against the person so outlawed, for the offence whereupon he or she shall

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1790. have been outlawed, unless and until the same outlawry shall be afterwards avoided by the judgment of the same court, on plea pleaded in the nature of a writ of error.

§ 2. When any person outlawed as aforesaid, shall be taken, either by *capias utlagatum*, or otherwise, or being in the sheriff's custody, shall be brought to the bar of the Supreme Court, the court shall, upon the suggestion and prayer of the Attorney-General, award execution to be done upon him or her, unless the prisoner shall plead, either *ore tenus*, or in writing as his or her counsel shall advise, that he or she was not the person who was outlawed, or shall assign errors in fact, or in law, sufficient to prevent the award of execution; in which case the court shall proceed to determine the same, either by an inquest, or by their own judgment, agreeably to law, and the prisoner shall by such plea have all the benefit and advantage of all legal matters in his or her favour, as if he or she had brought a writ of error, and had assigned the several matters pleaded, as errors. *Provided*, That if any person outlawed, shall, within the space of one year next after the outlawry pronounced against him or her, yield himself or herself to one of the Justices of the Supreme Court, and offer to traverse the indictment whereon the said outlawry shall be pronounced as aforesaid that then he or she shall be received to the same traverse, and being thereupon found not guilty, by the verdict of a jury, of the offence for which he or she shall be clearly acquitted and discharged of the said outlawry, and of all penalties and forfeitures by reason of the same, as fully as if no such outlawry had been had.

§ 3. All the costs and charges of the proceedings to outlawry, shall be borne and paid by the county, where the crime is laid to have been committed; *Provided*, That if the person or persons so outlawed, shall have real or personal estate, the same, or so much thereof as shall be necessary, shall be sold, by warrant from the commissioners of the said county, and the nett proceeds of such sales shall be applied to the payment of the said costs and charges, or so far as the same shall extend, in exoneration of the county. (See vol. 1, page 116, and *Respublica* v. *Doan*, 1 Dallas, 86.) [It may not be improper here to observe, that the late changes in the Judiciary system, and the abolition of the courts of *Nisi Prius*, and *Circuit Courts* in the counties, may render outlawries impracticable out of the city and county of Philadelphia; and some legislative interference may be necessary to remove doubts, or to vest the county courts with the powers given by this act only to the Judges of the Supreme Court.]

§ 4. Repeals the act against conjuration, witchcraft, and dealing with evil and wicked spirits, 1, Jac. 1, C. 12, (see vol. 1, page 114.)

§ 5. If any prisoner shall, upon his or her arraignment for any capital or inferior offence, stand mute, or not answer directly, or shall peremptorily challenge above the number of persons summoned as jurors for his or her trial, to which he or she is by law intitled, the plea of not guilty shall be entered for him or her on the record, the supernumerary challenges shall be disregarded, and the trial shall proceed in the same manner, as if he or she had put himself or herself upon the county, any law, custom, or usage to the contrary thereof in anywise notwithstanding. (See vol. 1 page 112.)

§ 6. Whereas it sometimes happens that bastard children, begotten out of the state, are born within the state, and others begotten within one of the counties of the state, are born in another county, and difficulties have arisen about the place of trial; and it is reasonable and just that the reputed fathers of bastard children should be at the expense of their maintenance. It is enacted, that in the latter case, the prosecution of the reputed father shall be in the county where the bastard child shall be born, and the like sentence shall be passed, as if the bastard child had been, or shall have been begotten within the same county; and in the former case, to wit, of a bastard child begotten out of the state, and born within the state, the like sentence shall be passed, except in the imposition of a fine or corporal punishment, in lieu thereof, which part of the sentence shall be omitted. (See vol. 1, page 27.)

§ 7. So much of the act against adultery and fornication, as declares that whipping, imprisonment at hard labour, or branding, shall or may be a part of the sentence, on conviction of adultery, is repealed; and in all cases of conviction for adultery, a fine not exceeding fifty pounds shall be imposed, and in addition thereto, the offender shall be imprisoned for any time not exceeding twelve, nor less than three months (See vol. 1, page 27.)

§ 8. In all cases of felony of death, robbery and burglary, it shall and may be lawful to punish the receivers of such felons, robbers and burglars,

by fine and imprisonment, although the principal felon, robber or burglar, cannot be taken, so as to be prosecuted and tried for said offences, which conviction, and sentence of the said receivers, shall exempt them from being prosecuted as accessaries after the fact, in case the principal felon, robber or burglar, shall be afterwards taken and convicted. (See vol. 1, page 115. 116, 119, 273; and see also the 4th section of the act in the text.)

§ 9. Whenever any person or persons shall be convicted of robbery or burglary, such person or persons shall be ordered to restore to the lawful owner or owners the goods and chattels so stolen, or to pay to him, her or them, the full value thereof, or so much thereof as shall not be restored, and the forfeiture of his, her or their lands and chattels, shall only extend to the residue thereof, after such restitution made as aforesaid: and the owner or owners of goods and chattels, stolen as aforesaid, shall have like remedy for restitution, by executions issued by the court, in which the attainders shall be had, as is provided by an act of Assembly in the case of conviction of larceny, entitled "An act for the advancement of justice, and more certain administration thereof." (See vol. 1, page 122.) But such felons, unable to make restitution, may be discharged as insolvent debtors, by the court by which he was committed, by act of 28th of February, 1787, (chap. 1250, ante. page 396.) And by act of 27th of March, 1790, (chap. 1485, ante. page 522.) the court is empowered to direct additional labour, in commutation of the restitution. And as to the forfeiture, see the 19th section of the 9th article of the existing constitution.)

§ 10. When any person shall be accused before a magistrate, upon oath or affirmation, of any of the said crimes, and the said magistrate shall have issued his warrant to apprehend such person or persons, or to search for such goods as have been described on oath or affirmation to have been stolen, if any goods shall be found in the custody or possession of such person or persons, or in the custody or possession of any other person or persons, for his, her or their use, and there is probable cause, supported by oath or affirmation, to suspect that other goods which may be discovered on such search, are stolen, it shall and may be lawful for the said magistrate to direct the said goods to be seized, and to secure the same in his own custody, unless the person in whose possession the same were found, shall give sufficient surety to produce the same at the time of his or her trial; and the said magistrate shall forthwith cause an inventory to be taken of the said goods, and shall file the same with the clerk of that court in which the accused person is intended to be prosecuted, and shall give public notice in the newspapers, or otherwise by advertising the same in three or more public places in the city or county where the offence is charged to have been committed, before the time of trial, noting, in such advertisement, the said inventory, the person charged, and time of trial; and if on such trial the accused party shall be acquitted, and no other claimant shall appear, or suit be commenced, then, at the expiration of three months, such goods shall be delivered to the party accused, and he, she or they shall be discharged, and the county be liable to the costs of prosecution; but if he or she be convicted of larceny only, and, after restitution made to the owner, and the sentence of the court being fully complied with, shall claim a right in the residue of the said goods, and no other owner shall appear or claim the said goods, or any part of them, that then it shall be lawful, notwithstanding the claim of the said party accused, to detain such goods for the term of nine months, to the end that all persons having any claim thereto may have full opportunity to come, and, to the satisfaction of the court, prove their property in them, on which proof the said owner or owners, respectively, shall receive the said goods, or the value thereof, if, from their perishable nature, it shall have been found necessary to make sale thereof, upon paying the reasonable charges incurred by the securing the said goods, and establishing their property in the same; but if no such claim shall be brought, and duly supported, then the person so convicted shall be entitled to the remainder of the said goods, or the value thereof, in case the same shall have been sold, agreeably to the original inventory; but if upon an attainder of burglary or robbery, the court shall, after due enquiry, be of opinion the said goods were not the property of such burglar or robber, they shall be delivered, together with a certified copy of the said inventory, to the commissioners of the county, who shall endorse a receipt therefor on the original inventory, register the said inventory in a book, and also cause the same to be publicly advertised, giving notice to all persons claiming the said goods to prove their property therein to the said commissioners, and unless such

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1790. proof shall be made within three months from the date of such advertisement, the said goods shall be publicly sold, and the neat monies arising from such sale shall be paid into the county treasury, for the use of the commonwealth. *Provided*, That if any claimant shall appear within one year, and prove his or her property in the said goods to the satisfaction of the commissioners, or, in the case of dispute, shall obtain the verdict of a jury in favour of such claim, the said claimant shall be entitled to recover and receive from the said commissioners or treasurer, the neat amount of the monies paid as aforesaid, into the hands of the said commissioners, or by them paid into the treasury of this commonwealth.

§ 11. The costs accruing on all bills returned *ignoramus* by the grand jury of the city, or any county in this commonwealth, shall be paid out of the county stock, by the city or county in which the prosecution commenced, and not by the party charged, before such grand jury, with any felony, breach of the peace, or other indictable offence. (But by an act passed 7th of December, 1804. chap. 2513, in all prosecutions, cases of felony only excepted, if the bill or bills of indictment shall be returned "*ignoramus*," the grand jury who returns the same shall decide and certify on such bill, whether the county or the prosecutor shall pay the costs of prosecution; and the court in which the determination shall be made, shall forthwith pass sentence to that effect, and order him, her or them committed to the gaol of the county until the costs are paid, unless he, she or they give security to pay the same in ten days. This provision is made perpetual by an act passed 29th of March, 1809.)

§ 12. Every person and persons, who is, are or shall be held in confinement by order or judgment of any court of this commonwealth, for the costs of prosecution, shall be intitled to the benefit of the several acts of Assembly of this commonwealth for the relief of insolvent debtors, and may be discharged from personal imprisonment by the court in which such prosecution was or may be had, so far as regards confinement of their bodies for said costs, if such court shall, on consideration of the circumstances of such person or persons, finding that he, she or they shall be unable to discharge the said costs of prosecution; provided that the like previous notices of such application for discharge from confinement be given to the several persons interested in the said costs, as the law requires where insolvent debtors in other cases apply for such discharge.

§ 13. Where any person shall be brought before a court, justice of the peace, or other magistrate, of any city or county in this commonwealth, having jurisdiction in the case, on the charge of being a runaway slave, or of having committed a crime, and such charge upon examination, shall appear to be unfounded, no cost shall be paid by such innocent person, but the same shall be chargeable to, and paid out of the county stock, by such city or county.

§ 14. The expenses of the removal of prisoners from one county to another, for trial, shall be borne and paid by the county, to which he, she or they shall be thus removed for trial; and whereever by order of the Governor, or one of the Judges of the Supreme Court, any person charged with having committed an offence in one county, shall be removed into another county for safe custody, or shall be transported from another state into this state for trial, the expenses of such removals, or transportations, shall be paid by the State Treasurer, on the order of the Governor, and the subsequent expenses shall be at the charge of the county where the fact is supposed to have been committed. (By the third section of the supplement of 4th of April, 1807, (chap. 2805.) Where any person charged with having committed a felony, in the city of *Philadelphia*, or in any county in this state, shall go, or escape into any other county of this state, or into the city aforesaid, it shall and may be lawful for the President or any Judge of the court of Common Pleas in the county where the said person may be found, to issue his warrant, authorizing and requiring the Sheriff of the said county to take the said person, and conduct him or her to the proper city or county where the said felony is alleged to have been committed, the expenses of which shall be paid to the said Sheriff by the county or city to which the said person is conducted.—And—By the second section of the fourth article of the constitution of the *United States*, "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." And the manner in which such fugitives from justice are to be apprehended, secured, and delivered over, is prescribed by an act of Congress passed February 12th, 1793.)

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§ 15. In all cases where any person hath been, since the passing of the act in the text, or shall be convicted of any offence or offences, which shall be punishable capitally, or by imprisonment at hard labour, the county where the crime hath been or shall be committed shall pay the costs of prosecution, if the defendant hath not property sufficient to discharge the same; but where the same person hath been, or shall be convicted of divers offences at the same term or sessions, the costs of prosecution on one of the indictments only, shall be paid out of the county stock.

§ 16. Repeals any former acts of Assembly, and all other parts of the criminal law of the state, and forms of proceedings relative thereto, so far as this act has altered or supplied the same. *Provided*, That all prosecutions, convictions, attainders and outlawries, or other proceedings heretofore duly and legally had or made, or which may be had or made under the former laws of this state, during the existence thereof, shall have the like force or effect, as if this act had not been made; and that in all cases, where by this act any new punishment is declared for any offence, that the said former acts of assembly, and all other parts of the criminal law, shall remain and continue in force, with respect to all such offences as have been committed before the passing of this act.

§ 17 & 18. Respecting the appointment, and powers of the Inspectors of the prison, have been already stated.—

The criminal law has undergone considerable and important changes by an act, entitled "An Act for the better preventing of crimes, and for abolishing the punishment of death in certain cases," passed the 22d of April, 1794, (chap. 1766.) By this act it is enacted that no crime whatsoever, hereafter committed (except murder of the first degree) shall be punished with death in the state of Pennsylvania.

§ 2. All murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree: and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but if such person shall be convicted by confession, the court shall proceed, by examination of witnesses to determine the degree of the crime, and to give sentence accordingly.

§ 3. Every person liable to be prosecuted for petit treason shall in future be indicted, proceeded against, and punished, as is directed in other kinds of murder. (See vol. 1, pa. 111.)

§ 4. Every person duly convicted of the crime of high treason shall be sentenced to undergo a confinement in the gaol and penitentiary-house of Philadelphia, for a period not less than six nor more than twelve years, and shall be kept therein at hard labour, or in solitude, and shall in all things be treated and dealt with as is prescribed by an act, entitled, "An act to reform the penal laws of this state," or by the provisions of this act; that every person duly convicted of the crime of arson, or as being an accessary thereto, shall be sentenced to undergo a similar confinement, for a period not less than five nor more than twelve years, under the same conditions as are herein expressed in the first clause of this section; that every person duly convicted of the crime of rape, or as being accessary thereto before the fact, shall be sentenced to undergo a similar confinement, for a period of time not less than ten years, nor more than twenty-one years, under the same conditions as are herein expressed in the first clause of this section; that every person duly convicted of the crime of murder, of the second degree, shall be sentenced to undergo a similar confinement, for a period not less than five years, nor more than eighteen years, under the same conditions as are herein expressed in the first clause of this section. (See vol. 1, pa. 111, 435, 451, 499.)

§ 5. Every person who shall be convicted of having, after the passing of this act, falsely forged and counterfeited any gold or silver coin, which now is or hereafter shall be passing or in circulation within this state, or of having falsely uttered, paid, or tendered in payment, any such counterfeit and forged coin, knowing the same to be forged and counterfeited, or having aided, abetted, or commanded the perpetration of either of the said crimes, or shall be concerned in printing, signing, or passing any counterfeit notes of the Banks of Pennsylvania, North America, or the United States, knowing them to be such, or altering any genuine notes of any of the said banks shall be sentenced to undergo a confinement in the gaol and penitentiary-house aforesaid, for any

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§ 6. Whosoever, on purpose and of malice aforethought, by laying in wait, shall unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off the nose, ear or lip, or cut off or disable any limb or member of another, with intention in so doing to maim or disfigure such person, or shall voluntarily, maliciously, and of purpose, pull or put out an eye, while fighting, or otherwise, every such offender, his or her aiders, abettors and counsellors, shall be sentenced to undergo a confinement in the gaol and penitentiary house aforesaid for any time, not less than two, nor more than ten years, and shall be kept, treated and dealt with in manner aforesaid; and shall also pay a fine not exceeding one thousand dollars, three fourth parts whereof shall be for the use of the party grieved. (See vol. 1, pa. 114.)

§ 7. Whosoever shall be convicted of any voluntary man-slaughter, hereafter committed, shall be sentenced to undergo an imprisonment, at hard labour and solitary confinement, in the gaol and penitentiary-house of Philadelphia, for any time not less than two, nor more than ten years, and to give security for his or her good behaviour during life, or for any less time, according to the nature and enormity of the offence; and for the second offence shall be sentenced to undergo an imprisonment at hard labour and solitary confinement, in the gaol and penitentiary-house aforesaid, for any time not less than six, nor more than fourteen years.

§ 8. Wheresoever any person shall be charged with involuntary man-slaughter, happening in consequence of an unlawful act, it shall and may be lawful for the Attorney-General, or other person prosecuting the pleas of the commonwealth, with the leave of the court, to wave the felony, and to proceed against and charge such person with a misdemeanor, and to give in evidence any act or acts of man-slaughter; and such person or persons, on conviction shall be fined or imprisoned, as in cases of misdemeanor; or the said Attorney-General or other person prosecuting the pleas of the commonwealth, may charge both offences in the same indictment, in which case the jury may acquit the party of one, and find him or her guilty of the other charge.

§ 9. All claims to dispensation from punishment by benefit of clergy, or benefit of the act of Assembly, entitled, "An act for the advancement of justice, and more certain administration thereof," shall be and hereby are forever abolished; and every person convicted of any felony, heretofore deemed clergyable, shall undergo an imprisonment at hard labour and solitary confinement, in the gaol and penitentiary-house aforesaid, for any time not less than six months, and not more than two years, and shall be treated and dealt with as is directed in the act to reform the penal laws of this state except in those cases where some other specific penalty is prescribed by the act aforesaid to reform the penal laws of this state, or by this act: (See vol. 1, pa. 117.)

§ 10. Every person convicted in any county in this state, other than Philadelphia county of any crime (except murder of the first degree) which now is, or on the fifteenth day of September, one thousand seven hundred and eighty-six, was capital, or a felony of death, without benefit of clergy, or of knowingly uttering counterfeit coin, or of being concerned in printing, signing, or passing any counterfeit notes of the Banks of Pennsylvania, North America or of the United States, knowing them to be such, or of altering any of the genuine notes of either of the said banks, shall as soon as possible, be safely removed and conveyed by the Sheriff, and at the expense of the commonwealth, to the gaol and penitentiary-house aforesaid, and therein be kept during the term of their confinement, in the manner and on the terms mentioned in the thirty-fourth section of the act, entitled "An act to reform the penal laws of this state;" and every Sheriff, who shall neglect to remove and safely deliver at the gaol aforesaid such convict, within forty days after sentence is pronounced on the said convict, shall forfeit and pay the sum of one hundred dollars, to be recovered in any court of justice, and applied, one half to the use of the county in which the offence was committed, the other to such person as shall sue for the same.

§ 11. Every person convicted of any of the crimes last aforesaid and who shall be confined in the gaol and penitentiary-house aforesaid, shall be placed and kept in the solitary cells thereof, on low and coarse diet, for such part or portion of the term of his or her im-

prisonment, as the court in their sentence shall direct and appoint: *Provided*, That it be not more than one half, nor less than one twelfth part thereof: and that the Inspectors of the said gaol shall have power to direct the infliction of the said solitary confinement at such intervals, and in such manner, as they shall judge best.

§ 12. *Whereas*, It is of importance that the nature of the offence, and the former conduct and character of the convict, should be known by the said Inspectors, and their successors in office: *Be it enacted*, &c. That whensoever any person shall be convicted of any crime, which, on the said fifteenth day of September, one thousand seven hundred and eighty-six was capital, or a felony of death, or shall be removed from any county to the gaol and penitentiary-house aforesaid, the court, before whom such conviction is had, shall, within forty days after such offender is removed from the said county, make, and cause to be transmitted to the said Inspectors, a report or short account of the circumstances attending the crime committed by such convict, particularly such as tend to aggravate or extenuate the same, and also what character the said convict appeared on the trial to sustain, and whether he had at any time before been convicted of any felony or other infamous crime; which report the said Inspectors shall cause to be entered in books or registers, to be provided for that purpose.

§ 13. If any person convicted of any crime, which, on the said fifteenth day of September, one thousand seven hundred and eighty-six, was capital, or a felony of death, without benefit of clergy, shall commit any such offence a second time and be thereof legally convicted, he or she shall be sentenced to undergo an imprisonment in the said gaol and penitentiary-house, at hard labour, during life, and shall be confined in the said solitary cells at such times, and in such manner, as the Inspectors shall direct; and if any person sentenced to hard labour and solitary confinement, by virtue of this or any former act, shall escape, or be pardoned, and after his or her escape or pardon shall be guilty of any such offence, as on the said fifteenth day of September, one thousand seven hundred and eighty-six, was capital, or a felony of death, without benefit of clergy, such person shall be sentenced to undergo an imprisonment for the term of twenty-five years, and shall be confined in the solitary cells aforesaid, at the discretion of the said Inspectors. [See the 22d and 23d sections of the act in the text.]

§ 14. If any person shall hereafter be convicted of any crime committed before the passing of this act, he or she shall be sentenced to undergo such pains and punishment as by the laws now in force are prescribed and directed, unless such convict shall openly pray the court, before whom such conviction shall be had, that sentence may be pronounced agreeably to the provisions of this act for the like offence, in which case, the said court shall comply with the said prayer, and pass such sentence on such convict, as they would have passed had the said offence been committed subsequent to the passing of this act.

§ 15. Every person convicted of murder, of the first degree, his or her aiders, abettors and counsellors, shall suffer death by hanging by the neck.

§ 16. No person indicted for any crime, the punishment whereof is altered by this act, shall lose any peremptory challenge, to which he or she would have been entitled, had this act not been passed; nor be liable to be tried before any court other than the Supreme Court or Court of Oyer and Terminer in the county where the fact was committed. [See section 2 of the act in the text.]

§ 17. If any woman shall endeavour privately, either by herself, or the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would by the law be a bastard, so that it may not come to light whether it was born dead or alive, or whether it were murdered or not, every such mother, being convicted thereof, shall suffer imprisonment at hard labour in the county gaol of the county where the fact was committed, or in the gaol and penitentiary-house aforesaid, for any time not exceeding five years; or shall be fined and imprisoned, at the discretion of the court, according to the nature of the case; and if the Grand Jury shall in the same indictment charge any woman with the murder of her bastard child, as well as with the offence aforesaid, the jury, by whom such woman shall be tried, may either acquit or convict her of both offences, or find her guilty of one, and acquit her of the other, as the case may be. [See vol. 1, pa. 113, and section 6 of the act in the text.]

§ 18. The concealment of the death of any such child shall not be conclusive evidence to convict the party indicted of the murder of her child, unless the circumstances attending it be

1790. such as shall satisfy the mind of the jury, that she did wilfully and maliciously destroy and take away the life of such child. [See vol. 1, pa. 113, and section 6 of the act in the text.]

§ 19. The several acts of Assembly of this commonwealth, and such parts thereof, so far as the same are repugnant to or supplied by this act, and no further, shall be, and hereby are, repealed.

By a supplement to the penal laws, passed 20th of March, 1797, (chap. 1918,) all costs accruing on all bills of indictment found by the grand jury of the city, or any county in this commonwealth, charging a party with any felony, breach of the peace, or other indictable offence, shall, if such party be acquitted by a petit jury, on the traverse of the same, be paid out of the county stock, by the city or county in which the prosecution commenced. (But, by an act passed 7th of December, 1804, in all cases of acquittals, by the *petit* jury, on indictments, cases of felony only excepted, the jury trying the same shall determine by their verdict whether the county, or the prosecutor, or the defendant, shall pay the costs of prosecution; and the jury so determining, in case they direct the prosecutor to pay the costs, shall name him or them in their return, or verdict; and in such case, the court, in which the said determination shall be made, shall forthwith pass sentence to that effect; and order him, her or them to be committed to the gaol of the county until the costs are paid, unless he, she, or they give security to pay the same in ten days.—This provision is made perpetual by act of 29th of March, 1809.)

By act of 3d of April, 1804, (chap. 2510,) every person who shall commit perjury, or suborn, or procure any person to commit perjury, by wilfully and falsely swearing or affirming, shall, upon being thereof convicted in any court of law within this commonwealth, forfeit and pay any sum not exceeding five hundred dollars, and suffer imprisonment, and be kept at hard labour during any term not exceeding seven years, at the discretion of the court before whom such conviction shall be had; and further, shall thereafter be disqualified from holding any office of honour, trust or profit in this commonwealth, and from being admitted as a legal witness in any matter of controversy.

By the act entitled "A supplement to sundry penal laws of this commonwealth," passed 21st of March, 1806, (chap. 2687,) the first section of which has been before cited in this note, it is further enacted, § 2. That in all cases of larceny, wherein by the laws of this commonwealth, in addition to restitution of goods stolen, it is directed that any person convicted of such crime, shall pay to the commonwealth the like value of such goods, and in *all cases*, where by law, a fixed or specific fine is affixed to the commission of any crime, the court, before which conviction of any of the crimes aforesaid shall be had, is hereby authorized in lieu thereof, to sentence the offender to pay such fine as the said court, in its discretion, may judge right; *Provided*, the same shall not exceed the fine heretofore affixed by law.

§ 3. If any person or persons shall wilfully set fire to any barn, stable or out-house, or to any barrack, rick or stack of hay, grain or bark, with intent to destroy the same, or shall be an accessary, or accessaries before the fact, such person or persons being thereof legally convicted shall suffer an imprisonment at hard labour in the jail and penitentiary house in the city of *Philadelphia*, for any term not less than five years, nor more than twelve years, and pay a fine not exceeding two thousand dollars, at the discretion of the court.

§ 4. Any of the presidents of the courts of Common Pleas, may admit to bail any person accused of any or either of the crimes of robbery, burglary, sodomy or buggery, as fully, amply and effectually, as the Judges of the Supreme Court, or some, or one of them might or could do under the act in the text. (See sect. 2.)

By an act entitled "An act to restrain the horrid practice of duelling," passed 31st of March, 1806, (chap. 2717,) if any person within this commonwealth shall challenge by word or writing the person of another, to fight at sword, rapier, pistol or other deadly weapon, or if any person so challenged shall accept the said challenge, in either case, such person so giving, or sending, or receiving any such challenge, shall for such offence, being thereof lawfully convicted in any court of record within this commonwealth, by the testimony of one or more witnesses, or by confession, forfeit and pay the sum of five hundred dollars, and shall suffer one year's imprisonment at hard labour in the same manner as convicted felons are now punished, and moreover shall forfeit and be deprived of all right of citizenship within this commonwealth for the term of seven years.

§ 2. If any person shall willingly and knowingly carry and deliver any written challenge, or shall verbally deliver any

message, purporting to be a challenge, or shall consent to be a second in any such intended duel, and shall be thereof legally convicted as aforesaid, he or they so offending, shall for every such offence, forfeit and pay the sum of five hundred dollars, and suffer one year's imprisonment at hard labour, in the same manner as convicted felons are now punished, and moreover shall forever thereafter be rendered incapable of holding any office of honour, trust or profit, within this commonwealth, which incapacity shall be declared, and made part of the judgment of the court.

§ 3. In any case it shall be sufficient to form an indictment, generally, against either of the principals, for challenging another to fight at deadly weapons, and notwithstanding it may appear on the trial that the defendant only accepted the challenge, it shall be sufficient to convict, and render him liable to the penalties of this act, and in like manner an indictment against the seconds may be framed generally for carrying and delivering a challenge, and proof of the mere act of fighting, and the defendant being present thereat, shall be sufficient to convict the defendant upon an indictment so framed, and if the duel shall take place within this commonwealth, the mere fact of fighting shall be full and complete evidence of the charges respectively of giving or receiving, or of carrying or delivering, a challenge, without other proof thereof.

