

A
TREATISE
ON
CRIMINAL LAW.

BY
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AND "AGENCY."

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IN TWO VOLUMES.
VOLUME I.

EIGHTH EDITION.

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PREFACE TO THE EIGHTH EDITION.

THE first edition of my work on Criminal Law was prepared, when I was Prosecuting Attorney in Philadelphia, as a manual for practice. It treated, first, of Pleading, then of Evidence, then of a series of crimes in the concrete, and then of Practice. In six succeeding editions this plan was followed; but its modification now becomes necessary for the following reasons: In the first place, the enormous accumulation of cases renders it impossible, without undue expansion, to recapitulate, in connection with each crime, the adjudications which bear on it in common with other crimes, and makes it desirable, therefore, to discuss these rulings in a preliminary exposition, considering subsequently each crime only in respect to its distinctive characteristics. In the second place, a due regard both to symmetry and to convenience requires that the generic principles belonging to all crimes should be considered at large before the differentia of each crime is detailed. I have, therefore, rearranged the work on the following basis: Two volumes are given, first, to the statement of the principles or philosophy of Criminal Law, as bearing on crimes in general; and, secondly, to the examination of specific crimes, referring in each

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- Page 117. Immediately before note 1, read, "In the Report of the English Commissioners of 1879, the rule in *R. v. Gibbons* was adopted, and this was agreed to by Sir J. Stephen. Compare his explanation in *Nineteenth Century* for January, 1880. To the same effect are *Gardner v. People*, 62 N. Y. 299 ; *Halsted v. State*, 41 N. J. L. 552."
- Page 118. At end of note 1, read, "See *infra*, § 1695."
- Page 119. Note 4, for "40 Grat." read "30 Grat."
- Page 181. Note 2, last line, for "57 Ill." read "57 Ind."
- Page 260. Second line, for "instigator" read "perpetrator."
- Page 287. At foot of page, add, "In *Whart. Cr. Pl. & Pr.* (1880), §§ 783 *a*, 980 *et seq.*, will be found the rulings in 1880 of the U. S. Supreme Court on the topics in the text."
- Page 287. End of second paragraph of first note, add, "S. P., *Com. v. Ketter*, 8 *Weekly Notes*, 133."
- Page 288. At end of first paragraph in note, add, "S. P., *Abbott v. U. S.* 75 N. Y. 602."
- Page 294. At end of first note, add, "See *Whart. Cr. Pl. & Pr.* (1880), § 981."
- Page 300. At end of note 5, add, "See *Com. v. Kunzemann*, 41 *Penn. St.* 429."
- Page 501. In note 7, enter, "*State v. Ivins*, 36 N. J. L. 233."
- Page 547. At end of first paragraph in note 3, to "*Whart. Cr. Pl. & Pr.* § 159," add, "§ 163 *a*."
- Page 662. Note, first line of second column, for "16 L. J. N. S." read "16 L. T. N. S."

BOOK I.

PRINCIPLES.

CHAPTER I.

I. BASIS OF CRIMINAL JURISPRUDENCE.

I. RELATIVE THEORIES.

That object of punishment is to prevent offender from further offending, § 2.

That the object is public self-defence, § 3.

That it is reformation of offender, § 4.

That it is to terrify others, § 7.

That penal justice is law teaching by example, § 9.

II. ABSOLUTE THEORIES.

That punishment is an act of retributive justice to which reformation and example are incidental, § 10.

Crime as such is to be punished by *de facto* government, § 11.

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And so the reformation of the offender, § 13.

§ 1. WHAT purpose has the State in punishing? Upon the answer to this question depends not merely the extent of the punishment which we inflict upon conviction, but the conception of justice on which convictions rest. It becomes important, therefore, to examine at the outset the several theories which have been propounded as the basis, in this respect, of criminal jurisprudence.¹ These theories may be arranged as follows:—

¹ It may be said that the philosophy of the law is a subject that belongs exclusively to the legislature; and that the practitioner is concerned solely with the law that the legislature enacts. But this is based on a *petitio principii*. How can we determine what is the law which the legislature has enacted until we settle its construction; how can we settle its construction without regarding the intention of the legisla-

ture; and how, especially in cases of codes, can the intention of the legislature be gathered without taking into consideration the system on which the legislation of the particular state rests? Under our own distinctive polity two additional arguments are to be given for this conclusion. The first is that our legislatures, unlike those of most European states, are not absolute. Their acts are limited

not make them more hardened and more wary in the pursuit of crime when they are discharged.¹ Prevention however may, in peculiar cases, be a proper point to be considered in moulding sentences. But prevention cannot be viewed either as forming the proper theoretical justification of judicial punishment, or as one of its invariable results.

§ 3. The right of self-defence has also been invoked as a justification of punishment.² As the individual has a right to resort to self-defence, to prevent a wrong being inflicted on himself, so has the State. The individual has a right to repel an attack, and even to kill the assailant, it is argued, when his existence is imperilled; and so has the State; and as every crime threatens the existence of the State, by the State every crime may be punished. But to this there are two replies. The first is that there are many crimes which, so far from imperilling the State, strengthen it, being reasons why the State should be invested with increased power; and as the State is not imperilled by such crimes, on the theory now before us such crimes cannot be punished by the State. The second, and less technical objection, is that this theory confounds self-defence with retribution. Self-defence, as we will hereafter more fully see,³ can ward off a threatened crime, but cannot be invoked to punish a crime that is consummated. It may be preventive, but it cannot be retributive. On this theory, therefore, while the State can seize and even destroy a person threatening a crime, it cannot punish a person by whom a crime has been committed.

§ 4. That the object of punishment is simply reformation of the offender was the theory of the humanitarian philosophers of whom Rousseau was the chief, whose eloquent declamation on this topic was one of the pre-ludes of the French Revolution. The good can take care of themselves,—so reads this theory when stated

That the object is public self-defence.

That the object of punishment is the reformation of the offender.

¹ To this theory President Woolsey justly objects that "the cardinal doctrine, that the motives to be set before the criminal are simple pleasure and pain, and the end, prevention, by overlooking the ill-desert of wrong-doing, makes it and all similar systems immoral, and furnishes no measure of the

amount of punishment, except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering." Woolsey's Political Science, § 112.

² Trendelenburg, *Naturrecht*, &c., Berlin, 1876, § 56.

³ See *infra*, §§ 97 et seq.

selfishness and implant moral principle. Independently of the objection that this transcends the functions of the State, it makes the State attempt to effect a moral end by immoral means. For it is immoral to punish except for the purpose of vindicating right against wrong.¹

¹ In this connection may be considered the following observations by the present author, printed in 4 South. L. R. 245 *et seq.* : —

"The first inquiry we may make, in meeting the theory that reformation is to be the reason and limit of penal justice, is, What right have we to reform a man by removing him from his business and putting him in a prison, unless he be guilty of a crime which requires a specific punishment? Would imprisonment be likely to reform me if I thought it undeserved and unjust, and if it were imposed without a due conviction of guilt?

"The next inquiry is as to the constitutional power of a State to reform its citizens by force. In answering this question we may waive the provisions in our state as well as federal constitutions limiting convictions of crime to cases where bills have been lawfully found by grand juries, and where the offender has the right to meet before the petit jury the witnesses against him face to face. Aside from these restrictions, what power has a constitutional State to attempt to forcibly reform its adult citizens, unless as a mere subsidiary incident to penal justice? What power has it to make penal justice subordinate and auxiliary to ethics? Governments there have undoubtedly been which — sometimes on the paternal theory, sometimes because they were distrustful of the ordinary processes of law — have undertaken ethical reformation; but such governments have never been called constitutional. A prominent Russian officer, for instance, may re-

quire, in the opinion of his superiors, 'reformation,' and he may be sent to Siberia, or imprisoned in a fortress, in order to develop his better, and repress his worse, qualities. A group of leading French politicians may be banished or imprisoned as an incident to a *coup d'état*, in order to 'reform' their political views. A vigilance committee may undertake to 'reform' an obnoxious citizen by maltreating his person or destroying his property. We can conceive of such things in conditions of despotism or of anarchy; but we cannot conceive how, in a constitutional State, of which it is one of the fundamental sanctions that nothing is to be done by the government that can be properly executed by the voluntary moral power of the community, the reformation of individuals should be attempted by force. Houses of refuge and other asylums, as well as schools for children, we rightfully have. But it is beyond the scope of a constitutional government to open compulsory houses of reform for adults, or to make moral reform by force a primary function of state.

"Supposing, however, we should hold that this is within the province of the State, the next question that would arise, in view of the fact that there must be discrimination, is, What persons are we to attempt to reform? To say, 'those convicted of crime,' is no answer, because this takes us back to the absolute theory that a person is to be punished because he is guilty, whereas the theory before us is that a person is to be punished because he is to be reformed. In a general sense,

whole secular jurisprudence of the Continent of Europe. Men were to be scared from crime, and therefore punishment was to be made as shocking and ghastly as possible.¹ To this was to be subordinated not only the humane instincts of the court, but the

fender? When the sole object of punishment is reformation, then, when there can be no reformation there can be no punishment. The Pomeroy boy (now a full-grown man), who was convicted in Massachusetts some few years ago of at least one cruel murder, has been pronounced by competent specialists to be so desperate a case that no hope of his reformation could be indulged; and if this be so, he should at once, on the reasoning now before us, be discharged. More than half of those on the trial lists of our criminal courts are marked as old convicts; and by recent statutes in almost all our States such old convicts, when reconvicted, are to have cumulative sentences, proportioned to the degree of their former conviction. Our penal system, therefore, goes on the hypothesis that the more incorrigible a man, by the record of his former convictions, appears to be, the longer should be his imprisonment when convicted. The theory we here contest is, that the more incorrigible he is the less he is to be punished. In other words, the criminal is to be punished severely for a first and comparatively light offence, and relieved in proportion to his obduracy and his persistency in crime."

