

Nos. 25-238, 25-566

IN THE
Supreme Court of the United States

CUTBERTO VIRAMONTES, *et al.*,
Petitioners,

v.

COOK COUNTY, ILLINOIS, *et al.*,
Respondents.

EDDIE GRANT, JR., *et al.*,
Petitioners,

v.

RONNELL HIGGINS, IN HIS OFFICIAL CAPACITY
AS COMMISSIONER OF THE CONNECTICUT
DEPARTMENT OF EMERGENCY SERVICES
AND PUBLIC TRANSPORTATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE SEVENTH AND SECOND CIRCUITS

**AMICUS CURIAE BRIEF OF THE
HAWAII RIFLE ASSOCIATION
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE

This amicus curiae brief is filed on behalf of the Hawaii Rifle Association in support of petitioners. Hawaii Rifle Association is a non-profit organization dedicated to the correct construction, interpretation, and application of the law.¹ Its mission is to protect Hawaiians' Second Amendment right to keep and bear arms, and to protect Hawaii's hunting and shooting traditions. The rifles at issue in this litigation are used by its members and other Hawaiians to hunt and protect their families. Hawaii Rifle Association's interest in this matter is for this Court to come to the correct interpretation of the Second Amendment so that Hawaiians can continue to hunt and defend themselves with those rifles.

SUMMARY OF THE ARGUMENT

This Court should not find the rifles at issue in this litigation are dangerous and unusual weapons. That is because the term "dangerous and unusual" weapons does not refer to any particular type of weapon or characteristic of any arm. Rather, it refers to forms of conduct with weapons. To put it another way, under the historical definition of the term "dangerous and unusual" weapon, no weapon, or class of arms, can be dangerous and unusual because the term refers to conduct not any particular type of weapon. As will be shown below, historically the term "dangerous and unusual" weapons was a conjunctive test. All

¹ No counsel for a party authored this brief in whole or in part, nor did such counsel or any party make a monetary contribution to fund this brief. No person other than the amicus, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

weapons were considered dangerous. Unusual referred to an unusual *use* of a dangerous weapon. It did not refer to a weapon which was rarely owned or any other characteristic intrinsic to a weapon. A weapon only became a “dangerous and unusual weapon” when it was used in an unusual manner reasonably foreseeable to cause terror.

ARGUMENT

This Court should not find the rifles at issue in this litigation are inherently dangerous and unusual weapons. Any finding that an arm is inherently dangerous and unusual, based upon a characteristic of the arm itself, would be a misapplication of the phrase because the term only refers to the unusual use of an arm in a manner which historically could be prohibited. This Court should determine whether the rifles at issue in this litigation are protected by the Second Amendment solely based on whether they are in common use for lawful purposes – which they plainly are. This position is supported by every single source in *Heller* which references “dangerous and unusual” weapons.

Writing for the Court in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), Justice Scalia stated:

[w]e also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those “in common use at the time.” [*U.S. v. Miller*, 307 U.S. 174, 179 (1939)]. We think that limitation is fairly supported by the historical tradition of prohibiting

the **carrying** of “dangerous and unusual weapons.” (Emphasis added).

Heller, 554 U.S. at 627.²

The prohibition on carrying “dangerous and unusual” weapons is derived from the Statute of Northampton 2 Edw. 3, c. 3 (1328)³ which is a statute that banned carrying in certain situations, such as affrays.

...Item, it is enacted, that no man great nor small, of what condition soever he be, except the King’s servants in his presence, and his ministers in executing of the King’s precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to come before the King’s justices, or other of the King’s ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King,

² Please note that any case not hyperlinked or included in the appendices is available on LexisNexis.

³ Available at <https://firearmslaw.duke.edu/laws/statute-of-northampton-1328-2-edw-3-c-3-eng>

and their bodies to prison at the King's pleasure.

Id.

This law is cited by several of the commentators on which *Heller* relies. For example, *Heller* cites Timothy Cunningham (see 554 U.S. at 581). Cunningham's 1789 law dictionary defines "affray" as follows:

Affray, Is derived from the French word effrayer, to affright, and it formerly meant no more, as where persons appeared with armour or weapons **not usually worn, to the terror of others**; and so is the word used in the statute of Northampton []. It is now commonly taken for a skirmish, or fighting between two or more. ... Yet, as it is there said, they differ in this, that where an assault is but a wrong to the party, an affray is wrong to the commonwealth, and therefore both inquirable and punishable in a leet. ... Beside this signification, it may be taken for a terror wrought in the subject by an unlawful fight or violence, &c. as if a man shew himself furnished with armour or weapons not usually worn, it may strike a fear into others unarmed; and so it is used in flat 2 Ed 3 c 3. But altho' no bare words, in the judgement of law, carry in them so much terror as to amount to an affray, yet it seems certain, than in some cases there may be an affray, where there is no actual violence, as where a

man arms himself with dangerous and unusual weapons **in such a manner as will naturally cause a terror to the people**; which is said to have been always an offence at the Common law and is strictly prohibited by Statute.

See Cunningham, Timothy, -1789. A New And Complete Law-dictionary: Or, General Abridgment of the Law : On a More Extensive Plan Than Any Law-dictionary Hitherto Published : Containing Not Only the Explanation of the Terms, but Also the Law Itself, Both With Regard to Theory And Practice : Very Useful to Barristers, Justices of the Peace, Attornies, Solicitors, &c.. London: Printed by the Law printers to the King's Most Excellent Majesty, for S. Crowder, 17641765.⁴ (Emphasis added).

Cunningham defines riding armed, with “dangerous and unusual” weapons as:

an offense at Common law. [citation omitted] By the stat. 2 Ed. 3. Cap. 3. None shall ride armed by day or night to the terror of the people; or come with force and arms before the King's justices...but men may wear common arms according to their quality and fashion, and have attendants with them armed agreeable to their characters; all persons may ride or go armed take

⁴ Available at <https://babel.hathitrust.org/cgi/pt?id=mdp.35112103369031&seq=84>

felons, suppress riots, execute the King's process...

Cunningham, *supra*, Riding.

As shown below, this is a prohibition against carrying arm(s) in a threatening manner which disturbs the public. The North Carolina Supreme Court correctly interpreted the dangerous and unusual language and found that the phrase refers to an unusual *use* of a weapon. *See State v. Dawson*, 272 N.C. 535 (1968).⁵

The term “dangerous weapon,” in the English common law, is a legal term of art that usually included weapons designed or able to kill human beings. In this context, the Common Law’s definition of “dangerous” was any item that could be used to take human life through physical force. *See United States*

⁵ “It has been remarked that a double-barrel gun, or any other gun, cannot in this country come under the description of ‘unusual weapons,’ for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an ‘unusual weapon,’ wherewith to be armed and clad. No man amongst us carries it about with him, as one of his everyday accoutrements - - as a part of his dress -- and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding State, as an appendage of manly equipment. But although a gun is an ‘unusual weapon,’ it is to be remembered that the carrying of a gun, *per se*, constitutes no offense. For any lawful purpose -- either of business or amusement -- the citizen is at perfect liberty to carry his gun. It is the wicked purpose, and the mischievous result, which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people.” *Dawson*, 272 N.C. at 544-45 (citation omitted)

v. Hare, 26 F. Cas. 148, 163-64 (C.C.D. Md. 1818)⁶ (“[S]howing weapons calculated to take life, such as pistols or dirks, putting [the victim] in fear of his life ... is ... the use of dangerous weapons.”). *See also The King v. Oneby* 92 E.R. 465 (Court of the King’s Bench 1727) (“Any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt.”).⁷ Thus, all arms are “dangerous” within this context because they can be used to injure another person.⁸ They only become “dangerous and unusual” arms when they are used in an unusual manner. Historically, an unusual use of weapons involved using those weapons in a manner which caused an affray.

Timothy Cunningham’s 1789 law dictionary defined an affray as “to affright, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror of others.” *See* Cunningham, *supra*, Affray. When discussing forcible entry or detainer, Blackstone stated, “so that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained, with force, with violence, and unusual weapons.” W. Blackstone, *Commentaries on the Laws of England*,

⁶ Alternative citation as used by Lexis, *United States v. Hare*, 26 F. Cas. 148; 1818 U.S. App. LEXIS 240.

⁷ Available at Appendix E.

⁸ “[T]he very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous.” *Heller*, 554 U.S. at 711 (Breyer, dissenting).

bk. 4, ch. 11 (1765–1769).⁹ It would make little sense to think that the distinction was being drawn between peaceable entry and entry with weapons that are difficult to purchase or hard to find, or new. Instead, the term “unusual weapons” means weapons that are being used in a threatening or shocking manner, or weapons that are being used to facilitate an unlawful endeavor.

This position is supported by case law. In an English case, *Baron Snigge v. Shirton*, a tenant was in a dispute with his landlord, and “kept the possession [of the house he rented] with drum, guns, and halberts”. See generally *Baron Snigge v. Shirton* 79 E.R. 173 (1607).¹⁰ “The drum was only to give notice if any came to enter, but no body offered to enter.” *Id.* This was considered keeping “his house with unusual weapons against a purchaser.” *Id.* In another English case, a sailor fired warning shots with a “musquet and ball” across the bow of another ship as a signal and killed a man. See generally *Rex v. Rowland Phillips* 98 E.R. (1385).¹¹ The Court found “[t]he firing was not done in an uncommon manner, or with unusual weapons.” *Id.* And held “[i]t is impossible upon this special verdict to say, that the defendant is guilty of more than manslaughter. For it is expressly found, that he fired in the usual manner to bring vessels to, and to hit the hallyards.” *Id.* In both cases, the weapons were in common use at the

⁹ Available at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-411/>

¹⁰ Available at Appendix F.

¹¹ Available at Appendix D.

time. However, in one case, the weapon was unusual, while in the other case, it was not. The relevant difference between the cases is whether the use of force was reasonable. In no case did the mere possession of an arm, unrelated to the manner in which the arm was used, ever fall within the “dangerous and unusual weapon” prohibition.