§ 4. If any person shall have knowledge of any challenge to fight with any deadly weapons given or received, or in any manner be witness to the fact of such challenge, duel, or fighting, not being a second thereat, or party criminal therein, and shall conceal the same, and do not inform thereof, he or she shall be guilty of a misdemeanor; and upon conviction thereof, shall be adjudged to pay a fine of fifty dollars, and moreover suffer nine months imprisonment, without bail or mainprize.

§ 5. If any person or persons shall presume to publish in any newspaper, or post by hand-bills, written or printed, or otherwise, any other person or persons, as a coward or cowards, rascal or rascals, liar or liars, or use any other irritating abusive language for not accepting a challenge, or fighting a duel, such person or persons shall for such offence, being thereof convicted, be subject to the same punishment as though he or they had fought a duel, as provided by the first section of this act, and the publisher or printer shall in all prosecutions under this section be summoned as a witness, and accepted by the courts as a good witness against the writer or writers of such publication or hand-bill; and if the said printer or printers, when summoned before the court, shall refuse to give up the writer's name or names, the court shall consider him or them as the author or authors thereof, and proceed to punish him or them accordingly. 1790.

By the first section of the act of 4th of April, 1807, (chap. 2805,) before cited, instead of two years imprisonment, to which the power of the courts of this commonwealth is limited, in and by the fourth section of the act in the text, the said courts respectively shall hereafter be invested with the power of extending the confinement in such cases, to a period not exceeding seven years in their discretion, according to the circumstances of the case before them; provided, that the power thus conferred on the said courts shall not extend to offences enumerated in said section, of bigamy, or of being an accessary after the fact, in any felony, or of receiving stolen goods, knowing them to have been stolen.

By an act entitled "An act to declare masquerades and masqued balls to be common nuisances, and to punish those who promote or encourage them," passed 15th of Feb'y, 1808, (chap. 2903,) it is enacted, that masquerades or masqued balls be, and they are hereby declared to be common nuisances; and every housekeeper within this commonwealth, who shall knowingly permit or suffer a masquerade or masqued ball, to be held or given in his or her house, and every person who shall set on foot, promote or encourage, any masquerade or masqued ball, and every person who shall knowingly attend or be present at any masquerade or masqued ball, in mask, or otherwise, being thereof legally convicted in the Mayor's Court of the city of Philadelphia, or in any Court of Quarter Sessions of the Peace, or *Oyer* and *Terminer* and General Gaol Delivery, shall, for each and every such offence, be sentenced to an imprisonment not exceeding three months, and to pay a fine not exceeding one thousand, nor less than fifty dollars, and to give security in such sum as the court may direct to keep the peace, and be of good behaviour for one year.

§ 2. Prescribes a general form of indictment, under which any of the offences declared in the first section may be given in evidence, as if the same had been therein particularly set forth and

1790. described; and no exception shall be allowed to such indictment for insufficiency of form.

Every person or persons who shall be concerned in any banking house, or office of discount and deposit, in this state, under any company incorporated by the laws of any other of the United States, on conviction thereof in any court of justice within this state, shall, for every such offence, forfeit and pay for the use of the same, two thousand dollars, &c. Act of 28th of March, 1808, (chap. 3002.)

Unincorporated banks shall not issue any notes in nature of bank notes, payable to bearer, or order, or otherwise; or loan any sum or sums of money upon any actual or accommodation note or notes; or receive any sum or sums in the nature of deposits; or do or perform any other act which an incorporated banking company may lawfully do; and each and every person so offending, shall, on conviction thereof, before any Alderman, or Justice of the Peace, forfeit and pay for every such offence, the sum of one hundred dollars; one half to the use of the informer, and the other half for the use of the commonwealth; and it is declared to be unlawful for any person or persons to make any deposit in any such bank, or to offer at any such bank any actual or accommodation note for discount; or to take or transfer any share or shares of the stock of any such association for the purposes of banking; and a similar forfeiture, in like manner recoverable, &c. Paying and receiving the notes are also declared to be unlawful; and all payments which may be made or accepted, wherein any such note or notes shall be the medium, shall be, and the same are declared to be null and void. Act of 19th of March, 1810.

No body politic or corporate, of any foreign state, kingdom or country, no company or co-partnership of foreigners, by themselves, or any agent or agents of such company or copartnership, and no person or persons who is or are not a citizen or citizens of the United States, shall be insurers in any case within this state, against loss at sea, against loss by fire, upon any property within the same, upon the inland transportation of any goods, wares or merchandize, in or out of this state, or upon the life or lives of any person or persons, residing within the same, and all contracts and policies entered into by any such person or persons, company, co-partnership, or body politic or corporate, as insurers, shall be null and void. If any person shall make or renew any contract or policy of insurance as assurer, on account, or in behalf of, or as agent for any body politic or corporate, of any foreign state, kingdom or country, any company or co-partnership of foreigners, or any person or persons who is or are not a citizen or citizens of the United States, within this state, every such person so offending, shall, on conviction in any court of competent jurisdiction, forfeit and pay the sum of five thousand dollars, for every such offence, one half to the use of the commonwealth, and the other to the use of the informer, who shall sue for the same. If any citizen of this commonwealth, who shall make or renew any contract or policy of insurance, as a party insured with any foreign company or corporation, any agent or agents for any such company or corporation, or with any person or persons who is or are not citizens of the United States, every person so offending, shall, on conviction in any court of competent jurisdiction, forfeit and pay the sum of five hundred dollars to the uses aforesaid, and in all and either case or cases, the policy or policies shall be deemed and received as conclusive evidence of such contract or insurance; *Provided*, that the penalty herein mentioned shall not be construed to extend to any case of marine insurance made in any foreign country by any agent or agents for any American merchant or merchants, so as to secure the vessel or cargo belonging to any American merchant or merchants; nor to prevent any foreigner or foreigners from having his, her or their property insured within this state, excepting only an alien enemy. Act of 10th of March, 1810.

No person shall be subject to prosecution by indictment in any of the courts of this commonwealth, for the publication of papers examining the proceedings of the legislature or any branch of government, or for investigating the official conduct of officers or men in public capacity.

In all actions or criminal prosecutions of a libel, the defendant may plead the truth thereof in justification, or give the same in evidence, and if any prosecution by indictment, or any action be instituted against any person or persons contrary to the true intent and meaning of this act, the defendant or defendants in such action or indictment may plead this act in bar, or give the same in evidence on the plea of not guilty—To continue in force for three years, and from thence to the end of the next session of the legislature. Act of 16th of March, 1809.

On the construction of this act, see the case of the *Commonwealth* v. *Duane*, 2 Binney, 601.—And see the 7th sec-

tion of the 9th article of the existing constitution.

The power of the Judges of the courts to issue attachments, and inflict summary punishments for contempts of court, shall be restricted—to the official misconduct of the officers of such courts respectively—to the negligence or disobedience of officers, parties, jurors, or witnesses, against the lawful process of the court—to the misbehaviour of any person in the presence of the court, obstructing the administration of justice. All publications out of court, respecting the conduct of the Judges, officers of the court, jurors, witnesses, parties, or any of them, of, in and concerning any cause pending before any court, shall not be construed into a contempt of said court, so as to render the author, printer, publisher or either of them, liable to attachment and summary punishment for the same; but if such publication shall improperly tend to bias the minds of the public, the court, the officers, jurors, witnesses, or any of them, on a question pending before the court, any person feeling himself aggrieved by such publication, shall be at liberty to proceed by indictment, or to bring an action at law against the author, printer, publisher, or either of them, and recover thereupon such damages as a jury may think fit to award.

The punishment of imprisonment in the first instance shall extend only to such contempts as are committed in open court; and all other contempts shall be punished by fine only; *Provided*, that the Sheriff, or other proper officer, may take into custody, confine, or commit to gaol, any person confined for a contempt, until such fine is discharged or paid; but if he shall be unable to pay such fine, such person may be committed to prison by the court, for any time not exceeding three months.

This act not to extend to rules on Sheriffs, &c. and is limited to two years, and to the end of the next session.—Act of 3d of April, 1810.

For contempts before arbitrators under the arbitration law, see the 21st section of the act of 20th of March, 1810.

By act of 30th of January, 1810, the robbery or larceny of any bank note, or bank notes of any incorporated bank, shall be punishable in the same manner as the robery or larceny of any goods or chattels of equal amount.

For the general law for the prevention of vice and immorality, and of unlawful gaming, and to restrain disorderly sports and dissipation, see the act of 22d of April, 1794, (chap. 1746.)

When a number of persons shall be charged and tried on one indictment, costs shall be taxed, as if the name of one person only was contained in the said indictment. Act of 7th of Dec'r, 1804, (chap. 2513.)

In all cases where two or more persons have committed an indictable offence, the names of all concerned, (if a prosecution shall be commenced,) shall be contained in one bill of indictment, for which not more costs shall be allowed, than if the name of one person only was contained therein. Act of 28th of March, 1805, (chap. 2571.)

These provisions being limited, were made perpetual by act of 29th of March, 1809 with this addition, "That any prosecutor, notwithstanding his being liable for the payment of, or exemption from costs, shall be a competent witness before the grand or *petit* jury."

No person who may hereafter be arraigned on an indictment, and who shall be bound by recognizance to abide the judgment of the court, shall be put within the prisoner's bar, to plead to the same, or be confined therein during his or her trial, but shall have an opportunity of a full and free communication with his or her counsel: act of 28th of March, 1808, (chap. 2984.)

In all criminal prosecutions, wherein peremptory challenges have not been heretofore permitted by law, the defendant or defendants shall be allowed to challenge four jurors peremptorily; act of 4th of April, 1809.

By the judiciary act of 13th of April, 1791, (chap. 1564.) The president and judges of the court of Common Pleas, shall have and execute all and singular the powers, jurisdictions and authorities of judges of the courts of Oyer and Terminer, and General Gaol Delivery, and justices of the courts of Quarter Sessions of the peace, agreeably to the laws and constitution of this commonwealth. (sect 3.)

Whenever any person shall be indicted in any court of Oyer and Terminer, Gaol Delivery, or Sessions of the peace, the party charged shall be at liberty to remove the said indictment, and all proceedings thereupon, or a transcript thereof, into the Supreme Court, by a writ of *Certiorari*, or by a writ of error, as the case may require. *Provided*, That no such writ of certiorari, or writ of error, shall issue, or be available to remove the said indictment, and proceedings thereupon, or a transcript thereof, or to stay execution of the judgment thereupon rendered, unless the same shall be specially allowed by the Supreme Court, or one of the Justices thereof, upon sufficient cause to it, or him shewn, or shall have been sued

1790. out with the consent of the Attorney-General; which special allowance or consent shall be in writing, and certified on the said writ, (sect. 7.) See the fifth section of the fifth article of the constitution.

This privilege is involved in difficulties, if not rendered useless, as to removals by *Certiorari*, from any of the county courts except *Philadelphia*, by the act abolishing the Circuit Courts, passed the 11th of March, 1809. But by the 9th section of that act, it is provided, that where any person or persons may be indicted, prosecuted or charged with any criminal offence, in the Mayor's Court of the city of *Philadelphia*, the defendant or defendants, traverser or traversers, in addition to his, her or their right or power to remove the same into the Supreme Court, as heretofore, may forthwith, but not at any after session, of right demand, that such indictment, prosecution or charge, with all the records and proceedings touching the same, be transferred or remitted to the court of Quarter Sessions of the peace of the county of *Philadelphia*, and the same shall be there proceeded in, tried and determined in the same manner, and to all intents and purposes, according to law, as if the same had been found, prosecuted, or instituted in the said court of Quarter Sessions.

For the limitation of suits, and indictments on penal acts of Assembly, where the penalty is pecuniary, see chap. 1134, sect. 6, ante. page 299.

General summary of crimes, and their punishments.

The enlightened *Beccaria* observes "That every member of society should know when he is criminal, and when innocent. If arbitrary magistrates be necessary in any government, it proceeds from some fault in the constitution. The uncertainty of crimes hath sacrificed more victims to secret tyranny, than have ever suffered by public and solemn cruelty."

The learning touching these subjects, says the learned *Foster*, is a matter of great and universal concernment. It merits, for reasons too obvious to be enlarged on, the attention of every man living. For no rank, no elevation in life, no conduct how circumspect soever, ought to tempt a reasonable man to conclude, that these enquiries do not, nor possibly can, concern him. A moment's cool reflection on the utter instability of human affairs, and the numberless unforeseen events which a day may bring forth, will be sufficient to guard any man, conscious of his own infirmities, against a delusion of this kind.

If, therefore, in this interesting summary, there should appear to be some repetition, the editor will be excused, because it is intended as "a beacon set up in a perilous place." To the learned of the profession, it can give no information. To the citizens of the commonwealth at large, who cannot have recourse to books and authorities, it will be important and useful.

A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. Offences against the laws, says lord *Hale*, whether the common law, or acts of parliament, are divided into two general ranks, or distributions in respect of the punishments that are by law appointed for them, or in respect of their nature or degree; and thus they may be divided into capital offences, or offences only criminal; or, more properly, into 1, felonies, 2, misdemeanors; because there is no capital offence but hath in it the crime of felony; and yet there be some felonies, that are not in their nature capital.

Simple felony is likewise of the same distribution, namely, such as were felonies at common law, and such as are by statute put under the degree, or under the punishment of felony.

And the same distribution is to be made touching misdemeanors. Such as are so by the common law, or, such as are specially made punishable by act of parliament. *H. H. P. C. Procm.*

Felony in the general acceptation of the English law, comprizes every species of crime, which occasioned at common law, the forfeiture of lands or goods. All treasons, therefore, strictly speaking, are felonies; though all felonies are not treason. And this, also we may add, that not only all offences, now capital, are in some degree or other felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance medley, or self defence; and *petit* larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures, so that upon the whole, the only adequate definition of felony seems to be that which is before laid down; viz. An offence which occasions a total forfeiture of either lands, or goods, or both, at the *common law*; and to which capital, or other punishment may be superadded, according to the degree of guilt. 4. *Black. Com.* 94-5.

For the numerous felonies punished

as directed by the English law, the reader is referred to the act of 31st of May, 1718, vol. 1, page 105.

The law of forfeiture has, however, undergone a great change in Pennsylvania.

By the 19th section of the ninth article of the constitution, "No attainder shall work corruption of blood, nor, *except during the life of the offender*, forfeiture of estate to the commonwealth; that the estates of such persons as shall destroy their own lives shall descend or vest as in case of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof."

By the ninth section of the act of 23d of September, 1791, "Wherever any person shall be convicted of any robbery or burglary, the forfeiture of his, her or their lands and chattels shall only extend to the residue thereof, after restitution made to the owner of the goods and chattels stolen, or the value thereof."

Forfeiture was annexed to the conviction of these crimes, by the second section of the act in the text.

But if it shall be considered, by the operation of the existing penal laws, where a particular judgment or punishment is prescribed for offences heretofore felony, and that forfeiture is no consequence of a conviction: yet it is presumed the grade of crime is not changed. They will still be felonies. The acts of the legislature still speak of felons convict, and of felonies. The legislature may declare crimes to be felony, which were not so at common law. The forms of indictment have undergone no change.

There is an offence known to the law, called *misprison* of felony, which is a concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either a principal, or accessory. It is punishable by discretionary fine and imprisonment. 4 Black. Com. 121.

Theft-bote, is where the party robbed, not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called compounding of felony. By the English statute of 25th of *George* 2d, c. 36, even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purpose, subjects the advertiser and the printer, to a forfeiture of £. 50 each. 4 Black. 133-4. But this statute does not extend to *Pennsylvania*.

The act of 31st of May, 1718, sect. 32, describes and punishes the offence, thus, "If any person or persons shall agree or compound, or take satisfaction, for any stealing, or goods stolen, such person shall forfeit twice the value of the sums agreed for or taken; but no person shall be debarred from taking his goods back, which are stolen, *provided he prosecute the felon*. Vol. 1, page 123. 1790.

OF HIGH TREASON.

The great body of the statute law of *England* which relate to treason, or misprison of treason was struck from the criminal code of *Pennsylvania*, by the act of 28th of January, 1777, vol. 1, page 430.

By another act passed 11th of February, 1777, vol. 1, page 435, all and every person and persons (except prisoners of war,) now inhabiting, residing, or sojourning within the limits of the state of *Pennsylvania*, or that shall voluntarily come into the same hereafter to inhabit, reside, or sojourn, do owe, and shall pay allegiance to the state of Pennsylvania.

If any person or persons, belonging to or residing within this state, and under the protection of its laws, shall take a commission or commissions from the king of Great Britain, or under his authority, or other the enemies of this state, or the United States of America; or who shall levy war against the state, or government thereof; or knowingly and willingly shall aid or assist any enemies at open war against this state, or the United States of America, by joining their armies, or by enlisting, or procuring or persuading others to enlist for that purpose, or by furnishing such other enemies with arms or ammunition, provision, or any other article or articles, for their aid or comfort, or by carrying on a traitorous correspondence with them; or shall form, or be anywise concerned in forming any combination, plot or conspiracy, for betraying this state, or the United States of America, into the hands or power of any foreign enemy; or shall give or send any intelligence to the enemies of this state for that purpose; every person so offending, and being thereof legally convicted, by the evidence of two sufficient witnesses, in any court of Oyer and Terminer, shall be adjudged guilty of high treason. The punishment was death, and forfeiture of estate to the commonwealth.

By an act passed the 3d of December, 1782, (ante. page 60,) it was enacted, that any persons who shall erect or form, or shall endeavour to erect or

1790. form, any new or independent government within the boundaries of this commonwealth; or who shall set up any notice, calling on the people to meet with that design; or who shall assemble for that purpose, in consequence of such notice; or who shall, at any such meeting, maliciously and advisedly recommend or desire the people to erect or form any new independent government in any part of this state; or shall read to them any new form of constitution, with a design to induce them to adopt the same, as a new and independent constitution; shall be adjudged guilty of high treason; and on conviction by the evidence of two witnesses shall suffer death, and forfeiture of estate.

This act has hitherto remained a dead letter. Indeed were we to judge from the preamble of the act, the very grounds and principles upon which it was passed, are extinguished. The price of the western (and then unlocated) lands, is chiefly in the coffers of the commonwealth. The motives for separation, if separation was ever thought of, are removed. The strong tie of interest binds now in opposition to the crime. Still it is the law. But the object itself is now impracticable. By the constitution of the United States, article 4, sect. 3, it is now established, that no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress. From the completion of the crime we are therefore protected by the strong arm of the union. Shall that union ever be dissolved, by internal weakness, or external violence, vain, indeed, for the moment, will be all penal laws!

PUNISHMENT OF HIGH TREASON IN PENNSYLVANIA.

By the 4th section of the act of 22d of April, 1794, every person duly convicted of the crime of High Treason, shall be sentenced to undergo a confinement in the gaol and penitentiary-house of *Philadelphia*, for a period not less than six, nor more than twelve years, and shall be kept therein at hard labour, or in solitude, and shall in all things be treated and dealt with as is prescribed by the act in the text, &c. For the second offence, imprisonment, &c. during life. (Sect. 13.)

By the constitution of the United States, art. 3, sect. 3, Treason against the *United States* shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of Treason, unless on the testimony of two witnesses to the same *overt* act, or on confession in open court.

The act of congress on the same subject, passed 30th of April, 1790, is in these words. If any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort, *within the United States, or elsewhere*, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same *overt* act of the Treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of Treason against the United States, and shall *suffer death*.

The term "*levying war*," is used in the constitution of the United States, in the same sense in which it was understood in *England*, and in this country, to have been used in the statute of 25th of Edward 3d, from which it was borrowed.

On this important subject, see the notes to chap. 729, vol. 1, page 436.

OF MISPRISON OF TREASON.

By the English law, misprison of Treason consists in the bare knowledge, or concealment of Treason, without any degree of assent thereto; for any assent makes the party a principal traitor. Stat. 1 and 2, *Phil.* and *Mary*. c. 10. This concealment becomes criminal, if the party apprized of the Treason does not, as soon as conveniently may be, reveal it to some judge of assize, or Justice of the peace. But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing before hand, that a conspiracy is intended against the king, or being in such company again, and hears more of it, but conceals it; this is an implied assent in the law, and makes the concealer guilty of actual High Treason. 4 *Black. Com.* 120.

But the English law respecting misprison of Treason, having been abolished in this state, the offence is thus extensively described by the act of 11th of February, 1777, vol. 1, page 436.

If any person or persons within this state, shall attempt to convey intelligence to the enemies of this state or the United States of America, or by publicly and deliberately speaking or writing against our public defence; or shall maliciously and advisedly endeavour to excite the people to resist the government of this commonwealth, or persuade them to return to a depen-

dence upon the crown of Great Britain; or shall maliciously and advisedly terrify or discourage the people from enlisting into the service of the commonwealth, or shall stir up, excite, or raise tumults, disorders or insurrections in the state, or dispose them to favour the enemy; or oppose and endeavour to prevent the measures carrying on in support of the freedom and independence of the United States; every such person, being thereof legally convicted, by the evidence of two or more credible witnesses, in any court of General Quarter Sessions, shall be adjudged guilty of misprision of Treason, and shall suffer imprisonment [during the present war,] and forfeit to the commonwealth one half of his or her lands and tenements, goods and chattels. (See the constitution.)

This section surely wants revision.

By the act of March 8th, 1780, vol. 1, page 500. In all cases where any charge is made upon oath or affirmation against any person or persons, of facts amounting to Treason, or misprision of Treason, it shall and may be lawful for the Attorney-General, with the leave of the court, to proceed against, and charge such person or persons with a misdemeanor, and give in evidence any act or acts of Treason, or misprision of Treason, by one witness on the trial, or other proper and legal testimony, and such person or persons, on conviction, shall suffer as in cases of misdemeanor.

See the case of the *Commonwealth* v. *Weidle*, vol. 1, page 439. (Note.)

By the act of Congress of 30th of April, 1790. If any person or persons, having knowledge of the commission of any treason, shall conceal, and not as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the president or governor of a particular state, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of Treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

This follows the English law above stated.

OF MURDER.

The highest degree of murder known to the English law, is petit (or petty) Treason. It is an offence described by the statute of 25th *Edward* 3, c. 2, and is committed when a servant killeth his master, when a wife killeth her husband, or when a secular or religious slayeth his prelate, to whom he oweth faith and obedience.

It will be obvious to the reader, that this latter was no part of the law of *Pennsylvania*. This crime, thus defined, was adopted by the sanguinary law of the 31st of May, 1718, vol. 1, page 111. Let us then understand what the law was, before we proceed to consider what the law is. Even at this day, when our penal code is tempered with as much humanity as is compatible with the safety of society, the learning on this subject may not be altogether useless. 1790.

A person guilty of *petit* Treason might be indicted of murder, for it is a species of murder; and such facts and circumstances as would convict another man of murder would convict, a wife or servant of *petit* Treason. *Fost.* 325. If done upon a sudden provocation, and without malice, it would be only manslaughter. 1 *Hale*, 378, 1 *Hawk.* (folio) 88.

If a wife conspire to kill her husband, or a servant to kill his master, which is done by a stranger in pursuance of that conspiracy, it is not *petit* Treason in the wife or servant, because it is only murder in the principal. The accessory can be guilty of no higher crime than his principal; 1 *Hale*, 378-9, *Finch* 17, 1 *Hawk*, (folio) 88, 3 *Inst.* 20, 139. But if a wife procure a *servant* to kill her husband, *both* are guilty of *petit* Treason. ib.

If a wife, or servant, intending to poison, or kill a stranger, by *mistake* kills the husband or master, as it would have been murder if it had taken effect upon the stranger, so it is *petit* Treason in the death of the husband, or master. 1 *Hale*, 379.

If a wife or servant conspire with a stranger to kill the husband, or master, and by agreement be in the same house, though not in the same room, in judgment of law they are present and are principals, and guilty of *petit* Treason; but the stranger is guilty of murder only. 1 *Hale*, 379, 1 *Hawk.* (folio) 88. See *Kel.* 53.

But it is said, that if a stranger procure a wife or servant to kill the husband, or master, he may be indicted as accessary to *petit* Treason, 1 *Hawk.* (folio) 88. But the judgment shall be only as in case of a felony; for being a stranger, he cannot be guilty of *petit* Treason as principal, *ib.* and 1 *Hale*, 382.

If a servant, being gone from his master, kills him upon a grudge conceived against him while he was inhis service, which he attempted while a servant, but was disappointed, it is *petit* treason, 1 *Hale*, 380. *Plowd.* 260. 3 *Inst.* 20. 1 *Hawk.* (folio,) 88.

If a child murder his father or mo-

1790. ther, although a more henous offence, it is not *petit* treason, for the judges are restrained from interpreting the statute *a minore ad majus*, (unless he live with his father as a servant, and receive wages, or meat and drink from him for his service, or be bound apprentice to him, and kills his father or mother, this is petit treason, and he shall be indicted by the name of servant,) 1 *Hale*, 380. 1 *Hawk.* (folio,) 87. 3 *Inst.* 20. *Dallison*, 14. For, by 1 *Mary*, stat. 1, c. 1, nothing is *petit* treason, but what is expressly, and without argument or inference, declared to be so by 25 *Edw. 3*, for such a statute ought not to be extended by equity.

By the act of 22d of April, 1794, the distinction between *petit* treason and murder is abolished; and, by sect. 3, every person liable to be prosecuted for *petit* treason, shall in future be indicted, proceeded against and punished, as is directed in other kinds of murder.

A compendious abridgment of the law on this subject as it stood previous to the act of 1794, will greatly assist the reader in marking the distinction and degrees of crimes which now necessarily arise upon that great act. The authorities are also copiously given for the convenience of the learned in the profession, who may at any time, suddenly, have occasion to pursue the subject more minutely.

The taking away the life of a man, whether it amount to felony, or not, is called by the general name of homicide; and by the English law, is branched out and distinguished into, 1. Murder, 2. Manslaughter, 3. Homicide *per infortunium*, (misfortune, or accident,) or chance-medley, 4. Self defence and justifiable homicide.

Murder has long since been settled to be, the voluntary killing a person of *malice prepense*, and that whether it was done secretly or publicly, (*Lord Coke* adds, *unlawfully*, 3 *Inst.* 47.)—So that the party die within a year and day. 2 *Lord Raym.* 1487, 1578.—2 *Stra.* 770. —1 *Hawk.* (folio,) 78-9.—1 *Hale*, 425.—3 *Inst.* 47-53.—4 *Black. Com.* 195-197.

Malice, express or implied, is an essential ingredient to make the killing a person murder.—Malice *express*, is a design formed of taking away another man's life, or of doing some mischief to another, in the execution of which design, death ensues.—Malice *implied*, is collected either from the manner of doing, or from the person slain, or the person killing.—Thus, *wilfully poisoning* implies malice;—or doing an act that apparently must do harm, with an intent to do harm, and death ensues:—or, if a man kills another without a sufficient provocation, 2 *Ld. Raym.* 1448-1488-9-1578.—2 *Stra.* 770-1.—3 *Inst* 47-52.—1 *Hawk.* 80. 4 *Black. Com* 199. 1 *Hale*, 451-455. And where the circumstances of deliberation and cruelty concur, the fact is undoubtedly murder, as flowing from a wicked heart, a mind grievously depraved, and acting from motives highly criminal, which is the genuine notion of malice in the English law, *Fost.* 138-256. And most, if not all, the cases of implied malice in the books, if carefully adverted to, will be found to turn upon this single point, that the fact hath been attended with such circumstances, as carry in them the plain indications of an heart regardless of social duty, and fatally bent on mischief, ib. 257-291-2. *Kel.* 126-7.

