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Difference between *certiorari* in *B. R.* and chancery: In *B. R.* record itself is removed, and what remains below is but a scroll; but usually in chancery, if *certiorari* be returnable there, tenor of record only is removed; and if tenor of record of indictment, attainder or conviction be removed by *certiorari* into chancery, and thence sent by *mittimus* into *B. R.* they cannot thereon proceed to judgment or execution ib.

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This statute extends as well to felonies made after as before ib.

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An *act* prohibits shooting in a gun without such a qualification, and under a penalty; one unqualified shoots with a gun at a bird, and it kills a by-stander by some accident, that in another case would have amounted only to chance-medley; this no more than chance-medley *infortunium*, keeping a gun in such case, being only *malum prohibitum* 475, 476

A servant set by his master to watch in the night in a corn-field with a gun charged, and ordered by him to shoot when he heard any bustle in the corn by deer; master himself imprudently rushes into the corn, servant supposing it to be deer, shoots and kills his master, only chance-medley, because servant misguided by his orders 476

But if master had not given such orders, it would have been manslaughter, because he did not *adhibere debitam diligentiam* to discover his mark ib

A. drives his cart carelessly, and it runs over a child in the street, if *A.* having seen the child, yet drives on upon him, it is murder; but if he saw not the child, manslaughter; but if child had run cross the way, and cart run over it before it was possible for carter to stop, it is *per infortunium* ib

If one riding in the street whip his horse to put him into speed,

and run over a child and kill him, homicide, and not *per infortunium*; and if he had rid so in a press of people with intent to do hurt, and horse had killed another, it had been murder Page 475

But if one be riding in the street, a by-stander whips the horse, whereby he runs away against will of rider, and runs over and kills a man, it is chance-medley only, in which case jury are to find the special matter; yet where coroner's inquest finding special matter stands untraversed, court will receive verdict of *not guilty* on indictment by grand inquest, and party confessing indictment by coroner, shall have his pardon of course 476, 477

Killing another *per infortunium*, not in truth felony, how verdict concludes; party forfeits his goods, and why; tho he ought to have *quasi de jure* a pardon of course, yet he is not to be discharged, but bailed till next term or sessions to sue out such pardon 477

Homicide *ex necessitate*, partly voluntary, partly involuntary 478

Necessity of two kinds: 1. Of a private nature. 2. That which relates to public justice and safety ib

Former obliges one to his own defense and safe-guard, and what inquiries this takes in ib

Two kinds of homicide *se defendendo*, and respective consequences thereof ib

Homicide *se defendendo* defined 479

What circumstances thereof observable 479 to 484

There being malice between *A.* and *B.* they appoint time and place to fight, and meet, *A.* gives first onset, *B.* retreats as far as he can with safety, and then kills *A.* who had otherwise killed him, murder; because they met by compact 479

There

CONTAINED IN THE TWO PARTS.

There being malice between *A.* and *B.* they meet casually; *A.* assaults *B.* and drives him to the wall; *B.* in his own defense kills *A.* this *se defendendo*

Page 479

A. assaults *B.* and *B.* presently thereon strikes *A.* without flight, whereof *A.* dies, this is manslaughter; but if *B.* strike *A.* again, but not mortally, and blows pass between them, and at length *B.* retires to the wall, and being pressed on by *A.* gives him a mortal wound whereof *A.* dies, only *se defendendo* ib

A. by malice makes a sudden assault on *B.* who strikes again, and bearing hard on *A.* *A.* retreats to the wall, and in saving himself kills *B.* whether murder, or *se defendendo*; what fact the question depends on

479, 480

In homicide *se defendendo*, some act to be done by party killing, for if he be merely passive, only *per infortunium* 480

A. assaults *B.* who flies to the wall, or falls holding his sword, &c. in his hand, *A.* runs violently, or falls on knife, &c. of *B.* without any stroke or thrust offered by *B.* and dies, *per infortunium*; *quare*, whether *A.* *felo de se* 480, 481

He, who kills in his own defense, ought to fly, as far as he may, to avoid violence of assault, before he turn on assailant 481,

483, 486

Argument against duelling ib
If gaoler be assaulted by prisoner, or sheriff, or bailiff in execution of his office, he is not bound to give back to the wall; but if he kill assailant without such retreat, only *se defendendo* ib

The like of a constable, or watchman 481

But if prisoner resists not, but flies, yet officer for fear of rescue

gives prisoner a mortal stroke, it is murder; for here was no assault first made by prisoner, and so cannot be *se defendendo* in officer Page 481

Difference between civil actions and felonies ib

If one be in danger of arrest by cap. in debt, &c. and he flies, and bailiff kills him, murder ib

But if felon flies, and cannot be otherwise taken, if he be killed, justifiable, and officer forfeits nothing but person killed forfeits his goods ib

A. thie, assaults a true man, either abroad, or in his own house, to rob or kill him, true man not bound to give back, but may justify killing assailant, and it is no felony ib

If *A.* assault *B.* so fiercely, that *B.* cannot save his life, if he give back, or if *B.* fall to the ground, whereby he cannot fly, if *B.* kills *A.* it is *se defendendo* 482

Where first assailer may be said to kill the assailed *se defendendo*, or not 482 to 484

If *A.* assault *B.* and *B.* thereon re-assault *A.* and *A.* flies to avoid the assault of *B.* who pursues him, and then *A.* being driven to the wall turns again, and kills *B.* whether *se defendendo* 482

But if *A.* assaults *B.* first, and *B.* re-assaults *A.* so fiercely, that *A.* cannot retreat to the wall, or other *non ultra*, without danger of his life, nay, tho *A.* fall on the ground on the assault of *B.* and then kills *B.* murder or manslaughter ib

Where one is assaulted so fiercely, that he cannot fly, law will interpret this necessity to a flight to give him the advantage of *se defendendo*: but *contra*, where first assailant is re-assaulted so vigorously that he cannot fly, law will not let him take advantage of this necessity, the consequence of his own wrong ib

Where