This definition of unusual is supported by Blackstone’s discussion of forfeited recognizance. “A recognizance for the good behavior may be forfeited ... by going armed with unusual attendance, to the terror of the people.” 4 William Blackstone, *Commentaries on the Laws of England* ch. 18 (1769).¹² At Common Law, just as people could legally own weapons, large groups of people could legally gather, so long as their purpose was lawful. It is when those groups of people became threatening (or terrifying), that these gatherings were labeled as “unusual attendance” to the terror of the public and became unlawful. Similarly, when the manner in which one carries a weapon becomes threatening, the conduct is labeled as carrying a unusual weapon.

When used to describe weapons, the word, “unusual” is not being used in a different way than when it is being used to describe attendance. Blackstone states, “Any justice of the peace... bind all those... who make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people” 4 William

¹² Available at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-418/#fn11d>

Blackstone, *Commentaries on the Laws of England* ch. 18 (1769).¹³ Just as the common law is not outlawing the assembly of unusual people, the common law is not referring to the type of weapon involved when it mentions unusual weapons. The historical phrase, “dangerous and unusual weapons” does not refer to classes or characteristics of weapons. Rather, it describes a class of behavior.

Other, stricter laws outlawed specific types of weapons for certain individuals, or when possessed with certain “intent”. For example, “[n]o negro or mulatto shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive; but all and every gun, weapon and ammunition found in the possession or custody of any negro or mulatto may be seized by any person, and upon due proof thereof made before any justice of the peace of the county where such seizure shall be, shall by his order be forfeited to the seizer for his own use, and moreover every such offender shall have and receive by order of such justice, any number of lashes not exceeding thirty-nine, on his or her bare back, well laid on, for every such offense...”. A Law for the Regulation of Slaves, 1799 Miss. Terr. Laws 112, 113 (A. Marschalk 1799).¹⁴ Also, Georgia had a law prohibiting bearing certain weapons based on intent, “[i]f any person shall be apprehended, [...] shall have upon him any pistol, hanger, cutlass, bludgeon, or

¹³ Available at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-418>

¹⁴ Available at <https://firearmslaw.duke.edu/assets/1799.-ms.-laws-of-the-mississippi-territory.-1799.-a-law-for-the-regulation-of-slaves.pdf>.

other offensive weapon, with intent feloniously to assault any person[...]every such person shall be deemed a rogue and vagabond." Ga. Code, div. 10, no. 19 (T. S. Hannon 1821) (Law Passed 1816).¹⁵ In these specifically defined and limited instances, the people or arms at issue were considered inherently suspect. Therefore, all use of arms was prohibited whether those uses were usual or unusual. If the term "dangerous and unusual" weapons meant a type of prohibited arm, then the legislature would have used that phrase with these laws. Rather, the carrying of dangerous and unusual weapons refers to a class of conduct with arms.

Historically, this class of conduct was that which caused terror. Terror in this context means carrying in a threatening manner. A 1675 dictionary defined "terror" as "dread, great fear or fright". An Universal Etymological Dictionary (R. Ware, W. Innys and J. Richardson, J. Knapton (and twelve others)) (1675).¹⁶ An affray may not be committed in private because then, the public would not be terrified. F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852) at 725 ("An affray has been noticed, is the fighting of two or more persons in some public place,

¹⁵ Available at <https://firearmslaw.duke.edu/assets/1816.-ga.-a-compilation-of-the-laws-of-the-state.-div.-10.-no.-19-1745947360.pdf>.

¹⁶ Available at <https://archive.org/details/baileyuniversaletymdict2ed/page/n873/mode/2up>.

to the terror of the citizens”).¹⁷ The Cyclopedia Law Dictionary from 1922 defined terror as “That state of mind which arises from the event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger. One of the constituents of the offense of riot is that the acts of the persons engaged in it should be to the terror of the people, as a show of arms, threatening speeches, or turbulent gestures; but it is not requisite, in order to constitute this crime, that personal violence should be committed.” See The Cyclopedia Law Dictionary (Walter a. Shumaker and George Foster Longsdorf, ed. Callaghan and Company 1922) (1901) at 1003.¹⁸ Historically, “terror” was an apprehension of harm to come. In describing a mugging, James Wilson wrote, “If one assault another with such circumstances of terrour as to put him in fear, and he, in consequence of his fear, deliver his money; this is a sufficient degree of violence.” 3 Wilson 59 (1804).¹⁹ Later, Wilson described arson as “a crime of deep malignity ... The confusion and terror which attend arson, and the continued apprehension which follows it, are mischiefs frequently more distressing than even the loss of the property.” *Id* at 63. Wilson wrote, in

¹⁷ Available at https://books.google.com/books/about/A_Treatise_on_the_Criminal_Law_of_the_Un.html?id=Q04rAQAAAMAAJ.

¹⁸ Available at https://books.google.com/books/about/The_Cyclopedic_Law_Dictionary.html?id=x3c8AAAAIAAJ.

¹⁹ Available at https://www.google.com/books/edition/The_Works_of_the_Honourable_James_Wilson/74s0AAAAMAAJ?hl=en&gbpv=1&bsq=one%20assault%20another%20.

describing interrogation methods, “terroure is frequently added to fraud. The practice... is said... to have been derived its origin from the customs of the inquisition.” 3 Wilson 155 (1804).²⁰

Giles Jacob’s law dictionary states, when describing a legal device known as a Surety of the Peace (which appears to be a promise not to harm), “the demand of the Surety of the Peace ought to be soon after the cause of fear; for the suffering much time to pass before it is demanded, shews that the party has been under no great terror.” Giles Jacob, *The law-dictionary* 149 (P. Bryne 1811 first American from the second London edition) (1811).²¹ Jacob further described the difference between mere fear and terror while defining the word, “robbery”. Jacob wrote, “[a]nd 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.” *Id* at 546. From these sources, “terror” is more than mere apprehension of danger; it might more aptly be described as the apprehension of an extreme danger or a catastrophe.

²⁰ Available at <https://www.google.com/books/edition/The Works of the Honourable James Wilson/74s0AAAAMAAJ?hl=en&gbpv=1&bsq=terroure>.

²¹ Available at <https://babel.hathitrust.org/cgi/pt?id=nyp.33433008807749&seq=157>.

Some American case law comports with the above view. A 1795 case describes “a defence based upon the ground of duress and terror.” *United States v. Vigol*, 2 U.S. 346 (1795). Another 1795 case stated, “raising a body of men to ... oppose and prevent by force and terror, the execution of a law, is an act of levying war.” *United States v. Mitchell*, 2 U.S. 348 (1795). However, other old American cases treat the word “terror” as if it were synonymous with the word “threat”. See e.g. *Warder v. Arell*, 2 Va. 282, 295 (1796) (This case mentions people “armed with all the terrors of forfeiture”).

Either way, as historically understood, the prohibition against carrying “dangerous and unusual” weapons requires an arm to be carried in a threatening manner. The longstanding prohibition on the carrying of “dangerous and unusual weapons” thus refers to types of conduct with weapons. “A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is traveling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, ***if the number of arms which are so carried are calculated to produce terror and alarm.***” *Rex v. Dewhurst*, 1 State Trials, New Series 529, 601-602 (1820).²² (Emphasis added). A necessary element of this common law crime of affray, to which the “dangerous and unusual” prohibition refers, had always required that the arms be used or carried in

²² Available at Appendix C.

such manner as to terrorize the population, rather than in the manner suitable for ordinary self-defense.

Heller's first source on the topic, Blackstone, offered that “[t]he offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, *by terrifying the good people of the land.*” 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769)²³ (emphasis added). Blackstone referenced the 1328 Statute of Northampton, which, by the time of the American Revolution, English courts had long limited to prohibit the carrying of arms only with evil intent, “in order to preserve the common law principle of allowing ‘Gentlemen to ride armed for their Security.’” David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, DET. L. C. REV. 789, 795 (1982)²⁴ (citing *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686)²⁵). “[N]o wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people.” See *Wrenn v. District of Columbia*, 864 F.3d 650, 660

²³ Available at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-411/>.

²⁴ Available at https://foac-illea.org/uploads/law_reviews/Caplan-The%20Individual%20Right%20to%20Arms.pdf.

²⁵ The same case is also reported in *Sir John Knight's Case*, 3 Mod. 117, 87 Eng. Rep. 75 (K.B. 1686). They are available at Appendix A and B respectively.

(2017) (quoting 1 William Hawkins, *A Treatise of the Pleas of the Crown* 135, ch. 63, § 4, at 135 (1716)).²⁶

Heller's additional citations regarding the “dangerous and unusual” doctrine are in accord. “[T]here may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, *in such a manner, as will naturally diffuse a terrour among the people.*” James Wilson, *WORKS OF THE HONOURABLE JAMES WILSON* (Bird Wilson ed., 1804) (footnote omitted) (emphasis added).²⁷ “It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, *in such manner as will naturally cause terror to the people.*” John A. Dunlap, *THE NEW-YORK JUSTICE* 8 (1815) (emphasis added).²⁸

Charles Humphreys stated, that:

[r]iding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land ... But here it should be remembered, that in this country the

²⁶ Available at https://archive.org/details/bim_eighteenth-century_a-treatise-of-the-pleas-hawkins-william_1771_1/page/136/mode/2up.

²⁷ Available at https://www.google.com/books/edition/The_Works_of_the_Honourable_James_Wilson/74s0AAAAMAAJ?hl=en&gbpv=1&bsq=affray.

²⁸ Available at <https://archive.org/details/newyorkjusticeor00dunliala/page/8/mode/2up?q=cause+terror>.

constitution guar[anties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.

See Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822);²⁹ see also *Heller*, 554 U.S. at 588 n.10 (quoting same). It is the *manner* of how the right is exercised, not the type of weapon that is carried, that constitutes the crime. Said another way, just because a firearm or other weapon is in common usage at the time does not make the *manner* in which the right is exercised excused or excusable simply due to the type of firearm or weapon carried. “[T]here may be an affray ... where persons arm themselves with dangerous and unusual weapons, in such manner as will naturally cause a terror to the people.” William Oldnall Russell, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271 (1826).³⁰ But:

it has been holden, that no wearing of arms is within [meaning of Statute of Northampton] unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality

²⁹ Available at <https://play.google.com/books/reader?id=jZRGAAIAAJ&pg=GBS.PA482&hl=en>.

³⁰ Available at <https://play.google.com/books/reader?id=AqcDAAAQAAJ&pg=GBS.RA1-PA270&hl=en>.

are in no danger of offending against the statute by wearing common weapons ... in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.