Murder may be committed without any stroke; the law has not confined the offence to any particular circumstances or manner of killing; for there are as many ways to commit murder, as there are to destroy a man, provided it be done with malice either express or implied, 2 *Ld. Raym.* 1578. 2 *Stra.* 884. 1 *Hale*, 431-2. *Palm.* 547-8. 1 *Hawk.* (folio,) 78. 4 *Black. Com.* 197. And see many instances, 3 *Inst.* 48.

Such was the case of him, who carried his sick father against his will, in a cold, frosty season, from one town to another, by reason whereof he died, 1 *Hawk.* 78. Such also was the case of the harlot, who being delivered of a child, left it in an orchard, covered only with leaves, in which condition it was struck by a kite, and died thereof, ib. 79. So, where a mother hid her infant in an hog-stye, and a sow came and devoured it. *Palm.* 548. 1 *Hale*, 431-2. 4 *Black. Com.* 197.

So, if a prisoner, by duress of the gaoler, comes to an untimely end, it is murder, 2 *Ld. Raym.* 1578, putting prisoner in a dungeon, or place too strait, is duress, 3 *Inst.* 52-91 1 *Hale*, 432, 466. And the instances of oppression which may fall within the rule of duress of imprisonment, are as various as a heart cruelly bent upon mischief can invent. A gaoler, knowing a prisoner, infected with the small pox, lodged in a certain room in a prison confined another prisoner, *against his will*, in the same room; the second prisoner, who had not had the distemper, *of which the gaoler had notice*, caught it, and died of it. This was rightly held to be murder, 2 *Stra.* 856. Another straitly confined his prisoner in a low, damp, unwholesome room without allowing him the common necessaries of chamber pot, &c. for keeping

things sweet and clean about him. The prisoner having been long confined in this manner, contracted an ill habit of body, which brought on distempers of which he died. This is murder. These were deliberate acts of cruelty, and enormous violations of the trust the law reposeth in its ministers of justice, *ib.* 883-4, 2 *Ld. Raym.* 1574, *Fost.* 321-2. Therefore, where one dies in gaol, the coroner ought to be sent for, to enquire the manner of his death, 3 *Inst.* 91, 1 *Hale*, 432, 466.

Where one by duress of imprisonment, compels a man to accuse an innocent person, who, on his evidence, is condemned and executed, this is murder, 3 *Inst.* 91. 1 *Hawk.* (folio,) 79. But the learned *Foster* says, it is a doubt at this day, whether the taking away the life of an innocent man, by perjury, in a course of legal proceeding, amounts to murder. By the ancient writers it was so held. But the practice of many ages backwards, doth by no means countenance their opinion (*M'Daniel* and *Berry's* case,) *Fost.* 131-2. But, by *Blackstone*, it is equally so in *foro conscientiæ*, as killing with a sword, and falls within the guilt of deliberate murder; and deserves an equal punishment, which the ancient law in fact inflicted. And nothing should be concluded from waiving the prosecution in the case of *M'Daniel* and *Berry*. The attorney general declined arguing the point of law from prudential reasons, not from an apprehension it was not maintainable. However, the modern law has not yet punished it as murder. 4 *Black. Com.* 139-196-7.

An infant under the age of fourteen years, in presumption of law, is supposed without discretion, and therefore, *prima facie*, he cannot commit murder, nor manslaughter, but ought to be found not guilty, (under *seven*, never,) 1 *Hale*, 26-7, 434. *Plowd.* 19. But if upon circumstances it can appear that he hath discretion, and knew what the action was, as by excuses, endeavouring to conceal, &c. it will be murder; but the evidence ought to be strong and pregnant, to convict of that age, 1 *Hale*, ib. An infant of *nine* years, hid the *blood*, and the body, and convicted, 1 *Hale*, 27. A boy aged *ten*, convicted of murder, *Fost.* 70.

Lord Hale hesitates, whether, if one infected with the plague, goes abroad with intent to kill another, it be murder, 1 *Hale*, 432. But if a man, by working on the fancy of another, or possibly by harsh and unkind usage, puts another into such passion of grief and fear, that he either dies suddenly, or contracts some disease whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of GOD; yet, in *foro humano*, it cannot come under the judgment of felony, ib. 429.

If a person hurt by another, die thereof within a year and a day, it is no excuse for the other that he might have recovered, if he had not neglected to take care of himself. Though the wound be not mortal in itself, but either for want of helpful applications, or neglect thereof, it turns to a *gangrene* or *fever*, which is the *immediate* cause of his death, it is murder or manslaughter as the case may be; for the stroke which caused the *gangrene*, &c. was the *mediate* cause of his death, being *causa causati*. But if the wound, or hurt, be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines, the party dies, if it can clearly appear, that this medicine, and not the wound, was the cause of his death, it seems not to be homicide; but then that must appear clearly and certainly to be so.—So, if a man be sick of some such disease, which possibly by the course of nature, would end his life in half a year, and another gives him a wound or hurt, which hastens his end, by irritating and provoking the disease to operate more violently or speedily, this is murder, 1 *Hale*, 428. See Kel. 26.—1 Keb. 17.—1 Hawk. (folio,) 79.

If a physician gives a person a potion, without any intent of doing him bodily harm, but with intent to cure or prevent the disease, and, contrary to his expectation, it kills the patient, it is not homicide, 1 *Hale*, 429.—4 *Black. Com.* 197.—1 *Hawk.* (folio,) 87.

If a woman be with child, and any one gives her a potion to destroy the child within her, and she takes it, and it works so strongly, that it kills her, it is murder, 1 *Hale*, 429. But if a woman with child take, or another gives her a potion, to make an abortion; or, if a man strikes her, whereby the child within her is killed, though anciently held to be murder, is now not murder, or manslaughter, by the law of *England*; because the infant is not *in rerum natura*, ib. 433.—4 *Black. Com.* 198.—3 *Inst.* 50.—Unless the child be born alive, and die by reason of the potion, or bruises it received in the womb. In which case it seems clearly to be murder, notwithstanding some opinions to the contrary, 1 *Hawk.* (folio,) 80.—This is the *better* opinion, 4 *Black. Com.* 198.—3 *Inst.* 50. *Lord Hale* is of a contrary opinion.—1 *Hale*, 433.—But if a

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man procures a woman with child to destroy her infant when born, and the child is born, and the woman in pursuance of that procurement, kills the infant, this is murder in the mother; and the procurer is accessary, 1 *Hale*, 433. 3 *Inst.* 51.—1 *Hawk.* (folio,) 80.—7 Rep. 9.—*Dyer*, 186, a-b.

If a man hath a beast that is used to do mischief, and he knowing it, suffers it to go abroad, and it kills a man, it is manslaughter in the owner. If he had purposely turned it loose, though barely to frighten people and make sport, it is as much murder, as if he had incited a bear, or dog to worry them, 1 *Hale*, 431. 4 *Black. Com.* 197. 1 *Hawk.* (folio,) 79.—So, if a person do a wanton, idle action, which cannot but be attended with manifest danger; or an action unlawful in itself, *deliberately*, and with an intention of *mischief*, either to particulars, or indiscriminately, fall where it may, and death ensue, though against the original intention of the party, it will be murder.—Thus, riding a horse, known to be used to kick, among a multitude of people, though only to divert himself, or frighten *them*, and one is killed, it is murder, 1 *Hawk.* (folio,) 86-7.—2 *Ld. Raym.* 1488. If one throw a stone over a wall, among a multitude, intending only to frighten them, or hurt them lightly, and a man is killed, it is murder upon the same principle. The act was *unlawful*, 3 *Inst.* 57. See 1 *Ld. Raym.* 143. But if such mischievous intention does not appear, but the act was done heedlessly and incautiously, it is manslaughter; not accidental death, *for the act was unlawful.* See *Fost.* 261.

And, in judgment of law, a man may be said to kill another, who in truth was killed by a third person. As, if a man incites a madman to kill himself, or another; or where A. by force, takes the arm of B. and the weapon in his hand, and stabs C. therewith; it is murder in A. but B. is not guilty. But if a man be *non compos*, or if a lunatic, in the time of his lunacy, kills a man, he may plead not guilty, and be acquitted, 1 *Hale*, 434. *Plowd.* 19. 1 *Hawk.* (folio,) 79. But if one that is *drunk*, kills another, it is no excuse, but it is murder, *Plowd.* 19. 4 *Black. Com.* 25-6.

In some instances, the books say, *malice egreditur personam.* Thus it is murder if A. with malice aims at B. but kills C. and where an injury intended against A. proceeded from a wicked, murderous, or mischievous motive, the party is answerable for all the consequences of the action, if death ensueth from it, though it had not its effect upon the person whom he intended to destroy. According to the circumstances, it will be murder or manslaughter, *Fost.* 261, 2. See 1. *Halle.* 438. *Plowd.* 101. 4, *Black. Com.* 201. If a man lays poison, with intent to kill a certain person, which is accidentally taken by another, who dies thereof, it is murder; but if laid to kill rats, and a man casually takes it, it is no felony, 1 *Hale*, 431. 9 Rep. 81. 1 *Hawk.* (folio,) 79, or if a man takes poison himself by the persuasion of another, though in the absence of the persuader, it is murder, and the persuader is principal in it, 4 Rep. 44 b. or, if A. gives poison to B. intending to poison him, and B. ignorant of it, gives it to C. a child, or other near relation of A. against whom he never meant harm, and C. takes it and dies: this is murder in A. and a poisoning by him, and C. is not guilty. 1, *Hale*, 431-5-6. *Plowd.* 474.

A married woman commits murder, &c. the *coercion* of her husband is no excuse. 1 *Hale*, 434. To kill an alien enemy within the kingdom, unless in the heat of war, and actual exercise thereof; or to kill one attainted of felony, otherwise than in execution of the sentence, by a lawful officer; is murder, or manslaughter, as the case may be: or, if a man be condemned to be hanged, and the Sheriff beheads him, it is murder. 1 *Hale*, 433-454. *Fost.* 267. Or the Court of Common Pleas execute a man for treason or felony; or, a Court martial, in time of peace, put a man to death by martial law, the Judges and officers are guilty of murder. 1 *Hawk.* (folio,) 70. 86.—But where the persons act by virtue of a commission, which, if it were strictly regular, would undoubtedly give them full authority, but happens to be defective only in some point of form, it seems they are no ways criminal. 1 *Hawk.* (folio,) 86.

When one voluntarily kills another, without any provocation, it is murder, for the law presumes malice, where there is not a sufficient provocation. If A. comes to B. and demands a debt of him, or comes to serve him with a *Subpœna*, and B. thereupon kills A. it is murder, for here is no provocation. So W. came along by the shop of B. and distorted his mouth, and smiled at B. who pursued and killed him; held to be murder, for it was no such provocation as would abate the presumption of malice in the party killing, (*Watts* and *Brains'* case.) 1 *Hale*, 455, See 3 *Inst.* 52,—9 Rep. 67b. 2 Stra. 771. Kel. 127. Cro. El. 778-9. For in all cases there must be a proportion in the provocation to the act of violence done after; as if a man break my close, and I

with a stake beat his brains out, it is murder, because the provocation bore no proportion to the death of the man, and there should be an *open act* of *violence* to make it manslaughter, Kel. 132. 2 *Ld. Raym.* 1298. So, where a Park keeper found a boy stealing wood, and tied him to a horse's tail and beat him, whereupon the horse run away and killed him; it is murder, for the correction was excessive, and an act of deliberate cruelty, 1 *Hale*, 454.—*Kel.* 127.. *Cro. Car.* 131.—1 *Jones*, 198.—*Palm.* 545.—*Fost.* 292. If there be a chiding between husband and wife, and the husband strikes his wife thereupon, with a pestle, that she dies presently, it is murder; the chiding will not be a provocation to extenuate it to manslaughter. 1 *Hale*, 457.

A provocation *sought* on the part of the slayer, aggravates the offence. Thus, A. and B. warmed with liquor, first *played*, then fought in earnest, but were parted. A. went away angry, and threatened to fetch something to stick B. he changed his clothes, returned with a sword concealed, and a cudgel in his hand;—drew on a discourse of the quarrel, and offered to cudgel with B. B. went up to him, and A. *thereupon* dropped his cudgel, which B. took up, and gave A. two blows on the shoulder. A. then drew the concealed sword, and said "stand off or I'll stab you," and thrust at him, but missed him. B. drew back, but A. shortened his sword, and leaped upon him, and stabbed him to his death. It is murder. *Fost.* 132-4 5. So A. and B. having some difference, A. bid (or dared) B. to take a pin out of his sleeve, intending thereby to take an occasion to strike or wound B. which B. did accordingly, and A. struck B. whereof he died. It is murder, because it was no provocation, but a deliberate artifice to take occasion to kill B. 1 *Hale*, 457. Or, if A. on a quarrel with B. tell him, he will not strike him, but that he will give him (B.) a pot of ale to strike him, (A.) which B. accordingly does, and then A. kills B. he is guilty of murder, for he shall not elude the Justice of the law by such a pretence to cover his malice, 5 *Bac.* 122, (5th Edo.)

In all possible cases, deliberate homicide upon a principle of revenge, is murder, how great soever, the provocation may be. Thus if the husband, deliberately, upon revenge, kills an adulterer, after the fact, and sufficient cooling time, it is murder. Though it had been only manslaughter, if, finding him in the fact, he had killed him in the first transport of passion. Fost. 296. 1 *Hale*, 486. 1 *Vent.* 158-9. *Kel.* 137. *T. Raym.* 212. 2 *Keb.* 829. A. and B. quarrelled at a tavern, and offered to fight, but were prevented. They continued together for an hour, in company. B. offered to make it up, but A. refused, and said, "no, damn you, I'll have your blood." The reckoning was paid by them jointly, and all the company went out. But as B. was going with them, A. who had staid behind, called him back, and said, "young man, come back, I have something to say to you." B. returned, the door was flung to, and the rest of the company kept out. They fought, and B. was killed. This was held to be murder by the twelve Judges, though it was found there was no reconciliation, and though A. in the fight had received three wounds from B. and B. owned he had received his wounds fairly. (*Oneby's* case,) 2 *Ld. Raym.* 1485. *S. C.* 2 *Stra.* 776. M. upon words of anger between him and *Cope*, threw a bottle with great force at the head of C. and immediately drew his sword. C. returned another bottle with equal violence at M. and wounded him in the head. Thereupon M. stabbed C. This is murder, for M. in throwing the bottle, shewed an intention to do some great mischief; and his drawing immediately, shewed he intended to follow his blow; and it was lawful for C. when assaulted to return the bottle. *Kel.* 119. *Fost.* 274. 295-6, and affirmed to be law, by all the Judges, in *Oneby's* case above cited. A. meets B. in the street, and immediately runs him through with a sword, or knocks out his brains with a hammer, or bottle; it is murder, though angry words had passed between them, for words are no provocation. And it settled, that if a man assaults another upon malice prepense, and after be driven by him to the wall, and kill him there in his own defence, it is murder in respect to his first intent, 2 *Ld. Raym.* 1488. *Kel.* 58, 60, 129. *See Sav.* 67. 1 *Hawk.* (folio.) 81-2. 1790.

Upon the same principle, deliberate duelling, if death ensue, is, in the eye of the law, murder, for duels are generally founded in deep revenge. The punctilio called, falsely, *honour*, will not excuse, 1 *Roll. Rep.* 360. But if upon a sudden quarrel the parties fight upon the spot, or if they presently fetch their weapons, and go into the field and fight, and one of them falleth, it is only manslaughter, because it may be presumed the blood never cooled. It will be otherwise if they appoint to fight the next day, or even upon the same day, at such an interval, as that the passion might have subsided; or if from any

1790. circumstances attending the case, it may be reasonably concluded that their judgment had actually controuled the first transports of passion before they engaged. *Fost.* 297. 1 *Hale*, 452-3. 1 *Hawk.* (folio) 81. *Kel.* 27. 2 *Stra.* 773. If there be a duel upon malice between A. and B. and C. be second to A. who kills B. it is murder in C. for he is present and aiding. 1 *Hawk.* (folio) 82. 1 *Hale*, 443, 452-3. So, if there be a duel upon malice and C. attempts to part them, and is killed, it is murder, not in both, but only in him who strikes. See 1 *Hale*, 441-2. 12 *Mod.* 631.

If A. with malice assaults the master, and in the quarrel kills the servant, it is murder. 1 *Hale*, 438. *Plowd.* 101.

If A. intend to beat B. upon preconceived malice or anger, and death ensueth, it will not be an excuse that he did not intend all the mischief that followed; for what he did, was *malum in se*, and he must be answerable for the consequences of it. It is murder or manslaughter, as the case may be. *Fost.* 259.

If a father, master, or schoolmaster, designeth moderate correction to his servant, child, &c. which the law alloweth him to use, and the servant &c. by some misfortune dieth thereof, this is not murder. But it seems, if the master designs an immoderate, or unreasonable correction, either in respect of the measure, manner, or instrument thereof, and the servant dies, it is murder if done with deliberation and design; or manslaughter, if done hastily, passionately, and without deliberation, with an instrument not likely to kill. 1 *Hale*, 454, 474. *Kel.* 64. 4 *Black. Com.* 199. *Fost.* 262. See 1 *Ld. Raym.* 144. *Grey*, a blacksmith, upon words of heat, struck his apprentice suddenly on the head with a bar of iron. It is murder. A bar of iron is no instrument of correction. *Kel.* 64. See 1 *Ld. Raym.* 144. *Turner's* footman not having cleaned his mistress's clogs, *Turner* struck him with the clog, of which stroke he died, held to be manslaughter only. The passion was sudden, and the instrument not likely to kill, cited in 1 *Ld. Raym.* 143. *Keate* sent his servant to demand the key of his garden of *Wells* his gardener, who refused to deliver it; whereupon *K.* took down his sword, and went to the kitchen, and expostulated with *W.* who told him he might take the key if he would. *K.* then drew his sword, and struck *W.* upon his head, *W.* thereupon took the snead of a scythe, and pushed *K.* with it several times, which, said *Lord Holt*, was lawful for him to do. *K.* retired to the door, and killed *W.* with his sword, this *seems* to be murder; a sword is not a proper instrument of correction. 1 *Ld. Raym.* 144. S. C. 5 Mod. 287.

It is settled, that words, how grating and offensive soever they may be, are not a sufficient provocation in the eye of the law, (though blows are) to lessen the crime into manslaughter. 5 *Burr.* 2796. *Ld. Raym.* 144, 1298, 1488. *Fost.* 290. 316. *Kel.* 55, 65, 130. 1 *Hawk.* (folio) 82. *Cro. El.* 779. 1 *Sid.* 277. 1 *Lev.* 180. 1 *Hale*, 456. See *Hob.* 120-1. 316. But, 1 *Jones* 482, seems contrary, but the case is doubted by *Lord Holt*, in *Kel.* 131-2. But if a person so provoked, had beaten the other only in such a manner, that it might plainly appear, he meant not to kill, but only chastise him, or restrained himself till the other had put himself upon his guard, and fought and killed him, it would be manslaughter only. 1 *Hawk.* (folio) 82, recognized as law by *Foster*, 290-1. *Kel.* 130-1. 1 *Hale*, 456.

When a man does an unlawful act, and death ensues, it is murder; as if a man rob an orchard, and being rebuked by the owner, kills him. So, if a man commits a riot, and in doing it, another is killed. Divers come to commit a riotous, unlawful act, in pursuit of which, one of them commits murder or manslaughter, all are guilty. 1 *Hale*, 442, 463. Divers come to steal deer in a park, the park-keeper shot at them; they fled, he pursued, they returned and killed the park-keeper, held to be murder in all, *Palm.* 35. The law presumes they came with intent to oppose all that should hinder their design, *ib.* See 1 *Hale*, 439, 443, 465. *Sav.* 67. So, if A. begins a riot, which continues for an hour, and then B. is killed by another, it will be murder in A. 1 *Salk.* 334-5, see 12 *Mod.* 630-1. So, if A. assaults B. to rob him, though without any precedent intention of killing him; yet if in the attempt, whether B. resists or not, A. kills him, it is murder, 1 *Hale*, 465. 3 *Inst.* 52. If A. commands B. to beat C. and he beats him so that he dies thereof, it is murder in B. and A. if present, is principal, if absent, accessary. 1 *Hale*, 435, 440. But to render it murder, the killing must be in pursuit of that unlawful act they were all engaged in. Thus, smugglers assemble to run wool; officers oppose; a smuggler fires a gun and kills another smuggler. If it does not appear that it was levelled at the officers, the other smugglers present are not guilty. For it does not appear it was in prosecution of the purpose for which they assembled. *Fost.* 352. 12 *Mod.* 627. So, divers committing an unlawful act, one

of them meets with D. with whom he had a former quarrel, and kills him, the rest are not guilty, for it was not within the compass of their original intention. 1 *Hale*, 443-4. Three soldiers go to rob an orchard, two get up the tree, the third stands at the gate with a drawn sword; the owner's son comes and seizes him; he stabs him. Those in the tree are not guilty, otherwise, if they had come with a general resolution against all opposers, which may be collected from their number, arms, or behaviour, at, or before. *Fost.* 353.

If persons assemble for a lawful act, and prosecute it lawfully, and one is killed, none are guilty but those who actually aided or abetted in the facts. *Fost.* 354.

If an affray be made in the night, and the constable, or any other who comes to his aid, be killed, it is murder. For when the constable commands the peace, although they do not know him to be the constable, yet at their peril they ought to obey him. If one kills a watchman, constable, &c. in the execution of his office, or a sheriff, or any of his officers, in the lawful execution of civil process, he is guilty of murder. The law implies malice, and the indictment need not be special. 9. Rep. 66-68. b. a. 4 Rep. 40. 41. a 1 Hawk. (folio) 86. *Fost.* 137. (where it is said this rule is founded on the policy of the law, and upon every principle of government) ib. 270. 308--9 —318. 321. 2 *Ld. Raym.* 1299. *Sav.* 67. 3. Inst. 52. 1 *Hale.* 457. 460---2---3. Kel. 66.—Though the process be apparently erroneous, provided it be not defective in the frame of it, and issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case; and though the officer did not tell him for what cause he arrested him, or did not show his warrant, which a known officer is not bound to do, nor a special one without demand; or though the arrest was in the night, yet if the minister of justice in the execution of it be killed, it is murder. 9 *Rep.* 68. a. *Fost.* 311. —1 *Hawk.* (folio) 86.—As in case of a warrant from a justice of the peace, in a matter wherein he hath jurisdiction, though the warrant was obtained by gross imposition on the magistrate, and false information touching the matters suggested in it. (*Curtis's* case) *Fost.* 135-312.—1. *Hale.* 460.—But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed; or if the name of such person, or of the officer, be inserted without authority, and after the issuing the process, this will amount to no more than manslaughter in the person whose liberty is invaded. *Fost.* 312. 1 *Hale*, 457---8. 1 *Hawk.* (folio) 86. *Dyer*, 88. (in margin) 1 *Jones*, 346. *Cro. Car.* 371--2. If the officer exceed the limits of his authority (*Fost.* 312.) or execute his office, or a legal warrant, in an irregular and unlawful manner, as by breaking open a door or window to arrest a man, which is unlawful, or if he arrest a man upon an ill warrant, or if he takes up a person in the night without any just ground of suspicion, whether in his jurisdiction or not, and the officer is killed, it is but manslaughter. *Cro. Car.* 537---8. 2 *Ld. Raym.* 1301--2. *March* 4. 1 *Hawk.* 86. If a private man be killed in endeavouring to part those whom he sees fighting, if he gives notice of his intention, it is murder in the slayer. 1 *Hawk.* 84. see *Kel.* 66. 1 *Hale*, 461. And it has been held (*Gooley's* case) that if a person is unlawfully deprived of his liberty, a *stranger* may attempt his rescue, and if he kills, it is manslaughter only; for that when the liberty of the subject is invaded, it is a provocation to all the subjects of *England*. 2. *Ld. Raym.* 1296. But this case is considered with great learning by judge *Foster*, and may be reasonably doubted. He says that doctrine has a fatal tendency to loosen the reigns of government, by giving an undue countenance to a spirit of popular opposition, upon principles of *false patriotism*. *Fost.* 312. 317. see *Hopkin Hugget's* case. *Kel.* 59. 62. 137. 1 *Hawk.* 86. § 54. In the case of private persons endeavouring to bring felons to justice, they must take care that a felony hath been actually committed; for if none hath been committed, or supposing one has been committed, but not by the person arrested, or pursued upon suspicion; if the person endeavouring to arrest, kills, he will not be excused from the guilt of manslaughter; nor will it amount to murder, if the pursuer himself be killed. But if *A.* a peace officer, has a warrant to apprehend *B.* by name, for felony, or *B.* is indicted for felony, or the hue and cry raised against him by *name*, and he, though innocent, flies or resists, and *A.* or any assisting him, is killed by *B.* or any of his accomplices, joining in that outrage, it is murder. And all this doctrine is established upon an undoubted principle of a *justice* due to the community, founded in the interest every individual hath in the public tranquillity, which once destroyed, all private rights will sink and be absorbed in the general wreck. *Fost.* 317---18. 1 *Hale* 490.

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In proceeding to give the general outline of manslaughter, it is necessary to notice the statute, commonly called the "*statute of stabbing*."

By the statute of 1 *James*, 1. c. 8. any

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who stabs a person, not having a weapon drawn, nor first stricken, so that he die in six months, though malice aforethought cannot be proved, is ousted of clergy.

This statute is said to have been made on account of the frequent quarrels and stabbings, with short daggers, between the Scotch and the English, at the accession of *James* the first, and being therefore of a temporary nature, ought to have expired with the mischief which it meant to remedy. 4 *Black. Com.* 193.

This statute was adopted as the law of *Pennsylvania*, by the 9th section of the act of 1718. vol. 1. pa. 114.

It is generally held that this statute is but declaratory of the common law. *Kel.* 55. 1 *Hawk.* (folio) 77. *Fost.* 298. And if the offence be barely manslaughter at common law, the prisoner is rarely convicted on the statute. *ib.* 299. And though the indictment be upon the statute, the jury may find manslaughter generally, nor need it conclude "against the form of the statute, though it is well enough if so laid. 1 *Hawk.* 77. 1 *Hale*, 468. The statute does not extend to persons present, who do not stab. Therefore if it cannot be proved by whom the stroke was given, none can be found guilty within the statute. *ib.* & 2 *Hale*, 344. *Style*, 86. *Salk.* 542. It was once held by eleven judges, that not having *first* struck, means not having given the *first blow* in the affray. 1 *Jones*, 340." But, in the opinion of *Holt*, against the natural order of the words, and the obvious meaning of the act. *Fost.* 301. But it seems settled, that wherever a person, who happens to kill another, was struck by him in the quarrel, before he gave the mortal wound, he is out of the statute, though he himself gave the first blow. 1 *Hawk.* 77. A cudgel, or other thing proper for defence or annoyance in the hand of the party, is a weapon drawn. *Fost.* 300. So, throwing a pot, or other dangerous weapon at the party, is within the *equity* of the words "having a weapon drawn." 1 *Hawk.* 77. 3 *Lev.* 256. So, throwing a candlestick. *Style*, 468. A person in a passion throwing a hammer at another, is not within the statute. 1 *Hale*, 469. *Fost.* 300. 1 *Hawk.* 77. 1 *Jones*, 433. *Style*, 469. *Kel.* 131-2. But firing a pistol, sending an arrow from a bow, a stone from a sling, or thrusting with a staff, or blunt weapon, is a stabbing within the statute. *Fost.* 300. So, stabbing with a tobacco pipe. *Style*, 468. But this statute does not extend to a husband stabbing an adulterer found in the fact, nor to a man assaulted by thieves in his house, *ib.* 469: nor to one, who on surprise suddenly stabbed an officer, who pushed into his chamber early in the morning, abruptly and violently to arrest him, not telling his business, nor using words of arrest. 1 *Hale*, 470. Nor, if one concealed in a closet, but no thief, is stabbed on a sudden outcry of thieves, in the night time, *ib.* 42. 474. *Cro. Car.* 538. 1 *Jones*, 429. *Fost.* 298-9.