¹ "The State, endeavoring to operate on the fears of mankind, organizes a method of absolutely repressing or of absolutely commanding certain classes of acts." Amos on Jurisprudence, 297, London, 1872. See also Maine's Ancient Law (ed. of 1870), 389. To the same effect speaks Seneca: "Nemo prudens punit quia peccatum est, sed

ne peccatur." Seneca, de Ira, lib. i. cap. 16.

Dr. Franklin, in a letter of March 14, 1788, to Mr. Vaughan, argues that "punishment, inflicted beyond the merit of the offence, is so much punishment of innocence;" and, when commenting on a pamphlet just published ("Thoughts on Executive Justice"), which advocated the "example" theory, pure and simple, gives the following characteristic criticism:—

"I have read of a cruel Turk in Barbary, who, whenever he bought a new Christian slave, ordered him immediately to be hung up by the heels, and to receive an hundred blows of a cudgel on the soles of his feet, that the severe sense of the punishment, and fear of incurring it thereafter, might prevent the faults that should merit it. Our author himself would hardly approve entirely of this Turk's conduct in the government of slaves, and yet he appears to recommend something like it for the government of English subjects. He applauds the reply of Judge Burnet to the convicted horse-stealer, who, being asked what he had to say why judgment of death should not be passed against him, and answering, that it was hard to hang a man for only stealing a horse, was told by the judge: 'Man, thou art not to be hanged only for stealing a horse, but that horses may not be stolen.' But the man's answer, if candidly examined, will, I imagine, appear reasonable, as being founded on the eternal principles of justice and equity, that punishments should be proportioned to offences; and the judge's reply brutal and unreasonable."

that terrorism has of late days ceased to be one of the elements in the measurement of judicial punishment.

§ 8. But it should be remembered that this criticism applies to terrorism in its coarse and merely sensuous sense. For there remains to be considered a principle with which terrorism is sometimes unintelligently confounded, but which, when disentangled from the spectacular brutalism and the contempt of personal rights by which terrorism is marked, forms an important element in penal jurisprudence. This principle will now be noticed.¹

¹ It is remarkable, in view of the importance of the question before us in the moulding and in the application of criminal law, that it has received such slight attention from English and American jurists. Beccaria — whose treatise on Crimes was translated early in the present century, and who held that as the State rests on social contract it has the right to punish only so far as it has power given to it by such contract — took the ground that the object of punishment was simply preventive and deterrent; and what Beccaria taught it was natural that those who agreed with him in principle, and who were fascinated by the purity and dignity of his style, should adopt as if it were unquestionable. General prevention, it was argued, ought to be the chief end of punishment. General prevention was distinguished from particular prevention in this: that particular prevention has respect to the cause of the mischief, and general prevention to the whole community. This system is, therefore, virtually the terroristic theory of Feuerbach, which is discussed in the text; with this qualification, — that pleasure, as well as pain, are to be used by the law-giver as inducements to avoidance of criminal acts. To this, as we will soon see more fully, applies with great force President Woolsey's criticism, that the

preventive theory, "by overlooking the ill-desert of wrong-doing, makes it and all similar systems immoral, and furnishes no measure of the amount of punishment except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering."

The founders of the Pennsylvania prison system, it should be added, while laying great stress on reform and prevention, fell back on justice as the main end of punishment.

Mr. Livingston repeatedly gives his adhesion to the preventive theory. "We have established it as a maxim," he tells us in his Report on the Penal Code (Livingston's Works, 1873, i. 26), that the object of punishment "is to prevent the commission of crime;" and again (Ibid. 81), "no punishments greater than are necessary to effect this work of prevention ought to be inflicted, and that those which produce it by uniting reformation with example are the best adapted to the end." Subsequently, however (Ibid. 83), he quotes with approval the preamble to the statute of the Legislature of Louisiana establishing the Code. This preamble contains, *inter alia*, the following: —

"The only object of punishment is to prevent the commission of offences; it should be calculated to operate, —

"First, as to the delinquent, so as

an example to others, not only is open to the objections already noticed as applying to the terroristic scheme, but exhibits to the community an example of evil and not of good. But in imposing a just sentence, it is one of the highest prerogatives of justice so to mould and explain it as to make it the means of the prevention of future crime, not merely in the offender himself, but in the community at large.

II. ABSOLUTE THEORY.

§ 10. The absolute theory of punishment, on which we must therefore fall back, rests on the assumption that crime as crime must be punished; *punitur quia peccatum est*. But then comes the question, by whom? The State, as representing society at large, springs from a moral necessity. It is not a matter of choice whether we will live under government. Some government, some form of civil organization, we must have. And the State is not to be guided simply by expediency, or by the merely external purposes of society. It has an existence of its own to maintain, a conscience of its own to assert, moral principles to vindicate. Penal justice, therefore, is a distinctive prerogative of the State, to be exercised in the service and in the satisfaction of the duty of the State, and rests primarily on the moral rightfulness of the punishment inflicted. Penal discipline undoubtedly is expedient, both for the community and for the individual punished. But the jurisdiction is exercised, not because it is expedient, but because it is right.¹ Another step remains to be taken, which is this: Each *de facto* government is to be viewed as representing, for penal purposes, the State by which it is sanctioned. The State says, "Crime as crime is to be punished, and I constitute each *de facto* government as my agent for this purpose." We have an interesting illustration of this tacit authorization in the recognition given by the Supreme Court of the United States, at the close of the late civil war, to the penal sentences of the Confederate courts. These courts were *de jure* nullities. Yet, nullities as they were, through their sentences thousands of convicted offenders were, when the war closed,

¹ In this result, though by different processes of reasoning, concur Hooker, *Ecc. Pol. book i.*, and Hegel, as exhibited by Berner, *Strafrecht*, 1877, § 17. *Infra*, § 13, note.

on the part of the engineer of a steamer is a far more flagrant, because it is a more dangerous crime. It displays, when deliberate, a heart not only callous to social duty, but recklessly depraved. So, to adopt another illustration, setting fire to a building at night, when its inmates are unconscious in their beds, is an act exhibiting a guilt far more heinous and desperate than setting fire to the same building in the day, when, if within doors, they will soon discover the fire, and if they do not extinguish it can at least escape. Graduating the punishment, therefore, by the guilt involved, a far higher penalty will be imposed in the first case than in the second. And so, with regard to the grade of homicide, as settled by our American law. Homicides by poisoning, and lying in wait, are engendered by a deeper guilt, while productive of greater danger, than most other classes of homicide; and hence they are visited with peculiarly condign punishment. In fact, with intelligent agents, the guilt of an act is proportioned, as a general rule, to its dangerousness, since the audacity and profligacy of the offender are measured by the extent of the mischief he attempts. There is no necessity, therefore, for resorting to the ground of expediency, as a means of grading punishability, when we can reach the same result by adopting the right principle of the adaptation of punishment to guilt.

§ 13. And so with regard to the *reform* theory. The old convict, who has been twice or thrice previously sentenced, needs severer treatment, and is sentenced to longer imprisonment, with the least ameliorations; and this because his guilt is of the deeper dye. On the other hand, the boy who is tried for his first offence is committed to a house of refuge, surrounded with benignant influences which may tend to his reform. In each case the objects aimed at by the reformatory theory are effected; and yet in each case the punishment is graduated simply by the offender's guilt. The old convict is sentenced to a long imprisonment at hard labor, because his guilt is great; but the very greatness of this guilt invokes the severity of sentence that would be produced by a just construction of the reformatory theory, when it was found that all milder measures failed. The youthful culprit is sentenced to a more lenient punishment, under more generous influences, be-

And so the
reforma-
tion of the
offender.

(nach dem Werthe) to the evil of the crime.

It is not the mission of philosophy, so continues Hegel, to establish a valuation of punishment so as to apportion it duly to each particular crime. Philosophy deals with the principle, and leaves the application to the practical reason. All that philosophy can do is to assign a qualitative and quantitative certainty to an impaired right, to which its punishment is to correspond. Hegel, *Rechtsphilosophie*, 390 *et seq.*

Hegel's views may in this respect be criticised as speculative, but it must be remembered that they have been accepted and elaborated as the basis of penal law by some of the most practical of contemporary jurists. Bismarck is no idealist, yet we find Bismarck, in a speech in the Prussian Herrenhaus, in 1872, adopting the Hegelian theory of punishment, and illustrating it by the famous maxim which Meyer has taken as the motto of his late valuable treatise on criminal law: "Laws are like medicines: they are usually nothing more than the healing of one disease by another disease less, and more transient, than the first." Certainly Hegelianism, in adopting and sustaining philosophically the theory of a just retribution as the sole primary basis of punishment, exhibits a healthy contrast to the sentimentalism of humanitarian philosophers who ignore the moral and retributive element in punishment, making its primary object to be the reform of the alleged criminal, and example to the community. To such theorists the final answer is, that until a man is proved to be guilty of a crime we have no right either forcibly to reform him or to punish him as an example to others; and that neither reformation nor example will be promoted by assigning to him, after he

is convicted, a punishment disproportionate to his offence. At the same time, in the application of such punishment, reform and example are to be kept incidentally in view. Conviction and sentence are to be according to justice; but prison discipline is to be so applied as to make the punishment conduce as far as possible to the moral education of both criminal and community.

The general question of the limits of punishment will be found discussed by Plato, in *Gorgias* (ed. Bipont. 4, pp. 49, 57; and in *de legg.* (lib. 9, 10, 11); and by Aristotle, *Ethics*, book 5, chap. 8.