Id. at 272. The Supreme Court then referred to F. Wharton's, *A Treatise on the Criminal Law of the United States* which states:

An affray, as has been noticed, is the fighting of two or more persons in some public place, to the terror of the citizens. (footnote omitted) There is a difference between a sudden affray and a sudden attack. An affray means something like a mutual contest, suddenly excited, without any apparent intention to do any great bodily harm. (footnote omitted). ... yet it seems certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by the statute. For by statute 2 Edw. 3., s. 3, in force in several of the United States, it is enacted...

F. Wharton, *A Treatise on the Criminal Law of the United States* (1852) at 726.

Wharton also includes a manner requirement to the rule against dangerous and unusual weapons. If a man armed himself with a “dangerous and unusual” weapon in such a manner that did not naturally cause a terror to the people, he would not be guilty of an affray. After discussing the King’s statute, Wharton stated:

It has been said generally, that the public and open exhibition of dangerous weapons by an armed man, to the terror of good citizens, is a misdemeanor at common law. (*State v. Huntley*, 3 Iredell, 418; but see *State v. Simpson*, 5 Yerger 356). On the same general reasoning, it has been held indictable to drive a carriage through a crowded street, in such a way as to endanger the lives of the passers-by; (footnote omitted) to disturb a congregation when at religious worship; (footnote omitted) to beset a house, with intent to wound, tar and feather; (footnote omitted) to raise a liberty-pole, in the year 1794, as a notorious and riotous expression of ill-will to the government; (footnote omitted) to tear down forcibly and contemptuously an advertisement set up by the commissioners of a sale of land for county taxes; (footnote omitted) to break into a house in the day-time, and disturb its inhabitants; (footnote omitted) and to violently disturb a town-meeting, though the parties engaged were not sufficient in number to amount to a riot.

F. Wharton, *A Treatise on the Criminal Law of the United States* (1852) at 727.

All of Wharton's examples compare the reasoning behind outlawing riding with dangerous weapons to the terror of the public with behavior that caused a disruption to the public peace.³¹ This supports the proposition that carrying dangerous and unusual weapons to the terror of the people is a manner of carry which disturbs others rather than a particular type of weapon. Notably, Wharton referenced rioting. Blackstone defined a riot as follows:

A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel (footnote omitted): as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.

³¹ Wharton's reference to a liberty pole deals with a traditional symbol of protest during the colonial era. A liberty pole is "a tall flagstaff surmounted by a liberty cap or the flag of a republic and set up as a symbol of liberty." See <https://www.merriam-webster.com/dictionary/liberty%20pole> (last accessed 8/24/2026) "The mere erection of a liberty pole was innocent in itself." *Respublica v. Montgomery*, 1 Yeates 419, 422 (1795). However, "riotously raising a liberty pole in a public place" was unlawful because it disturbed the peace. See *Commonwealth v. Moss*, 9 Pa. D. & C. 713, 715 (1927).

See W. Blackstone, *Commentaries on the Laws of England*, bk. 4, ch. 11 (1765–1769).³²

The rule against riots is meant to help preserve the public peace and to avoid unruly mobs.³³ Similarly, to preserve the peace, the common law has outlawed reckless displays of firearms in public.³⁴

The other sources *Heller* cites in support of the “dangerous and unusual” doctrine are in accord, as are the cases *Heller* cites. See *O’Neill v. State*, 16 Ala. 65, 67 (1849) (affray “probable” “if persons arm

³² Available at <https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-411/>.

³³ Historically, it was legal to assemble armed. It was only when the assembly turned threatening did the conduct become illegal. “A Virginia commentator observed that “the common” meaning of unlawful assembly did not prohibit large, armed assemblies to peaceably discuss redress. J.A.G. Davis, *A Treatise on Criminal Law with an Exposition of the Office and Authority of Justices of the Peace of Virginia* 254-55 (1838). That’s because peaceably assembling while armed was normal behavior, not dangerous or riotous.” See *Koons v. Att’y Gen.* N.J., 156 F.4th 210, 305 (2025) (Porter, J., concurring in part and dissenting in part).

³⁴ *Heller* also refers to Henry John Stephen, *Summary of the Criminal Law*, 1840 available at <https://play.google.com/books/reader?id=PtCAQAAMAAJ&pg=GBS.PA48&hl=en>. This treatise has a very short discussion of dangerous and unusual weapons. “Riding or going armed with dangerous or unusual weapons. By statute of Northampton, 2 Edw. III c. 3, this is a misdemeanor, punishable by forfeiture of the arms and imprisonment during the King’s pleasure.” *Id.* at 48. Stephen does not investigate the intricacies of what constitutes a violation of the law.

themselves with deadly or unusual weapons for the purpose of an affray, *and in such manner as to strike terror to the people*") (emphasis added); *State v. Langford*, 10 N.C. 381, 383 (1824) (affray "when a man arms himself with dangerous and unusual weapons, *in such a manner as will naturally cause a terror to the people*") (emphasis added); *English v. State*, 35 Tex. 473, 476 (1871) (affray "by terrifying the good people of the land"). In fact, one does not even need to be armed with a firearm to commit the crime of affray under the dangerous and unusual doctrine. See *State v. Lanier*, 71 N.C. 288, 290 (1874) (riding horse through courthouse, unarmed, is "very bad behavior" but "may be criminal or innocent" depending on whether people are alarmed).

And in *Simpson v. State*, the Supreme Court of Errors and Appeals of Tennessee dismissed an indictment alleging that "William Simpson, labourer, with force and arms being arrayed in a warlike manner, in a certain public street or highway situate, unlawfully, and to the great terror and disturbance of divers good citizens, did make an affray...". *Simpson v. State*, 13 Tenn. 356, 361 (1833) The Attorney General sought to rely on Hawkins' claim that "there may be an affray... where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes." *Id.* at 358.

The court in *Simpson* held that the indictment was insufficient as it failed to allege the elements of an affray of fighting between two or more persons. The *Simpson* court repeated Hawkins' comment about the

Statute of Northampton that “persons of quality are in no danger of offending against this statute by wearing their common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places and upon occasions in which it is the common fashion to make use of them without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace.” *Id* at 358-59 citing William Hawkins, *Pleas of the Crown*, book 1, ch. 28, sec. 4. 40 (1716).

No law or court, cited by *Heller* or from the Founding Era, ever examined the characteristics of the arm itself, completely unconnected to how it was used and labeled it as “dangerous and unusual.” The traditional right to arms “was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626. It was a right to keep and carry weapons for usual purposes such as self-defense. The term “dangerous and unusual” has nothing to do with the analysis of whether an arm is protected by the Second Amendment. That is entirely dealt with by the common use test which should be decided solely by an inquiry into whether an arm’s typical use is for a lawful purpose. After the common use inquiry is complete, the decision on whether an arm is protected is definitively decided.

The “dangerous and unusual” inquiry is only applicable to deciding whether a manner of carry or similar conduct is protected by the Second Amendment. *E.g.* a prohibition on brandishing firearms is supported by the tradition of prohibiting the carry of “dangerous and unusual” weapons

because brandishing a firearm is an unusual use of a weapon. This interpretation also makes sense considering *Heller*'s finding that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are presumptively constitutional. See *Heller*, 554 U.S. at 626. As shown above, historically it was permissible to prohibit carrying in places where it would be unusual to do so. Those places are what *Heller* refers to as sensitive places. It might be unusual to carry one arm in a location whereas it would be usual or permissible to carry a different arm in that same location. As shown below, people used to wear certain defensive weapons as part of their everyday dress, almost everywhere.

However, Justice Scalia once said that historically there were times when it was permissible to prohibit carrying certain arms. "For example, there was a tort called affrighting, which if you carried around a really horrible weapon just to scare people, like a head ax or something, that was I believe a misdemeanor. So yes, there are some limitations that can be imposed. What they are will depend on what the society understood was reasonable limitation." See <https://www.nbcnews.com/id/wbna50490090> (last visited 08/16/2026). This was true despite the fact other arms were regularly carried by ordinary people for self-defense. In the medieval period, "[a]lmost everyone carried a knife or a dagger in his belt." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 41 (2022) (quoting H. Peterson, *Daggers and Fighting Knives of the Western World* 12 (2001)). "While these knives were used by knights in warfare, "[c]ivilians wore them for self-protection," among other things."

Id. (quoting H. Peterson, *Daggers and Fighting Knives of the Western World* 12 (2001)).

Historically, it was normal (usual) for a person to carry a dagger to the market and that carry was not prohibited. Whereas carrying a head axe dressed in armor to a market, would be unusual and could likely be prohibited. Similarly, there were restrictions on **riding** with lancegays despite them being legal to possess. *See* 7 Rich. 2, ch. 13 (1383).³⁵ This despite the fact “[e]ven common folk with no military associations seem to have [legally] possessed the weapon [the lancegay].” *See* Scott Macnab, David: Sir John Fastolf and the Diverse Affinities of the Medieval Lancegay, *S.A. Journal of Medieval and Renaissance Studies*, 19 (2009), pp.97-116.³⁶ This is in line with the overall tradition of regulating unusual carry in certain circumstances but not possession. “The Statute’s apparent focus on armor and, perhaps, weapons like launcegays makes sense given that armor and lances were generally worn or carried only when one intended to engage in lawful combat or—as most early violations of the Statute show—to breach the peace.” *Bruen*, 597 U.S. at 41. Weapons like head axes and lancegays were typically not worn for everyday self-defense, therefore their carry in metropolitan areas such as marketplaces or in the case of lancegays,

³⁵ Available at <https://firearmslaw.duke.edu/laws/7-ric-2-35-ch-13-1383>.

³⁶ Available at https://www.researchgate.net/publication/236870083_Sir_John_Fastolf_and_the_Diverse_Affinities_of_the_Medieval_Lancegay.

while riding, fell within the prohibition against carrying of “dangerous and unusual” weapons.