But by the act of the 22d of April, 1794, the punishment of death is taken away from this offence, and it is now no more than voluntary manslaughter.

Manslaughter is a killing which happens, either on a sudden quarrel, or in the commission of an unlawful act, and without any deliberate intention of doing any mischief at all. And being done without malice prepense, there can be no accessaries before the fact. 1 *Hawk.* (folio) 76. See 3. *Inst.* 55. It is to human frailty alone, that the law indulgeth in every case of felonious homicide. Therefore it ought to be remembered, that in all cases of homicide upon slight provocation, if it can be collected from the circumstances, that the party intended to kill, or to do some great bodily harm, it will be murder. The mischief is irreparable, and the outrage is considered as flowing rather from brutal rage, or diabolical malignity, than from human frailty. Thus, *A.* finding a trespasser upon his land, in the first transport of passion, beats, and happens to kill him, it is but manslaughter; but if he had knocked out his brains with a billet, or hedge stake, or beat him outrageously, beyond the bounds of a sudden resentment, it would have been murder. *Fost.* 291. If *A.* in the prosecution of an act, *malum in se*, though without intention of bodily harm to any person, happens to kill, it will be murder or manslaughter, as the case may be. If done in prosecution of a felonious intention, it will be murder; if the intent was only to commit a trespass, manslaughter only. Thus, *A.* shooteth at the poultry of *B.* and by accident killeth a man; if his intention was to steal the poultry, which may be collected from circumstances, it will be murder; but if done wantonly, without that intent, barely manslaughter. *Fost.* 258-9. 3 *Inst.* 56. *Kel.* 117. A man at the diversion of cock throwing at *Shrove-tide*, missed his aim and killed a child. It was held to be manslaughter. It is a barbarous custom, productive of great disorder, and dangerous to the bystanders. *Fost.* 261. If on words arising in the street, a woman strikes a man in the street with an iron patten, and draws much blood, and he gives her a blow on the breast with the pommel of his sword; she flies, he pursues her, and stabs her in the back, it is but manslaughter. (*Stedman's* case.) The smart

of the man's wound, and the effusion of the blood, might possibly keep his indignation boiling to the moment of the fact. *Foster.* 292. Two bailiffs, who killed a prisoner, (*Mr. Luttrel*) in his own house, by giving him nine wounds with a sword, and shooting him with a pistol when he was fallen on the ground, were found guilty of manslaughter only, because it appeared he had given one of them a blow with his cane; that his sword was drawn and broken, (*how*, did not appear) that he had brought the pistols in the room, and declared he would not be forced out of his lodgings. Both the officers were slightly wounded. (*Reason* and *Tranter's* case.) 1 *Stra.* 499. *Foster.* 292--3. If the captain of a ship has a press warrant, directing that no person but a *commission* officer is to execute it, and his name to be inserted on the back of it; and he accordingly appoints his lieutenant, who *stays in the ship*, and the captain sends his boat with some of the crew, to press; and some leagues off they board a ship, and attempt to press, and one of them is killed, it is only manslaughter, for they did not act according to the warrant. *Foster.* 154. Two boys fought, and he who was beat, ran home all bloody, and complained to his father, who run three quarters of a mile, and beat the other boy, of which beating he died. It was ruled to be manslaughter, because done in a sudden heat and passion, and with a small cudgel or rod, not likely to kill. (*Rowley's* case.) 12 *Rep.* 87. *Cro. Jac.* 296. 1 *Hale.* 453. 2 *Ld. Raym.* 1498. *Foster.* 294--5. 1 *Hawk.* (folio) 83. Divers playing at *bowls*, two of them fell out and quarrelled; the third who had not any quarrel, in revenge of his friend, struck the other with a *bowl*, of which stroke he died. Being done upon a sudden motion, in revenge of his friend, ruled to be only manslaughter. 12 *Rep.* 87. If two fight, and one of them breaks his sword, and a stranger gives him another, with which he kills his adversary. It is manslaughter in both. *Com. Dig. A.* seeing two fight together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other; it is but manslaughter. 1 *Hawk.* (folio) 82. *A.* useth provoking language or behaviour towards *B.*: *B.* striketh him, upon which a combat ensues, in which *A.* is killed: it is but manslaughter; for it was a sudden affray, and they fought upon equal terms. And upon such combats, upon sudden quarrels, it matters not who gave the first blow: for according to the proverb, the *second blow* makes the affray. 1 *Hale.* 456. *Foster.* 277. 295. *A.* came home drunk, his father ordered him to bed; he refused; a scuffle ensued; *B.* another son, got out of bed, threw *A.* on the ground and beat him; *A.* in the strife, wounded *B.* with a penknife, and he died. Ruled to be but manslaughter. (*Naylor's* case.) *Foster.* 278. If two meet together, and striving for the wall, the one kills the other, this is manslaughter and felony. And so it is, if they had upon that sudden occasion, gone into the field and fought, and the one had killed the other: this had been but a manslaughter and no murder, because all that followed was but a continuance of the first sudden occasion; and the heat of blood, kindled by ire was never cooled till the blow was given, and so in similar cases. 3 *Inst.* 55. 1 *Hale.* 455--6. So it would be, if *A.* riding on the road, *B.* had whipped the horse of *A.* out of the track, and then *A.* had alighted and killed *B. ib.* A gentleman coming to town in a chaise, before he alighted discharged his pistols, and by accident killed a woman. It was ruled to be manslaughter. 1 *Stra.* 481. If one draws upon another in a sudden quarrel, but makes no pass at him till his sword is drawn, and then fights with him and kills him, it is but manslaughter; for he gave his adversary time to defend himself, and be upon his guard. *Foster.* 295. *Kel.* 130. 2 *Ld. Raym.* 1493. Neither can he be thought guilty of a greater crime, who finding a man in bed with his wife, or being actually struck by him, or pulled by the nose, or fillipped on the forehead, immediately kills him. So, defending his person from an unlawful arrest, or his house against persons attempting to enter it forceably, &c. 1. *Hawk.* (folio) 81--2--3.

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From this outline, the remark of *Mr. Bradford*, in his Inquiry, pa. 41. will appear to be correct. Manslaughter, he says, as explained in our law books, is exceedingly comprehensive in its nature. While its deepest shades partake of the hue of murder, its lightest are faintly tinged with the feeble colours of carelessness and inadvertence.

Homicide occasioned by accident, improperly called *chance medley*, is, where a man doing a lawful act, without intention of bodily harm to any person, but not using proper caution, unfortunately happens to kill. *Foster.* 258. 3 *Inst.* 56. 1 *Hawk.* (folio) 73. 1 *Hale.* 472.

Death ensuing from accidents happening at sports and recreations, such recreations being innocent and allowable, fall within the rule of excusable homicide. *Foster.* 259. 1 *Hawk.* (folio) 74. But it is not sufficient that the act upon which death ensueth, be lawful or innocent; it must be done in a proper man-

1790. ner, and with due caution to prevent mischief. *Fost.* 262. If the act from which death ensues be not *malum in se*, but only *malum prohibitum*, as if an unqualified person shoot at game, and by accident kills a man, this will not enhance the accident beyond its intrinsic moment. *ib.* 259. 1 *Hale.* 475--6. If a person be cutting wood, and the head of the axe flies off and kills a man, it is homicide *per infortunium* only. *ib.* 472. If workmen throw stones, timber, rubbish, &c. from an house in the ordinary course of their business, and kill, if they gave timely warning, it will be but accidental death; if not, it is manslaughter at least. *ib.* 472--5. *Fost.* 262. But if done in a populous town or street, it will be manslaughter notwithstanding such warning, unless it be done very early in the morning, when few people are stirring. *Fost.* 263. 1 *Hale*, 475. *Kel.* 40. See 1 *Hawk.* (folio) 74. If a man drawing a cart, &c. kills, if he had notice of the mischief likely to ensue, and yet drove on, it will be murder; if done through heedlessness and want of due circumspection, it will be manslaughter; if he took all due care, it is but accidental death. *Fost.* 263. 1 *Hale*, 476. If a man whip a horse on which another is riding, whereupon he springs out, and runs over a child and kills him, the rider is guilty of homicide *per infortunium*, the other of manslaughter. *ib.* A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer; he carried it home and showed it to his wife, and she standing before him, he pulled up the cock and touched the trigger, the pistol went off and killed the woman. This was ruled to be manslaughter. *Kel.* 41. But, in the opinion of *Foster*, a hard and illegal judgment. *Fost.* 263--4. A man went with his wife on a Sunday to dine at a friend's house, carried a gun in hopes of sport, discharged it before dinner, set it in a private place, dined, went to church, and in the evening returned with his wife and neighbours. The gun had been loaded by another during his absence, and he ignorant of what had passed, took up the gun, touched the trigger, and killed his wife, whom he tenderly loved, and he was acquitted. *Fost.* 265. But regularly, if the act which occasions the death of a man, be a trespass, or cannot but be attended with the manifest danger of hurt to some man, or be of such a nature, that it cannot be used without manifest hazard of life, and there were no deliberate intent of mischief, the killing is esteemed manslaughter. Thus, shooting at deer in a third person's park, throwing stones at another wantonly, at play, or by parrying with naked swords, covered with buttons at the points, or with swords in the scabbards. 1 *Hale*, 472--3. 1 *Hawk.* (folio) 75. See *Fost.* 260--1.

Homicide in advancement of justice may be considered as founded in necessity, for the ends of government will be totally defeated, unless persons can, in a due course of law, be made amenable to justice, and therefore, where persons having authority to arrest or imprison, using the proper means for that purpose, are *resisted* in so doing, and the party making resistance is killed in the struggle, this homicide is justifiable; and on the other hand, if the party having authority to arrest or imprison, using the proper means, happeneth to be killed, it will be murder in all who take a part in such resistance; for it is homicide committed in despite of the justice of the kingdom. This rule supposes that resistance is made, and upon that supposition will hold in all cases, civil or criminal. For in case of resistance in either case, the party having authority to arrest or imprison, may repel force by force, and if death ensueth in the struggle, he will be justified. This is founded in reason and public utility; for few men will quietly submit to an arrest, if in every case of resistance, the party empowered to arrest was obliged to desist, and leave the business undone. The case of *bare flight* in order to avoid an arrest in a civil proceeding, and likewise in some cases of a criminal nature, will fall under a different consideration. A defendant in a civil suit being apprehensive of an arrest, *flieth*, the officer pursueth, and in the pursuit killeth him, *this*, says lord *Hale*, (1 Hale. 481.) *will be murder*. *Foster* says, murder or manslaughter; as circumstances may vary the case. For if the officer in the heat of pursuit, and merely in order to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon *not likely to kill*, and death should unhappily ensue, it will amount to no more than manslaughter, if, in some cases, even to that offence. The blood was heated in the pursuit, his prey, a *lawful* prey, just within his reach, and no signal mischief was intended. But had he made use of a deadly weapon, it would have amounted to murder. The mischievous vindictive spirit, which always must be collected from circumstances, determines the nature of the offence. The law is the same in case of a mere breach of the peace, or any other misdemeanor short of felony. But where felony is committed, and the felon *flieth from justice*, or a dangerous

wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party flying is killed, *where he cannot be otherwise overtaken*, this will be deemed justifiable homicide; for the pursuit was not barely warrantable, it is what the law requires, and will punish the wilful neglect of. It is the duty of every man in these cases quietly to yield himself up to the justice of his country. And for this reason it is, that flight alone upon a charge of felony, induces a forfeiture of goods, though the party upon his trial may be acquitted of the fact. For he hath done what in him lay, to stop the course of public justice. These rules are founded in public utility, that crimes may not remain unpunished. And if in the cases last mentioned, the felon, or person giving a dangerous wound, turns upon the pursuers, and in the scuffle any one of them is killed, this will be murder in the person so resisting, and all his adherents present and knowingly abetting. See *Post.* 270--1--2.

Self defence naturally falls under the head of homicide founded in necessity, and may be considered in two different views: 1. homicide, *se et sua defendendo*, which is perfectly innocent and justifiable. 2. That which is in some measure, blameable and barely excusable.

No place can be so sacred as to deprive a man of his right of self defence, and oblige him to yield himself a tame sacrifice. Such passive conduct would, in fact, make him criminal in the highest degree; for should he neglect to defend himself, he would become a *felo de se*. The law of nature which dictates self preservation, is so powerful, that it supersedes all other laws, and an attempt to restrain it, is absurd and inefficacious. *Dagge*, on crim. law. chap. 8. § 1.

In the case of justifiable self defence, the injured party may repel force by force in defence of his person, habitation or property, against any one who manifestly intends, and endeavours by violence or surprize to commit a known felony, upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger, and if in a conflict between them he happens to kill, such killing is justifiable. *Kel.* 128--9. Even his servant, then attendant on him, or any other person present, may interpose for preventing mischief. 1 *Hale.* 481. 484. In this case nature and social duty co-operate. A woman in defence of her chastity may lawfully kill a person attempting to commit a rape upon her. The injury intended can never be repaired or forgotten; and nature, to render the sex amiable, hath implanted in the female heart, a quick sense of honour, the pride of virtue, which kindles and inflames at every such instance of brutal lust. Here the law of self defence plainly co-operates with the dictates of nature. See 1 *Hale.* 485. An attempt is made to commit arson or burglary in the habitation; the owner or any part of his family, or even a lodger with him, may lawfully kill the assailants for preventing the mischief intended. *Cro. Car.* 544. See *Post.* 273—4. 1790.

Culpable, and through the benignity of the law, *excusable*, self defence, borders very nearly upon manslaughter, and in fact and experience, the boundaries are in some instances, scarce perceivable; but in consideration of law they have been fixed. In both cases it is supposed, that passion hath kindled on each side, and blows have passed between the parties. But in the case of manslaughter, it is either presumed, that the combat on both sides hath continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. He, therefore, who, in the case of a mutual conflict would excuse himself upon the foot of self defence, must show, that before a mortal stroke given, he had declined any farther combat, and retreated as far as he could with safety; and also that he killed his adversary through mere necessity, and to avoid immediate death. If he fails in either of these circumstances, he will incur the penalties of manslaughter. Thus (1 *Hale* 479.) *A.* being assaulted by *B.* returns the blow, *and a fight ensues. A.* before a mortal wound given, declines any farther conflict, and retreats as far as he can with safety, and then, in his own defence, kills *B.* this is *excusable* self defence, though *A.* had given several blows, *not mortal*, before. But if the mortal stroke had been first given, it would have been manslaughter. The cases here put, suppose that the first assault was made upon the party who killed in his own defence. But, as in the case of manslaughter upon sudden provocations, where the parties fight on equal terms, all malice apart, it matters not who gave the first blow; so, in this case of excusable self defence, the first assault in a sudden affray, all malice apart, will make no difference, *if either party quits the combat and retreats before a mortal wound be given.* But if the first assault be upon malice, which must be collected from circumstances, and the assailant, to give some colour for putting in exe-

1790. cution the wicked purposes of his heart, retreats and then turns and kills, this will be murder. If he had killed without retreating, it would undoubtedly have been so; and the craft of flying rather aggravates than excuses, as it is a fresh indication of the malice already mentioned, the heart deliberately bent upon mischief. The other circumstance necessary to be proved in a plea of self defence, is, that the fact was done from mere necessity, and to avoid immediate death: as in *Nailor's* case, before cited, who, coming home drunk, was ordered to bed by his father, and in a scuffle stabbed his brother with a penknife. It was ruled to be manslaughter, for there did not appear to be any *inevitable necessity* so as to excuse the killing in this manner; the deceased did not appear to aim at the prisoner's life, but rather to chastise him for his misbehaviour and insolence towards his father. See *Fost.* 276--7--8. But though the party assaulted must flee as far as he can, either by reason of some wall, ditch, or other impediment; yet the assault may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice, as well as of the municipal law. And, as the *manner* of the defence, so is also the *time* to be considered; for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Under this excuse of self defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself. See 4 *Black. Com.* 183--6.

In justifiable homicide, the party is to be dismissed without any forfeiture. So, in the case of death by casualty, by the constitution of the commonwealth; which, by benign interpretation, might be construed to extend beyond the obsolete forfeiture of *deodand*. To the case of a *felo de se*, it is expressly extended. But the commonwealth seeks not forfeitures; nor in any case could they be extended beyond the life of the offender. From manslaughter, the forfeiture was removed by act of 8th March, 1780. (Chap. 878. § 4.) except in cases of stabbing; and imprisonment substituted.

On an indictment of murder, the party offending *may* be acquitted of murder, and yet be found guilty of manslaughter; but the jury are not compellable so to do. *Cro. El.* 276. (464--5.)

In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence proved against him. For the law presumes the fact to have been founded in malice, until the contrary appears. And when the question is, whether the homicide was committed wilfully and maliciously, or under circumstances, justifying, excusing or alleviating, it is the proper and only province of the jury, to find whether the facts alledged by way of justification, excuse or alleviation, are true. But supposing them true, whether such homicide be justified, excused or alleviated, must be submitted to the judgment of the court. For on a special verdict, the court are judges of the malice, and whether there was time to *cool*, or the act be *deliberate*, or not, and not the jury. 2 *Stra.* 773. 2 *Ld. Raym.* 1493. But this doctrine, in this extent, is not adapted to the climate of *Pennsylvania*. The jury may, and do, give general verdicts, judging both of the fact and the law. It is true the court *direct* in matter of law; and such also is the English practice. See *Fost.* 255, 280.

No one can excuse the killing of another, by setting forth in a special plea, that he did it by misadventure, or self defence; but he must plead not guilty; and give the special matter in evidence. 1 *Hawk.* (folio) 76. *Co. Lit.* 283. a.

The act of Assembly of the 22d of April, 1794, makes no other alteration in this law, than to distinguish the shades, or degrees of crime, and apportion the punishment. Thus, all murder, which shall be perpetrated by means of *poison*, or by *lying in wait*, or by any *other kind* of *wilful, deliberate*, and *premeditated* killing, or which shall be committed in the perpetration, or attempt to perpetrate, any *arson, rape, robbery*, or *burglary*, shall be deemed murder of the *first* degree, and shall be punished with death. All other kinds of murder shall be deemed murder of the *second* degree, and shall be punished by imprisonment and hard labour, in the gaol and penitentiary house of *Philadelphia*, for a period not less than five years, nor more than eighteen years: but on conviction of a second offence of murder in the *second* degree, the imprisonment at hard labour shall be *during life*.

By this act, murder in the *first* degree, by *poison, arson, rape, robbery*, or *burglary*, is precisely defined; by *lying in wait*, not certainly, but reasonably so; but all

other kinds of *wilful, deliberate,* and *premeditated* killing, are left to construction upon circumstances, by the correct, but benevolent principles of the common law. The jury, under the direction of the court, must ascertain it. Upon temperate unimpassioned reflection, they can seldom err. Cases of *implied* malice, are not excluded. *Poison* implies malice. In this crime peculiarly, the circumstances attending the case generally betray the motives of the heart. Has the fact been attended with such circumstances, as carry in them the plain indications of an heart regardless of social duty, and fatally bent on mischief? He who carried his sick father against his will, from town to town, in a cold and frosty season, so that he died;—The mother who laid her infant in a hogstye, that it might be devoured;—The gaoler, who by oppression of a prisoner in his power, extinguishes life, by protracted, unrelenting severity; are not these cases in which deliberation and cruelty concur, flowing from a wicked heart, a mind grievously depraved, and acting from motives highly criminal? It is with a view to the act of 1794, that the editor, in this outline, has drawn the cases together with considerable labour, to enable those who are not of the profession, to judge for themselves, and to distinguish, on a subject deeply interesting to the whole community. Who can wish the outline to be filled up, or enlarged by new cases? who can wish that all the distinctions or discriminations of which the act may be susceptible, may be marked hereafter by judicial decisions? Thrice happy for the commonwealth, should it remain on our statute book, a dead letter, and accumulate the rust of ages!

All murder which follows felonious acts, which were not formerly capital crimes; of which numerous instances have been given, or in consequence of offensive language, which has been deemed to be no provocation, and the murder not premeditated, or on revenge *predetermined;* or in consequence of acts prohibited by law, called *mala prohibita;* in consequence of riots and unlawful assemblies; in consequence of trespasses committed upon the property or possession of another; in all similar cases where it is evident there has been no precedent intention to kill; and more particularly in cases closely bordering on manslaughter, will be but murder in the *second* degree, and according to the shade or colour of the offence, in the sound discretion of the court, the punishment may be apportioned by imprisonment and hard labour, between five and eighteen years.

Concealment of the death of bastard children, according to the circumstances of the case, may be punished by imprisonment at hard labour for any time not exceeding five years; or as a misdemeanor. 1790.

Voluntary manslaughter which the act does not define, but leaves it to the common law, includes that class of cases formerly punished with death under the statute of *stabbing;* killing on a sudden quarrel, or in consequence of reasonable provocation, or in consequence of an assault, under circumstances which would not excuse upon the principles of self defence, shall be punished by imprisonment at hard labour, in the gaol and penitentiary house of *Philadelphia,* for any time not less than two, nor more than ten years, leaving a discretion to apportion it according to the circumstances; and to give security for good behaviour during life, or for any less time. And for the second offence, the imprisonment &c. not to be less than six, nor more than fourteen years.

Involuntary manslaughter, happening in consequence of an *unlawful* act, may, with the leave of the court, be charged as a misdemeanor, and the felony waived, and on conviction, the party be fined and imprisoned as in cases of misdemeanor, or both offences may be charged in the same indictment, and the jury may acquit him of one and find him guilty of the other charge. If it happen in consequence of a civil trespass, it should be charged as manslaughter. But where the crime "is faintly tinged with the feeble colours of carelessness and inadvertence," there will be enough of severity in its punishment as a misdemeanor.

All the remaining branches of homicide are left as they were, save only that the forfeiture anciently attending them, may be considered as removed.

MAYHEM.

Mayhem, is the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or annoy his adversary. And therefore the cutting off or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be *mayhems.* But cutting off the ear, or nose, or the like, were not held to be *mayhems* at common law, because they do not weaken, but only disfigure.

By the statute of 22d & 23d *Charles* 2d. *c.* 1. called the *Coventry* act, being occasioned by an assault on sir *John Coventry,* in the street, and slitting his nose

1790. in revenge (as was supposed) for some obnoxious words uttered by him in Parliament, it is enacted, that "if any person shall *of malice aforethought*, and by *lying in wait*, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or disfigure him*, such person, his counsellors, aiders and abettors, shall be guilty of felony, without benefit of clergy." This statute was adopted in the same terms by our act of 1718, "and the persons so offending, their counsellors, &c. knowing of and privy to the offence, shall suffer death as in cases of felony, without benefit of clergy." Vol. I. pa. 114.

It was held, on an indictment against one *Coke*, for slitting the nose of one *Crispe*, (intending to murder him) and who had the effrontery to rest his defence upon this point, that the assault was committed with an intent to murder, (which is no felony) and not with an intent to disfigure, and therefore not within the statute: that if a man attacks another to murder him, with such an instrument as a hedge bill, which cannot but endanger the disfiguring him; and in such attack, happens not to kill, but only to disfigure him, he may be indicted on this statute, and it shall be left to the jury whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure, as well as to murder. See 4 *Black. Com.* 205 —7.

The sixth section of the act of 22d of April, 1794. re-enacts the above, and further includes the criminal act punished by the English statute of 37 *Hen.* 8. *c.* 6. of maliciously and unlawfully cutting off the *ear;* and this further addition of "voluntarily, maliciously, and of purpose, pulling or putting out an eye, while fighting or otherwise; and, abolishing the punishment of death, punishes the offender with a confinement at hard labour in the gaol and penitentiary house of Philadelphia, for any time not less than two, nor more than ten years; and also to pay a fine not exceeding one thousand dollars, three fourths whereof shall be for the use of the party grieved.

RAPE.

Rape is another of the private felonies against the body of the subject. The statute of 18th of *Elizabeth*, excluded it from the benefit of clergy. This punishment of death was adopted in Pennsylvania by the 7th section of the act of 1718. vol. I. pa. 113. It is defined to be, "the carnal knowledge of a woman forcibly, and against her will." The subject, says *Blackstone*, is highly improper to be publicly discussed, except only in a court of justice. Nothing more will therefore be added here. The nature of the crime is as well understood, as the crime itself is detested.

By the act of 22d of April, 1794. § 4. The punishment of this crime, or of being accessary thereto before the fact, is imprisonment at hard labour for a period not less than ten, nor more than twenty one years, in the gaol and penitentiary house of *Philadelphia*. For a second offence, by sect. 13. a similar imprisonment at hard labour, *during life*.

SODOMY, or B——GG——RY.

This is denominated the infamous *crime against nature*, committed either with man or beast; a crime which ought to be strictly or impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for if false, it deserves a punishment inferior only to the crime itself.

This offence was made felony without benefit of clergy, by the statute of 25th *Henry* 8th. revived and confirmed by statute of 5th *Elizabeth*, *c.* 17. and incorporated into our law by the act of 1718. vol. 1, pa 113.

By the act of 5th April, 1790, Every person convicted of this offence, or as accessary thereto before the fact, shall forfeit to the commonwealth all his lands and tenements, goods and chattels he possessed at the time the crime was committed, and at any time afterwards until conviction, and be sentenced to undergo a servitude of any term or time, at the discretion of the court, not exceeding ten years, at hard labour, &c. And by the act of 22d of April, 1794, the punishment for a second offence, is imprisonment at hard labour during life.

ARSON.

If any person or persons shall be convicted of maliciously and voluntarily burning the dwelling house, barn, stable or out house of another, having corn or hay therein, he shall suffer death. Act of 1718, vol. I. pa: 115.

By the act of 21st February, 1767. (vol. 1. pa: 272.) If any person shall maliciously and voluntarily burn the dwelling house, or any other house, barn or stable adjoining thereto, or any barn or out house, having corn or hay therein, although the same shall not be adjoining to such dwelling house, belonging to any

other, he shall suffer death without benefit of clergy.

By the act of 21st of March, 1772: If any person shall maliciously and voluntarily burn the state house, or any of the adjoining offices or buildings, or any church, meeting house, or other building for public worship, or any academy or school house, or library belonging to any body politic or corporate, he shall suffer death without benefit of clergy. Vol. 1. pa: 382.

But by the act of 22d of April, 1794: Every person duly convicted of this crime, or as being accessary thereto, shall be punished by imprisonment at hard labour, &c. for a period not less than five, nor more than twelve years: and for a second offence, during life.