Bentham, in his treatise on punishments, advocates the absolute theory, subject to the following qualifications:—

(1.) The evil of the punishment must exceed the advantage of the offence:

(2.) The severity must be increased as the certainty is diminished:

(3.) The greater the offence, the more severe may be the punishment adopted for the chance of its prevention:

(4.) Punishments may be varied with the sensibility of the offender:

(5.) "Real" punishments should be "apparent" for the sake of example:

(6.) The power of further injuring should be taken away or reduced:

(7.) Recompense to the injured party should be kept in view. See summary in Montague on Punishment, i. 211 *et seq.*

Meyer, in his *Lehrbuch des Deutschen Strafrechtes* Erlangen, 1875, sums up the controversy noticed in the text substantially as follows:—

The question who is to be punished depends upon the question as to the object of the State in punishing. We must start with the view, now universally accepted, that the exclusive ob-

CHAPTER II.

DEFINITION AND ANALYSIS OF CRIME.

<p>Crime is an act made indictable by law, § 14.</p> <p>Immorality and indictability not convertible, § 14 a.</p> <p>Distinction between public and private wrongs, § 15.</p> <p>English common law in force in the United States, § 15 a.</p> <p>Want of English common law authorities does not preclude offence from being indictable at common law in the United States, § 16.</p> <p>Disturbances of the public peace indictable at common law, § 17.</p> <p>So of malicious mischief, § 18.</p> <p>So of public scandal and indecency, § 19.</p> <p>Offences exclusively religious not indictable, § 20.</p> <p>Offences at common law are treasons, felonies, and misdemeanors, § 21.</p> <p>Felonies are crimes subject to forfeiture, § 22.</p> <p>Misdemeanors include offences lower than felonies, § 23.</p>	<p>Police offences to be distinguished from criminal, § 23 a.</p> <p>An act, when prohibited by statute, is indictable, though indictment is not given by statute, § 24.</p> <p>Statutory provisions to be strictly followed, § 25.</p> <p>New statutory penalties are cumulative with common law, § 26.</p> <p>An offence may be divisible (1.) by discharging aggravating incidents, (2.) by diversity as to time, (3.) by diversity as to place, (4.) by diversity as to objects, (5.) by diversity as to aspects, and (6.) by diversity as to actors, § 27.</p> <p>Penal statutes to be construed favorably to accused, § 28.</p> <p>Retrospective statute inoperative, § 29.</p> <p>And so as to <i>ex post facto</i> acts imposing severer penalty, § 30.</p> <p>But procedure may be retrospectively changed, § 31.</p> <p>State may relieve from punishability by limitation or pardon, § 31 a.</p>
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§ 14. An offence which may be the subject of criminal procedure has been defined to be an act committed or omitted in violation of public law, either forbidding or commanding it.¹ This definition, however, though adequate

Crime is act made indictable by law.

¹ "A crime or misdemeanor (delict) is an act committed or omitted, in violation of a public law, either forbidding or commanding it." Stephen's *Com. l.* 89, note, adopted in Nasmith's *Institutes*, 68.

A crime is "an act of disobedience to a law forbidden under pain of punishment." *Steph. Cr. Law*, 1, adopted in *Harris Cr. L.* 1.

"A crime may be provisionally defined to be 'an act which the State absolutely prohibits, or a forbearance from an act which the State absolutely commands to be done, the State making use of such a kind and measure of punishment as may seem needed to render such prohibition or command effectual.'" *Amos on Jurisprudence* (London, 1872), 286.

"To the question what is a 'criminal act?' the answer most generally given is 'an act which the State absolutely prohibits, or a forbearance from an act which the State absolutely commands to be done, the State making use of such a kind and measure of punishment as may seem needed to render such prohibition or command effectual.'" *Amos on Jurisprudence* (London, 1872), 286.

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§ 14 a. It has been often said that at common law indictability and immorality are convertible terms. So far, however, from this being the case, there are indictable acts which are not immoral, and immoral acts which are not indictable. Assaults of all kinds are indictable; but all assaults are not necessarily immoral. An assault in self-defence is the exercise of a right; and waiving this, as presenting a question of doubtful indictability, there are many cases in which a man may be convicted of an assault which is in itself not immoral, as when he acts under a mistake of fact or of law. Honest belief, also, as we see elsewhere,¹ that an action is right, while it purges the action from immorality, does not relieve it from indictability. The morality of an act depends upon its conscientiousness; and unless we recognize the rights of the individual conscience in this respect, even as against the opinion of the majority, no ethical system could be constructed. On the other hand, there are numberless immoralities which the State does not and cannot undertake to punish. We must, therefore,

Immorality and indictability not convertible.

dent,' Pollock, C. B., said: 'I entirely agree with the spirit of this passage so far as it regards the repressing what is a public evil, and preventing what would become a public mischief; but I think there is a wide difference against protecting the community between a new source of danger and creating a new right. I think the common law is quite competent to pronounce anything to be illegal which is manifestly against the public good; but I think the common law cannot create new rights,' &c. *Jeffreys v. Boosey*, 4 H. L. C. 638."

"It is not till a very late stage in its history that law is regarded as a series of commands issued by the sovereign power of the State. Indeed, even in our own time and country, that conception of it is gaining ground very slowly. An earlier, and, to some extent, a still prevailing view of it is, that it is more like an art or science, the principles of which are at first enun-

ciated vaguely, and are gradually reduced to precision by their application to particular circumstances. Somehow, no one can say precisely how, though more or less plausible and instructive conjectures upon the subject may be made, certain principles came to be accepted as the law of the land. The judges held themselves bound to decide the cases which came before them according to those principles, and, as new combinations of circumstances threw light on the way in which they operated, the principles were, in some cases, more and more fully developed and qualified, and in others evaded or practically set at nought and repealed. Thus, in order to ascertain what the principle is at any given moment, it is necessary to compare together a number of decided cases, and to deduce from them the principle which they establish." *Stephen's Dig. Int.*

¹ *Infra*, § 88.

reject immorality as the condition of indictability, and fall back upon the public sense of right and public policy as already stated.¹ If we are required to supply a further test, we might say that public policy requires the indictability of acts objectively immoral, of which punishment by law is the proper retribution. From this class are to be excluded immoralities which are not of enough consequence to be prosecuted, and immoralities which the public welfare requires should remain unprosecuted.

§ 15. Starting, then, from the principle that crimes at common law, apart from statute, are offences which public policy manifestly requires to be prosecuted by the State, we may be able to give logical expression to the distinction between wrongs which can be redressed only by private suit, and wrongs the perpetrators of which may be proceeded against by public prosecution. That such a distinction exists in practice we have numerous instances. I may have a right to have the air about me pure; but this does not make it an indictable offence for a person to invade this right by infecting my land with a drain whose odors reach to no one but myself. I may exclude trespassers from my grounds; I may sue them for damages caused by their trespass; but I cannot, for the mere trespass, prosecute them criminally. On the other hand, if the drain is such as to affect the community injuriously, or the trespass be conducted in such a way as to threaten the common peace, an indictment lies. The reason for this, if the above definition be correct, is that public policy in the first class of cases does not require the State to intervene, while in the second class of cases it does so require. In other words, in all matters in which the peace, order, or health of the community is not concerned, a sound social economy requires that men should settle their differences by themselves, just as a sound social economy requires that they should conduct their own business and regulate their own families, provided that in so doing they do not threaten public peace, or disturb public comfort, or create public scandal. As to acts, however, threatening public peace, or dis-

¹ Meyer, § 4, while concurring in the reasoning of the text, makes the test incompatibility with the well-being of the Commonwealth. He pred-

icates indictability of acts "welche den Bedingungen des Gemeinwesens und seiner Fortentwicklung widersprechen."

tarbing public comfort, or creating public scandal, it is the duty of the State to intervene. We have abundant illustrations of this distinction in other departments of social science. It is now conceded that business which can be conducted equally well by individuals should not be undertaken by the State. Duties purely private it is not within the province of the State to enforce. A board of health, for instance, may properly forbid unwholesome food to be sold in a market, but it cannot properly forbid an individual from eating food that will probably make him sick. The State is only justified in intervening to protect interests that concern itself directly; and if wrongs be committed strictly private in their character, then these wrongs must be redressed by private suit. It may be said that a distinction of this kind, based on public policy, is one to be laid down, not by the courts, but by the legislature.¹ This is no doubt the case where there is a code which undertakes to cover the whole ground, so that no offence is indictable which is not made indictable by the code. It is otherwise, however, when offences are to be defined by the common law. In the latter case, there is a wide range of offences as to which the judges are obliged to apply the test of public policy. The banks of a canal, for instance, or the embankments of a railroad, are wantonly torn down by a marauder. The case is one of first impression in the courts, as no one has heretofore been prosecuted for doing this particular thing. Is the offence indictable as malicious mischief? It certainly would not be if the mounds cut down were in an open field, where nobody but the owner is affected by the trespass. Yet as it is, in consequence of the danger to the public if canals or railroads be subject to depredations of this kind, — *i. e.* on grounds of public policy, — such an offence would be held indictable.² I may be standing by a river side, to take another illustration, and see a man drowning. I do not help him out, though I could readily do so; but as omissions to perform acts of charity cannot be made indictable without great disarrangement of industry, I am not indictable for this omission, immoral as it is. I am indictable, however, on the grounds of public policy, if, being charged, as a public officer, with the protection of persons bathing on the spot,

¹ See *infra*, § 29.