Similar restrictions on arms bearing existed during the colonial era. *E.g.* a 1786 Virginia statute forbade persons to “go nor ride armed by night or by day, in fairs or markets, or in other places, in terror of the Country. *See* 1786 Va. Acts 33.³⁷ During Colonial America, being armed with a head axe outside of certain locations would likely cause apprehension i.e. terror whereas a person carrying a knife would not. Thus, certain arms could be banned at certain locations because they created terror whereas other arms could not be banned at the same location. This was true even though “no colonial law banned any particular arm.” Kopel, David B. and Greenlee, Joseph, *The History of Bans on Types of Arms Before 1900* (May 23, 2024). *Journal of Legislation*, Vol. 50, No. 2, 2024, U. Denver Legal Studies Research Paper at page 4, available at SSRN: <https://ssrn.com/abstract=4393197>.

Bruen is in line with this reading. In *Bruen*, the Supreme Court reviewed the carry restrictions of the history of “the Colonies and early Republic.” *Bruen*, 597 U.S. at 4. It found “[t]he statutes essentially prohibited bearing arms in a way that spread “fear” or “terror” among the people, including by carrying of “dangerous and unusual weapons.” *Id.* Later, the Court addressed New York’s amici’s argument “that “offensive” arms in the 1600s and 1700s were what Blackstone and others referred to as “dangerous or

³⁷ Available at <https://firearmslaw.duke.edu/assets/1786-va-ch.-49-an-act-forbidding-and-punishing-affrays.pdf>.

unusual weapons,” [...] a category that they say included firearms.” *Id* at 46

The Court dismissed this argument. “Respondents, their amici, and the dissent all misunderstand these statutes. Far from banning the carrying of any class of firearms, they merely codified the existing common-law offense of bearing arms to terrorize the people, as had the Statute of Northampton itself.” *Id* at 47. *Bruen* then reiterated *Heller*’s findings. There, “we found it ‘fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons” that the Second Amendment protects the possession and use of weapons that are “in common use at the time.”’” *Id* at 21.

This is another way of saying Americans have a right to own arms which are in common use. However, the government may permissibly restrict carry in certain circumstances pursuant to the tradition of prohibiting the carrying of “dangerous and unusual” weapons. Amici acknowledges that *Bruen* did say “[w]hatever the likelihood that handguns were considered “dangerous and unusual” during the colonial period, they are today “the quintessential self-defense weapon.” *Id.* at 4. This must be read in context. *Bruen* is a case about handgun **carry**. This discussion by the Court is another way of saying whatever the likelihood it was considered unusual to carry a handgun during the colonial period, in the modern-day, handguns are considered usual to carry. Therefore, modern day handgun carry does not run afoul of the tradition of carrying dangerous and unusual weapons.

Likewise, nothing in Justice Breyer’s dissent in *Bruen* contradicts Amici’s position. Justice Breyer acknowledges that the Statute of Northampton and similar law applied “only to “dangerous and unusual weapons,” [...] [and] that category almost certainly included guns.” *Id* at 121 (Breyer, J., dissenting). We know from *Heller* and *Bruen* that handguns are protected arms. Thus, it cannot be that the phrase “dangerous and unusual” weapons refer to types of arms which are intrinsically unprotected by the Second Amendment. Rather the term only refers to prohibitions on types of conduct with arms.

Similarly, nothing in *Rahimi* contradicts Amici’s position. In *Rahimi* the Supreme Court reiterated its prior findings that historical prohibitions on “dangerous and unusual” weapons dealt with carry not possession. “The “going armed” laws—a particular subset of the ancient common law prohibition on affrays, or fighting in public—provided a mechanism for punishing those who had menaced others with firearms. Under these laws, individuals were prohibited from “riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land.” 4 Blackstone 149.” *United States v. Rahimi*, 602 U.S. 680, 681-82 (2024). “Whether classified as an affray law or a distinct prohibition, the going armed laws prohibited “riding or going armed, with dangerous or unusual weapons, [to] terrify[] the good people of the land.” 4 Blackstone 149 (emphasis deleted).” *Id* at 697.³⁸ The term “dangerous and

³⁸ This Court’s subsequent Second Amendment opinions in *United States v. Hemani*, 146 S. Ct. 1677 (2026), and

unusual” weapons dealt with prohibitions on types of conduct with arms not the intrinsic property of an arm. The historical tradition of weapons in common use being protected by the Second Amendment is fairly supported by the historical tradition of prohibiting the *carrying* of “dangerous and unusual” weapons because even when an arm is constitutionally protected citizens may not carry them “in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626.

CONCLUSION

This Court should determine whether the rifles at issue in this litigation are protected by the Second Amendment solely by a determination of whether they are in common use for lawful purposes. Any opinion which holds that arms can be “dangerous and unusual” weapons unrelated to their particular use by a person under specific circumstances would do so via a misapplication of the historical term.

Respectfully submitted,

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Wolford v. Lopez, 146 S. Ct. 2032 (2026), contain no language applicable to the issue discussed in this brief.

APPENDIX

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**APPENDIX A — *SIR JOHN KNIGHT’S CASE*,
3 MOD. 117, 87 ENG. REP. 75 (K.B. 1686)**

CASE 78. SIR JOHN KNIGHT’S CASE.

An *information* lies, both at common law and on the statute 2 Edw. 3, c. 3, for going armed, to the terror of the public.—S. C. Comb. 38, 40. Dalton, 130. F. N. B. 249. 2 Bulst. 330. Crompt. 64. Fitzg. 47, 65. 10 Mod. 121, 337, 358, 409.

1 Ld. Ray. 347, 682. 2 Ld. Ray. 1039.

2 Stra. 828. 1 Hawk. P. C. 267. 2 Hawk. P. C. 369.

An information was exhibited against him by the Attorney General, upon the statute of 2 Edw. 3, c. 3, which prohibits “all persons from coming with force and arms before the King’s Justices, &c., and from going or riding armed in affray of peace, on pain to forfeit his armour, and suffer imprisonment at the King’s pleasure.” This statute is confirmed by that of 20 Rich. 2, c. 1, with an addition of a further punishment, which is to make a fine to the King.

The information sets forth, that the defendant did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King’s subjects, *contra formam statuti*.

This case was tried at the Bar, and the defendant was acquitted (*a*).

(*a*) But on the motion of the Attorney General he was bound to his good behavior.

Appendix A

[118] The Chief Justice said, that the meaning of the statute of 2 Edw. 3, c. 3, was to punish people who go armed to terrify the King's subjects. It is likewise a great offence at the *common law*, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law; and it having appointed a penalty, this Court can inflict no other punishment than what is therein directed.

**APPENDIX B — *REX V. SIR JOHN KNIGHT*,
1 COMB. 38, 90 ENG. REP. 330 (K.B. 1686)**

REX *versus* SIR JOHN KNIGHT. Post, p. 40.

Information for going to church armed.

Information for going to church with pistols, &c.
contra stat. 2 Ed. 3, of Northampton.

Winnington pro defendente. This statute was made to prevent the people's being oppressed by great men; but this is a private matter, and not within the statute. Vide stat. 20 R. 2.

C. J. This offence had been much greater, and better laid at common law. But tho' this statute be almost gone in desue-[39]-tudinem, yet where the crime shall appear to be malo animo, it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security); but afterwards he was found, not guilty.

RODNEY AND STROUD. Ante p. 18.

Nolle prosequi.

Hollis. This case differs from *Heydon's case*; for here the jury have gone contrary to evidence. 3 Cro. 860, *Miles's case*.

Bulst. 157, and Cro., *Walsh and Bishop* come not up to our case, which is on a nolle prosequi.

Appendix B

Pollexfen contra. Cited *Trebarefoot and Greenway's case* in B. E. and that it is in the plaintiff's power to help it by nolle prosequi.

Roll. Error, 784, 785. Vide two cases there in an ejectment for a term, and a fishery. So in an action for words, if some are incertain, a nolle prosequi will help the other.

C. J. This differs from *Heydon's case*; where several damages are given by several juries, there the release of the one, and election of the better damage, is good. But where one jury assess several damages, the verdict is bad.

An insufficient verdict is not curable; and the cases cited are not in point; for in them the fault is in the declaration; but here the declaration is good, and the fault in the verdict.

Wythens, Holloway, and Wright contra pro quer'.

Judgment pro quer'.

Order to provide for a bastard-child: exception was taken, that it doth not appear in the order, that he is chargeable to the parish, or likely to be so. 1 Cro. 36. Sid. 222, quash'd.

Appendix B

REX *versus* DAVIES.

Felonica interfectio implies murder in a pardon. Q.

Indicted of felony and murder, and pray'd to have his pardon allow'd.

Per Wythens and Holloway. Felonica interfectio is well enough, tho' murdrum be omitted.

C. J. contra. Manslaughter is felonica interfectio, but at another day (the Chief Justice being absent) it was allowed.

Comperuit ad diem pleaded. Clerk of the rules gives a day by rule.

Per Aston and other clerks, A defecit de recordo cannot be entred without a rule given, and notice; the like in bail.

[40] Per C. J. An attaint lieth against a jury for giving excessive damages.

This term a new order was made per Cur', that all orders to be spoke to, shall be put in the paper and copies given, and not to be spoke to the two last days of the term.

C. J. When a man proceeds both criminally and civilly upon the same cause of

APPENDIX C — *REX V. DEWHURST*,
1 STATE TRIALS, NEW SERIES 529, 601-602 (1820)

THE KING *against*
GEORGE *Dewhurst* AND OTHERS.

TRIAL OF GEORGE *DEWHURST*, JOHN *KNIGHT*, NATHAN
BROADHURST, JOHN *ADAMSON*, WILLIAM *FLETCHER*, JOHN
BURY, JOHN *ASTIN*, JAMES WADE, AT LANCASTER, ON APRIL
1ST, 1820, BEFORE MR. JUSTICE BAYLEY AND A COMMON
JURY, FOR UNLAWFULLY ASSEMBLING AND CAUSING PEOPLE
TO GO ARMED TO A PUBLIC MEETING.

A meeting, at which the defendants were present, and of which the defendant *Knight* was chairman, was held at Habergham Eaves, near Burnley, on the 15th November 1819, “to consider the best means of bringing the instigators and perpetrators of the late Manchester massacre to justice, and to embrace the subject of the necessity of Parliamentary Reform.” Bodies of men to the number of several thousands, many of them carrying sticks, marched, with banners and music, to the place of meeting. Some days before the meeting the magistrates had issued notices cautioning all persons against attending it.