And, by an act passed 21st March, 1806: (chap. 2687.) If any person shall wilfully *set fire* to any barn, stable or out house, or to any barrack, rick or stack of hay, grain or bark, *with intent to destroy the same*, or shall be an accessary before the fact, being thereof legally convicted, he shall suffer an imprisonment at hard labour in the jail and penitentiary house of *Philadelphia*, for any term not less than five years, nor more than twelve years, and pay a fine not exceeding two thousand dollars, at the discretion of the court.

The offence of arson may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's; for by the *common law*, no intention to commit a felony, amounts to the same crime, though it does in some cases by particular statutes. And in this case of arson, by the law of March, 1806, the *intent* to burn and destroy, evidenced by the particular act of *setting fire*, though not made felony, is a very high misdemeanour, and punishable with greater severity by this law, than an actual *arsonry*. The wilful firing one's own house *in a town*, is said to be a high misdemeanour, and punishable by fine, imprisonment and surety for good behaviour. And if a landlord, or reversioner, sets fire to his own house, of which another is in possession, under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant. See *4 Black. Com.* 221. *Fost.* 115.

BURGLARY.

By the act of 1718: If any person, or persons shall be convict of burglary, which is a breaking and entering into a dwelling house of another in the night time, with an intent to kill some reasonable creature, or to commit some other felony within the same house, whether the felonious intent be executed or not, he or they so offending, within this province, being convicted thereof as aforesaid, shall suffer death without benefit of clergy. Vol. 1. pa: 115. 1790.

And, by an act of 21st of March, 1772: If any person shall break and enter the state house, or any of the adjoining offices or buildings, or any church, meeting house, or other building for public worship, or any academy or school house, or library belonging to any body politic or corporate, in the night time, with intent to commit a felony within the same, whether the felonious intent be executed or not, being thereof legally convicted, shall stand in the pillory, &c. have his ears cut off, &c. be publicly whipped, &c. and committed to the work house, or gaol of the county, &c. during the space of twelve months. Vol. 1. pa: 382.

But, by the act of 5th of April, 1790: Every person convicted of this offence, or as accessary thereto before the fact, shall forfeit to the commonwealth all his lands and tenements, goods and chattels, whereof he was seized or possessed at the time the crime was committed, and at any time afterwards until conviction, and be sentenced to imprisonment at hard labour for any time, at the discretion of the court, not exceeding ten years: and for such part of the offence formerly punished with death, for a second offence, imprisonment at hard labour during life, by the act of 22d of April, 1794. But by the 9th section of the act of 23d of September, 1791: The forfeiture shall extend only to the residue, after restitution made to the owner of goods and chattels stolen.

In the definition of Burglary, there are *four* things to be considered: the *time*, the *place*, the *manner*, and the *intent*.

1. The *time* must be by night, and not by day; for in the day time there is no burglary. If there is day light enough begun or left, to discern a man's face, it is no burglary. But this does not extend to moonlight; for then many midnight burglaries would go unpunished; and the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.

2. As to the *place*. That is now described in our acts of Assembly. Exclu-

1790. sive of the offence described by the act of 1772, of an entry by night into *public* buildings with a felonious intent, and adverting only to the original act of 1718, which follows the English law: it seems indispensibly necessary to form its guilt, that it must be in a mansion or dwelling house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence; nor is a breaking open of houses wherein no man resides, and which therefore, for the time being are not mansion houses, attended with the same circumstances of midnight terror. A house however, where a man sometimes resides, and which the owner hath only left for a short season, with intention to return, is the object of burglary, though no one be in it at the time of the fact committed. And, if the barn, stable, or warehouse, be parcel of the mansion house, and within the same common fence, though not under the same roof, or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall. A chamber in a college, is the mansion house of the owner; or a room or lodging in any private house, the mansion for the time being of the lodger, if the owner does not himself dwell in the house, or if he and the lodger enter by different outward doors: but not where they are merely inmates, and the apartments are but parcel of the owner's dwelling house. So, the house of a corporation, inhabited in separate apartments, by the officers of the body corporate, is the mansion house of the corporation, and not of the respective officers. But if one hires a shop, parcel of another man's house, and works or trades in it, but never lies there, it is no dwelling house, nor can burglary be committed therein; for by the lease it is severed from the rest of the house, and therefore it is not the dwelling house of him who occupies the other part; nor can he be said to dwell therein who never lies there. Nor can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices, and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it a burglary to break it open, than it would be to uncover a tilted waggon in the same circumstances. See 4 *Black. Com.* 225--6.

3. As to the *manner*. There must be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars. There must in general be an actual breaking, not a mere civil trespass (or leaping over ideal, invisible boundaries) but a substantial and forcible irruption. As, at least, by breaking, or taking out the glass of, or otherwise opening a window, picking a lock, or opening it with a key; lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary; yet, if he afterwards unlocks an inner or chamber door, it is so. But to come down a chimney, is held a burglarious entry; for this is as much closed, as the nature of things will permit. So, to knock at a door, and upon opening it, to rush in with a felonious intent; or under pretence of taking lodging, to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking, for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. So, if a servant opens and enters his master's chamber door, with a felonious design, (1 *Stra.* 481,) or if any other person lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent, it is burglary. If the servant conspires with the robber, and let him into the house by night, this is burglary in both: (2. *Stra:* 881.) for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as, to step over the threshold, to put a hand or hook in at a window, to draw out goods, or a pistol to demand one's money, are all of them burglarious entries. And it is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry in order to complete the burglary. See 4 *Black. Com.* 226--7. *Fost.* 108--9.

4. As to the *intent*. Such breaking and entry must be with a *felonious* intent, otherwise it is only a trespass. And it is the same, and so is the act of assembly, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of

which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary, whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute; since that statute which makes an offence felony, gives it incidentally all the properties of a felony at common law. See 4 *Black. Com.* 227 —8.

ROBBERY.

Robbery, which is done by assaulting another, on or *near* the highway, putting him in fear, and taking from his person money or other goods, to *any value* whatsoever, was to be punished by the act of 1718, as well the robber, as his counsellors, aiders, comforters and abettors, being lawfully convicted thereof, as felony, according to the tenor, direction, form and effect of the statutes, in such case made and provided, in Great Britain. Vol. 1, pa. 113.

This open and violent larciny from the person, agreeable to the above definition, was punished with death, and debarred the benefit of clergy, particularly by the statute of 23 *Henry* 8, c. 1.

The statute of 3 & 4 *William* and *Mary*, c. 9, took away clergy from both principals and accessaries before the fact, in robbery wheresoever committed.

Corresponding to this latter statute, it is enacted by the act of 8th of March, 1780, that if any person or persons shall commit robbery, which robbery is done by assaulting another, putting him in fear, and taking from his person money or other goods, to any value whatsoever, whether the same robbery be committed on or near the highway, or *elsewhere*, in any place or places whatsoever, within this commonwealth, he or they so offending, his or their counsellors, aiders, comforters and abettors, being duly convicted or attainted, shall suffer as felons, without benefit of clergy, in like manner as by the laws of this commonwealth is provided in the case of robbers *on or near* the highway. Vol. 1, pa. 499.

But, by the second section of the act in the text, every person convicted of robbery, or as accessary thereto before the fact, shall forfeit to the commonwealth, his lands and tenements, goods and chattels, whereof he or she was seized or possessed at the time the crime was committed, and at any time afterwards until conviction, and undergo a servitude at hard labour for any time not exceeding ten years, &c. And for a second offence, imprisonment at hard labour during life, by the act of 22d of April, 1794. 1790.

By the act of 23d of September, 1791, any person convicted of robbery or burglary, shall be ordered to restore to the lawful owner or owners the goods and chattels so stolen, or to pay to him or them, the full value thereof, or of so much thereof, as shall not be restored, and the forfeiture of his, her, or their lands or chattels, shall only extend to the residue thereof, after such restitution shall be made.

Concealers of robbers, &c. who were intitled to clergy by the act of 1718, are now to be punished by fine and imprisonment, by the 4th section of the act in the text. And by the act of 4th of April, 1807, (chap. 2805,) the imprisonment may be extended to any term not exceeding seven years, and the convict sent to the penitentiary house in *Philadelphia*, at the discretion of the court.

There must be a *taking*, otherwise it is no robbery. A mere attempt to rob, is but a misdemeanor, punishable by fine and imprisonment. If the thief, having once taken a purse, returns it, still it is a robbery; and so it is, whether the taking be strictly from the person of another, or in his presence only; as, where a robber by menaces and violence, puts a man in fear, and drives away his sheep, or his cattle before his face. But if the taking be not either directly from his person, or in his presence, it is no robbery. The taking must be by force, or a previous putting in fear, which is the criterion that distinguishes robbery from other larcinies. For, if one privately steals any money, &c. from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent. And though it is usual, it is not necessary to lay in the indictment, that the robbery was committed by *putting in fear*; it is sufficient if laid to be done by *violence*: And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed; it is enough that so much force or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without, or against his consent. Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery. Or if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of

1790. violence, this is a felonious robbery. So, if under a pretence of sale, a man forcibly extorts money from another, this subterfuge shall not avail him. See 4 *Black. Com.* 242--3. See *Fost.* 128--9.

LARCINY.

Simple Larciny, is the "felonious taking and carrying away of the personal goods of another." The stealing of goods above the value of twelve pence, is called *grand* larceny; of goods to that value or under, *petit* larceny. There was formerly a great difference here in the mode of trial of these offences, but the kind of punishment was the same, though differing in quantity. There is no other distinction between them. It is called simple larciny, to distinguish it from *mixed* or *compound* larciny, which is accompanied with one, or both of the aggravations of a taking from one's *house*, or *person*. Larciny from the house, in the *night time*, under certain circumstances, we have seen, is *burglary;* from the *person*, by open and violent assault, and not *privately*, is *robbery*.

By the act of 1718, the party convicted of this offence, his aiders, comforters and abettors, were to be adjudged, for the first offence, to restore the goods and chattels stolen, to the right owner, or to pay him the full value thereof, or so much of them as cannot be restored; the value to be set by such persons, as the court, before whom the offenders should be convicted, should appoint to do the same, upon their oaths or affirmations; also, to pay the costs of prosecution, with all such other sums of money as the same court should allow for such owner or owner's loss of time, charges and disbursements, in the apprehending and prosecuting such offenders; and moreover, to forfeit and pay the like value of the goods to the governor, for the support of government, and committed to the common gaol of the county where they were convicted, there to remain 'till they made satisfaction for all sums so to be adjudged or recovered against them; and moreover, to be publicly whipped on his, or her, or their bare backs, with stripes well laid on, not exceeding twenty one. For the second offence, the sentence was to be the same, except that the forfeiture was to be double the value of the goods stolen, to the governor, for the support of government, and the public whipping, with not less than twenty one, nor more than forty stripes: And for the third, the same sentence, with this alteration and addition: The forfeiture to the governor, for the support of government, to be treble the value of the goods stolen, and the public whipping to be with not less than thirty-nine stripes, nor more than fifty: And the court, at their discretion, were, for such third offence, to award and give judgment, that such offenders should be sent to some house of correction, or public work house, there to be set to work, corrected and remain without bail for such time as the justices should then judge and award, not less than twelve months, nor more than four years, to be accounted from the time of such conviction. And a form of execution was devised, to be issued from the same court, to inforce the restitution, &c. (which is extended to the cases of conviction for *robbery* and *burglary*, by the 9th section of the act of 23d of September, 1791.) Vol. 1 pa. 121--2.

By the act of 24th. of February, 1720—1, persons guilty of larciny under the value of five shillings, were to be tried before two justices of the peace, without the intervention of a jury, and on conviction were to be adjudged, to be immediately and publicly whipped, upon his or her bare back, not exceeding fifteen lashes, or be fined for the first offence, at the discretion of the said magistrates, in any sum not exceeding twenty shillings, and to make restitution, if able, to the party wronged; and also to pay the charges of prosecution and whipping, or be sent to the work house, or prison, to be kept at hard labour, for any time not exceeding twelve days. But persons requesting to be tried at the sessions, might there be tried, upon giving security to appear, &c. (Chap. 243. Printed in *Galloway's* Edition, pa. 102.)

By the third section of the act in the text, the punishment to be inflicted for simple larciny, to the value of twenty shillings, or for being an accessary before the fact, is imprisonment at hard labour, for any term not exceeding three years, restitution of the stolen goods, and forfeiture of the value to the state. And by the 4th section, the act of Feb. 1720--1, is repealed, and larciny under twenty shillings shall be tried as other simple larcinies; and on conviction shall be deemed *petty* larciny; and the judgment is the same, except that the imprisonment is not to exceed one year.

By the 5th section of the act in the text, robbery or larciny of obligations or bonds, bills obligatory, bills of exchange, *promissory notes for the payment of money*, lottery tickets, paper bills of credit, certificates granted by or under the authority of this commonwealth, or of all, or any of the United States of America, shall be punished in the same manner as robbery, or larciny of any goods or chattels.

In consequence of the decision in the case of the *Commonwealth*, v. *Boyer*. 1 *Binney*, 201, which was an indictment for stealing "*one ten dollar note of the President, Directors and Company of the Bank of North America*," and in which the judgment was arrested, because it did not follow the description in the act, viz. "*a promissory note for the payment of money.*" "*bank notes*" not being described in the act, not being the subject of larciny at common law; The act of 30th of January, 1810, was passed, which declares, that the robbery or larciny of any *bank note* or *notes* of any incorporated bank, shall be punishable in the same manner as robbery or larciny of any goods or chattels of equal amount.

By an act of 28th of February, 1787, (chap. 1250,) felons committed 'till they make restitution, shall have the benefit of the insolvent laws; which privilege, a subsequent act of 27th of March, 1790, (chap. 1485,) modified so as to empower the court to direct the felon to perform additional labour, in commutation of the restitution.

By the act of 27th. of March 1789, (chap. 1400,) persons confined for thirty days, in execution or otherwise, for any debts, fines or forfeitures, none of which exceed five pounds, exclusive of costs, shall upon application, be discharged by the gaoler, and shall not be liable to be again imprisoned for the same cause. Admitting this to apply to *fines* inflicted for *crimes*, the remedy was partial. And as it was ascertained that many miserable wretches, who are most frequently the objects of punishment for larcinies, were long detained for the fines and forfeitures only, after the residue of the sentence had been fulfilled; it is provided, that in all cases of *larciny*, or where by law a fixed or specific fine is affixed to the commission of any crime, the court, in its discretion, may, in lieu thereof, assess such fine as they may judge right, not exceeding the fine heretofore affixed by law. It also provides, that persons convicted of felony or larciny, and sentenced to undergo an imprisonment at hard labour, for any term not exceeding three years, the court in their discretion, may order the imprisonment, &c. to be in the county, or in the gaol and penitentiary of Philadelphia. See the act of 4th of April, 1807, (in this note, *ante*.)

The felonious taking of *one* bill obligatory, is punishable as larciny under this act. 1 *Binney*, 273. With respect to goods found on search, suspected to be stolen. See the 10th section of the act of 23d of September, 1791.

Horse stealing was punished by the act of 21st of February, 1767, (chap. 557,) on conviction, in the following manner: For the first offence, to restore the horse, mare or gelding to the owner, or pay him the full value thereof, and also the costs of prosecution, with all such other sums of money as the court shall allow to such owner for his loss of time, charges and disbursements, in apprehending and prosecuting the offender; and also pay to the governor, for the support of government, the like value of the horse, &c. and stand in the pillory during the space of one hour, and be publicly whipped on his bare back with thirty nine lashes well laid on, and be committed to the work house or gaol, for any time not exceeding six months. For the second offence, the same sentence, with the addition of imprisonment at hard labour for any time not exceeding three years. Vol. 1, pa. 273. Receiving knowingly stolen horses, the same punishment. *ib.*

By the act of 10th of March, 1780, (chap. 879,) If any person shall feloniously take and carry away any horse, mare or gelding, of the property of any other person or persons, or of the United States of America, and shall be thereof convicted, for the first offence, he shall stand in the pillory for one hour, and shall be publicly whipped on his bare back, with thirty nine lashes well laid on, and at the same time shall have his ears cut off, and nailed to the pillory; and for the second offence, shall be whipped and pilloried in like manner, and be branded on the forehead, in a plain and visible manner, with the letters *H. T.*

But, by the third section of the act in the text, the judgment is now, to restore the horse, mare or gelding stolen, to the owner thereof, or to pay him the full value thereof, and also pay the like value to the commonwealth; and moreover, undergo a servitude for any term not exceeding seven years, in the discretion of the court, and be confined, kept to hard labour, fed and clothed as in that act is directed.

All felony includes trespass, and every indictment for larciny must have these words, "that he, &c. did *feloniously* take and carry away," from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. *Kel.* 24. 3 *Inst.* 107. Therefore, one who finds goods which I have lost, and *animo furandi* (with a felonious intention) converts them to his own use, is no felon, *a fortiori*, one who has the actual possession of my goods, by my delivery for a special purpose, as a carrier, a taylor, or a friend, who is intrusted to keep them for my use, cannot be said to steal them, by embezzling them afterwards. 3 *Inst.*

1790. 107--8. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine; or if a miller who has corn to grind, takes out part of it, with intent to steal: These are larcinies, and the *animus furandi* (the intent to steal) is manifest. So, if a carrier, after he has delivered the goods, secretly takes away the whole, for his trust was determined. 3 *Inst.* 107. *Bro. Corone.* 160. So, where one has the bare charge, or special use of goods, but not the possession of them: as a shepherd who looks after my sheep, or a butler, who takes care of my plate, or a servant, who keeps a key to my chamber, or a guest who has a piece of plate set before him in an inn, may be guilty of felony in fraudulently taking them away. *Bro. Corone.* 58, 137, 160. *Poph.* 84. *Owen.* 52. If a person intending to steal my horse, take out a replevin, and thereby have the horse delivered to him by the sheriff; or one intending to rifle my goods, gets possession from the sheriff, by virtue of a judgment obtained upon false *affidavits*, it is felony, for it is done in *fraud of the law.* 3 *Inst.* 64, 108. *Kel.* 43--4. 1 *Sid.* 254. *T. Raym.* 276. Yet, if one thinking he has a title to the horse of *B.* seizes it as his own; or supposing that *B.* holds of him, distrains the horse of *B.* without cause, this is no felony, but a trespass, because there is a pretence of title. But, if done secretly, or being charged with it, he denies it: these circumstances may make it a felony. 1 *Hale.* 509. He who steals my goods from *J. S.* who had stolen them before, may be indicted as having stolen them from me. So, he who steals my goods in the county of *Lancaster*, and carries them to the county of *York*, may be indicted in either county. *Bro. appeal*, 84. ib. *Corone.* 171. As there must not only be a *taking*, but a *carrying away*; so, it has been held, and is clear law, that the least removing of the thing taken, from the place where it was before, is sufficient, though it be not *quite carried off*: as if a man be leading another's horse out of the close, and be apprehended in the fact: or, if a guest stealing goods out of an inn, has removed them from his chamber down stairs; or a thief, intending to steal plate, takes it out of a chest and lays it down upon the floor, but is surprized before he can escape with it: or, removing goods with a felonious intention, from the fore part to the hind part of a waggon, where he is detected: these are larcinies. 3 *Inst.* 108--9. *Dallison.* 21. 2 *Vent.* 215. *Bro. Corone.* 107. A man may commit larciny by taking his own goods: as, if *A.* delivers goods to *B.* being a taylor, carrier, &c. and afterwards, with an intent to charge him, fraudulently and secretly take them away, it is felony. *Bro. Corone.* 45, 160. *Cro. El.* 536--7. 3 *Inst.* 110. But no delivery of goods from the owner to the offender upon trust, can ground a *larciny*: as, if *A.* lends *B.* a horse, and he rides away with him; or, if I send goods by a carrier, and he carries them away, these are no larcinies. The goods must not be annexed to the freehold, for it is but a trespass to steal *corn* or *grass growing*, or *apples* from a *tree*, &c. But if the thief severs them at one time, whereby the trespass is completed, and comes at another time when they are so turned into personalty, and takes them, it is larciny. So it is, if the owner, or any one else had severed them. 2 *Kel.* 875, 1 Mod. 89. *Bro. Corone.* 76. 1 *Vent.* 187. Taking a shroud from a dead person is felony: (so it may be for taking goods whose owner is unknown.) 3 *Inst.* 110. Yet, *presumptive* evidence of felony should be admitted cautiously. And lord *Hale* recommends, never to convict a man for stealing the goods of a person *unknown*, merely because he will give no account how he came by them, unless an actual felony be proved of such goods. 2 *Hale*, 289 90. A married woman commits not larceny, if it be done by the coercion of her husband; nor can she be accessary to her husband: But of her own accord she may commit felony. 3 *Inst.* 108. See 1 *Hawk.* (folio) 89—94. and 4 *Black. Com.* 229—236.

The following case was decided in the supreme court at Lancaster, 25th of May, 1811.

Eve Spangler, Plaintiff in Error, v. The *Commonwealth.*

Tilghman, C. J. This was a writ of error to the court of quarter sessions of *Dauphin* county. Judgment was given against *Eve Spangler*, on an indictment for stealing *four* bank notes.

The plaintiff in error has made several points concerning the jurisdiction of the court of quarter sessions, and the process for summoning the jury, on which I shall give no opinion. It will be sufficient to consider the exception to the indictment. *Eve Spangler* is charged with stealing "three several promissory notes for the payment of money, viz. three bank notes, each for the payment of $5. of the value each of five dollars lawful money of the United States; and a promissory note for the payment of money, viz. a bank note for the payment of $10. like lawful money, the property of *William Graydon*, esq."

The indictment is founded on the act of 5th of April, 1790, by the 5th section of which, it is enacted, that robbery or larciny of "promissory notes for the payment of money," shall be punished

in the same manner as robbery or larciny of any goods or chattels. I will not say whether the indictment might not have been supported, if the case had turned intirely on the act which has been mentioned. But it is necessary to take other acts into consideration. By the "act to amend the penal laws" passed 30th of Jan. 1810: It is enacted, that robbery or larciny of any bank note or bank notes of any *incorporated bank*, shall be punished in the same manner as the robbery or larciny of any goods or chattels of equal amount. Whether the legislature considered bank notes as included in the terms "promissory notes for the payment of money," in the act of 5th of April, 1790, is not certain. The "act to amend the penal laws" contains no express repeal of any part of the act of 5th April, 1790. Yet, when larciny of the notes of *incorporated banks* is made punishable, one cannot help supposing that it was intended, that notes of *unincorporated* banks, should not be the subject of larciny. It is evident, that in the year 1810, it was the object of the legislature to suppress all *unincorporated* banks. This appears, not only from the act just mentioned, but still more clearly from another act passed the same session, (19th March, 1810,) which bears strongly on the case before the court. By the first section of this last act, it is made unlawful, after 1st May, 1810, for any association of persons, who, at the time of passing the act, were, or thereafter should be connected for the purpose of banking, and who were *not incorporated by law*, to make, utter, or issue, any bills or notes, in the nature of bank notes, payable to bearer, or order, or otherwise. The third section declares it to be unlawful for any person "to offer, or accept in payment, any note issued from any unincorporated bank, knowing it to be such." The fourth section contains a *proviso*, that "nothing contained in the act should be construed so as to discharge any person or persons, or any association of persons, who might, before the passing of the act, have become engaged for the payment of any sum of money, from such engagements." Suppose now, that a person should have *knowingly* received a note issued contrary to this law, and the bank had refused payment, no action would lie on it, because the courts of the commonwealth would not suffer themselves to be instrumental in enforcing the execution of an unlawful contract. This principle has been established in the cases of *Anthony's* Executors, v. *Vanlear*, and *Mitchell*, v. *Smith*, both decided in this court. There may be bank notes therefore which are of no value or validity in law, and consequently cannot be the subject of larciny. For although bank notes are "promissory notes for the payment of money," within the meaning of the act of 5th April, 1790, yet that act cannot be construed so as to afford protection to notes unlawfully issued, and unlawfully received. That being the case, it is necessary, that an indictment for stealing bank notes, should either aver in general, that they were issued by a bank incorporated by law, or name the bank, and aver that it was incorporated, or show in some sufficient manner, that the notes were lawful. If this is not done, judgment cannot be entered, because it cannot appear to the court, that any offence has been committed. Inasmuch then, as this indictment does not show that the bank notes charged to have been stolen, were lawful notes. I am of opinion, that the judgment of the court of quarter sessions was erroneous. 1790.

Yeates, J. delivered his opinion at large; to the same effect.

Brackenridge, J. concurred.

Judgment reversed.

See the cases of the *People*, v. *Wilson* and *Osborn*. 6 Johnson's New York Reports, pa. 320.

FORGERY, COUNTERFEITING, UTTERING, PUBLISHING.

Forgery, or the *crimen falsi*, is an offence at common law, and may be defined to be "the fraudulent making or alteration of a writing, to the prejudice of another man's right;" for which the offender might suffer fine, imprisonment and pillory.

By an act passed in 1700, (chap. 16. vol. 1, pa. 4.) Whosoever shall forge, deface, corrupt or embezzle any charters, gifts, grants, bonds, bills, wills, conveyances or contracts, or shall deface or falsify any inrollment, registry or record, within this state, shall forfeit double the value of the damage thereby sustained, one half whereof shall go to the party wronged: and the party so offending, shall be discarded from all places of trust, and publicly disgraced as a false person, in the pillory or otherwise, at the discretion of the court before whom the cause shall be tried.

By an act passed in 1705, (chap. 149. vol. 1, pa. 49.) If any person shall be convicted of counterfeiting the hand or seal of another, with an intent to defraud such person, shall suffer three months imprisonment at hard labour, and be fined treble the value he or she shall have defrauded, or attempted to have defrauded thereby, to the use of the party wronged; and whosoever shall

1790. counterfeit the privy or broad seal of the province, being convicted thereof, shall suffer seven years imprisonment as aforesaid, and be fined at the discretion of the court, in any sum not exceeding one hundred pounds to the support of government.

If any person shall forge any entry of acknowledgments, certificates or indorsements of or on deeds, whereby the freehold or inheritance of any man may be charged, he shall be liable to the penalties against forgers of false deeds &c. Act of May, 28th 1715, for acknowledging and recording of deeds, vol. 1. pa. 95.

By the 5th section of the act of 22d of April, 1794. Every person who shall be concerned in printing, signing or *passing*, any counterfeit notes of the banks of Pennsylvania, North America, or the United States, knowing them to be such, or altering any genuine notes of the said banks, shall be sentenced to undergo a confinement in the gaol and penitentiary house of *Philadelphia* for any time not less than four, nor more than fifteen years, and shall also pay such fine as the court shall adjudge, not exceeding one thousand dollars,—or, of the Philadelphia bank, by the seventh section of its incorporating act, passed March 5th, 1804, (chap. 2439.) or, of the Farmers and Mechanics bank, by the 9th section of their incorporating act, passed 16th of March, 1809.

By the 20th section of the act to regulate the general elections, passed February 15th, 1799, (chap. 2009.) if any one shall knowingly, publish, utter, or make use of any forged or false receipts, or certificate (for payment of taxes, or of naturalization) with intent to impose the same upon, or to deceive any Judge or Inspector of any election, such person shall incur a fine of fifty dollars, and suffer six months imprisonment, and by the 22d section of the same act, if any judge of the election, inspector, clerk or other person, shall deface, alter, embezzle or destroy, any of the tickets, lists or tally papers, or certificates, after the election shall be closed, and the said tickets &c. deposited &c. such person, so offending shall, forfeit and pay the sum of three hundred dollars to any person who shall sue for the same within six months, and suffer imprisonment for a term not exceeding twelve months.