² See *infra*, §§ 1065 *et seq.*

§ 16. Certain points of difference, however, between the penal system of England¹ and that of the United States must be kept in mind, in determining how far the want of common law authority in one country is to weigh upon the courts of the other.² There is a grade of offences, in the first place comprehending adultery, fornication, and lewdness in general, together with those misdemeanors connected more particularly with the conduct of the rites and observances of religion, which in England is cognizable chiefly in the ecclesiastical courts, but which with us is in many States punished by indictment as offences at common law. In England, in the second place, from the earliest period of judicial history, statutes were from time to time passed which defined the limits and determined the punishment of almost every offence, as it in its turn attracted legislative action. Thus, in the English books, few cases are found of malicious mischief at common law; penalties more summary than the common law afforded being provided for the protection of each species of property as it became the object of investment. No case, for instance, is to be found of an indictment at common law for malicious injury done to locks or other

Want of English common law authorities does not preclude an offence from being indictable at common law in the United States.

and see *State v. Rollins*, 8 N. H. 550; *State v. Briggs*, 1 Aikens, 226; *Com. v. Newell*, 7 Mass. 245; *Com. v. Chapman*, 19 Met. 68; *State v. Danforth*, 3 Conn. 112; *Loomis v. Edgerton*, 19 Wend. 419; *Kilpatrick v. People*, 5 Denio, 277; *Resp. v. Teischer*, 1 Dall. 335; *Com. v. Eckert*, 2 Browne (Penn.), 249; *Com. v. Taylor*, 5 Binn. 277; *Henderson's case*, 8 Grat. 708; *Grisham v. State*, 2 Yerger, 589; *Smith v. People*, 25 Ill. 17; *State v. Huntley*, 3 Ired. 418; *State v. Two-good*, 7 Iowa, 252; *State v. Pulte*, 12 Minn. 164; *Bianchard, ex parte*, 9 Nev. 101; *Territory v. Ye Wan*, 2 Montans, 478. In Louisiana, the English common law has been established by statute. *State v. Davis*, 22 La. An. 77. The federal courts, however, as will be seen (*infra*, § 253), have been ruled

to have no common law criminal jurisdiction. In Ohio, also, it has been decided that the criminal side of the English common law is not in force. *Vanvalkenburg v. State*, 11 Ohio, 404; *Smith v. State*, 12 Ohio St. 466. And such is the statutory rule in Indiana; *Hackney v. State*, 8 Ind. 494; *Marvin v. State*, 19 Ind. 181; *Jones v. State*, 59 Ind. 229; and to a limited extent in other States. See *Meyers, ex parte*, 44 Mo. 279. As to Pennsylvania and Florida, see *infra*, § 26. How far the ecclesiastical or canon law of Christendom is here effective will be considered in other sections. *Infra*, §§ 20, 1717, 1741.

¹ *Black. Com.* 65 w; 1 *Hawk. P. C. c. 5, s. 1*; 1 *East P. C. c. 1, s. 1*;

² *Russell on Crimes*, 46.

³ *Grisham v. State*, 2 Yerger, 589.

ment so severe, that they were of course resorted to, and the common law thus lost sight of, though the statutes were intended as a mere increase of its penalties." ¹

§ 17. It has been held by us, therefore, in application of the reasoning just stated, that whatever, in the first place, is provocative of public disturbance; ² or, in the second place, consists of malicious injury to another's property in such a way as to provoke violent retaliation; ³ or, in the third place, constitutes a public scandal or indecency; ⁴ is indictable in this country, although in England the offence is punishable now only by statute, or in the ecclesiastical courts.

(1.) Acts, therefore, provocative of public disturbance are indictable, though there be no English precedent for the indictment. Hence 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; ⁵ to disturb a congregation when at religious worship; ⁶ to go about armed with dangerous and unusual weapons, to the terror of citizens; ⁷ to raise a liberty-pole in the year 1794, as a notorious and riotous expression of ill-will to the government; ⁸ to tear down forcibly and contemptuously an advertisement, set up by the commissioners, of a sale of land for county taxes; ⁹ to agree to fight, though no fight takes place; ¹⁰ to break into a house in the day or night time, and disturb its inhabitants; ¹¹ to violently disturb a town meeting, though the parties engaged were not sufficient in number to amount to riot; ¹² to publicly kidnap an-

Disturbances of the public peace indictable at common law.

¹ *State v. Briggs*, 1 Aikens, 226; *Loomis v. Edgerton*, 19 Wendell, 419; *State v. Cawood*, 2 Stewart, 360. On this point see a comprehensive opinion of Shaw, C. J., in *Com. v. Chapman*, 13 Met. 68.

² See §§ 1553-1557.

³ See, on this point, 7 Law Rep. N. S. 88, 89, and *infra*, § 1066.

⁴ See *infra*, §§ 1410 *et seq.*, 1432, 1446, 1468.

⁵ *United States v. Hart*, 1 Peters C. C. R. 390. See generally *infra*, §§ 1536 *et seq.*

⁶ *State v. Jasper*, 4 Dev. N. C. R. 323. *Infra*, § 20.

⁷ *State v. Huntley*, 3 Iredell N. C. R. 418; though see, *per contra*, *Simpson v. State*, 5 Yerger's Tenn. R. 356, Peck, J., dissenting.

⁸ *Penns. v. Morrison*, Addison's Fa. R. 274. See *Adams's Gallatin*, 123 *et seq.*

⁹ *Penns. v. Gillespie*, Addison's Fa. R. 267.

¹⁰ *State v. Hitchens*, 2 Harrington's Del. R. 527.

¹¹ *Com. v. Taylor*, 5 Binney, 277; *Hackett v. Com.* 15 Penn. St. 95.

¹² *Com. v. Hoxey*, 16 Mass. 385.

from thence shoot and kill a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and to the terror and alarm of the females in the house; ¹ though it is not an indictable offence to remove a stone from the boundary line between the premises of A. and B. with the intent to injure B.; ² nor to shave and crop the hair from a mare's tail in a stable; ³ nor to frequent a neighbor's house, grossly abuse his family, and make their lives uncomfortable.⁴

§ 19. (8.) On the same reasoning we have held it indictable to do an act which is a great scandal and shock to the moral sense of the community.⁵ Under this head it has been held indictable to cast a dead body into a river without the rites of Christian sepulture; ⁶ to be guilty of eaves-dropping; ⁷ to knowingly sell noxious food; ⁸ to sell a wife; ⁹ to disinter a dead body without proper authority; ¹⁰ to give more than a single vote at an election; ¹¹ to be guilty of individual offensive drunkenness,¹² or notorious lewdness,¹³ though on this point the better rule is that, to make the offence indictable, it must be such as to shock and insult, not an individual, but the community; ¹⁴ to indulge publicly in profane swearing; ¹⁵ or in loud and obscene language, so as to draw together a crowd in a thoroughfare; ¹⁶ though the offence be not laid as a nui-

And so of public scandal and indecency.

¹ Henderson's case, 8 Gratt. 708.

² State v. Burroughs, 2 Halsted R. 426. See Com. v. Powell, 8 Leigh, 719.

³ State v. Smith, 1 Cheves (S. Car.), 157; *contra*, Boyd v. State, 2 Humph. 39.

⁴ Com. v. Edwards, 1 Ashmead, 46.

⁵ See *infra* generally, §§ 1410 *et seq.*

⁶ Kanavan's case, 1 Greenleaf, 226. *Infra*, § 1432 a.

⁷ State v. Williams, 2 Tenn. 108;

Com. v. Lovett, 6 P. L. J. 226; State

v. Pennington, 3 Head, 119. See

ibid. 231; *infra*, § 1446.

⁸ State v. Smith, 3 Hawks, 378;

State v. Norton, 2 Iredell, 40; R. v.

Sharpe, 7 Cox C. C. 214.

⁹ R. v. Delaval, 3 Burr. 1434.

¹⁰ Com. v. Cooley, 10 Pick. 37; R.

v. Lynn, 2 T. R. 733; 2 Leach, 560.

Infra, § 1432 a. See R. v. Vann, 2 Denison C. C. 324; 8 Eng. Law & Eq. 596; R. v. Sharpe, 7 Cox C. C. 214; 40 Eng. Law and Eq. 581.

¹¹ Com. v. Silsbee, 9 Mass. 417. *Infra* § 1832.

¹² Smith v. State, 1 Humph. Tenn. R. 396.

¹³ State v. Moore, 1 Swan Tenn. 136; Brooks v. State, 2 Yerger, 482;

State v. Rose, 32 Missouri, 560. *Infra*, § 1456.

¹⁴ *Infra*, § 1446. State v. Waller,

3 Murphey, 229.

¹⁵ *Infra*, §§ 1442-4; State v. Kirby,

1 Murphey, 254; State v. Ellar, 1 Devereux, 267; State v. Graham, 3 Sneed,

134.

¹⁶ *Infra*, § 1432. State v. Appling, 25 Mo. 315.

part of the common law that the State can determine what are the dogmas of Christianity. That which is part of the common law can be changed by statute; but as the dogmas of Christianity are beyond the reach of statute, we must hold that they are not part of the common law of the land.¹

St. 211; *State v. Pepper*, 68 N. C. 259. See *R. v. Carlile*, 3 B. & Ald. 161; *R. v. Waddington*, 1 B. & C. 26; and see *infra*, § 1431; *Story's Misc. Writings*, 451; 2 *Life of Story*, 431.

¹ In an article by Dr. Spear, reprinted in the *Albany Law Journal*, vol. xiii. p. 368, we have the following:—

“The first judicial declaration that ‘Christianity is parcel of the laws of England’ was made by Sir Matthew Hale. Lord Mansfield subsequently modified the statement by saying that ‘the essential principles of revealed religion are part of the common law.’ Lord Campbell, in his *Lives of Chief Justices*, explains the language as simply meaning that the law will not permit the essential principles of revealed religion to be ridiculed and reviled. The English commissioners on criminal law, in their sixth report (1841), express the opinion that the maxim does not ‘supply any reason in favor of the rule that arguments may not be used against’ Christianity, ‘provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance.’ Archbishop Whately, in his preface to his *Elements of Rhetoric*, says that he had ‘never met with any one who could explain’ to him the meaning of the maxim; yet he did not understand it as implying ‘the illegality of arguing’ against the established religion of England. Thomas Jefferson, in an appendix to his *Reports of Virginia Cases*, says that the declaration of Sir Matthew Hale was not at the time of its utterance sustained by any authority, and

that, though frequently repeated by English judges, it never had any legislative authorization. He speaks of it as resting upon the ‘usurpation of the judges alone, without a particle of legislative will having ever been called on or exercised toward its introduction or confirmation.’ He characterizes it as ‘the most remarkable instance of judicial legislation that has ever occurred in English jurisprudence, or, perhaps, in any other.’”