* * *

On the subject of carrying arms the learned judge said:] Gentlemen, I forgot to observe to you on the subject of carrying arms that I do not agree with the counsel on the part of the defendants that persons have a right to carry arms in the way in which those arms are described

Appendix C

to have been carried. Mr. Justice *Blackstone* lays down the right of the subject to carry arms as “having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 *William* and *Mary*, sess. 2. c. 2 ; and it is indeed a public allowance under due restrictions of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.”(a)

Gentlemen, he refers to the Bill of Rights. You will see what the Bill of Rights says upon that subject. It provides that, “The subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.”(b)

But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to arms to protect himself in his house. A man has a clear right to [602] protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm; and if you could be at liberty to carry arms upon an expectation that by possibility there might be an attack at the place, that would be an excuse for carrying arms

(a) Book 1, c. 1.

(b) 1 Will. and Mar. sess. 2. c. 2. 7.

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in every instance when you went to a public meeting.^(a) Therefore, I have no difficulty in saying persons are not warranted in carrying arms to a public meeting, if they are calculated to create terror and alarm. You have no right to suspect there will be an illegal attack on you. Therefore, you are not at liberty to carry arms with you. You will, therefore, on this evidence pause, and judge whether you are of opinion that at the time the pikes were produced *Dewhurst* was in such a situation in which he must have seen them. If he was in such a situation in which he must have seen them, then he would have seen that the persons who were attending there were armed in a way in which they ought not to be armed. And if he did not at once take steps to remove those persons and those arms from that assembly, his continuing there and lending himself to the purposes of that assembly was an illegal act.

* * *

^(a) See above, p. 519.

APPENDIX D — *REX V. ROWLAND PHILLIPS*
98 E.R. (1385)

REX versus ROWLAND PHILLIPS. Same day, 1778. If an officer on the impress service fire in the usual manner at the ball-yards of a boat, in order to bring her to, and kill a man, it is only manslaughter.

Upon an indictment against the defendant, at the Lent Assizes, at Exeter, for the county of Devon, 1778, for the murder of William Collier, the jury at the trial before Mr. Baron Perryn, found a special verdict, stating in substance as follows: “An Order of Council for impressing seamen. A warrant made in consequence of it to Captain Milbank, Commander of His Majesty’s ship ‘Princess Royal,’ who, by indorsement deputed John Nasmith, Fourth Lieutenant of the ‘Princess Royal,’ to execute it. That William Collier, the deceased, was a fisherman: the defendant was a midshipman belonging to the ‘Princess Royal,’ and on the 25th of September 1777, was sent in the brig ‘Hope’ (a tender) commanded by Lieutenant Nasmith, into Torbay, to impress seamen. That he went from the tender into a boat, by the directions of the lieutenant, to put people on board the fishing boats as they returned from sea, who might carry them under the stern of the tender that the lieutenant might examine whether they had any protections. That he put Francis Graham, a quartermaster, on board the boat or smack of the deceased; that the smack at first made a feint of proceeding towards the tender; but instead of continuing in that course, she afterwards put out to sea, with the said Francis Graham on board. That Graham [831] then waived his hat, by way of signal of distress, and for assistance: upon which the

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defendant went on board another fishing-boat, with the quarter-master as his assistant, armed with a musquet and ball, and two cutlasses; and gave chase to the deceased for three hours; in the course of which time, the defendant fired six or seven shots, at the distance of a quarter or half an hour between each, for the purpose of bringing the smack of the deceased to. That the hallyards of the smack had been cut by Francis Graham, and that the smack was in the act of lying to. That within the distance of sixty yards, the defendant fired a musquet loaded with ball, the sea then running very high, and shot the deceased on the left side of his head. That Francis Graham was at that time standing close to the deceased. That the defendant said, 'If they did not bring to, he would fire at the man at the helm; but if he could get Graham out of the vessel, he might go to hell.' That before the defendant fired the musket, the master of the 'Industry' fishing-boat desired him not to fire, but the defendant did fire; the deceased fell, and then one John Desent said, 'You have killed a man:' upon which the defendant said, 'Do you think I meant it.' That before the last firing, a struggling was seen between Francis Graham and the deceased, and that there was an apprehension Graham would have been thrown overboard: that a hat and four bludgeons were seen floating on the sea. That the defendant fired from a musquet loaded with ball, as is usual in the Navy, to bring the smack of the deceased to, and to hit the hallyards."

No counsel appeared on the part of the prosecution.

Mr. Baldwyn for the prisoner argued, that the facts found, amounted only to manslaughter. To constitute

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murder, there must be malice, either express or implied. Lord Coke, 3 Inst. 47, defines murder thus: “When a person of sound memory and discretion, unlawfully killeth any reasonable creature in being under the King’s peace, with malice aforethought either express or implied:” and according to Lord Hale, vol. 1, 449, “murder is killing a man of malice prepense.” But the unfortunate act here, has nothing of express or implied malice within the above definition. There is no appearance of to the deceased. The firing was not done in an uncommon manner, or with unusual weapons. He cited Hawk. Pl. C. 85, sect. 50, and Kelyng, 60.

Lord Mansfield.—It is impossible upon this special verdict to say, that the defendant is guilty of more than manslaughter. [832] For it is expressly found, that he fired in the usual manner to bring vessels to, and to hit the hallyards.

Whereupon, the defendant was immediately arraigned, and upon praying the benefit of clergy, Mr. Justice Willes pronounced the sentence for burning him in the hand, which was executed in the face of the Court, and he was then discharged.

**APPENDIX E — *KING V. ONEBY* 92 E.R. 465
(COURT OF THE KING'S BENCH 1727)**

THE KING *vers.* ONEBY.

[Referred to, *Allen v. Flood* [1898], A. C. 63.]

S. C. with the arguments of the counsel in
B. R. Str. 766, and with the indictment, evidence
and special verdict. 9 St. Tr. 14.

The killing of a man may be a murder altho' he had stricken the person who killed him before the mortal wound was given. Acc. ante, 140, and see the books there cited. A transport of passion shall never make the killing of a man manslaughter only, unless it deprived the party of his reasoning faculties from the time when it was raised until the giving of the mortal wound. S. C. 1 Barnard. B. R. 17, acc. Fort. 296. Any act of deliberation in the interim affords a proof that the party was not deprived of his reasoning faculties during the whole of that period. S. C. 1 Barnard. B. R. 17. A transport of passion shall not be taken to continue an immoderate length of time. 'Tis properly the province of the Court to determine what acts afford proof of malice. D. acc. post, 1584, vide Burr. 396, 474, 937. 3 T. R. 428. What deliberation, and within what time a transport of passion shall be taken to have subsided, vide *Sweetapple v. Appleton*, B. R. M. 23 G. 3. 1 T. R. 168, 169, 171. 'Tis a proof of malice to tell a man deliberately after a quarrel, you will have his blood. S. C. 1 Barnard. B. R. 17, of deliberation to call a man back into a room he has quitted. 'Tis never

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to be presumed that the killing of a man took place upon a sudden quarrel.

At the General Sessions of the Peace held at Hickeys Hall for the county of Middlesex 28th of Feb. in the 12th year of His Majesty's reign John Oneby of St. Martins in the Fields, gent. was indicted, for that he the 2d of Feb. 12 Geo. at the said parish, feloniously, voluntarily, and of his malice forethought, made an assault upon one William Gower, Esq; and that he the said John Oneby, with a sword which he had then and there held drawn in his right hand, the said William Gower in and upon the left part of his belly near the navel feloniously, voluntarily, and of his malice forethought, did strike and thrust, giving the said William Gower then and there with the said drawn sword in and upon his said left part of his belly near the navel a mortal wound, of which mortal wound the said William Gower lived in a languishing condition from the said 2d of Feb. to the third day of the said Feb. on which 3d day of Feb. the said William Gower at the parish aforesaid of the said mortal wound did die; and so the jurors find, that the said Oneby the said William Gower feloniously, voluntarily, and of his malice forethought, did kill, and murder. Which indictment being delivered to the Justices of Goal Delivery for Newgate, the said John Oneby was arraigned thereupon, and pleaded not guilty. And upon the trial, which was had before Mr. Baron Hale and Sir William Thompson Recorder of London, the jury found the special verdict following, viz. that the said John Oneby and the said William Gower, together with John Rich, Thomas Hawkins and Michael Blunt, were in company together in a room in the Castle-Tavern in the parish of St. Martin's in

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the Fields, in a friendly manner; that after the said John Oneby, William Gower, John Rich, Thomas Hawkins and Michael Blunt, had continued together in the said room for the space of two hours, a box and dice were called for; whereupon the drawer said, that he had dice but no box, and that thereupon the said John Oneby commanded the drawer to bring a pepper-box, and accordingly a pepper-box and dice were brought; that immediately after the said John Oneby, William Gower, John Rich, Thomas Hawkins, and Michael Blunt, began to play at hazard; and after they [1486] had played half an hour, the said John Rich asked if any of the company would set him three pieces of money called half-crowns, that thereupon the said William Gower in a jocular manner set three pieces of money called halfpence, and then said to the said John Rich, that he had set him three pieces; that the said John Oneby at the same time set the said John Rich three half-crowns, which the said John Rich won; and immediately the said John Oneby in an angry manner turned to the said William Gower, and said to him, that it was an impertinent thing to set halfpence; and further said to the said William Gower that he the said William Gower was an impertinent puppy in so doing; to which the said William Gower then and there answered, that whosoever called him so was a rascal; and thereupon the said John Oneby took up a glass bottle, and with great force threw it at the said William Gower, but the glass bottle did not strike the said William Gower, but passing by near his head brushed his peruke, which he then had upon his head, and beat out some of the powder out of his peruke; that thereupon the said William Gower immediately after tost a glass or candlestick at the said John Oneby, but the glass or candlestick did not hit the

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said John Oneby; upon which both the said John Oneby and William Gower presently rose from their seats, to fetch their swords, which then hung up in the room; and the said William Gower then drew his sword out of the scabbard, but the said John Oneby was hindred by others of the company from drawing his sword out of the scabbard, whereupon the said William Gower threw away his sword, and by the interposition of the said John Rich, Thomas Hawkins and Michael Blunt, the said William Gower and John Oneby sat down again, and being so set down continued for the space of an hour in company with the said John Rich, Thomas Hawkins and Michael Blunt; that after the expiration of that hour the said William Gower said to the said John Oneby, We have had hot words, but you was the aggressor, but I think we may pass it over; and at the same time the said William Gower offered his hand to the said John Oneby; to which the said John Oneby then answered the said William Gower, No damn you, I will have your blood; that afterwards the reckoning was paid by the said John Oneby, William Gower, John Rich, Thomas Hawkins and Michael Blunt; and that the said William Gower, John Rich, Thomas Hawkins and Michael Blunt went out of the said room, with an intent to go home, leaving the said John Oneby in the room; that the said John Oneby so as aforesaid remaining in the room, called to the said William Gower, Young man come back, I have something to say to you; that thereupon the said William Gower returned into the said room and the door of the room was immediately flung to, and shut, by reason of which shutting of the door, all of the said company besides the said William Gower and John Oneby were shut out of the room; and that then after [1487] shutting of the door

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a clashing of swords was heard; then the jury find, that the said John Oneby gave the said William Gower with his sword the mortal wound in the indictment mentioned, of which he died; but they further find, that at the breaking up of the company the said John Oneby had his great coat thrown over his shoulders, and that the said John Oneby received three small wounds in the fighting with the said William Gower; and that the said William Gower, being asked upon his death-bed, whether he the said William Gower had received his wounds in a manner among swords-men called fair, answered, I think I did; and they further find, that from the time the said Oneby threw the glass bottle at the said William Gower, there was no reconciliation between the said John Oneby and William Gower: and whether this is murder or manslaughter, the jury pray the advice of the Court: and if, &c.