As to the punishment of forgery in cases where the pillory was formerly part of the sentence, see the 4th section of the act in the text, and the act of 4th of April, 1807, (chap. 2305, § 1.) by which the imprisonment at hard labour may be extended to a period not exceeding seven years, and by § 2, may be sent to the penitentiary of *Philadelphia*.

In the case of the *Commonwealth* v. *Searle*, the defenda was indicted at common law, for forging and for uttering and publishing as true a counterfeit ten dollar note of the bank of *North America*. He was acquitted of the forgery, and convicted on the second count for *uttering* and *publishing* the said note, as true and genuine, knowing the same to be false, forged and counterfeited &c.

His counsel moved in arrest of judgment for the following reasons. Because the uttering a note of the bank of *North America*, knowing the same to be counterfeit, is not indictable at common law, but is an offence created by act of Assembly, and therefore the indictment should have concluded "against the act of Assembly," or, if it is an offence at common law, still as it is punishable only by act of Assembly, no punishment can be inflicted, because the indictment does not conclude against the form of the act, &c.

After full argument, the following opinion was delivered by the Chief Justice.

It will be necessary to consider, 1st. Whether the offence is indictable at common law. 2d. Whether it is punishable by any act of Assembly, and, 3d. Whether judgment for the punishment prescribed by act of Assembly, can be rendered on this indictment.

1st. It seems to have been the opinion of the old writers on criminal law, that forgery at common law could not be committed with respect to any writing of a *private* nature, unless the same was under *seal*. But this point was fully investigated and decided to the contrary, in the case of the *King* v. *Ward*. 2 *Ld. Raym.* 1461; since which the law has been considered as settled. In that case the indictment contained two counts; the 1st, for forging an unsealed writing, with intent to defraud the Duke of *Buckingham*, and the 2d, for *publishing* the same writing, with the same intent. The court did not decide on the second count, because there was no occasion; but I can see no reason, why the publication should not be indictable, as well as the forgery; every mischief that might be produced by one, might also be produced by the other, one point decided by the court, was, that it was immaterial whether the Duke of *Buckingham* was actually injured by the forgery or not. In giving their opinion, they say, it may be inferred from the statute, 5 *Eliz.* c. 14. that the forgery of writings without seal, was an offence at *common law*, because the preamble of the statute recites, that the wicked practice of making, *forging* and *publishing*, deeds, writings &c. hath increased, chiefly because the punishments, limited by the laws and statutes were too mild. Now this argument has as much weight to prove that the *publication* was punishable, as that the forgery itself was, because both are mentioned. But what I chiefly rely on, is, that the *publication* is in its

nature as dangerous to society as the forgery; and therefore there is no good reason, why the common law should punish one, and not the other. There have been so many statutes in *England* inflicting severe punishments on forgery, and the uttering and publishing forged writings, within the last century, that we are not to expect many precedents of indictments at *common law* in that country. But no authority, or even *dictum*, has been produced to shew that publication was not an offence. We may safely conclude therefore, from the reason of the thing that it is.

We have no act of assembly expressly prohibiting the forging, or uttering of forged notes of the Bank of North America. But the act of 22d of April, 1794, § 5. that every person who shall be convicted of having falsely *uttered, paid*, or *tendered* in payment, any counterfeit or forged *gold* or silver coin, knowing the same to be forged or counterfeit, or shall be concerned in *printing, forging*, or *passing* any counterfeit notes, of the banks of *Pennsylvania, North America*, or the *United States*, knowing them to be such, or altering any of the genuine notes of any of the said banks, shall, &c. The offence laid in the indictment does not come within this act, for the plaintiff is not charged with *passing*, but only *uttering* and *publishing*, which is a different thing. The different expressions in this act, with respect to gold and silver coin, and bank notes, shew that the legislature intended a difference; and there is really a difference in the nature of things. To *utter* and *publish*, is to declare or assert, directly or indirectly, by words or actions, that a note is *good*. To offer it in payment would be an *uttering* or *publishing*; but it is not *passed*, until it is received by the person to whom it is offered. It is unnecessary to decide whether it would be *passed*, if the person to whom it is offered, receives it for the purpose of having it examined. The indictment only charges the uttering and publishing it as true and genuine. But there is another act of assembly, passed the 5th of April, 1790, (act in the text) which provides for the offences set forth in the indictment (see the section) and by the act of 4th of April, 1807, this time is increased to any term not exceeding seven years, at the discretion of the court. There is no doubt but this offence might have been punished by *setting in the pillory*. It is therefore within the act.

It remains to be considered, whether under this indictment we can give judgment for the punishment prescribed by the act of assembly. I take the law to be, that where a statute creates, or expressly *prohibits* an offence, and inflicts a punishment, the indictment must conclude against the form of the statute. But where a statute only inflicts a punishment on that which *was an offence before*, there is no necessity of mentioning the statute. When an indictment charges a person with having done a thing against the form of the statute, &c. the obvious meaning is, that the offence was committed against the form of the statute, without any reference to the punishment. This seems to be Lord *Hale's* idea, who says, "if an offence be at *common law*, and *also prohibited* by statute, with a corporal or other penalty, yet it seems, the party may be indicted at common law; and then, though it concludes not *contra formam statuti*, it stands as an indictment at common law, and can receive only the penalty the common law inflicts in that case." 2 *Hale* 191. The expressions of *Hawkins* are more general, and less accurate. He says, "it seems to be taken as a common ground, that a judgment by statute shall never be given on an indictment at common law, as every indictment which doth not conclude *contra formam statuti* shall be taken to be." I presume his meaning was the same as *Hale's*; but if his opinion was, that judgment for the punishment prescribed by statute, could in no case be given on an indictment not concluding *contra formam statuti*, he was mistaken, as may be proved by the highest authority. By the statute 25 *Geo.* 2. c. 37. The judgment in murder is altered; the day of execution is mentioned, and the body of the criminal is ordered to be dissected and anatomized; yet the indictments since that statute do not conclude *contra formam statuti*. See the appendix to *Blackstone's Com.*; also, the trial of Earl *Ferrars*—State Trials—so in many other cases. It may be proper to mention an instance establishing the same principle in *England*, though not an authority here, because it is since our revolution. By *Stat.* 30 *Geo.* 3. c. 48. the judgments against women convicted of treason, or petty treason, are altered; yet the indictments continue to be drawn at *common law*. I do not know that the point has ever before been brought before the courts of this state for decision; but the precedents as far as they have been searched, are to be found in both ways. I make no doubt but in a vast many cases, judgments under acts of assembly have been given on the indictments at common law. Upon the fullest deliberation, the court are satisfied, that the judgment ought not to be arrested. 2 *Binney* 332.

1790.

By the act of 21st of February 1767, (Chap. 557.) If any person shall falsely forge, and counterfeit any coin of gold or silver, which is now or shall be passing, or in circulation, in this province, being thereof lawfully convicted, shall suffer death without benefit of clergy; and every person, who shall pay, or tender in payment any such forged and counterfeited coin of gold or silver, knowing the same

1790. to be so forged and counterfeited, on conviction shall be sentenced to the pillory, have both his ears cut off and nailed to the pillory, and be publicly whipped on his bare back with twenty one lashes well laid on, and forfeit the sum of one hundred pounds &c. Vol. 1. p. 272.

Counterfeiting the bills of credit emitted by the act of 21st of Feb. 7. 1773. (Chap. 672.) or forging the names of the signers thereof, within the province or elsewhere, or *uttering* such bills, knowing them to be counterfeit, was punishable with death, without benefit of clergy.—So of those emitted by the act of March 1785, &c. *ante*. p. 289.—But these crimes, it is presumed cannot now be committed, as the bills are not in circulation and are irredeemable.

By the act of 22d of April 1794, the counterfeiting gold or silver coin, or uttering, paying or tendering it in payment &c. is punished equally, by imprisonment at hard labour, for any time not less than four, nor more than fifteen years, and a fine not exceeding a thousand dollars—and a second offence of *counterfeiting*, which was capital, by imprisonment during life.—

Counterfeiting the brandmarks on casks, of beef and pork, was punishable on conviction, for the first offence, with forfeiture of five pounds—the second offence ten pounds, and for the third and every other offence, by imprisonment and pillory. Vol. 1. p. 172, (act of 18th of August, 1727) and the same punishment throughout, for counterfeiting the brand-marks on flour casks, by the act of 5th of April 1781, (Vol. 1. p. 527) on shad and herring casks, Vol. 1. p. 420. See p. 271, *ante*.

This offence a third time committed, is of course punishable under the 4th section of the act in the text, and the act of 4th of April, 1807.

PERJURY—SUBORNATION OF PERJURY.

By the act of 1718. §. 25. the statute made in the 5th year of queen *Elizabeth*, c. 9. entitled "an act for the punishment of such persons as shall procure or commit any wilful perjury, shall be observed in this province, and be duly put in execution, as well against those that shall falsify their affirmations, as those who shall falsify their oaths, or be convicted of subornation of perjury. Vol. i. p. 120.

This statute is still in force, except the 10th, 11th, 12th and 13th sections, which are inapplicable to this commonwealth, and except the punishment by imprisonment and paying of money, which is altered by our penal laws.

The parts of the statute in force here follow:—

"All and every person and persons, which shall unlawfully and corruptly procure any witness or witnesses, by letters, rewards, promises, or by any other sinister and unlawful labour and means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause depending in suit and variance, by any writ, action, bill, complaint, or information, in any wise touching and concerning any lands, tenements or hereditaments, or any goods, chattels, debts or damages, (in any court having authority, &c.) or shall likewise unlawfully and corruptly procure or suborn any witness, or witnesses, to testify *in perpetuam rei memoriam*, every such offender being thereof lawfully convicted, &c.—No person so convicted or attainted, to be from thenceforth received as a witness to be deposed and sworn in any court of record until such time as the judgment given against him be reversed, &c.

If any person, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent or agreement, wilfully and corruptly commit any manner of wilful perjury by his or their deposition, in any court &c. or being examined *ad perpetuam rei memoriam*, that then every person so offending, and being thereof duly convict or attainted &c. shall &c. and the oath of such person so offending, from thenceforth not to be received in any court of record &c. until such judgment be reversed &c.

As well the Judge or Judges of the court where any suit is or shall be, and whereupon any such perjury is or shall happen to be committed, as also the justices of Assize and Gaol Delivery, in their several circuits, and the Justices of the peace in every county, at their Quarter Sessions, shall have full power and authority, by virtue hereof, to enquire of all and every the defaults and offences, perpetrated, committed or done, contrary to this act, by inquisition, presentment, bill or [information] before them exhibited, or otherwise lawfully to hear and determine the same, and thereupon to give judgment, reward, process and execution of the same, according to the course of the laws, &c."

By the act of 1718, § 24. Subornation of perjury, not only with respect to any cause depending in suit and variance, but in any matter, cause or thing whatsoever, upon oath or affirmation, was punishable by forfeiture of forty pounds, one-half to the Governor, for the support of government, and the other half to the party grieved. But for want of lands, goods &c. to satisfy the said forty pounds, such offender, being convicted or attainted of *perjury or* subornation aforesaid, was to suffer imprisonment for the space of six months, and stand on the pillory &c.

Perjury in proving deeds &c. to incur the like penalties, as if the oath or affirmation had been in any court of record, vol. 1, pa. 95.

False affirmation to incur the same penalties as wilful and corrupt perjury, by the laws of Great Britain, vol. 1, pa. 111, 112.

Witnesses for prisoners, swearing or affirming falsely in their evidence to incur the like penalties, vol. 1, pa. 112.

Insolvent debtor, committing perjury, on his discharge, by oath or affirmation, to incur the like penalties, and may be taken in execution *de novo*, vol. 1, p. 184.

Persons swearing falsely by an uplifted hand, to incur the like penalties, vol. 1. p. 388

For perjury at elections, under the election law, see the act of the 15th of February, 1799, (chap. 2009.) See the 4th section of the act in the text—But now, by an act passed the 3d of April, 1804, (chap. 2510.) every person who shall commit perjury or suborn, or procure any person to commit perjury, by wilfully and falsely swearing or affirming, shall, upon being thereof convicted in any court of law within this commonwealth, forfeit and pay any sum not exceeding five hundred dollars, and suffer imprisonment, and be kept at hard labour during any term not exceeding seven years, at the discretion of the court before whom such conviction shall be had; and further shall thereafter be disqualified from holding any office of honour, trust or profit in this commonwealth, and from being admitted as a legal witness in any matter of controversy: and so much of any law hereby altered, is repealed.

For other cases, under particular acts of assembly, in which perjury may be committed. See the general Index, title, *Perjury*.

Perjury is defined by Sir *Edward Coke*, to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter *material*, to the issue, or point in question. 3. *Inst.* The law takes no notice of any perjury, but such as is committed in some court of Justice, having power to administer an oath; or before some magistrate or proper officer invested with similar authority, in some proceedings relative to a civil suit, or a criminal prosecution; but takes no notice of a voluntary *affidavit* in any extrajudicial matter. The perjury must also be corrupt (that is *malo animo*, or with a wicked intention) wilful, positive and absolute; not upon surprize or the like; it must also be upon some point material to the question in dispute; for if it only be in some trifling collateral circumstance to which no regard is paid, it is no more penal than in the voluntary, extrajudicial oaths before mentioned. *Subornation* of perjury, we have seen, is the offence of procuring another to take such a false oath, as constitutes perjury in the principal. The prosecution is usually carried on for the offence at common law. See 4 *Black. Com.* 137.—8. 1790.

The statute of *Elizabeth* does not reach every case; and in England has been supplied by various subsequent statutes; and here, by the last act on the subject, of the 3d of April 1804. The punishment far exceeds that in the statute; and the terms used being general, "wilfully and falsely swearing or affirming" would appear to include every thing which is perjury at common law.

Since this note went to press, the following important case occurred; and no apology will be necessary for its insertion at large.

Frederick Kræmer, Plaintiff in Error, *v.* the *Commonwealth*.

Indictment for *perjury*, in the Court of Quarter Sessions of *Berks* County.

The Defendant was convicted, and the judgment rendered was as follows: "1st *April* 1811. Sentence and judgment of the court is, that the said *Frederick Kræmer* pay a fine of one hundred dollars to the commonwealth, undergo an imprisonment at *hard* labour for six calendar months from this day in the Gaol of Berks County, and during that time to be confined, fed, cloathed, and treated as the law directs, and further that the said *Frederick Kræmer* shall hereafter be disqualified from holding any office of honour, trust or profit in this commonwealth, and from being admitted as a legal witness in any matter of controversy, and that he pay the costs of prosecution, and stand committed until this sentence be complied with.

Several errors were assigned; but as the opinion of the court was expressed upon two points only, it will be unnecessary to state the others.

1. That the Court of Quarter Sessions has no jurisdiction in cases of *perjury*.

2. That the judgment rendered on the verdict is illegal, and contrary to the act of assembly.

The argument came on at the Supreme Court for the Lancaster district, May term 1811, and on the 27th of May, the opinions of the judges were delivered as follow.

Tilghman, C. J. This is a writ of error to the Court of Quarter Sessions of *Berks*, in which the Plaintiff in error was indicted and convicted of perjury. Many errors have been assigned; there are but two, however, on which I think it necessary to give an opinion. The first is, that the court below had no jurisdiction. Second, that the punishment awarded is greater than is warranted by law.

1. As the Court of Quarter Sessions exercises an extensive criminal jurisdiction, it is of importance that no doubt should remain on that subject. I shall endeavour, therefore to mark the line of its jurisdiction distinctly, in order that

1790. the legislature, if they think it necessary, may alter it. It is provided by our present constitution, made in the year 1790, that there shall be a Court of Quarter Sessions of the peace, and a Court of Common pleas for each county; and that the judges of the Court of Common Pleas of each county, *any two of whom* shall be a *quorum*, shall compose the Court of Quarter Sessions of the peace. It is also provided, that the judges of the Court of Common pleas in each county, shall by virtue of their offices, be justices of *oyer* and *terminer* and general gaol delivery, for the trial of *capital* and *other offenders* therein; and any two of them, the *president* being one, shall be a *quorum*. The constitution is silent as to the jurisdiction of the Quarter Sessions, from whence it is to be inferred, that it is to be considered as a court whose jurisdiction was well known, and in which it was not intended to make any alteration. This leads me to inquire, what was the jurisdiction of this court previous to the adoption of the constitution. At the time of the American revolution, all authority under the king of *Great Britain* having ceased, it became necessary to reorganize the courts of justice. Accordingly we find that by an act passed 28th of January 1777. (Vol. 1. pa. 430.) the several courts were re-established, with the same jurisdiction that they possessed before that time. The question recurs; what was the jurisdiction of the Court of Quarter Sessions? On this head we are not left to conjecture. The foundation of that, and other courts is found in an act passed 22d of May 1722, entitled "an act for establishing courts of judicature in this province." (Vol. 1. pa. 131.) By the second section it is enacted, that there shall be a court styled "The General Quarter Sessions of the peace, and gaol delivery," holden and kept four times a year in each county. The third section provides, that the justices of the peace, or any three of them, "shall and may hold the said General Sessions of the *peace* and gaol *delivery* according to law, and as fully and effectually as any justices of the *peace*, justices of the *assize*, justices of *oyer* and *terminer* or of *gaol delivery* may or can do." It would seem from this, that the court of Quarter Sessions were to have jurisdiction of *capital* offences. But that this was not the case, will appear clearly from other parts of the act. The third section directs, that every recognizance taken before any of the justices, for suspicion of any manner of felony, or other crime *not triable in the Court of Quarter Sessions of the peace and gaol delivery*, "shall be certified before the *justices of the Supreme Court of oyer* and *terminer*. By the 18th section, the justices of the *Supreme Court* are authorized and empowered, from time to time, to deliver the gaols of all persons who then were, or thereafter should be committed for "treason, murder, and such other crimes, as by the laws of the province then were, or thereafter should be made *capital or felonies of death*." When all parts of this act are considered, the intention is plain, that crimes punishable with death should be tried by the justices of the Supreme Court, and all other offences, by the courts of Quarter Sessions. But the justices of the Supreme Court had likewise jurisdiction of inferior offences, when holding courts of *oyer* and *terminer* and general gaol delivery. That this was the boundary of the respective jurisdictions, I have always understood, and the records of the several courts before the revolution will prove it. By the merciful improvements of our penal code, in the year 1790, and since, no crime but murder of an atrocious nature, is now punished with death. But that has produced no alteration in the criminal jurisdiction, so far as relates to the sessions. Those crimes which were *formerly* punished with death, remain out of the jurisdiction of the Courts of Quarter Sessions. (See act of 22d of April 1794. §. 16.) They may be tried, however, by the same persons, who now compose the Court of Quarter Sessions, provided the president attends, because as before mentioned, the judges of the Courts of Common Pleas compose the Courts of Quarter Sessions, and by virtue of their offices, are justices of *oyer* and *terminer*, and *general gaol delivery*. It sometimes happens that the sickness of the president prevents the holding of courts of *oyer* and *terminer*, and in that case, the offences of *perjury* and *forgery &c.* may be tried in the sessions. If this be thought improper, the legislature have the power to order it otherwise; as the law now stands, I have no doubt of the jurisdiction of the Court of *Quarter Sessions*.

I will now consider the second point; the judgment rendered by the court below. In order to understand this matter, it will be necessary to take a view of several acts of assembly relative to the punishment of perjury. By the 4th section of the act of 5th of April 1790, a certain class of offences, in which perjury is included, were made punishable (instead of cutting off the ears &c.) by fine and imprisonment at hard labour, not exceeding the term of two years, and during the time of imprisonment, they were to be fed, cloathed and treated in the manner directed in another part of the said act. This manner of treatment was different in the gaol of the county of *Philadelphia*, from what it was in the gaols of the other counties, for reasons which it is unnecessary to mention. The present subject relates to the latter only. The 28th sect. of the act describes the manner in which those persons should be

treated who were confined in gaols, other than that of the county of *Philadelphia*. Without mentioning the whole of it, it is sufficient to say, that the keepers of the gaol were authorized, in case the convicts were *idle*, or refused to *labour*, or were guilty of any *trespass*, to withhold from them all sustenance except bread and water, to put *iron yokes* round their *necks*, *chains* upon their *legs*, or *otherwise restrain in irons* such as should be incorrigible, or irreclaimable without such severity. This mode of treatment may amount to a heavy punishment, and it has always constituted part of the *judgment* against convicts who were subject to it. To avoid prolixity, the judges have generally used this mode of expression, "that he shall be confined, fed, cloathed and treated as is directed by law." These are the expressions in the present judgment, and that is the error complained of. Having shewn what was *formerly* the punishment of perjury, let us see what it *now* is. This will be found in an act intitled "an act for the punishment of perjury or subornation of perjury" passed 3d of April 1804. The convict is made liable to a fine, not exceeding five hundred dollars, imprisonment at hard labour during any term not exceeding seven years, disqualification from holding any offices of honour, trust or profit, and from being a legal witness in any matter of controversy. The second section repeals so much of any former law as is thereby altered or supplied. This act was certainly intended to define the complete punishment of perjury, and every former law, so far as the same related to punishment, was repealed. Now we see that nothing is said in the act of the *manner* in which convicts were to be treated, during their imprisonment. The question then is; had the court a right to direct the manner? They certainly had not, unless this act can be connected with the former act, so as to retain that part of the former, which prescribes the manner of treatment. If the manner of treatment is a substantial part of the punishment, and if every thing in former laws, *inflicting punishment*, was repealed, this connection cannot be supported. But besides it will appear, that the 28th section of the act of 5th of April 1790, was confined to persons sentenced to hard labour, under the provisions of *that act*. The expressions are "the malefactors sentenced to hard labour *as aforesaid*;"—that is to say, under the provisions in that act, for the punishment of the several offences therein mentioned. I know of no law, by which persons, in general, who are sentenced to imprisonment at hard labour, are made liable to any particular treatment. On the contrary, the mode of *treatment* is prescribed in the several acts by which the punishment is directed. This will appear by the act of 22d of April 1794. § 4. 5. and 6. by which persons punishable by imprisonment at hard labour, for the crimes of high treason, arson, rape, murder of the second degree, forgery, and counterfeiting of gold and silver coin, passing counterfeit notes of sundry banks, and maim, are expressly made subject to the treatment prescribed by an act entitled "an act to reform the penal laws of this state," or by the provisions of the said act of 22d of April 1794, which made some alterations in the treatment prescribed by the former; and it is remarkable, that in the 7th section of the act of 22d of April 1794, the punishment of voluntary manslaughter, is, by hard labour, and solitary confinement, but no particular treatment is prescribed, from whence I infer, that persons convicted of that offence, were not intended to be liable to the same treatment with the offenders mentioned in the 4th, 5th and 6th sections. But it has been contended, that the words in this judgment, which relate to the feeding, clothing and treatment, shall be rejected as surplusage; because, if the law directs no particular manner of feeding, &c. that part of the judgment can have no operation.—I cannot think so. These words were certainly intended to have an operation, and will perplex the gaoler who has the custody of the prisoner. To adjudge that a man shall be fed, clothed and treated, as the law directs, implies an assertion that the law directs some particular mode of feeding, &c. A judgment in a criminal case must not be expressed in terms which tend to mislead the persons by whom it is to be executed. I am therefore of opinion, that the judgment of the Court of Quarter Sessions was erroneous.

1790.

Yeates, J.—The present writ of error has been argued with singular zeal and ingenuity. I deem it superfluous to consider all the different exceptions which have been taken to the proceedings; but it is highly important to the peace and good order of the community, that the opinion of this court should be known as to the legitimate jurisdiction of the courts of general Quarter Sessions of the peace and gaol delivery of this state.

It has been strenuously contended, that the powers of the sessions here, are the same as in *England*; that their authority is derived from the commission of the justices founded on the statute of 34 Edw. 3. c. 1. and that the words of the statute have received a known construction. 2 *Hawk.* c. 8. § 18.—4 *Black. Com.* 271. No indictment lies before justices of the peace for forgery, or for perjury at common law; but perjury on the statute of 5 Eliz. is indictable in the sessions, because it is so directed by the statute. 1 *Salk.* 406. an indictment for perjury at the Quarter Sessions, at common

1790. law, was quashed for want of jurisdiction. 2 *Stra.* 1088.

I am fully satisfied, that the jurisdiction of the sessions is solely founded on our own acts of assembly; and therefore I shall examine those laws as far back as I have materials in my power.

The establishing of all courts of judicature within the government, was granted to the first proprietary, by the royal charter. (See Appendix.) An act for establishing courts of judicature was passed, 13 *William.* 3. in 1701. (chap. 106. in repealed laws of 1701. vol. 1, p. xi.) which was repealed by the queen in council, 7th of Feb. 1705. (*ib.* p. lvii.)—Another act was made, 9th ann. in 1710. (*ib.* p. xiii.) which was also repealed in council, 20th of Feb. 1713. (*ib.* p. lviii.)—An act for establishing the Courts of General Quarter Sessions was made 28th May 1715. (*ib.* c. 202. p. xiv.) which was repealed by the lords justices 21st July, 1719, with two other acts for establishing Courts of Common Pleas, and a Supreme, or Provincial Court of Law and Equity. (*ib.* p. lviii.)—An act for the better recovery of fines and forfeitures due to the governor and government of this province, was passed 28th of May, 1715, (*ib.* c. 206. p. xiv.) which directed, that all fines &c. set in the Supreme Court, or in any of the Courts of Common Pleas, Courts of *General Quarter Sessions of the peace and gaol delivery*, or before the special courts of *Oyer* and *Terminer*, shall be estreated into the Supreme Court. This act continued in force, until it was repealed by a law passed 18th March, 1780. (*ib.* c. 388. p. liv.) The act for establishing courts of judicature, passed 22d of May 1722. (Vol. 1. p. 131.)—The second section erects a *Court of General Quarter Sessions of the peace and gaol delivery*, which shall be holden four times in every year in each county; and, by sect. 3. the justices thereof shall hold the same court according to law, and *as fully and effectually as any justices of the peace, justices of the assize, justices of Oyer and Terminer*, or *of gaol delivery*, may or can do. The 4th section directs them to certify their recognizances to the next sessions. But every recognizance for suspicions of any manner of felony *not triable before them*, shall be certified before justices of the Supreme Court of *Oyer* and *Terminer*. The 13th section gives very extensive powers to the judges of the Supreme Court, and it is declared by section 19. that all capital offences or felonies of death, shall be enquired of, heard and determined before the same judges. It is enacted then in express terms, that the Courts of General Quarter Sessions of the peace and gaol delivery, shall possess all the powers of justices of the assize, of *Oyer* and *Terminer* and gaol delivery, but as to capital offences, or felonies of death, the jurisdiction is confined to the Supreme Court. The law as well as our present constitution, clearly had in view the powers exercised by such official characters in the kingdom of *England*, concerning which an accurate knowledge can be obtained from the English books: but the limits of jurisdiction of the Supreme Court and Quarter Sessions are precisely drawn. The sessions have a concurrent jurisdiction with the Supreme Court as to all crimes cognizable before them, except as to capital offences, or felonies of death. Perjury was an offence not capital, and of course, triable in the sessions.—There is no ambiguity in the words of the act.