See also to the same effect as the text, *Sedgwick's Stat. & Const. Law*, 14; *Cooley's Const. Limitations*, 472.

An exhaustive examination of the authorities by Dr. Anderson will be found in 20 *Alb. L. J.* pp. 265, 285. Among the conclusions reached by this able writer may be given the following:—

“6. We see that the first introduction of the maxim under discussion was due to a misunderstanding of the Year Books, and has never been practically sanctioned in its natural and literal sense by any English or American court. The common law has never furnished the ground for persecution, but it has always been inflicted by positive statutory enactment. The common law has taken account of Christianity as a positive system, for the purpose of punishing blasphemy and malicious ridicule of Christian doctrines and rites. The common law has recognized these as crimes against the State, and not as sins against God. It has regarded them in the light of moral nuisances against which the believers in Christianity have a right to be protected.

compassing the sovereign's death ; comprising the slaying, by a wife, of her lord and husband, and by an ecclesiastic of his ordinary. In this country, however, petit treason as a distinct class of offences is no longer recognized, the crimes composing it having sunk into a place among the more flagrant homicides ; and high treason, under the constitutions both of the Federal Union and of the several States, is limited to the levying war against the supreme authority, or adhering to its enemies, giving them aid and comfort.

§ 22. Felonies, in England, as distinguished from misdemeanors, comprised originally every species of crime which occasioned the forfeiture of lands and goods ; but though this distinction, originally based on the supposed heinousness of the crime, is still nominally recognized, its continuance, while conducing to much technical difficulty, is productive of no good, and its abolition is only a question of time.¹

Felonies include crimes subject to forfeiture.

¹ "In modern English legislation, any affected demarcation of crimes by the sort of moral or social significance anciently implied in a felony as contrasted with a misdemeanor is practically abandoned, though a memory of the distinction is preserved in certain judicial forms. The tendency of all modern legislation is to arrange crimes on no more logical or abstruse principle than that based on either the gravity of the punishment with which they are visited, or the dignity and constitution of the courts of justice in which they are investigated." Amos on Jurisprudence (London, 1872), 302. See also Stephen's Cr. L. 66, 57, 105-110 ; Lyford v. Farrar, 31 N. H. 814 ; Shay v. People, 22 N. Y. 317.

"In consequence of the general statutory departure from the ancient English gradation of crimes and punishments, the word 'felony' has, for some purposes, in this State lost its ancient English signification, and acquired the meaning of a crime punishable by death or imprisonment in a

state prison ; and it is to be so construed in this third section. The crime intended to be charged in this case, being a state prison offence, is a felony ; and the ancient rule was, that the word 'feloniously' is necessary in all indictments for felony, whether common law or statutory. What would 'feloniously' mean in this indictment? Would it inform the defendant that in England felony was formerly punished by forfeiture, and generally by death? An indictment is an accusation, and not historical instruction. Would it inform him that New Hampshire punishes his crime either by death or state prison? That would be a statement of law, deficient in certainty ; and an indictment is a statement, not of law, but of fact." State v. Felch, 58 N. H. 1 ; 6 Reporter, 1878, 689.

The Roman law regarded as *Delicta publica* (*crimina*, or *crimina publica*) offences which affected the public interests, and the perpetrators of which could be prosecuted by the *Accusatio publica*. *Delicta privata*, sometimes

earliest period, new felonies were, from time to time, created; till finally, not only almost every heinous offence against person or property was included within the class, but it was held, that whenever judgment of life or member was affixed by statute, the offence to which it was attached became felonious by implication, though the word felony was not used in the statute. In this country, until recently, the common law classification obtained; the principal felonies being received as they originally existed, and their number increased as the exigencies of society prompted.¹ In several of the States, however, all offences subject to death or imprisonment are now made felonies; all others are misdemeanors. In some States the distinction is abolished absolutely. In most of the others it exists only so far as to make it requisite, in indictments for felonies, to use the term "feloniously." As there are now few jurisdictions in which "feloniously" cannot be rejected as surplusage,² it follows that in such jurisdictions the term feloniously can be used in all cases, to be discharged when not necessary to the description of the offence.

§ 23. Misdemeanors comprise at common law all offences lower than felonies, which may be the subject of indictment. They are divided into two classes: first, such as are *mala in se*, or penal at common law; and secondly, such as are *mala prohibita*, or penal by statute.

Misdemeanors comprise offences lower than felonies.

§ 23 a. In all jurisprudences a distinction more or less marked has been made between police wrongs and criminal wrongs. The distinction is made to rest sometimes on the tribunal having jurisdiction of the wrong: wrongs peculiarly cognizable by police courts being called police wrongs; those peculiarly cognizable by courts of oyer and terminer being called criminal wrongs. This line, however, is unsatisfactory, many prosecutions which are eminently of a police character involving large interests, and hence

Police offences to be distinguished from criminal.

¹ In Louisiana it has been held that a prior ruling of the late Court of Errors and Appeals, that the term felony was not known to the laws of Louisiana, was an *unadvised dictum*, and not law. *State v. Rohfrischt*, 12 La. An. 382.

² See cases given at large in Whart. *Crim. Pleading & Prac.* § 261.

made subjects of prosecution in our highest courts. For similar reasons we must reject the distinction that *little* wrongs are police wrongs, and *great* wrongs are criminal wrongs; since there are many criminal wrongs (*e. g.* small larcenies) which are little, and many police wrongs (*e. g.* such as interfere with liberty of trade) which are great. Nor can we accept as entirely adequate the tests sometimes given, that police wrongs consist of threatened, and criminal wrongs of consummated injuries; or that police wrongs consist exclusively in disturbances of order, criminal wrongs in violations of justice. We may more properly hold, enlarging the last distinction, that by criminal wrongs the existence of the State is assailed; by police wrongs, only the administration of its economical structure; the first attack the fundamental principles of society, the latter only its modes of operation. It is true that the two classes melt undefinably into each other, as is the case with civil and criminal wrongs. But that there is a distinction in ethics there can be no question, the one case involving, the other not involving, a moral taint. Nor can we refuse to admit a distinction in law. Accessories in criminal offences, for instance, are involved in the guilt of principals; not so accessories in police offences.¹ It is not indictable, for instance, to buy spirituous liquor illegally sold;² nor is it indictable to contract to sell such liquor in the gross to a person who is to sell it illegally at retail.³ Nor is it indictable to attempt such offences.⁴ Police offences, we may further notice, have, in common with offences of omission, this characteristic, — that they are usually breaches of affirmative and not of negative commands. The police law says, "You must do a particular thing." The offender, either designedly or negligently, omits to do this thing. The offence, also, as we have just seen, is usually not against the material and moral element in the law, but against its formal structure. It becomes, therefore, in most police prosecutions, a matter immaterial whether evil consequences flow from the defendant's disobedience, and whether, if they do, they are imputable to the defendant. It may be made an indictable offence, for instance,

¹ *Infra*, § 1529; *Com. v. Willard*,
22 Pick. 476.

² *Ibid.*

³ *Pulse v. State*, 5 Humph. 108.

⁴ *Hill v. State*, 53 Ga. 125.

for a man to permit ice to accumulate before his front door on a city street. If so, it is of no consequence whether an injury occurred thereby to individuals traversing the street, or whether the offender was cognizant of the violation of law. The same remarks are applied by a recent leading German jurist¹ to a series of acts made penal by the German Code, such as the possession of unstamped and unverified scales and measures; and the storing of explosive compounds in places forbidden by law. Our own prosecutions of persons concerned in selling intoxicating liquors may be placed in the same category. We do not inquire whether any person was injured by the sale or exposure of the liquor. We do not inquire whether the person charged knew that the liquor was intoxicating. These questions are irrelevant. Certain acts are dangerous to the community, and these acts are unconditionally and absolutely forbidden, as the best way of preventing their deleterious results. Hence, in such cases we have simply to determine whether the acts in question conflict with the letter of the law.² We must at the same time remember that there are other offences beside those exclusively of a police character which are indictable, irrespective of the criminal intention of the person indicted. It is within the power of the legislature to say of particular acts that they are to be prohibited irrespective of the intention of the person by whom they are committed.³

§ 24. Misdemeanors which are *mala prohibita*, and which become penal by statute, may consist, not only of acts made specifically indictable, but of acts enjoined or forbidden by statute, though by such statute such omission or commission is not made the subject of indictment. If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding.⁴ Thus,

An act when prohibited by statute is indictable, though indictment is not given by statute.

¹ Merkel, *Kriminalistische Abhandlungen*, i. p. 97. Leipzig, 1867.

² See *Com. v. Wolf*, 3 S. & R. 48; *Specht v. Com.* 8 Barr, 812, in which it was held that conscientious religious belief that another day was

the Sabbath is no defence to an indictment for Sabbath breaking. And see *infra*, § 88.

³ See *infra*, § 88.

⁴ 2 Hawk. c. 25, s. 4; *R. v. Davis*, Say. 163; and see *R. v. Gregory*, 2 N.

§ 27. Questions frequently arise whether a particular offence is divisible; in other words, whether it is susceptible of being divided into two or more offences, each to be open to a separate prosecution. The first line of cases of this class we have to notice is where one offence is contained as a necessary ingredient in another, as

Offences are divisible: (L.) by discharging aggravating incidents.

succeeding statute (*R. v. Boyall*, 2 Burr. 832), or the same statute, in a subsequent substantive clause, describes a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law; or he may proceed in the manner pointed out by the statute, at his option; 2 Hale, 171; *R. v. Wright*, 1 Burr. 543; and see *R. v. Jones*, 2 Str. 1146; *R. v. Harris*, 4 T. R. 202; Whart. Crim. Plead. & Pract. §§ 232, 281; but if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued and no other; for the express mention of any other mode of proceeding impliedly excludes that of indictment. *R. v. Robinson*, 2 Burr. 799; *R. v. Buck*, 2 Str. 679.