So that the question upon the special verdict is, whether John Oneby-the prisoner at the Bar is guilty of murder or manslaughter.

A great deal of time was spent in drawing up this special verdict; for altho' the trial at the Old Bailey was in the beginning of last March was twelve months, yet the record was not removed into this Court till Hilary term last; towards the end of which term it was argued by counsel on both sides, and another argument being desired by the counsel for the prisoner, we thought it proper, to desire the opinion of all the rest of the Judges; and for that purpose it was argued before all the Judges at Serjeants Inn Hall in Chancery Lane upon the 6th day of May last; which was as soon as all the Judges could meet

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by reason of the intervention of the circuits. And after mature consideration had, upon a meeting of them, they seriatim gave their opinions; and came to this resolution unanimously, not one of them dissenting, and which I have authority from them to declare, viz. that John Oneby the prisoner at the Bar, upon the facts found upon special verdict, is guilty of murder.

Without entring into a nice examination of the several definitions or descriptions of murder, as they are found in the old law-books, as Bracton, Briton, and Fleta where the wickedness of the act is aggravated by the circumstances of secrecy or treachery; murder has been long since settled to be, the voluntary killing a person of malice prepense, and that whether it was done secretly, or publicly. Staundf. pl. Cor. 18 b. 3 Inst. 54.

But then it must be considered, what the word malice in such case imports. In common acceptation malice is took to be a settled anger (which requires some length of time) in one person against another, and a desire of revenge. But in the legal acceptation, it imports a wickedness, which [1488] includes a circumstance attending an act, that cuts off all excuse. By the 25 H. 8, c. 33, for taking away clergy, it is enacted, that every person, who shall be indicted of the crimes therein mentioned, and thereupon arraigned, and stand mute of malice or of frowardness of mind, shall lose the benefit of his clergy. Now in that place malice can never be understood in the vulgar sense, for the party cannot be thought to stand mute out of a settled anger, or desire of revenge, but only to save himself; and therefore such standing mute, and refusing to submit to the course

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of justice, is said to be done wickedly, i.e. without any manner of excuse, or out of frowardness of mind.

This malice, an essential ingredient to make the killing a person murder (to use the expressions of Lord Chief Justice Coke and Lord Chief Justice Hale, whose authority hath established them) must be either implied or express; and says Hale in his Pleas of the Crown 44, this implied malice is collected, either from the manner of doing, or from the person slain, or the person killing. As to the two last, there is no occasion at present, to take them into consideration.

1. As to the first, viz. from the manner of doing, as Hale expresses it, or as Holt Chief Justice, Kelynge 126, says, from the nature of the action. 1. Wilfully poisoning any man implies malice. 2. If a man doth an act, that apparently must do harm, with an intent to do harm, and death ensues; it will be murder. As if A. runs with a horse used to strike, among a multitude of people, and the horse kills a man; it will be murder, for the law implies malice from the nature of the act. 3. Killing a man without a provocation is murder; as if A. meets B. in the street, and immediately runs him through with a sword, or knocks out his brains with a hammer, or bottle. And if angry words had passed in that case between A. and B. yet it would have been murder in A. because (a)¹ words are not such a provocation, as will prevent such a homicide from being murder; *Lord Morley's case*, Kelynge 56. 4. The law will imply malice from the nature of the original action, or

1. (a) R. acc. ante, 140, and see the books there cited.

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first assault, tho' blows pass between the parties, before the stroke is given, which occasions the death. As if upon angry words, or abusive language, between A. and B. of a sudden, A. without any provocation (for angry words or abusive language in such a case is looked on as none) draws his sword immediately, and makes a pass at B. or strikes at him with any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt, and then B. draws his sword, and mutual passes are made, and A. kills B. this will be murder; for the act was voluntary, and it appears from the nature of it, that it was done with an intent to do mis-[1489]-chief; and therefore since in all probability it might have occasioned B.'s death, or done him some great bodily harm, the law implies malice prepense; and the resistance or passes that were made by B. were but in the defence of his person, which was violently and cruelly attacked. And this was the resolution of Kelynge Chief Justice, Twisden, Windham, and Morton Justices, in *Hopkin Huggers case*, Kelynge 62, cit. ante, 1300, 1302. And though in the principal case the eight other Judges differed in opinion from the four Judges in the King's Bench, yet to this opinion of the four the eight Judges did agree, as Kelynge took it. And this was the true reason of *Mawgridge's case*, Kel. 119, the judgment in which case is a great authority in this case, that not being so strong a case as the present case. It was indeed objected by the counsel for the prisoner at the Bar in their arguments in the present case, 1. That *Mawgridge's case* was a single case, that the judgment in that case had carried murder further than it had ever been carried before. 2. That it was not determined with the unanimous opinion of all the then

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Judges, for one very great Judge of the then twelve, viz. Lord Trevor, differed from the other Judges, and held it was only manslaughter. But upon our meeting to consider of this present case, all the Judges unanimously agreed, that *Mawgridge's case* was undoubted law, and that that judgment was a right and just judgment so groundless was that insinuation which had been made (for such an insinuation there was) in Westminster-Hall, that some of the present Judges were of opinion, that the judgment in *Mawgridge's case* was not a legal judgment.

And this is as much as is necessary, rather more than is necessary, to be said as to implied malice, since there will be no occasion in this case to look out for malice implied.

2. 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. And this holds, where such design is not formed against any particular person; as if A. having no particular malice against any particular person, comes with a general resolution against all opposers; if the act be unlawful, and death ensue, it is murder. As if it be to commit a riot, to enter into a park, *Lord Dacre's case*, H. P. C. 47. Moor 86. Say. 67. So if A. goes with a resolution to kill the first man he meets, and meeting B. kills him, it is murder with express malice; yet A. had riot declared any malice against B. nor against any particular person. Much more will it be express malice, when the mischievous design is formed against any particular person, which may be made evident as well by circumstances as by the express declarations of the person

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killing. As that he would be revenged of B. or that he [1490] would have his life, or have his blood, and some time after he kills B. And that such declarations spoken seriously, or deliberately, or after time for reflection, manifest an express malice, no body can doubt.

Having thus briefly mentioned that known and settled rule, that there must be either malice express or implied, to make murder, and also some instances of what is one and what the other of them; I come to the present case before us.

All the twelve Judges were unanimous in opinion, that as the facts are founded in this special verdict, it appears, that the prisoner at the bar had express malice against Mr. Gower, when he gave him the mortal wound, of which he died: 1. Mr. Gower did nothing that could reasonably raise a passion in Mr. Oneby. He gave him no provocation whatsoever, for when Mr. Gower set the three halfpence, he set them against Mr. Rich, and that in a jocular manner, therefore that was no affront to Mr. Oneby. 2. Upon that Mr. Oneby turned to Mr. Gower in an angry manner, and gave him abusive language, and called him impertinent puppy; the answer of Gower was not improper, nor more than what might be expected, that whosoever called him so was a rascal. 3. That as Oneby had before began with Gower, by giving him abusive language, so he then took up the glass bottle, et magna cum vi threw it at Gower, and beat the powder out of his peruke; if it had killed G. it had been certainly murder; upon which Gower tossed a glass or candlestick at Oneby. And the difference of the finding in the special verdict is observable, Oneby

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threw the bottle at G. magna cum vi; Gower only tossed the glass or candlestick at Oneby. 4. When they fetched their swords, Gower did it only to defend himself; for the verdict finds, that though G. drew his sword first, yet the prisoner at the Bar being hindered by the company from drawing his sword, Gower thereupon threw his sword away. 5. By the interposition of the company the prisoner at the Bar and Mr. Gower sat down again, and continued in company for an hour, after which Mr. Gower said, We have had hot words, but you was the aggressor, but I think we may pass it over, and offered his hand to the prisoner; that the prisoner at the Bar was the aggressor is true, and that in a violent manner; this was sufficient, to have appeased Mr. Oneby, but what is his answer? No, damn you, I will have your blood. There is an express declaration of malice, an express declaration of a design of taking away Mr. Gower's life. These words are incapable of any other construction. These words shew his malicious intent, even in throwing the bottle at first; they are spoken an hour after the first action; and are spoken with deliberation. The next fact [1491] the jury find is, that afterwards (not particularly finding what interval of time passed between the speaking these words, and what is found next) that Mr. Gower, Rich, Hawkins, and Blunt went out of the room, with an intent to go home, leaving the prisoner at the Bar in the room; that the prisoner remaining in the room, called to the said William Gower, saying, Young man, come back, I have something to say to you. These words also shew a plain deliberation, and being attended with the circumstances found before, and what follows immediately, import contempt, Young man, come back, are insolent and imperious, and import a resentment

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he had conceived against Mr. Gower, about which he had something to say to him. For what purpose did the prisoner stay, after all the company had left the room, to go home it was to say something to Mr. Gower. What is that? Why as soon as Mr. Gower is returned into the room, the door was immediately flung to, and shut; and the rest of the company shut out; and then after shutting the door, a clashing of swords was heard, and the prisoner gave Mr. Gower the mortal wound of which he died.