We are told, that justices of the peace in *England*, notwithstanding the general expressions of stat. 34 Edw. 3. c. 1. seldom, if ever try any greater offence than small felonies within the benefit of clergy; and that they have no jurisdiction in cases of forgery or perjury at common law, according to the authorities cited. Be it so.—The law is so settled by judicial decisions. But in *Pennsylvania* the act of assembly has received a different construction, and the law is settled otherwise. It has been the uniform practice since the passing of the act, to prosecute forgery and perjury either in the sessions, or court of *Oyer* and *Terminer*, at the election of the person who conducts the prosecutions; and numerous judgments for those offences have been rendered in the sessions. The practical exposition of a law during a period of eighty-seven years, would have a most powerful effect, if even the words of it were dubious, which I firmly deny to be the case here.—I have no doubt, therefore, of the power of the Quarter Sessions to try the present indictment.

Exceptions have been taken to the judgment given upon the indictment, inasmuch as the prisoner was sentenced to undergo an imprisonment at *hard* labour in the gaol of *Berks* county, and during that time be *confined, fed, cloathed* and *treated* as the law directs. It is admitted that the other parts of the sentence were conformable to the act for the punishment of perjury, or subornation of perjury, passed on the 3d of April 1804.—During the argument it was taken for granted, that the adjective *hard* was not to be found in the act, and so it appeared from vol. 7th of *Bioren's* edition, p. 398. But the 6th vol. of *Bailey's* edition (Pamphlet-Laws.) p. 513. inserts that word. I regret that such a variance should exist in the different editions of our laws, as it may lead to very serious consequences. I found myself therefore, under the necessity of examining the original law in the secretary's office, and found that the terms *hard labour* were included therein. The first ground of exception is therefore removed, but the last remains in full force. It has been said on

the part of the commonwealth, that the second section of this act repeals so much only of any former law as is thereby altered or supplied, and consequently the provisions in the close of the 4th section of the law of 5th April 1790 (in the text) as to *confining, feeding, clothing* and *treating* a convict *as the law directs*, remain in full force. It is contended that the punishment of perjury or subornation of perjury is merely cumulative; but if the court should be of a different opinion, those words in the judgment, are merely superfluous, and impose, at all events no hardship on the prisoner which is not warranted by law. To this it may be justly answered, that odious as the crime of perjury is, and injurious as it may be to the interests of society, the punishment prescribed by the legislature is sufficiently severe without recurring to forced construction:—a fine not exceeding $500.—Imprisonment at hard labour, during any term not exceeding seven years,—disqualification from holding any office of honour, trust or profit, and disability as a witness, are serious evils, which would deter any man from the commission of an offence, who can be restrained by the passion of fear.—If the legislature had intended to have gone further they would have said so in express terms: They seem to have made these provisions as a complete substitute for the former punishment prescribed by law.

The words cannot be deemed superfluous. They have a definitive meaning in the act of 5th of April 1790, § 28. as to malefactors sentenced to hard labour in the several counties of this state, other than the county of Philadelphia. All power of self goverment is taken from them; and in case they shall refuse to labour, are idle, or are guilty of any trespass, all sustenance, except bread and water may be withheld from them; iron yokes may be put around their necks, chains upon their leg, or legs, &c. In the 4th, 5th, 6th and 10th sections of the act of 22d of April 1794, (*ante.*) we find superadded to the punishment at *hard labour* of the several offenders therein specified, that they shall be kept, treated and dealt with in the manner prescribed by the act of 5th of April 1790; but in the 7th section, it is declared, that one convicted of a second manslaughter shall undergo an imprisonment at hard labour for any time not less than six, nor more than fourteen years. Two conclusions may be fairly deduced herefrom; one, that where it was meant to inflict this mode of treatment, it is so expressed in plain terms; and in the second place, that these words carry with them a precise and distinct meaning. If the expressions of the act do not imperiously demand, that the *confining, feeding, clothing and treating the prisoner* as the law directs, should be made part of the sentence, the insertion of them therein naturally leads to an undue severity on the part of the gaoler, and tends to mislead a ministerial officer in the discharge of his duty in a point which ought to be free from all ambiguity. I am therefore of opinion that the judgment of the Sessions should be reversed. 1790.

Brackenridge J. concurred, and added, that the quarter session, have jurisdiction of all offences *not capital*, and any *two of them*, without the president of the district, may try such offences as are not capital. Yet there is great reason why, in the absence of the president, they should be confined to *misdemesnors*. But this must be by an act of the legislature. And the reason, I take it, why it has not heretofore attracted the attention of the courts or of the country, has been, that seldom has the Court of Quarter Sessions, in the absence of the president, proceeded to the trial of any thing *above a misdemesnor*, and I may say, seldom even this, without the president, who was rarely absent, save in this district, from extraordinary indisposition.

Judgment of the Court of Quarter Sessions reversed.

BREAKERS OF PRISON—ESCAPE.

By the act of 1718, § 18, he or they, who shall happen to break prison, shall not have judgment of life or member for breaking of prison only; except the cause for which he or they were taken and imprisoned did require such judgment, had he been convict according to law. Vol. 1, p. 117.

Breach of prison, by the offender himself, when committed for any cause, was felony at common law; or even conspiring to break it. Our act, which mitigated this severity, followed the statute of 1 Edw. 2. *de frangentibus prisonam.* And to break prison (whether it be the county gaol, or other usual place of security) when lawfully confined upon any inferior charge, is still punishable by the English law, as a high misdemesnor, by fine and imprisonment. For the act which ordains that such offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment, see *4 Black. Com.* 130; and also of escapes after an arrest, *ib.*

This offence, before conviction, does not appear to be otherwise altered by any act of assembly. But after conviction, it was to be punished by additional hard labour, and corporal punishment by the 32d section of the act in the text. And by the 13th section of the act of 22d of April, 1794, if any person sentenced to hard labour and solitary confinement, shall escape, or be pardoned, and after his escape or pardon shall be guilty of any such offence as on the 15th of Sept. 1786, was capital, or a felony of death without benefit of clergy, such person shall be sentenced

1790. to undergo an imprisonment for the term of twenty-five years, and shall be confined in the solitary cells, at the discretion of the inspectors.

So, rescue, is the forcibly and knowingly freeing another from an arrest or imprisonment, and is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemesnor, a misdemesnor also. But here likewise, as upon voluntary escapes, the principal must first be attainted, or receive judgment, before the rescuer can be punished. See *4 Black. Com.* 129—130—1.

BLASPHEMY.

This offence is punished, on conviction, by a fine of ten pounds, for the use of the poor, and three months imprisonment at hard labour, for the use of the poor. Vol. i. p. 6—7. And by act of 21st March, 1806, the fine may be any sum not more than ten pounds.

BARRATRY.

This common law offence is punishable by discretionary fine and imprisonment, by force of the statute of 34 Edw. 3. c. 1. Vol. i. p. 6.

BIGAMY.

This offence is punished by imprisonment at hard labour for any term not exceeding two years, by the 4th section of the act in the text. See vol. i. p. 29—30.

FORNICATION AND BASTARDY—ADULTERY—INCEST.

Incestuous fornication and adultery, besides the usual punishment, was subject to a fine of one third part of the offender's estate.—Vol. i. p. 26. Simple fornication, to a fine not exceeding ten pounds. Adultery, to a fine not exceeding fifty pounds, and imprisonment for a time not less than three, nor more than twelve months. See vol. i. p. 27. and the act of 21st March, 1806.

FORCIBLE ENTRY.

Forcible Entry, or *Detainer*, is, violently taking or keeping possession of lands and tenements, with menaces, force and arms, and without the authority of law. See vol. i. p. 1.

Removing Land Marks—Cutting Timber Trees (unlawfully) on another's land, declared to be punishable in the Quarter Sessions, by act of the 20th of March, 1810. See vol. i. p. 4—20.

RIOTS—ROUTS—UNLAWFUL ASSEMBLIES—AFFRAYS.

See the act against *Riots* and *Rioters*, vol. i. p. 30. and the notes thereto; and the statute of 34 Edw. 3. c. 1. in the note to chap. 41. vol. i. p. 6.

The punishment for these offences is discretionary fine and imprisonment, according to the laws of England.

The description of these offences need not be repeated here; they cannot be committed by fewer than *three* persons. And therefore, where several were indicted of a riot, and two only were found guilty, the judgment was arrested. But it would have been otherwise, it is said, if they had been indicted, that they, *with many others*, committed a riot. *1 Ld. Raym.* 484. *1 Stra.* 196. And where *six* were indicted for a riot, *two* were convicted, *two* were acquitted, and *two* had died before trial. The court refused to arrest the judgment, for the jury having found *two* guilty of a *riot*, it must have been together with the two that were untried. *3 Burr.* 1264. If a number of people assemble together, in a lawful manner, and upon a lawful occasion, and during the assembly a sudden affray happen, this will not make it a riot *ab initio*, but only a common affray. But if a number of people assemble in a riotous manner to do an unlawful act, and a person who was upon the place before, upon a lawful occasion; and not privy to their first design, joins them, he will be guilty of a riot equally with the rest. *2 Ld. Raym.* 965.

Affrays, are the fighting of two or more persons in some public place, to the terror of the people; for if the fighting be in private, it is no *affray*, but an *assault*.—*Affrays* may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may carry them before a justice, or imprison them by his own authority for a convenient time, till the heat is over. The punishment is also fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for where there is any material aggravation, the punishment proportionably increases: as in the case of deliberate *duelling*; but with respect to this aggravated species of affray, see the act to restrain the horrid practice of duelling in this note. See *4 Black. Com.* 145.

Obstructing the execution of lawful process, is an offence against public justice; and is at all times an offence of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal process; and it has been holden, that the party opposing such arrest becomes thereby *particeps criminis*. See *1 Hawk.* (folio) 121.

ASSAULT AND BATTERY—FALSE IMPRISONMENT.

In a public light, as a breach of the peace, assault and battery is indictable; and punishable with fine or imprisonment, or both; or with other ignominious penal-

ties, when committed with any very atrocious design, as an assault with intent to commit murder, rape, &c. As in these aggravated assaults, judgment of the pillory might formerly have been given; so now they may be punished by imprisonment at hard labour, by the 4th section of the act in the text, and the act of 4th of April, 1807.

An assault is an attempt, or offer, by force or violence, to do a corporal hurt to another. A battery, which always includes an assault, is the actual doing an injury, be it ever so small, in an angry or revengeful, or rude or insolent manner; as by spitting in his face, or violently justling him out of the way: or striking a horse on which one rides, whereby he is thrown (see 1 *Mod.* 24.—1 *Jones* 444.) or, wantonly doing an act, by which another is hurt, as pushing a drunken man upon another. *Buller* 16.

The plea must be not guilty, and whatever will justify, as self defence, or son assault, &c. may be given in evidence.

So, false imprisonment is indictable—The law punishes the breach of the peace, the loss which the state sustains by the confinement of one of its members, and the infringement of the good order of society. For there can be no doubt, but that all crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemesnors whatever, of a notoriously evil example, may be indicted at the suit of the commonwealth. See 4 *Black. Com.* 218.

We have seen, however, that a special provision has been made with respect to the costs on prosecutions of this nature, which is in daily practice.—And, as many complaints are daily made for very slight offences, upon the sudden heat of resentment, especially among the poorer class of citizens, who are illy able to bear the expences of the prosecution, the law has humanely (and in the editor's opinion, wisely) opened a door for repentance and reconciliation, before they enter the threshold of the court. By an act passed 17th of March, 1806, (chap. 2671.) any justice of the peace, before whom a complaint or charge may be made for an assault and battery, or for assault only, either before, or after recognizance is entered for the appearance of the defendant, may, before the next sessions, and he is enjoined, at the mutual request of the parties, by agreement signed by them mutually, to dismiss the same, and make a record thereof, for the fee of twenty-five cents; and no fee shall be demanded of the justice, by any officer of the commonwealth, on account of settling any such dispute or complaint.—*Provided* the justice shall be fully satisfied that the settlement of such complaint or charge will not injure the safety of the citizens, or the peace of society.

Of binding to the peace, and surety for good behaviour, see vol. i. p. 5.—4 *Black. Com.* 251.

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CONSPIRACY.

By 33 Edw. 1. Stat. 2. It is declared, "Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsly and maliciously to indite, or cause to indite; [2] or falsly to move or maintain pleas; (3) and also such as cause children within age to appeal men of felony, whereby they are imprisoned, and sore grieved; (4) and such as retain men in the country with liveries or fees for to maintain their malicious enterprises; and this extendeth as well to the takers, as the givers."

A conspiracy to indict an innocent man of felony, falsely and maliciously, who is accordingly acquitted, is an abuse and perversion of public justice, and is indictable. The punishment is by fine and imprisonment—and the pillory having been formerly part of the punishment—This offence may be now punished under the 4th section of the act in the text, and the act of 4th of April, 1807. There must be at least two to form a conspiracy.—4 *Black. Com.* 136.

Unlawful combinations are also known at the common law, as conspiracies. Thus several journeymen taylors were indicted for a conspiracy among themselves, to raise their wages. This was held to be an offence at common law, for the *conspiracy* is illegal, whether the matter be lawful or not. 8 *Mod.* 10.—And the same doctrine was held in the *journeymen* shoemaker's case, in the Mayor's Court of *Philadelphia*, by a very correct judge.—One only cannot be convicted of this crime—Fewer than two cannot conspire.

CHEAT.

Cheats indictable at common law, may, in general, be described to be, deceitful practices, in endeavouring to defraud, or defrauding another of his known right, by means of some artful device; contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate man to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by suppressing a will, &c.

This offence is punishable, generally, by fine and imprisonment, or by fine only, by the discretion of the judges, which is regulated by the circumstances of each particular case. But it is said, cheating with false dice, especially if the offender be a common gamester, might be punished with infamous punishment. See 1 *Hawk.* (folio) 187—8. See 1 *Dallas* 47.

BRIBERY.

Bribery, is an offence against public justice, and is, when a judge or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office. This offence is punished, in inferior offices,

1790. with ime and imprisonment; and in those who offer a bribe, though not taken, the same. See 4 *Black. Com.* 139—40. See the case of the *King* v. *Vaughan*, which was an attempt to corrupt a minister of state, for the purpose of procuring an office. 4 *Burr.* 2494. So an attempt to corrupt and bribe the commissioner of the revenue of the United States, with a view to accomplish a contract, which he had power to form. 2 *Dallas*, 384.

In a public officer, or a judge, this offence is impeachable, as well as indictable, and may be punished by removal from office, and disqualification. See the Constitution.

As to bribery at elections, see the general election law of 15th of February, 1799, (chap. 2009.)

EXTORTION.

This is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money, or thing of value, that is not due to him, or more than is due, or before it is due. The punishment is fine and imprisonment. See 4 *Black. Com.* 141.

A judge, in *Pennsylvania*, receives no fees, or perquisites. In a justice of the peace, it would be a high misdemesnor, and a forfeiture of his office, which he holds only during *good behaviour*. In offices held during pleasure, the power of removal by the governor, would, no doubt, be promptly exercised. As to extortion of Gaoler, Bailiff, or other officer, see vol. i. p. 186—8.

EMBRACERY.

Embracery is an attempt to influence a jury corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like. The punishment for the person embracing is by fine and imprisonment: and for the juror so embraced, if it be by taking money, the punishment is, (by divers statutes in the reign of *Edward* 3.) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value. See *Black. Com.* 140.

The English statutes, which extend to, and form part of the law of *Pennsylvania*, are:

5 *Edward* 3. c. 10. *Item*, it is accorded, that if any juror in assizes, juries or inquests, take of the one party or the other, and be thereof duly attainted, that hereafter he shall not be put in any assizes, juries, or inquests, and nevertheless shall be commanded to prison, [and further ransomed at the king's will] and the justices before whom such assizes, juries and inquests shall pass, shall have power to enquire and determine according to this statute.

34 *Edward* 3. c. 8. *Item*, that in every plea, whereof the inquest or assize doth pass, if any of the parties will sue against any of the jurors, that they have taken of his adversary, or of him, for to give their verdict, he shall be heard, and shall have his plaint by bill presently before the justices before whom they did swear, and that the juror be put to answer without any delay; and if they plead to the country, the inquest shall be taken presently. And if any man other than the party, will sue for the king (the commonwealth) against the juror, it shall be heard and determined as afore is said. And if the juror be attainted at the suit of other than the party, and maketh fine, the party that sueth shall have half the fine; and that the parties to the plea shall recover their damages by the assessment of the inquest; and that the juror so attainted have imprisonment for one year, which imprisonment the king granteth that it shall not be pardoned for any fine. And if the party will sue by writ, before other justices, he shall have the suit in the form aforesaid. [See the form of this writ in *Reg. Brev.* p. 188.]

38 *Edward* 3. *Stat.* 1. c. 12. *Item*, as to the article of jurors, in the four and thirtieth year "it is assented and joined to the same, that if any juror in assizes sworn, and other inquests to be taken the king and party, or party and party, do any thing take by them, or other of the party plaintiff or defendant, to give their verdict, and hereof be attainted by process contained in the same article, be it at the suit of the party that will sue for himself or for the king, or any other person, every of the said jurors shall pay ten times as much as he has taken; and he that will sue shall have the one half, and the king the other half. And that all the embraceors that bring or procure such inquests, in the country, to take gain or profit, shall be punished in the same manner and form as the jurors; and if the juror or embraceor so attainted have not whereof to make gree [*satisfaction*] in the manner aforesaid, he shall have the imprisonment of one year. And the intent of the king, of the great men, and of the commons is, that no justice, nor other minister shall inquire of office upon any of the points of this article, but only at the suit of the party, or of other, as aforesaid."

OPPRESSION BY OFFICERS.

Another offence against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the oppression, and tyrannical partiality of judges, justices, and other *magistrates*, in the administration, and under the colour of their office. And when prosecuted, either by impeachment, or indictment, is sure to be severely punished with forfeiture of their offices

and, if by indictment, by fine and imprisonment, regulated by the nature and aggravations of the offence committed.—See 4 *Black. Com.* 141.

NEGLECT OF DUTY.

The negligence of public officers, entrusted with the administration of justice, as sheriffs, coroners, constables, and the like, is punishable by fines. And particular penalties are frequently inflicted by special acts of the assembly, where particular duties are enjoined upon officers, or others. See 4 *Black. Com.* 140.

Neglecting to join the *posse comitatus*, or power of the county, being thereunto required by sheriffs, justices, &c. is fineable.

By statute of 3 *Edw.* 1, c. 9. "It is provided, that all generally be ready and apparelled, at the commandment and summons of Sheriffs, and at the cry of the country, to sue and arrest felons, when any need is," [as well within franchise, as without.]

Disobedience to an act of assembly, where no particular penalty is assigned, is yet punishable, by consequence, for the contempt, by discretionary fine and imprisonment. See 4 *Black. Com.* 122.

NUISANCE.

Common nuisances, are a species of offence against the public order, and œconomical regimen of the state; being either the doing of a thing to the annoyance of all the citizens, or neglecting to do a thing which the common good requires. As such they are indictable, as it would to multiply suits, by giving every man a separate action, for what damnifies him in common, only, with the rest of his fellow citizens.

Of this nature are, annoyances, in *highways*, *bridges*, *rivers*, by rendering the same inconvenient or dangerous to pass; either positively, by actual obstructions, or negatively by want of reparations.

With respect to the roads and highways, an attempt was made by the 13th section of the "act to regulate arbitrations and proceedings in courts of justice," to destroy the public prosecution by indictment at common law, and to restrict the remedy to the summary power given to the justices in the road law. But this was speedily found to be an inefficient remedy; and the indictment was restored by the 4th section of the act of 28th of March, 1808, (chap. 2987.) So that in this case, the indictment is now the statute remedy; but the summary power of the justices, also remains.

As to rivers, see all the acts declaring certain rivers, public highways, and vol. 1. p. 325.

All those kinds of nuisances, which when injurious to a private man, are actionable; are, when detrimental to the public, punishable by public prosecution, and subject to fine according to the quantity of the misdemeanor; such as offensive trades and manufactures; particularly the keeping hogs in any city or market town. *Salk.* 460. 1790.

All disorderly houses, inns or alehouses, bawdy-houses, gaming-houses, unlicenced stage-plays, booths and stages for rope-dancers, mountebanks and the like, are public nuisances; and may, upon indictment, be suppressed and fined. 1 *Hawk.* (folio) 198. 225.

As to inns, or taverns, See vol. 1, p. 25, 73, 127.

So, open and notorious *lewdness*; either by frequenting houses of ill fame; or by some grossly scandalous and public indecency, is indictable, and punishable by fine and imprisonment. 4 *Black. Com.* 64.—A wife may be indicted and punished with her husband for keeping a *brothel*; for this is an offence touching the domestic œconomy or government of the house, in which the wife has a principal share; and is also such an offence, as the law presumes to be generally conducted by the intrigues of the female sex. And in all cases; where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any single woman. *Ib.* 29.

Lotteries are declared to be public nuisances. Vol. 1, p. 246.

The making and selling fire-works and squibs, or throwing them about in any street, on account of the danger that may ensue, is a common nuisance.

Our acts of assembly, therefore inflicts penalties, 1st, on breaming vessels, and heating with blazing fire, pitch &c. at the wharves in the city, &c. or keeping fire on board any vessel, after a certain hour in the night without licence. Vol. 1. p. 129. and the act of 29th of March, 1803, (chap. 2358)—2d on building coopers shops, and bake houses, unless in a certain manner. Vol. 1. p. 194.—3d, keeping hay and faggots in the city, unless under certain regulations. *Ib.* p. 195.—4th, on firing guns within towns and boroughs, making or selling squibs, rockets, or other fire-works, or casting or firing any of them without licence, or firing chimnies in any town or borough, *Ib.* 208, 249, 319.—5th setting fire to woods or marshes, act of 18th of April, 1794, (chap. 1732.)

Eaves Droppers, or such as listen under the walls, or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, are indictable, and punishable by fine, and to find surety for good behaviour.—So, a common scold is a nuisance to her neighbourhood. See 4 *Black. Com.* 167—8.

IDLENESS.

Idleness, (the root of evil) is a high offence against the public œconomy. By ancient statutes, vagabonds are described

1790. to be, "such as wake on the night, and sleep on the day, and haunt customable taverns, and ale houses, and routs about, and no man wot from whence they come, ne whether they go." And by our act of assembly, "all persons, who, not having wherewith to maintain themselves and families, live idly and without employment, and refuse to work, for the usual, and common wages given to other labourers in the like work in the place where they then are; and all persons going about from door to door, or placing themselves in streets, highways, or other roads, to beg, or gather alms in the place where they dwell, and all other persons wandering abroad and begging; and all persons coming from the neighbouring states, into any place in this state, and shall be found loitering or residing therein, and shall follow no labour, trade, occupation or business, and have no visible means of subsistence, and can give no reasonable account of themselves, or their business in such place, shall be deemed, and are declared to be, idle and disorderly persons." They shall be punished, on conviction, before a Justice, in the workhouse, or gaol, at hard labour not exceeding one month. And the constable having notice, and neglecting to apprehend them, and to convey them to the Justice, shall forfeit and pay ten shillings to the use of the poor, vol. 1, pa. 102, 268.

USURY.

Usury, is an unlawful contract, upon the loan of money, to receive the same again with exorbitant increase.

If any person shall receive or take more than six pounds *per cent.* per *annum*, he shall, upon conviction, forfeit the money and other things lent, &c. vol. 1, pa. 156.

LIBEL.

Libels, in their largest, and most extensive sense, signify any writings, pictures or the like, of an immoral, or illegal tendency. In the common acceptation, they are malicious defamations of any person, made public, by either printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt and ridicule. Their direct tendency, is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. 4 *Black. Com.* 150. But see the constitution; and the act of 16th of March, 1809, before in this note.

CONTEMPTS.

See the act of 3d of April, 1810, before in this note.

MALICIOUS MISCHIEF.

Malicious mischief, or damage, is that species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; but either out of a spirit of wanton cruelty, or black, and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so does this, the other property of individuals.

The offences in *England* under this head, are generally statute offences, and the damage was considered as a trespass at common law; and it is said the line is not distinctly drawn. But it is a principle, that every act, of a public evil example, and against good morals, is an offence indictable at common law.

Thus, maliciously, wilfully and wickedly killing a horse, was held to be indictable, and by *M'Kean*, C.J. on examining the cases, we have not found the line accurately drawn; but, it seems to be agreed, that whatever amounts to a *public wrong*, may be made the subject of an indictment. The poisoning of chickens, cheating with false dice, fraudulently tearing a promissory note, and many other offences of a similar description, have heretofore been indicted in *Pennsylvania*; and 12 Mod. 337, furnishes the case of an indictment for killing a dog, an animal of a far less value than a horse. Breaking windows by throwing stones at them, though a sufficient number of persons were not engaged to render it a riot; and the embezzlement of public monies, have, likewise, in this state, been deemed *public wrongs*, for which the private sufferer was not alone entitled to redress; and unless, indeed, an indictment would lie, there are some very heinous offences, which might be perpetrated with absolute impunity, since the rules of evidence, in a civil suit, exclude the testimony of the party injured, though the nature of the transaction, generally, makes it impossible to produce any other proof. We entertain no doubt upon the subject. 1 *Dallas*, 335

By an act passed 21st of March, 1772, (chap. 652.) vol. 1, pa. 382. If any person or persons shall maliciously and voluntarily break, or take off or from the door of any inhabitant within this province, any brass, or other knocker, affixed to such door, or shall maliciously or voluntarily cut, break, or otherwise destroy, any leaden, tin or copper spout, or any part thereof, affixed to any such house, every person so offending, being thereof legally convicted, shall forfeit and pay the sum of twenty-five pounds, for every such knocker, or spout so broken, or taken away, or cut or otherwise destroyed, or be publicly whipped, &c.

If any person or persons, shall maliciously or voluntarily, break, take down or destroy or deface any sign put up by any inhabitant of this province, to denote his, her or their place of abode, occupation, business or employment, every such person or persons so offending, being there-

of legally convicted, shall forfeit and pay the sum of ten pounds for every such offence, or be publicly whipped, &c.

One half of the fines is appropriated to the party grieved, the other half to the use of the poor.

These offences are now to be punished, if the fine be not paid, by the 4th section of the act in the text, and the act of 4th of April, 1807.

Wantonly and maliciously cutting ferry ropes stretched across rivers, punishable by fine, on conviction in the Quarter Sessions, vol. 1, pa. 266.

Wilfully, or maliciously breaking, throwing down, or extinguishing any lamp hung up, or set out, to light the city of Philadelphia; or wilfully and maliciously damaging the post, iron, or other furniture thereof, punishable by fine, on conviction in the Sessions, vol. 1, pa. 357.

SUMMARY CONVICTIONS.

VICE AND IMMORALITY.

The general act to prevent vice and immorality, now in force, was passed 22d of April, 1794, (chap. 1746,) and the offences therein enumerated, are punishable by summary conviction before a justice.

1. Breach of the Sabbath, penalty four dollars.

2. Profane cursing or swearing, penalty sixty-seven cents for every profane curse or oath, or on non payment or inability to pay, commitment to the house of correction for not more than twenty-four hours, for an inferior offence therein described, forty cents, or similar commitment for twelve hours.