In Pennsylvania it is provided that "in all cases where a remedy is provided, or a duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect." Act of 21st of March, 1806, sect. xiii.; 4 Smith's Laws, 332; Whart. Crim. Plead. & Pract. § 232. It has been held by the courts, in conformity with this act, that wherever a mode of procedure is attached to a specific offence by any act of assembly, the common law remedy is abrogated, and the indictment and sentence must pursue the act. It was even held, that where an act of assembly gave a penalty to the party injured by the extorsive and corrupt conduct of a magistrate, which penalty was to be recovered in a civil suit, the offence ceased to be indictable at common law. But it seems that the act in question only applies when a specific method of procedure is directed by act of assembly; for when a new penalty is attached to a common law offence, then the indictment may still be at common law, though in case of conviction no other than the statutory punishment can be inflicted. Thus, when an act of assembly provided a new punishment for murder, it was held, that though by so doing the Act of 21st of March, 1806, prevented any other than the statutory punishment from being imposed, yet the indictment would still lie at common law, and that it was not necessary for it to conclude contrary to the act. *Com. v. Evans*, 13 Serg. & Rawle, 426. The statutes, also, against obstructing navigable rivers; *White v. Com.* 6 Binney, 179; and establishing a board of health, armed with plenary powers, to protect the health of the city of Philadelphia; *Com. v. Church*, 1 Barr, 105; leave unimpaired the remedy of the common law for such nuisances. *Com. v. Van Sickle*, Brightly R. 69; Whart. Crim. Plead. & Pract. § 232.

tions by common law, to the effect that the State may in such cases waive the felony, and prosecute only for the constituent misdemeanor.¹

No matter how long a time an offence may take in its perpetration, it continues but one offence. An explosive package, for instance, may be sent from Maine to California, and may take weeks in the transit, but the transmission is a single act. Difficult questions, indeed, may arise, to be hereafter noticed,² when gas or liquor is tapped by a pipe through which there is a continuous passage for days. But whatever may be the conclusion as to such cases, it is settled that nuisances, when distinct impulses are given at distinct successive times, may be the object of successive prosecutions.³ The distinction is this: when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.

An offence which is continued through a series of jurisdictions may be prosecuted in any one of them.⁴

An offence, also, is capable of division by being directed to a plurality of objects. It has been said, indeed, that to strike A. and B. at one blow is but one offence.⁵ But though this may be sustained in cases in which there was no intention to strike more than one blow, it is otherwise when two homicides, of distinct grades, are consummated by one act, or when there is an intention to kill two persons.⁶ And so

(2.) By diversity as to time.

(3.) By diversity as to place.

(4.) By diversity as to object.

¹ In Whart. *Crim. Plead. & Pr.* the topic in the text is discussed under the following heads: When one unlawful act operates on separate objects, conviction as to one object does not extinguish prosecution as to the other; e. g. when two persons are simultaneously killed, § 468; otherwise as to two batteries at one blow, § 469; so when several articles are simultaneously stolen, § 470; when one act has two or more indictable aspects, if the defendant could have been convicted of either under the first indictment, he cannot be convicted of the two suc-

cessively, § 471; so in liquor cases, § 472; severance of identity by place, § 473; severance of identity by time, § 474; but continuous maintenance of nuisances can be successively indicted, § 475; conviction of assault no bar (after death of assaulted party) to indictment for murder, § 476.

² Whart. *Crim. Pl. & Pr.* § 474.

³ *Ibid.* § 475.

⁴ *Ibid.* § 473; and see, as to conflicting jurisdictions, *infra*, §§ 287-291.

⁵ Whart. on *Crim. Plead. & Prac.* § 469.

⁶ *Ibid.* §§ 254, 468.

In construing such statutes, we are to look for the reasonable sense designed by the legislature; and if this is clearly ascertained it must be applied, though a narrower sense is possible.¹ At the same time, in matters of reasonable doubt, this doubt is to tell in favor of liberty and life.²

§ 29. A crime can only be regarded as a violation of a law in existence at the time of its perpetration.³ When a punishment is inflicted at common law, then the case is brought within the principle just stated by the assumption that the case obviously falls within a general category

¹ U. S. v. Jones, 3 W. C. C. R. 209; U. S. v. Brewster, 7 Peters, 164; U. S. v. Staats, 8 How. U. S. 41; State v. Smith, 32 Me. 369; Com. v. Houghton, 8 Mass. 107; Com. v. Whitmarsh, 4 Pick. 233; Stone v. State, Spencer, 401; Hodgman v. People, 4 Denio, 235; People v. Mather, 4 Wend. 229; People v. Hennessey, 15 Wend. 147; Ream v. Com. 3 S. & R. 207; Com. v. King, 1 Whart. 448; State v. Fearson, 2 Md. 310; Angel v. Com. 2 Va. Cas. 228; Thomas v. Com. 2 Leigh, 741; State v. Girken, 1 Ired. 121; State v. Taylor, 2 McCord, 483. This qualification is common to all systems of jurisprudence. Thus the Roman law:—

L. 6, § 1. D. de verb. signif. (50. 16.) Verbum: ex legibus, sic accipiendum est, tam ex legum sententia quam ex verbis. L. 3. D. de L. Pomp. de parric. (48. 9.) Sed sciendum est, lege Pompeia de consobriño comprehendendi, sed non etiam eos pariter complecti, qui pari proprioque gradu sunt. Sed et nocerae et sponsae personae omisae sunt, sententia tamen legis continentur. L. 1. § 13. D. ad SC. Turpill. (48. 16.) . . . verum hunc, qui hoc ministerio usus est ad mandandam accusationem, non ex verbis, sed ex sententia Senatus-consulti puniri, Papinianus respondit. Quintilian. Declam. 331. Nulla tanta providentia

potuit esse eorum, qui leges componebant, ut species criminum complecterentur. . . . Fecerunt ergo, ut rerum genera complecterentur, et spectarent ipsam aequitatem. Multa ergo inveniuntur frequenter, quae legum verbis non teneantur, sed ipsa vi et potestate teneantur. Idem Declam. 350. Nulla tanta esse potuit prudentia maiorum, ut ad omne genus nequitiae occurrat. Ideoque per universum, et per genera singula conscripta sunt iura. Caedes videtur significare sanguinem et ferrum. Si quis alio genere homo fuerit occisus, ad illam legem revertemur: si inciderit in Jatrones, aut in aquas praecipitatus, si in aliquam immensam altitudinem deiectus fuerit, eadem lege vindicabitur, qua ille, qui ferro percussus sit.

² U. S. v. Morris, 14 Pet. 464; U. S. v. Wiltberger, 5 Wheat. 76; U. S. v. Sheldon, 2 Wheat. 119; U. S. v. Clayton, 2 Dillon, 219.

³ Quoties de delicto quaeritur, placuit, non eam poenam subire quem debere, quam conditio eius admittit eo tempore, quo sententia de eo fertur, sed eam, quam sustineret, si eo tempore esset sententiam passus, quam deliquisset. L. 7. C. de legg. (1. 14.) L. 65. C. de decur. (10. 31.) Nov. 22. c. 1. cap. 2. 13. X. de constitt. (1. 2.) can. 3. Can. 32. qu. 4.

to which the law attaches indictability. It may be said, for instance, — “All malicious mischief is indictable. This offence (although enumerated in no statute, and never in the concrete the subject of prior adjudication) is malicious mischief. Therefore this offence is indictable.”

Strike out “malicious mischief” and insert “nuisance,” and the same conclusion is reached. It is no reply to this reasoning that we have, by this process, judge-made law, which is *ex post facto*.¹ Supposing the minor premise be correct, the objection just stated could not prevail without being equally destructive to most prosecutions for offences prohibited by statute under a *nomen generalissimum*. In many of our States, for instance, neither murder, burglary, nor assault is so described as to leave nothing remaining to the court by way of explanation or application. At the same time, if the offence charged is not one which by ordinary and natural construction falls within a prohibited class, it is far better that the criminal should escape, than that by a forced and unnatural construction the offence should be held indictable.²

§ 30. While acts imposing severer penalties cannot be applied retrospectively, doubtful questions as to what is a severer penalty are to be determined in favor of the accused; ³ though

¹ See supra, § 14.

² So far as concerns statutes, the rule is rigorously applied, and is fortified by the constitutional provision that no statute shall have an *ex post facto* operation. And this clause has been interpreted as meaning that no person is to be subjected by statute either to a penalty for an act at the time of its commission not the object of prosecution, or to a penalty for an indictable act higher than was attached to such act at the time of its commission. Const. U. S. art. 1, §§ 9, 10; 2 Story on Const. § 1345; Cooley's Const. Lim. 266 *et seq.*; Com. v. Phillips, 11 Pick. 28; Com. v. Lewis, 6 Binn. 266; Com. v. Reigart, 14 S. & R. 216; Myers v. Com. 2 Watts & S. 60; Perry v. Com. 3 Grat. 632;

Rand v. Com. 9 Grat. 738; State v. Hays, 52 Mo. 578.

³ “There has been great diversity of opinion as to what in this connection constitutes mitigation. In Texas, it has been held not to ‘mitigate’ the punishment where for the death penalty was substituted the infliction of stripes, and this upon the ground of the peculiarly degrading character of the latter method of punishment. Herber v. State, 7 Tex. 69. On the other hand, in South Carolina, where the punishment, death, was before final judgment changed to fine, whipping, and imprisonment, the new law was applied in passing sentence. State v. Williams, 2 Rich. 418. In Indiana, the law in force punished perjury by whipping, not exceeding one hundred

it has been held that changes in a punishment subsequent to the commission of an offence have no application to such offence.¹ But this cannot be extended so far as to authorize a court to impose the death penalty when such penalty has been abolished by the legislature, or to assign a longer imprisonment than the existing law permits.²

And so as to acts imposing severer penalty.