These immediate subsequent facts shew, what it was the prisoner had to say to Mr. Gower; it was to carry the malicious design, he had before declared he had against Mr. Gower, into execution, viz. to have his blood; and he had it, for he gave him the wound of which he died.

To go farther; if the prisoner had malice against Mr. Gower, though they fought after the door was shut, the interchange of blows will make no difference; for if A. has malice against B. and meets B. and strikes him, B. draws, A. flies to the wall, A. kills B. it is murder. H. P. C. 42. Kelynge 58.

Nay, if the case had been, that there had been mutual malice between the prisoner and Mr. Gower (which does not appear to have been on the part of the deceased) and they had met and fought upon that malice; the killing Mr. G. by the prisoner had been murder. H. P. C. 47. 1 Bulstr. 86, 87. Hob. 121. Crompt. 21.

The Judges were all of opinion upon the facts found in this verdict, there appeared to be express malice in Oneby

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against Mr. Gower, and then Oneby killing Gower, having such express malice against him, they were all unanimous and clear of opinion, that this was plainly murder.

Having thus mentioned the reasons, upon which we ground this present resolution; I shall next consider, if any of the objections made by the counsel for the prisoner are [1492] an answer to these reasons, or take off the force of them.

The counsel for the prisoner Mr. Oneby insisted, that upon the whole verdict the case was no more, than that from a slight occasion passionate words arose, mutual reproaches passed, the quarrel was sudden, mutual assaults were made, and on a sudden fighting in heat of passion the prisoner killed the deceased; which can be no more than manslaughter.

That such fact could amount to no more than manslaughter, they cited the known case, that if A. and B. fall out upon a sudden, and they presently agree to fight, and each fetches his weapon, and go into the field, and fight, and one of them kills the other; this is but manslaughter, H. P. C. 48. 3 Inst. 57, because the passion was never cooled.

In this case (said they) it is plain, the quarrel arose on a sudden; Mr. Oneby's passion was raised, and that is not found by the jury to have ever been cooled, and therefore: the words Mr. Oneby spoke, No, damn you, I will have your blood, &c. were only words of heat spoke under the continuance of the first passion. And they further insisted,

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that the law had fixed no time, in which the passion must be took to be cooled; but that depends upon circumstances, of which the jury are the proper judges. In this case the whole time that passed between the quarrel and giving the mortal wound, was but little more than an hour; and it has been adjudged, that the passion shall not be took to be cooled in very near that time in 12 Co. 87. Cro. Jac. 296. H. P. C. 48, *Rowley's case*, where the child of A. beat the child of B. B.'s child all bloody ran home to his father; B. the father ran three quarters of a mile, and beat the child of A. by means whereof he died; this was adjudged to be only manslaughter; yet there must have been a considerable time after B. was provoked by the usage of his child, before he killed A.'s child, because he ran three quarters of a mile; yet it being one continued passion raised in B. upon the beating of his child, it was held this was only manslaughter. And in this present case, to show the passion of Mr. Oneby, which was suddenly raised, was not cooled; the counsel for Mr. Oneby observed, that the jury had expressly found, that there was no reconciliation between Oneby the prisoner and Mr. Gower the deceased, from the time Mr. Oneby first threw the bottle.

This I take to be the chief objection, upon which the counsel for the prisoner principally relied.

[1493] In answer to this objection I must first take notice, that where a man is killed, the law will not presume, that it was upon a sudden quarrel, unless it is proved so to be; and therefore in *Legg's case*, Kelynge 27, it was agreed upon evidence, that if A. kills B. and no sudden quarrel appears, it is murder, for it lies upon the party indicted, to prove the sudden quarrel.

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In the next place, from what I have said before it appears, that though a quarrel was sudden, and mutual fighting before the mortal wound given; it is by no means to be took as a general rule, that the killing a man will be only manslaughter. It is true, if reproachful language passes between A. and B. and A. bids B. draw, and they both draw, (it is not material which of them draws first) and they both fight, and mutual passes are made; death ensuing from thence (a)² will be only manslaughter, because it was of a sudden, and each ran the hazard of his life. But there is a wide difference between that case, and where upon words A. draws his sword, and makes a pass at B. or with some dangerous weapon attacks him, and then B. draws, and they fight, and A. kills B. there though there was a quarrel upon abusive language, and there was afterwards a. mutual fighting, yet since A. attacked B. with a weapon or instrument, which might have taken away B.'s life, though they fought afterwards, that will be murder. And this was agreed by all the Judges in the present case.

But for argument's sake, and it is only for argument's sake, and to give the objection made by the counsel for the prisoner it's full force; if it should be looked on here, that what is found in the former part of the verdict was upon a sudden quarrel, and only the effect of passion; yet if it appears upon the special verdict, that there was sufficient, time for this passion to cool, and for reason to get the better of the transport of passion, and the subsequent acts were deliberate, before the mortal wound given; the killing of the deceased will be murder.

2. (a) Vide Fort. 295.

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And all the Judges were of opinion, that upon consideration of the facts found, it appeared, there had been sufficient time for Mr. Oneby's transport of passion to cool, and that he had deliberated, and that the killing of Mr. Gower was a deliberate act, and the result of malice Mr. Oneby had conceived against the deceased.

But before I mention their reasons, I must lay down this proposition, which they all agreed, viz. that the Court are judges of the malice, and not the jury; and that the Court are also judges upon the facts found by the jury, whether, if the quarrel was sudden, there was time for [1494] the passion to cool, or whether the act was deliberate or not?

Upon the trial of the indictment the Judge directs the jury thus, if you believe such and such witnesses, who have sworn such and such facts, the killing the deceased was with malice prepense express, or it was with malice implied, and then you ought to find the prisoner guilty of murder; but if you do not believe those witnesses, then you ought to find him guilty of manslaughter only: and so according to the nature of the case, if you believe such and such facts, the act was deliberate, or not deliberate; and then you ought to find so and so. And the jury may, if they think proper, give a general verdict, either that the prisoner is guilty of murder, or of manslaughter. But if they decline giving a general verdict, and will find the facts specially, the Court is to form their judgment from the facts found, whether there was malice or not, or whether the fact was done on a sudden transport of passion, or was an act of deliberation or not.

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Although there are many special verdicts in indictments for murder, there never was one, where the jury find in express terms, that the act was done with malice, or was not done with malice prepense, or that it was done upon a sudden quarrel and in transport of passion, or that the passion was cooled, or not cooled, or that the act was deliberate, or not deliberate; but the collection of those things from the facts found is left to the judgment of the Court. *Holloway's case*, Palm. 545. Cro. Car. 131. W. Jones 198. So in the case cited by the counsel for the prisoner, Cro. Jac. 266, *Rowley's case*, the jury find the fact, but don't find in express terms, that the father, whose child was beat, killed the other child in a sudden heat of passion; but that was left to the judgment of the Court, upon the particular facts found.

But then it is objected, that the law has fixed no time in which the passion must be supposed to be cooled. 'Tis very true, it has not, nor could it, because passions in some persons are stronger and their judgments weaker than in others; and by consequence it will require a longer time in some, for reason to get the better of their passions, than in others; but that must depend upon the facts, which shew whether the person has deliberated or not; for acts of deliberation will make it appear, whether that violent transport of passion was cooled or no.

But thus far the resolutions of the Judges have already gone, and it has been adjudged, that if two fall out upon a sudden, and they appoint to fight next day, that the passion by that time [1495] must be looked on to be cooled; and in such case, if they meet next day, and fight, and the one

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kills the other at that meeting, it has been often held to be murder. Hale P. C. 48.

To go a little further: if two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain; this is murder; for there was time to allay the heat, and their meeting is of malice. So is *Legg's case*, Kelyng 27.

At the meeting of all the Judges before Lord Morley's trial by the peers for the murder of one Hastings, they all agreed, that if upon words two men grow to anger, and afterwards they suppress that anger, and then fall into other discourse, or have other diversions, for such a reasonable space of time as in reasonable intendment their heat might be cooled, and some time after they draw upon one another, and fight, and one of them is killed; this is murder, because being attended with such circumstances, it is reasonably supposed to be a deliberate act, and a premeditated revenge upon the first quarrel. But the circumstances of such an act being matter of fact, the jury are judges of them, Kelyng 56. The meaning of which last words is, that the jury are judges of the facts, from which those circumstances are collected. But as I said before, when those facts are found, the Court is to judge from them, whether they do not shew the act was deliberate or not.

Lord Morley upon his trial by the peers was acquitted; and after that in Easter term 18 Car. 2, Broomwich, who was indicted as a principal, in being present, aiding and abetting Lord Morley in the murder of Hastings, was tried

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at the King's Bench Bar. The quarrel was at a tavern; but it was proved, when the quarrel was at the tavern, that Lord Morley said, if we fight at this time, I shall have a disadvantage, by reason of the height of my shoes; and presently after they went into the fields and fought, Lord Morley killed Hastings but while they were fighting, Broomwich made a thrust at Hastings, and Lord Morley closed in with Hastings, and killed him; and (says the book) this was held as clear evidence of their intention to fight, when they went out of the tavern; and the quarrel being only about words, and fighting in a little time after, it was held murder by all the Court. And there need not be a night's time between the quarrel and the fighting, to make it murder, but such time only as it may appear not to be done on the first passion; for Lord Morley considered the disadvantage of his shoes: and the Court directed the jury, that it was murder in Broomwich, being present and aiding; but the jury acquitted him. 1 Sid. 277 reports the same case, and says, that the Court in the direction to [1496] the jury laid it down, that after the provocation in the house, they say, this is no convenient place (and so have reason, to judge of conveniency) and appoint another place, though the fight is to be presently; this is murder, for the circumstances shew their temper.

In H. P. C. 48, if A. and B. fall out, A. says be will not strike, but will give B. a pot of ale to touch him, B. strikes, A. kills him; murder.

Two quarrel; the one says, If you'll go into the field I will break your head, and there one kills the other; murder. Crompt. 25, p. 49.

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Two fall out on a sudden in the town, and they by agreement go into the field presently, and one kills the other; murder. Crompt. 23, fol. 31.