3. Drunkenness, penalty sixty-seven cents, or similar commitment, not exceeding twenty-four hours.

4. Cock fighting for money or other valuable thing, or promoting or encouraging it by betting thereon; bullet playing in any place, for money, or other valuable thing: or, on any public highway, with or without a bet. Playing at cards, dice, billiards, bowls, shuffleboards, or any game of hazard or address, for money, or other valuable thing, penalty three dollars for every such offence.

5. Entering, starting or running any horse, mare or gelding, for any plate, prize, wager, bet, or sum of money, or other valuable thing; penalty, twenty dollars.

6. Any tavern keeper, public house keeper, keeper of a tippling house, or other retailer of wine, spirituous or other strong drink who shall incite, promote, or encourage any games of address, hazard, cock fighting, bullet playing, or horse racing, whereat any money, or other valuable thing, shall be betted, staked, striven for, won or lost, or who shall furnish any wine, spirituous liquors, beer, cyder, or other strong drink to any of the persons who shall be assembled, or attending upon any game &c. or shall permit or allow of any (such) game, &c. or any game, device or manner, to be practiced, played or carried on within his or her dwelling house, out house, shed or place, in his or her occupancy, every such tavern keeper, &c. being legally convicted before a Justice, or in the Quarter Sessions &c. shall forfeit and pay for every such offence, fourteen dollars; and if he be a licenced public house keeper, &c. his licence shall be void, and he shall be incapable of being licenced for one year; and upon a second conviction, he shall forfeit and pay twenty-eight dollars, and be forever incapable of being licenced, &c. But he may appeal from the conviction to the Sessions, whose determination shall be final. 1790.

7. No Billiard table, EO table, or other device, for the purpose of gaming for money, or other valuable thing, shall be set up, kept, or maintained, in any dwelling house, out house, or place, occupied by any tavernkeeper, &c. whether such person have a licence, or keep a tippling house, on pain of forfeiting such billiard table, EO table or other device, and also twenty-six dollars, on conviction, before a Justice, or in the Quarter Sessions, &c. The Judges of the Sessions to enquire, &c. and no licence to be granted to such person.

8. Money lost at play, shall not be recovered; or may be recovered back.

9. Penalty on sending challenges to fight, &c. (supplied *ante.*)

10. Prosecutions to be within thirty days after the offence committed.

See the act against masquerades, *ante.*

There are numerous pecuniary fines, and other penalties and forfeitures, inflicted by various acts of Assembly, for smaller offences, or petty misdemeanors, which would swell this note to an unreasonable length to enumerate them here. Several of them are recoverable by indictment, and many by action of debt, *qui tam,* in courts of record; and very many others upon summary conviction before Justices of the peace; and not a few penalties are inflicted for disobedience to or neglect of duties enjoined under particular laws, which can scarcely be called criminal offences being the very lowest species of contempt of the authority of laws. The whole of them will, however be arranged, in the general index, under the title "*penalties.*" One high misdemeanor, created by act of Assembly, cannot with propriety be omitted here; which is,

Removing negro, or mulatto slaves, or servants for term of years, out of the state; separating children from their parents, under a certain age; or, forcibly or fraudulently carrying off, or seducing

1790. away such negro, or mulatto slaves or servants; or building or equipping vessels to be employed in the slave trade. These offences are all, except the forcible abduction punishable only by action for the particular penalty; but the forcibly carrying away such slave or servant, is punishable by indictment, and on conviction, with the forfeiture of one hundred pounds, and imprisonment at hard labour, for any time not less than six months, nor more than twelve months. Act of 29th of March, 1788. (chap. 1334.)

OF PRINCIPAL AND ACCESSORY.

A man may be *principal* in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and in the second degree, he who is present, aiding and abetting the fact to be done. And there may be a constructive presence, as when one commits a robbery, or murder, and another keeps watch or guard at some convenient distance.

In case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, &c. and yet not administer it himself, nor be present when the very deed of poisoning is committed. And so with regard to other murders committed in the absence of the murderer, by means which he had prepared before hand, and which could not probably fail of their mischievous effects; as exciting a madman to commit murder; laying traps, or pitfalls for another whereby he is killed, &c. in such case he must be guilty as principal in the first degree; for he cannot be called an accessary, that necessarily supposing a principal; and the poison, the pitfall, or the madman cannot be held pricipal; being only the instruments of death. As he must therefore be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be so as principal; and if principal, then in the first degree; for there is no other criminal, much less superior in the guilt, whom he could aid, abet, or assist.

An *accessary*, is he who is not the chief actor in the offence, nor present at its performance, but is someway concerned therein, either *before* or *after* the fact committed.

In High Treason there are no accessories, but all are principals; the same acts that make a man accessory in felony, making him a principal in High Treason, upon account of the heinousness of the crime. In petit treason, murder and felonies there may be accessories, except only in those offences, which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessories *before* the fact.

In petty larciny, and in all crimes under the degree of felony, there are no accessories either *before*, or *after* the fact; but all persons concerned therein, if guilty at all, are principals, the same rule holding with respect to the highest and lowest offences.

The accessory cannot be guilty of a higher crime than his principal; being only punished as a partaker of his guilt.

Accessory *before* the fact, is one, who being absent at the time of the crime committed, doth yet procure counsel, or command another to commit a crime. Herein *absence* is necessary to make him an accessory; for if such procurer, or the like, be *present*, he is guilty of the crime as principal.

An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. It is requisite therefore, that he *knows* of the felony committed. In the next place, he must *receive, relieve, comfort*, or *assist* the felon. And, generally any assistance whatever, given to a felon, to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory, as furnishing him with a horse to escape his pursuers, money or victuals to support him, a house, or other shelter, to conceal him, or open force or violence to rescue or protect him. So, to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man accessory to the felony. But the felony must be complete at the time of the assistance given, else it does not make the assistant accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists, or receives the delinquent; this does not make him accessory to the homicide; for until death ensues, there is no felony committed, yet so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If a parent assists his child, or the child his parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories *after the fact*. But the wife cannot become accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her husband.

1799.

To buy or receive stolen goods, knowthem to be stolen, was at common law a mere misdemeanor, and did not make the receiver accessory to the theft, because he received the *goods* only, and not the *felon*. But by the act of 1718, (vol. 1, page 116,) if any person or persons shall receive or buy any goods or chattels that shall be feloniously taken or stolen, knowing the same to be stolen, and being convicted thereof, if they pray the benefit of that act, in lieu of clergy, shall be *burnt in their hands*. And the same punishment was inflicted on conviction of *receiving*, *harbouring*, or *concealing* any robbers, burglars, felons or thieves.

Buyers and receivers of stolen horses, knowing them to be such were to be punished in the same manner as the principal felon, by the act of 21st of February, 1767, (vol. 1, page 273)

By the 4th section of the act in the text, accessaries *after* the fact in any felony, and receivers of stolen goods, &c. are to be punished by imprisonment at hard labour, &c. for any term not exceeding two years. This remains unaltered.

The law respecting the punishment of accessories *before* the fact, will be found in the acts which relate to the various principal offences.

If the principal felony be committed in one county, and the fact or crime of accessory, be committed in another; the accessory may be indicted in the county where his offence was committed, and shall be as good and effectual in law, as if the principal offence had been done or committed in the same county, vol. 1, page 119.

Formerly no man could be tried as accessary, till after the principal was convicted, or at least he must have been tried at the same time with him; in which case the jury must be charged to inquire first of the principal; and if they are satisfied of his guilt, then of the accessory, but if the principal be not guilty, both must be acquitted.

The accessary may, *if he choose*, be brought to his trial *before* the conviction or attainder of the principal. But in case he be convicted, it seems necessary to respite judgment until the principal be convicted and attainted; for if the principal be after acquitted, the conviction of the accessory is annulled, and no judgment ought to be given against him.

If principal be convicted of any capital crime, made felony of death, standing mute, &c. it is made lawful to proceed against the accessory either before or after the fact, in the same manner as if the principal felon had been attainted hereof, notwithstanding any such principal felon shall be admitted to the benefit of clergy, pardoned, or otherwise delivered before attainder; and every such accessory, if convicted, &c. shall suffer the same punishment as he should have suffered, if the principal had been attainted. And, if any principal robber, burglar, felon or thief, *cannot be taken*, so as to be prosecuted and convicted for any such offence, nevertheless it shall be lawful to prosecute and punish every person or persons, buying or receiving any goods stolen by such principal felon, knowing the same to be stolen, as for a *misdemeanor*, to be punished by fine and imprisonment, or other such corporal punishment as the court shall think fit to inflict, although the principal felon be not before convict of the said felony; which punishment shall exempt the offender from being punished as accessary, if such principal felon shall afterwards be taken and convicted. Act of 1718, vol. 1, page 116-17.

And the same provision is made as to accessories after the fact in all cases of felony of death, robbery and burglary, by the 8th section of the act of 23d of September, 1791, (chap. 1572.)

These provisions are similar to those of the English statutes of 1st and 5th of *Ann*. Upon which, Judge *Foster* observes, that where the principal is amesnable, the prosecutor has no option whether to proceed against the receiver as for felony or misdemeanor, he must proceed as for felony. If he be not amesnable, and the prosecutor choose to wait for his conviction he may do so, and then proceed against the receiver as for felony; or, at his own pleasure, as for a misdemeanor without waiting till the principal shall be amesnable. Under these limitations, and these only, he conceives the prosecutor has an option.

Though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving and counselling a felon, is no acquittal of the felony itself, but is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory *before* the fact; since those offences are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also, (but see *Fost.* 361.) But it is clearly held that one acquitted as principal may be indicted as an accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. See 4 *Black. Com.* 34-40, *Fost. Disc.* 3, 341 to 375.

1790. *The following English statutes are reported by the Judges to extend to Pennsylvania.*

4 Edw. 3, C. 2. The authority of Justices of assize, Gaol Delivery, and of the peace. "(6) And the Justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before the keepers of the peace; (7) and that the said keepers shall send their indictments before the Justices, and they shall have power to enquire of Sheriffs, Gaolers and others, in whose ward such indicted persons shall be, if they make deliverance, or let to mainprize any so indicted, which be not main pernable, and to punish the said Sheriffs, Gaolers, and others, if they do any thing against this act."

25 Edw. 3, stat. 5, C. 3. "*Item*, it is accorded, that no indictor shall be put in inquests upon deliverance of the indictees of felonies or trespass, if he be challenged for that same cause by him which is so indicted."

The act that any indictment lacking these words, *vi et armis*, shall be good.

37 Hen. 8, C. 8. "Be it enacted, &c. that these words, *vi* & *armis*, viz. *cum baculis*, &c. or such other like, shall not of necessity be put or comprised in any inquisition or indictment; nor that the party or parties being hereafter indicted of any offence, shall have or take any advantage by writ, or writs of error, plea or otherwise, to annul or avoid any such inquisition or indictment, for that, that the said words, *vi et armis*, &c. or any of the same or like words shall not be put or comprised in the said inquisitions, or indictments: but that the same inquisitions or indictments, and every of them, lacking the same words, *vi et armis*, &c. or any of them, shall from thenceforth, by the authority aforesaid, be taken, deemed and adjudged, to all intents, constructions and purposes, as good and effectual in the law, as the same inquisitions and indictments, having the said words, *vi et armis*, &c. comprised and put in every of the same inquisitions and indictments were or heretofore have been taken, deemed or adjudged; any law, usage or custom heretofore had and used to the contrary notwithstanding."

An act for trial of murders and felonies committed in several counties, 2 and 3 Edw. 6, C. 24. "For as much as the most necessary office and duty of the law is to preserve and save the life of man, and condignly to punish such persons that unlawfully and wilfully murder, slay or destroy men, and also that another office and duty of law is to punish robbers and thieves, which daily endeavour themselves to rob and steal, or give assistance to the same, and yet by craft and cautele do escape from the same without punishment.

2. And where it often happeneth and cometh in ure in sundry counties of this realm, that a man is feloniously stricken in one county, and after dieth in another county, in which case it hath not been founden by the laws or customs of this realm, that any sufficient indictment thereof, can be taken in any of the said two counties, for that by the custom of this realm the Jurors of the county where such party died of such stroke, can take no knowledge of the said stroke being in a foreign county, although the same two counties and places adjoin very near together; ne the Juries of the county where the stroke was given cannot take knowledge of the death in another county, although such death most apparently come of the same stroke; so that the king's majesty within his own realm cannot, by any laws yet made or known, punish such murderers or manquellers, for offences in this form committed and done; (2) nor any appeal at some time may lie for the same, but doth also fail, and the said murderers and manquellers escape thereof without punishment, as well in cases where the counties where such offences be committed and done may join, or otherwise where they may not join. (3.) And also it is a common practice amongst errant thieves and robbers in this realm, that after they have robbed or stolen in one county, they will convey their spoil, or part thereof so robbed and stolen, unto some of their adherents into some other county where the principal offence was not committed ne done, who knowing of such felony, willingly and by false covin receiveth the same: (4) In which case, although the principal felon be after attainted in one county, the accessary escapeth by reason that he was accessary in another county, and that the Jurors of the said other county, by any law yet made, can take no knowledge of the principal felony ne attainder in the first county, and so such accessaries escape thereof unpunished, and do often put in ure the same, knowing that they may escape without punishment; "(5) For redress and punishment of which offences, and safeguard of man's life, be it enacted by the authority of this present parliament, that when any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof founden by the Jurors of the county where the death shall happen, whether it shall be founden before the Coroner upon the sight of such dead

body, or before the Justices of peace, or other Justices or commissioners who shall have authority to enquire of such offences, shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden; any law or usage to the contrary notwithstanding.

3. And that the Justices of Gaol Delivery and *Oyer* and *Terminer* in the same county where such indictment at any time hereafter shall be taken, and also the Justices of the king's bench, after such indictment shall be removed before them, shall and may proceed upon the same in all points, as they should or ought to do, in case such felonious stroke and death thereby ensuing, or poisoning and death thereof ensuing, had grown all in one and the same county: (2) And that such party to whom appeal of murder shall be given by the law, may commence, take and sue appeal of murder in the same county where the party so feloniously stricken or poisoned shall die, as well against the principal and principals as against every accessary to the same offences in whatsoever county or place the accessary or accessaries shall be guilty to the same. (3) And further, the Justices before whom any such appeal shall be commenced, sued and taken, within the year and day after such murder and manslaughter committed and done shall proceed against all and every such accessary and accessaries in the same county where such appeal shall be so taken, in like manner or form as if the same offence or offences of accessary or accessaries had been committed and done in the same county where such appeal shall be so taken, as well concerning the trial by the Jurors, or twelve men of such county where such appeal or appeals shall be hereafter taken upon the plea of not guilty pleaded by such offender or offenders, as otherwise.

4. And further be it enacted by the authority aforesaid, That where any murder or felony hereafter shall be committed or done in one county, and another person or mo shall be accessary or accessaries in any manner of wise to any such murder or felony in any other county, that then an indictment found or taken against such accessary and accessaries upon the circumstance of such matter before the Justices of the peace or other Justices or Commissioners, to enquire of felonies in the county where such offences of accessary or accessaries in any manner of wise shall be committed or done, shall be as good and effectual in the law, as if the said principal offence had been committed or done within the same county where the same indictment against such accessary shall be found; (2) and that the Justices of *Gaol Delivery*, or *Oyer* and *Terminer*, or two of them, of or in such county where the offence of any such accessary shall be hereafter committed and done, upon suit to them made, shall write to the *Custos Rotulor*, or keepers of the records where such principal shall be hereafter attainted or convicted, to certify them whether such principal be attainted, convicted or otherwise discharged of such principal felony; who, upon such writing to them or any of them directed, shall make sufficient certificate in writing under their seal or seals to the said Justices, whether such principal be attainted, convicted, or otherwise discharged, or not; (3) and after they that so shall have the custody of such records, do certify that such principal is attainted, convicted or otherwise discharged of such offence by the law; that then the Justices of *Gaol Delivery*, or of *Oyer* and *Terminer*, or other there authorized, shall proceed upon every such accessary in the county where such accessary or accessaries became accessary, in such manner and form as if both the said principal offence and accessary had been committed and done in the said county where the offence of accessary was or shall be committed or done; (4) and that every such accessary, and other offenders above expressed, shall answer upon their arraignments, and receive such trial, judgment, order and execution, and suffer such forfeitures, pains and penalties, as is used in other cases of felony; any law or custom to the contrary heretofore used in any wise notwithstanding."

With respect to bail in criminal cases, and the statutes of 1 and 2 *Philip* and *Mary*, and 2d and 3d *Philip* and *Mary*, c. 10. See vol. 1, pa. 56-7, (chap. 151,) and the notes thereto.

(* Omitted by mistake in page 545.)

Rules, Orders, and Regulations for the Gaol of the city and county of Philadelphia.

1. No persons whatever shall be admitted to a communication with the prisoners, except the keeper, his deputies, servants or assistants, the Inspectors, officers of justice, counsellors or attornies at law employed by a prisoner, ministers of the gospel, or persons authorized by two of the Inspectors.

1790.

II. The males and females shall be employed, and shall eat and be lodged in separate apartments, and shall have no intercourse or communication with each other.

III. The prisoners shall be constantly employed in such labour as the keeper, (with the concurrence of the Inspectors,) may consider best adapted to their age, sex and circumstances: Regard being had to that employment which is most profitable.

IV. If any of the prisoners shall be found remiss or negligent in performing what is required of them, to the best of their power and abilities, or shall wilfully waste or damage the goods committed to their care, they shall be punished for every such offence, as may be hereafter directed.

V. If any of the prisoners shall refuse to comply with these regulations, or to obey the officers of the prison, or shall be guilty of profane cursing or swearing, or of any indecent behaviour, conversation or expression, or of any assault, quarrel, or abusive words to or with any other person, they shall be punished for the same, in manner hereafter directed.

VI. The convicts, prisoners for trial, servants, runaways, and vagrants, shall be separately fed, lodged and employed.

VII. Offenders shall be reported to the Inspectors, and punished by close, solitary confinement, and their allowance of food reduced—But in cases where the security of the prison is in danger, or personal violence offered to any of the officers, then the said officers shall use all lawful means to defend themselves, and secure the authors of such outrage.

VIII. No officer or other person shall sell any thing used in the prison, nor buy, sell or barter any article by which they can have benefit; neither shall they suffer any spirituous or fermented liquors to be introduced, except such as the keeper may use in his own family, or for medical purposes prescribed by the attending physician, under the penalty of five pounds, if an officer, and of dismission from office; or if a prisoner, he shall be proceeded against as in the seventh article.

IX. The prisoners on their first admission shall be separately lodged, washed, and cleansed; and shall continue in such separate lodging, until it shall be deemed prudent to admit them among the other prisoners, and the clothes in which they were committed shall be baked, fumigated, and laid by; to be returned them at their discharge, and during their confinement to be cloathed according to law.

X. Any persons detected in gaming of any kind, shall be proceeded against agreeably to the 7th article.

XI. Any person who shall demand or exact a garnish, beg, steal or defraud, shall be punished as directed by the 7th article.

XII. The prisoners who distinguish themselves by their attention to cleanliness, sobriety, industry and orderly conduct, shall be reported to the Inspectors, and meet with such rewards as is in their power to grant or procure for them.

XIII. The prisoners shall be furnished with suitable bedding, shall be shaved twice a week, their hair cut once a month, change their linen once a week, and regularly wash their face and hands every morning.

XIV. The prison shall be white-washed at least twice in the year, and oftener, if occasion requires; the floors shall be swept every morning, and washed on Wednesdays and Saturdays, from 20th of May to the 1st of October, and once a week for the remainder of the year.

XV. The sweepings of the prison shall be collected and deposited in a place for the purpose, and removed once in every two weeks; the necessaries shall also be cleansed daily.

XVI. The yards of the prison shall be kept free from cows, hogs, dogs, and fowls.

XVII. The physician for the time being shall keep a register of the sick; their disorders, and his prescriptions; and shall render his accounts for the examination and allowance of the Inspectors at each of their quarterly meetings.

XVIII. At the performance of divine worship, all the prisoners shall attend, except such as may be sick.

XIX. The turnkey, deputies and assistants shall be tradesmen, in order that the trades and employments within the house shall be more effectually and profitably executed.

XX. All prisoners committed as vagrants, and who have been convicts, shall be confined in the cells during their commitment.

XXI. No provision, other than the prison-allowance, shall be furnished to a convict or vagrant, without the permission of the Visiting Inspectors.

XXII. There shall be wardsmen appointed by the Visiting Inspectors, whose duty it shall be to keep the windows, passages, yard, and privies clean, and who also shall be lodged, and fed in a room by themselves.

XXIII. Runaway or disorderly apprentices and servants shall be sepa-

rately fed, lodged, and employed, and the keeper shall give notice to their masters or mistresses, at the time of their commitment, of the charge that will accrue for their daily maintenance, who may at their option agree to pay the same, or provide the necessary food themselves.

XXIV. The charge for the maintenance of slaves shall be the same as that of apprentices or runaways.

XXV. The diet of prisoners shall be—on

Sunday, one pound of bread, and one pound of coarse meat made into broth.

Monday, one pound of bread, and one quart of potatoes.

Tuesday, one quart of Indian meal made into mush.

Wednesday, one pound of bread, and one quart of potatoes.

Thursday, one quart of Indian meal made into mush.

Friday, one pound of bread, and one quart of potatoes.

Saturday, one quart of Indian meal made into mush.

Besides the above, a half pint of molasses shall be distributed to every four prisoners, on every Tuesday, Thursday, and Saturday.

Signed and approved, &c. as directed by law, 26th of February, 1792.

Directions for the Inspectors, &c. of the Gaol of the city and county of Philadelphia.

WHEREAS, by a "Supplement to the penal laws of this state," it is enacted, "that the Prison Inspectors, appointed in pursuance of the act in such case provided, and of the said supplement, shall have power, with the approbation of the *Mayor, two Aldermen* of the said city, and *two of the Judges of the Supreme Court*, or *two of the Judges of the Common Pleas of Philadelphia county*, to make rules and regulations for the government of all convicts confined in the said prison, not inconsistent with the laws and constitution of this commonwealth."

It is therefore ordained, that the said Inspectors, seven of whom shall be a quorum, shall meet at the prison, quarterly, on the first Mondays in January, March, June, and September; and on every second Monday throughout the year....and, may also be specially convened by the Visiting Inspectors, when occasion requires. At their first meeting, they shall appoint two of their members to be Visiting Inspectors; one of whom shall serve for one month, and the other for two months, continuing to make a fresh appointment to this office monthly. 1790.

Visiting Inspectors.

The *Visiting Inspectors* shall attend at the prison together at least twice in each week, and oftener if occasion requires; at which times they shall examine into and inspect the management of the prison, the conduct of the keeper, deputies and assistants: They shall also carefully enquire into, and report the conduct and disposition of the prisoners, and see that they are *properly* and *sufficiently* employed; that proper attention to cleanliness is observed; that due enquiry be made respecting the health of the prisoners, and that their food is served in quantity and quality, agreeably to the directions of the Board; that the sick are properly provided for, and that suitable cloathing and bedding are furnished to all.—They shall hear the grievances of the prisoners, receive their petitions, and bring forward the cases of such, whose conduct and circumstances may appear to merit the attention of the Board—They shall be careful to prevent improper out-door communications with the prisoners; that no spirituous liquors be admitted on any pretext whatever, except by order of the physician—That no intercourse be admitted between the sexes—That the regulations of the Board, respecting the distribution of the prisoners, according to their characters and circumstances, be attended to—That proper means be used to promote religious and moral improvement by the introduction of useful books, and procuring the performance of divine service, as often as may be.

They shall from time to time report to the commissioners of the county, all such prisoners who have been sent from other counties, and have incurred a charge for their maintenance more than the profits of their labour will defray, in order that compensation may be had as the law directs.

They shall cause fair returns to be made out, and laid before the Board monthly, of all the prisoners, their crimes, length of confinement, by whom committed, when and how discharged, since the preceding return.

They shall attend to the keeper, deputies and assistants, by observing their treatment of the prisoners, and suffer no persons addicted to liquor, making use of prophane swearing, or other improper language to be employed on this duty.

1790. They shall constantly bear in mind, that all men are free, until legal proof is made to the contrary; they will therefore take care that no person is held in confinement, on bare suspicion of being a runaway slave; and those persons who are actually slaves, and not applied for by proper claims within a limited time, shall be returned to the Supreme or other proper court for a habeas corpus to remove them according to law; and generally they shall see that the present and subsequent directions of the Board be carried into effect.

Keeper of the Prison.

The *Keeper of the Prison*, besides attending to the safe keeping of the prisoners, shall carefully inspect into their moral conduct, shall enjoin a strict attention to the regulations, relative to cleanliness, sobriety and industry, and be careful to avoid that penalty which is incurred by suffering a criminal to escape. He shall also, with the approbation of two of the Inspectors, provide a sufficient quantity of stock and materials, working tools, and implements for the constant employment of the prisoners. He shall deliver out their work and receive it from them by weight or measure, as the case may be, in order that embezzlement or waste may be prevented, by the prisoners; and by every laudable means in his power make their labour as profitable as possible. He shall, as the law directs, keep separate accounts for all convicts sentenced to labour six months and upwards, in which the expense of cloathing and subsistence shall be charged, and a reasonable allowance for their labour be credited; these accounts shall be balanced at short periods, in order that the prisoner, at his discharge, may receive the proportion, if any, that is due to him.

He shall cause all accounts concerning the maintenance of the prisoners to be entered in a book or books for the purpose, and shall also keep separate accounts of the stock and materials purchased by him; shall take proper vouchers wherever money is expended; shall regularly credit the materials manufactured and sold, mentioning to whom and when disposed of; and at every quarterly meeting of the Board, shall exhibit his accounts and vouchers for their approbation and allowance.

Turnkey.

The *Turnkey* shall admit no persons except the Inspectors, Keeper, his deputies, servants or assistants, Officers and Ministers of Justice, Counsellors or Attornies at Law, *employed by a prisoner*, Ministers of the Gospel, or persons producing a written licence signed by two of the said Inspectors; and the latter only, in his presence or some one of the officers of the prison. He shall prevent the admission of any spirituous liquors or any other improper article to the prisoners, and on every attempt of this kind that may be detected, he shall make discovery thereof, in order that the penalty inflicted by law may be recovered.

Keeper's Deputies, &c.

The *Keeper's Deputies* and *Assistants* shall be careful to preserve cleanliness, sobriety and industry among the prisoners; to inform them of the rules of the house, and to enjoin an observance of them by mild yet firm measures; they shall be careful to prevent embezzlement, waste or destruction of implements or materials; they shall constantly reside in the house, and inspect the conduct and labour of the prisoners—Report the negligent, profane or disorderly, (who shall be removed,) and the industrious, quiet and exemplary, that they may be recommended by the Visiting Inspectors, who have it in charge to bring such to the favourable notice of the Board.

Watchmen.

The *Watchmen* shall continue in the prison all night, two of whom shall be within the iron gate, and two in the Inspector's room—They shall patrole the inside constantly, and strike the bell every hour—They shall report any remarkable occurrence of the night, to the Clerk of the prison, on the succeeding day, who shall commit the same to writing, and lay it before the Visiting Inspectors, at their next meeting; and as the safety of the prison so much depends on their vigilance and attention, it is required, that no circumstance shall prevent the performance of their regular and frequent rounds.

Signed and approved as directed by law, 26th of February, 1792.