Supposing the last view to be correct, we may hold that where the punishments are capable of actual measurement, a milder recent statute in force at the time of trial supersedes, so far as concerns the penalty, a prior statute under which the offence was committed. Should it happen that between a severer statute, during whose operation an offence was committed, and a milder statute, which was in operation at the time of the trial, a third statute was intermediately in force, milder than either, the last named statute is not to be taken into consideration, the dominant

strips. In a certain case, before trial the punishment was changed to imprisonment in the penitentiary, not exceeding seven years; *Strong v. State*, 1 Blackf. 193; and the last act was held applicable and not obnoxious to constitutional objections." *Sherwood, J., State v. Willis*, 66 Mo. 131.

¹ "In *Hartung v. People*, 22 N. Y. 95, Mr. Justice Denio, speaking for the court, said: 'It is enough to bring the law within the condemnation of the Constitution that it changes the punishment after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be most severe in a given case. That would depend upon the disposition and temperament of the convict. *The legislature cannot thus experiment upon the criminal law.*'

... It is enough, in my opinion, that it changes the punishment in any manner, except by dispensing with divisible portions of it.' This line of decision, which has become settled law in New York (*Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*,

29 N. Y. 124; *Kuckler v. People*, 5 Park. Cr. Rep. 212), I regard as enunciating the better doctrine, since it is easily understood, and the twofold test which it furnishes readily applied, namely: Has a change been effected in the prescribed punishment? If there has, and such change has not been brought about by a mere remission of some separable portion thereof, then the law professing to effect such change must be held, so far as concerns antecedent transactions, constitutionally inapplicable." *Sherwood, J., ut supra.*

² See *Com. v. Wyman*, 12 Cush. 237, and cases cited *infra*; *Cooley v. Const. Lim.* 267.

In *Yeaton v. United States*, 5 Cranch, 281, it is said: "It has long been settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced, nor punishment be inflicted, for violations of the law committed while it was in force." *S. P., Smith v. State*, 45 Md. 49; *Com. v. Cain*, 14 Bush, 525.

statute being that which was in force at the time of the trial.¹ But where after the commission of an offence a statute is passed assigning an increased penalty to second offences of a particular type, and then a second offence of such type is committed, the increased penalty may be inflicted on the second offence.²

§ 31. A statute, however, subsequent to an offence, may change the mode by which it is to be prosecuted, provided the punishment attached to the offence is not thereby increased.³ The rules of evidence may be intermediately changed, provided that the effect is not to make that an offence which was not before the passage of the

¹ Van de Poll, Dissert. pp. 23-8 ; Geib, ii. p. 46.

² Ross, in re, 2 Pick. 165 ; Gutierrez, ex parte, 45 Cal. 429. The question may be agitated whether a new statute inflicting a punishment only in some respects milder than that under which the offence was committed (as where the maximum of punishment is lower than under the old law, but the minimum is higher) repeals, as to the offence, the old statute. The answer has been given that the earlier statute is, in such case, to be exclusively applied, as otherwise the judge would be left to pick out of two statutes the parts he deemed applicable, and virtually to frame a new law. See Turner v. State, 40 Ala. 21.

In Chauveau Adolphe et Faustin Hélie Théorie du Code pénal, i. p. 44, *sqq.*, we have the following : " Une question assez délicate a surgi depuis la même époque. Il s'agissait de savoir si, lorsque depuis la perpétration d'un délit et avant qu'il ait été jugé, une loi nouvelle abaisse le maximum de la peine applicable, mais en élevant à la fois son minimum, laquelle de ces deux législations doit être appliquée au prévenu. . . . Un arrêtiste a pensé qu'il fallait combiner les deux lois en faveur du prévenu, de manière à lui conserver le minimum de la loi

abrogée, tout en le faisant jouir du maximum abaissé de la loi nouvelle. Un pareil système ne pourrait être admis. . . . Tout ce que le prévenu peut réclamer, c'est l'application de la loi la plus douce. Aller au-delà et dépouiller les deux législations de leurs dispositions les plus sévères pour en composer une loi mixte pour lui seul, ce serait absurde, puis-qu'il n'a aucun droit quelconque à un tel privilège : et comment qualifier cette combinaison étrange de deux lois pénales ? cette pénalité formée du maximum de l'une et du minimum de l'autre, cette disposition qui n'appartiendrait à aucune législation, qui serait en dehors de tous les systèmes ? "

On the other hand, we have high authority to the effect that the severer portions of the old statute only are to be considered (as to an offence committed under that statute) as repealed by the later statute, leaving the relatively milder conditions of the old statute in force. Hälschner, System, i. p. 43 ; Berner, pp. 53, 54 ; Geib, ii. 47. And, generally, a statute assigning a milder punishment is not *ex post facto*. Com. v. Wyman, 12 Cush. 237.

³ Calder v. Bull, 3 Dall. 386 ; Koch's case, 5 Rawle, 338 ; Cooley's Const. Lim. 266.

act.¹ But where after conviction, and while the case is pending in error, the statute creating the offence is repealed, the prosecution abates.²

§ 31 a. On either of the theories of punishability which have been heretofore stated, it is within the prerogative of the State, through its proper organs, to limit, to suspend, or to prohibit prosecutions, and to relieve from the penalties imposed on crime. In exercise of this prerogative, it is ordinarily made essential to the prosecution of an indictment that it should be found by a grand jury, and that the defendant should be entitled to meet the witnesses produced against him face to face. By statutes of limitation and pardons, which are considered more fully in another volume, the State prescribes that prosecutions must be brought within a limited time after the commission of the offence, or that the offender is not for the particular offence to be subject to prosecution.³

¹ See *Seip v. Storch*, 52 Penn. St. 210; *Journey v. Gibson*, 56 Penn. St. 57; *Richter v. Cummings*, 60 Penn. St. 441.

² *Smith v. State*, 45 Ind. 49. See

Yeaton v. U. S. 5 Cranch, 281; *Whitehurst v. State*, 43 Ind. 473.

³ *Whart. Crim. Pl. & Prac.* §§ 316, 500.

CHAPTER III.

FITNESS OF OFFENDER TO COMMIT OFFENCE.

I. PERSONS NON COMPOTES MENTIS.

Old English rulings on insanity no longer authoritative, § 32.

Irresponsibility to be determined by exclusion rather than by inclusion, § 33.

1. *Incapacity to distinguish Right from Wrong.*

Party incapable of determining as to right and wrong is irresponsible, § 34.

"Wrong" means moral wrong, § 36.

2. *Insane Delusion.*

Delusion excuses act done *bond fide* and without malice under its effect, § 37.

Rule applies to all *bond fide* erroneous non-negligent beliefs, § 38.

Actual danger not necessary, § 39.

Delusion must be mental, § 40.

Partial insanity no defence to crime not its product, § 41.

Delusion to exculpate must be non-negligent, § 42.

3. *Irresistible Impulse.*

"Irresistible impulse" to be distinguished from "moral insanity" and from passion, § 43.

Insane irresistible impulse a defence, § 44.

Caution requisite as to this defence, § 45.

4. *Moral Insanity.*

Moral insanity is no defence, § 46.

5. *Mental Disturbance as lowering Grade of Guilt.*

Mental disturbance admissible to disprove malice, § 47.

6. *Intoxication.*

Persons under *delirium tremens* may be irresponsible, § 48.

Voluntary intoxication does not exculpate, § 49.

Intoxication admissible to determine degree, § 51.

Especially as to intent to take life, § 52.

And so as to other questions of intent, § 53.

But not so as to reduce responsibility when malice is shown, § 54.

"Voluntary" is conditioned by temperament, § 55.

7. *Practice in Cases of Insanity.*

Witnesses may give opinion based on observation, § 56.

Defence may be taken by friends of accused, § 57.

Issue to be tried by jury, § 58.

Insanity after conviction defers execution, § 59.

Burden is on party disputing sanity, § 60.

Conflicting theories as to amount of evidence requisite to prove insanity, § 61.

Insanity to be inferred from conduct, § 63.

And from physical peculiarities, § 64.

And from hereditary tendency, § 65.

8. *Other Forms of Unconsciousness.*

Unconsciousness may be a defence, § 66.

II. INFANTS.

Infants under seven not penally responsible, § 67.

Between seven and fourteen infant *capax doli* may be convicted, § 68.

Boy under fourteen presumed incapable of rape, § 69.

Infant's liability in special cases, § 70.

Infant liable for false representations as to age, § 71.

When infant may appear by attorney, § 72.

Age is inferable from circumstances, § 73.

Confession of infants admissible, § 74.

III. FEME COVERTS.

Indictment not bad on its face when against wife alone, § 75.

And so as to indictments against husband and wife jointly, § 76.

Wife's misnomer must be pleaded in abatement, § 77.

Wife presumed to be acting under her husband's coercion when co-operating in crime, § 78.

Presumption is rebuttable, § 79.

For offences distinctively imputable to husband he is primarily indictable, § 80.

For offences distinctively imputable to wife she is primarily indictable, § 81.

In riot and conspiracy there must be others beside husband and wife, § 82.

Distinctive view as to accessories, § 83.

IV. IGNORANT PERSONS.

Ignorance of law no defence to an indictment for a violation of law, § 84.

But on indictment for negligence in application of law non-specialist not chargeable with ignorance of speciality, § 85.

Mistake of law admissible to negative evil intent, § 85 a.

Statutes not operative until published, § 86.

Ignorance or mistake of fact admissible to negative intent, § 87.

But when *scienter* is irrelevant, ignorance or mistake of fact no defence, § 88.

And so where the fact is one of which the defendant ought to have been cognizant, § 89.

In suits for negligence, party is not required to know facts out of his speciality, § 90.

V. CORPORATIONS.

Corporations indictable for breach of duty, § 91.