From these cases it appears, that though the law of England is so far peculiarly favourable (I use the word peculiarly, because I know no other law that makes such a distinction between murder and manslaughter) as to permit the excess of anger and passion (which a man ought to keep under and govern) in some instances to extenuate the greatest of private injuries, as the taking away a man's life is; yet in those cases it must be such a passion, as for the time deprives him of his reasoning faculties; for if it appears, reason has resumed its office; if it appears he reflects, deliberates, and considers before he gives the fatal stroke, which cannot be as long as the fury of passion continues, the law will no longer under that pretext of passion exempt him from the punishment, which from the greatness of the injury and heinousness of the crime he justly deserves, so as to lessen it from murder to manslaughter. Let us see therefore, whether upon this special verdict it appears, that the fighting and killing Mr. Gower was only done in heat of passion, or was a deliberate act. By what I observed before, it plainly appears, it was a deliberate act. But to recapitulate in short: after the words had passed, and the bottle was thrown by the prisoner, and swords drawn; by the interposition of friends they sat down, and continued in company for an hour (a reasonable time under those circumstances for the passion to cool,) and after that hour expired, the deceased says, We have had hot words, but you was the aggressor, but I think we may pass it over, and at the same time offered his hand

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to the prisoner, which was enough to have appeased the prisoner; to this Mr. Oneby answered, No, damn you, I'll have your blood, words expressing malice, not passion: then when the company went out of the room, the prisoner staid, and called the deceased back; Young man, come back, I have something to say to you; [1497] the door was immediately shut, clashing of swords was heard, and the deceased received the mortal wound from the prisoner at the Bar. The prisoner's words shew what was his intention, viz. to take away Mr. Gower's life; and the killing him may properly be said to have been done upon deliberation and consideration.

The counsel for the prisoner in their arguments insisted, that there were several circumstances found in the special verdict in favour of the prisoner, which were a foundation for the Court, to construe the other expressions to be only words of heat, and that what he did was in the heat of his first passion, which was never cooled, and not out of malice. As, 1. It is found, that at the breaking up of the company Mr. Oneby had his great coat thrown over his shoulders, from whence it would be a strain to think he then intended to fight with Mr. Gower. 2. It might be Mr. Gower who shut the door, who came back after he was out of the room, the jury not having found who shut the door. 3. That it was found, there was no reconciliation between them, from the throwing the bottle at Mr. Gower. But as to the first of these objections, considering the words the prisoner used after this, and after the deceased was out of the room, and what followed; since the jury have found this fact, without saying any more about it, the natural construction is, that this was only used by the prisoner

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as a blind to the company, to conceal from them his real intention, till they were gone out of the room. As to the second, it stands uncertain upon the verdict, but it is an uncertainty which can have no influence upon the present determination; for if Mr. Gower had shut the door, that would not alone have materially altered the case. As to the third, since express malice before appeared to be in the prisoner, the finding that fact does not import, that the first heat of passion continued only, but that the malice continued.

The counsel for Mr. Oneby farther objected, that it appeared, there was a mutual fighting after the door was shut; for it is found, that he received three slight wounds; then it is not found, who drew first, or made the first assault after the door was shut; and it was possible, a new sudden quarrel might then arise, in which Mr. Gower might be the aggressor; and therefore the special verdict was uncertain in a material point. The answer to which is, what is said in *Legg's case*, Kelyn. 27, cited before; that if A. kills B. and no sudden quarrel appears, it is murder; for it lies on the party indicted, to prove the sudden quarrel; and therefore the jury not having found any such thing for the prisoner's benefit, it is to be took, there was no such. This is said, supposing the latter part of the verdict could be [1498] considered, without regarding the former part of it; and that when the company went out of the room, the prisoner and Mr. Gower were reconciled. But however that might have done, here it appears there was no reconciliation, and therefore there can be no imagination of a new original quarrel in the room, after the door was shut. And as to the slight wounds the prisoner received,

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that is immaterial, for be having malice against Mr. Gower, though there was a mutual fighting, and the prisoner was wounded, yet when be killed Mr. Grower it will be murder.

The last fact in the special verdict, which they relied on was, when Mr. Grower was asked upon his death-bed, whether he had received his wounds in a manner among swordsmen called fair, he answered I think I did; whereby the deceased sheaved, he was satisfied the act was fair. The answer to which is plain, that if A. having malice against B. and they meet and fight, though the fight is never so fair according to the laws of arms, yet if A. kills B. it will be murder.

The cases the counsel for the prisoner principally relied on to make this fact only manslaughter, were *Rowley's case*, 12 Co. 87, and *Turner's case*, Comberbatch 407, 8.

As to 12 Co. 17, the case was, that two boys fighting together, the one of them was scratched in the face, and he bled a great deal at the nose, and so he run three quarters of a mile to his father, who seeing him very bloody, took in his hand a cudgel, and went three quarters of a mile to the other boy, and struck him upon the head, upon which he died; and it was held but manslaughter, for (a)³ the passion of the father continued. And there is no time, that the law can determine, that it was so settled, that it should be adjudged malice prepense.

3. (a) Vide Fort. 294.

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To which the answer is plain for the reason given in Cro. Jac. 269, which is the same case, that the father having no anger, before, but being provoked upon the complaint and sight of his son's blood, and in that anger beating him, of which he died; the law adjudged it to be upon that sudden passion. But that is, considering what has been said before, clearly distinguishable from the present case; besides it may be added, it was but a little cudgel he struck with, from which no such fatal event could be reasonably expected.

Turner's case was this; his wife complained, the boy had not cleaned her clogs, upon which Mr. Turner took up a clog and struck him on the head, and killed him; and though there was no other provocation it was only held manslaughter. [1499] But the reason of that was, because the clog was so small, there could be no design to do any great harm to the boy, much less to kill him; and a master may correct a servant in a reasonable manner for a fault. And Lord Chief Justice Holt, in *Comberbatch* 408, says, that in that case it was an unlikely thing, meaning that the clog should kill the boy. The counsel for the prisoner being apprehensive of the authority of *Maugridge's case*, Kelyng 119, besides the observations they had made, mentioned before, to induce the Court to look upon that judgment as not warranted by law; endeavoured to distinguish the present case from it, supposing it to be law. And 1st, they said, that in *Maugridge's case* the bottle hit Mr. Cope and stunned him; but here the bottle did not hit Mr. Grower, but only brushed some powder out of his peruke. 2dly, in *Maugridge's case* the bottle was full of wine; here it is not found to have been so, and therefore must be took

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to have been empty; and the size of the bottle does not appear, it might be very small. 3dly, Maugridge drew his sword immediately after throwing the bottle without intermission; here Mr. Gower's sword was first drawn. 4thly, Mr. Cope never drew; here Mr. Gower not only drew the first, but clashing of swords were heard, so there must have been fighting.

It is very true (so far as those facts will make a difference) this present case is distinguishable from *Maugridge's case*; for that case was determined only upon an implied malice (but as I said before, was very rightly and justly determined, as we all agreed;) for strictly and properly speaking, although the words express malice is mentioned in the reasons given for that resolution, yet it was but malice implied. But still this way of distinguishing the present case from *Maugridge's* will be of no service to the prisoner; because though all the Judges held, this case was distinguishable from *Maugridge's case*, it was in respect that this was a much stronger case as to the murder, the jury having found facts which skew Mr. Oneby had an express malice against Mr. Gower. Upon the whole matter this Court, with the concurrent opinion of all the other Judges, is of opinion, that the prisoner at the Bar John Oneby, by this special verdict is found guilty of murder.

The prisoner being, after this resolution pronounced, intitled by the course of the Court to have four days to move in arrest of judgment, he was sent back to Newgate, and a rule for bringing him up to receive judgment the end of the week, was made; before which time an account

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came of the death of His late Majesty at Osnaburgh the 11th of June. And afterwards at the time appointed by the rule he was brought to the Bar, and judgment was pronounced against him, and execution awarded. After which a pretty strong [1500] application was made to His Majesty King George the Second for a reprieve; but he was pleased to declare, that the Judges having adjudged the prisoner guilty of murder, the law should take its course. In which attempt the prisoner not succeeding, he killed himself in Newgate in the night before the day appointed for his execution, by cutting through the great artery in his arm with a razor, by which he bled to death.

Memorandum, as soon as I had delivered this resolution, I desired my brothers Fortescue, Reynolds and Probyn, that if they disapproved any thing I have laid down, they would express their disapprobation; but they publicly declared, they concurred in omnibus.

APPENDIX F — *BARON SNIGGE V. SHIRTON*
79 E.R. 173 (1607)

[199] CASE 28. BARON SNIGGE *against* SHIRTON.

In the Star-Chamber.

The possession of a termor is the possession of the lessor; and therefore, if a tenant for years, at the expiration of his term, keep his house with unusual weapons against a purchaser of the reversion to whom he has long paid rent, under colour of a lease from another, it is a forcible detainer, though no one attempts to enter.

F. N. B. 249. Lamb. 145. Dalt. c. 77. 2 Bac. Ab. 559.
 1 Hawk. P. C. 281. 288. 290.

Shirton being tenant for years, Baron Snigge purchased the reversion, and he paid to him rent for fifteen years. Before the end of the term, one Chambers came to Shirton, and persuaded him that Alexander Staples had title to the land, and advised him to take a lease from him; whereupon he took a lease of him for ten years, rendering seventy pounds per annum, and the land was worth one hundred and forty pounds per annum; and willed him to hold the possession against all persons; and he, at the end of his first term, kept the possession with drum, guns, and halberts, &c. (The drum was only to give notice if any came to enter, but no body offered to enter.) He was censured for this, being a riot and forcible detainer, although none other offered to enter.

For it was held, that the possession of the termor was the possession of the lessor; and when, at the end of the

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term, he kept it against him to whom he had so long paid his rent, it was a forcible detainment. And whereas the statute 31 Eliz. c. 11. is, that where one hath had possession for three years quietly, he might hold the possession with force, that is to be intended where the estate is continued.

And for this offence Shirton was fined five hundred pounds; and Chambers, for counselling and stirring up that title, was fined three hundred pounds; and all the servants in the house, which kept it with weapons, were fined ten pounds a-piece. But Alexander Staples was not censured; for he made the lease only, but did not command him to keep the possession with force.