Penalty is fine and distress, § 92.

Quasi corporations indictable for breach of duty, § 93.

VI. PERSONS UNDER COMPELSION.

Persons under compulsion irresponsible, § 94.

VII. PERSONS UNDER NECESSITY.

Necessity a defence when life or other high interests are imperilled, § 95.

Culpability does not preclude the defence, § 96.

Distinction between necessity and self-defence, § 97.

Not necessary to have had prior recourse to public authorities, § 97 a.

Objects for which self-defence may be exerted, § 98.

Flight not necessary to self-defence, § 99.

Defence of property justifiable, § 100.

But not violent defence of honor, § 101.

Danger must be immediate, and defence not to exceed attack, § 102.

Inference to be drawn from weapon, § 103.

I. PERSONS NON COMPUTES MENTIS.

§ 32. BOTH the legal and the psychological relations of persons of unsound mind are discussed at large in another work,¹ to which the reader is referred as containing on these topics an exposition fuller than is permitted by the limits of the present chapter. At present it is proposed to do no more than to give a brief synopsis of the practical points which the decisions of the courts, as exhibited at large in the fuller treatise to which reference is made, may be considered as establishing.

¹ Wharton & Stillé's Med. Juris. vol. i. §§ 108 *et seq.*

At the outset, it should be observed that the introduction of compulsory confinement for parties acquitted of guilt on ground of insanity has, to some extent, altered the issue which the older text writers and judges discussed. Under the old practice, if the defendant were convicted, he was punished as if he were a perfect moral agent; and if he were acquitted he was suffered to run at large, though he were acquitted on the ground of a monomania which would impel him to commit the same act the very next day. Under the present practice both these alternatives may be avoided, and the jury, by acquitting on the specific ground of insanity, may insure the sequestration of the defendant from society until the insanity be cured. This change of policy should always be kept in view when reconciling the older with the later cases. Under the old law the dangers ensuing from an acquittal on the ground of insanity made courts reluctant to accept insanity as the ground for an acquittal. Under the present law these dangers are much diminished, as such acquittal no longer involves the setting at large a dangerous lunatic. To this, as well as to the growing force of humane interest in the insane, we may attribute the more lenient attitude towards this defence which judges have lately assumed. The old rulings, so far as their severity is attributable to the then policy of the law, are no longer binding.¹

¹ The student is referred to the following analysis of the 1st vol. of the 3d edition (1878) of Wh. & St. Med. Jur. :—

CHAPTER I.

MENTAL UNSOUNDNESS IN ITS LEGAL RELATIONS.

A. WHAT DEGREE OF MENTAL UNSOUNDNESS INVALIDATES A CONTRACT OR WILL, § 1.

- (a¹) Imbecility, § 1.
- (a²) Contracts generally, § 2.
- (b²) Contracts of marriage, § 16.
- (c²) Wills, § 19.
- (b¹) Delusions, § 34.
- (c¹) Lucid intervals, § 61.

(d¹) Intoxication, § 65.

(e¹) Undue influence and fraud, § 76.

(f¹) Presumptions.

(a²) From character of act, § 83.

(b²) From old age, § 87.

(c²) From party being deaf, dumb, or blind, § 95.

(d²) As to sanity generally, infra, §§ 246-269.

B. WHAT IS TO BE PROVED IN ORDER TO DEPRIVE A PARTY OF THE MANAGEMENT OF HIS ESTATE, § 99.

C. WHAT AVOIDS RESPONSIBILITY FOR CRIME, § 108.

Preliminary question as to duty

§ 33. It will not be here attempted to lay down any general definition of insanity as constituting a defence in criminal trials. It is proposed simply to enumerate the several cases in which this defence, in any of its phases, has been sustained by the courts, not as conferring irresponsibility for crime, but, according to the present

Irresponsibility to be determined by exclusion rather than by inclusion.

of court to lay down the law, § 108.

- (a¹) Where the defendant is incapable of distinguishing between right and wrong as to the particular act, § 116.
- (b¹) Where the defendant is acting under an insane delusion as to circumstances, which, if true, would relieve the act from responsibility, or where his reasoning powers are so depraved as to make the commission of the particular act the natural consequence of the delusion, § 125.
- (c¹) Where the defendant, being insane, is forced by an irresistible impulse to do the particular act, § 146.
- (d¹) "Moral insanity" (i. e. a supposed insanity of the moral system claimed to coexist with mental sanity) is no defence, § 163.
- (e¹) While experts may be called to testify as to states of mind and conditions of health, it is for the court to declare whether such states and conditions constitute irresponsibility, § 190.
- (f¹) Predisposition to insanity as lowering grade of guilt, § 200.
- (g¹) Capacity of insane defendants to plead, § 200 a.

D. HOW FAR INTOXICATION AFFECTS RESPONSIBILITY, § 201.

- (a¹) Insanity produced by *delirium tremens* affects responsibility in the same way as insanity produced by any other cause, § 201.
- (b¹) Insanity immediately produced by intoxication does not destroy responsibility where the patient, when sane and responsible, made himself voluntarily intoxicated, § 207.
- (c¹) While intoxication is, *per se*, no defence to the fact of guilt, yet when the question of intent or premeditation is concerned, it may be proved for the purpose of determining the precise degree, § 214.

E. INSANITY AS RELATED TO LIFE INSURANCE, § 228.

F. INSANITY, WHEN DISQUALIFYING A WITNESS, § 242.

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freedom of action, we are obliged, when we determine responsibility, to affirm both.¹ The practical tests of capacity will be considered in the following sections.

1. *Incapacity to distinguish between Right and Wrong.*

§ 34. Wherever idiocy or amentia, or general mania, is shown to exist, the court will direct an acquittal; and if a jury should convict in the teeth of such instructions, the court will set the verdict aside. While the earlier cases lean to the position that such depravation of understanding must be general, it is now conceded that it is enough if it is shown to have existed in reference to the particular act.²

Party incapable of determining as to right or wrong of act is irresponsible.

§ 35. To this effect is the answer of the fifteen judges of England to the questions propounded to them by the House of Lords in June, 1843. "The jury," they said, "ought to be told in all cases that every man is presumed to be sane, and to pos-

¹ The controversy which divides theologians as well as metaphysicians as to the freedom of the will is not involved in the discussion in the text. It may be possible that, from a high metaphysical point of vision, all acts are necessitated. With this, however, jurisprudence, which is a practical science, has nothing to do. There have been indeed leading jurists, such as Feuerbach, who have adopted the principle of necessity as a basis, and have invoked the fear of punishment as a counter-weight to the temptation to crime; and Mr. Bain, as is elsewhere shown, has accepted the same view. See Whart. & St. Med. Jur. §§ 188, 540. But this, as is well said by a leading German author (Meyer, § 29), takes not only from jurisprudence, but from life, its moral dignity, making the former a mere marshalling of mechanisms, and the latter, a mere mechanism of necessities.

² 1 Inst. 247; Bac. Abr. Idiot; Co. Litt. 247 a; 1 Russell on Cr., by Greaves, 13; 1 Hawk. c. 1, s. 3; 4 Bla. Com. 24; Collinson on Lunacy, 573; 673 (n); R. v. Oxford, 9 C. & P. 525; Burrow's case, 1 Lewin, 238; R. v. Goode, 7 Ad. & El. 536; 67 Hans. Par. Deb. 728; Bowler's case, Hadfield's case, Ibid. 480; 27 How. St. Tr. 1282; R. v. Barton, 3 Cox C. C. 275; R. v. Offord, 5 C. & P. 168; R. v. Higginson, 1 C. & K. 129; R. v. Stokes, 3 C. & K. 185; R. v. Layton, 4 Cox C. C. 149; R. v. Vaughan, 1 Cox C. C. 80; U. S. v. Shults, 6 McLean, 121; Com. v. Rogers, 7 Met. 500; 7 Bost. Law. Rep. 449; State v. Richards, 39 Conn. 591; Freeman v. People, 4 Denio, 9; Flanagan v. People, 52 N. Y. 467; People v. Sprague, 2 Parker C. R. 43; State v. Spencer, 1 Zabriskie, 196; Com. v. Mosler, 4 Barr, 264; Com. v. Farkin, 3 Penn. L. J. 480; Brown v. Com. 78 Penn. St. 122; State v. Gardiner, Wright's Ohio R. 392; Vance v. Com. 2 Virg. C. 132; McAllister v. State, 17 Ala. 434; Dove v. State, 3 Heisk. 348; Stuart v. People, 1 Baxter, 178.

properly held that when idiocy or semi-idiocy is proved, it is for the prosecution to establish affirmatively a capacity on part of the defendant to distinguish right from wrong.¹

§ 36. "Wrong," in the sense in which the term is here used, means moral wrong. A man may want the capacity "Wrong" to distinguish between the various shades of illegality means moral wrong. which the law assigns to a particular act. This is no defence. If, however, he is incapable of distinguishing between what is morally wrong and morally right, and if this incapacity proceeds from intellectual defect, he is to be held irresponsible on the ground of insanity.²

2. *Insane Delusion.*

§ 37. The answer of the English judges on the special topic of delusion is as follows: "The answer must of course depend on the nature of the delusion: but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example: if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he

Delusion excuses act done bona fide and without malice under its effects.

to be evidence from which a jury might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it. *R. v. Law*, 2 F. & F. 886. So where a married woman, fondly attached to her children, and apparently most happy in her family, had poisoned two of them with some evidence of deliberation and design, it was left to the jury by *Wightman, J.*, as circumstances from which insanity could be inferred, that it appeared that there was insanity in her family; and that her demeanor before and after

the act, although not wholly irrational, was strangely erratic and excited; and that from recent antecedents, and the presence of certain exciting causes of insanity, and her own account of her sensations, the medical men were of opinion that she was laboring under actual cerebral disease, and that she was in a paroxysm of insanity at the time of the act. *R. v. Vyse*, 3 F. & F. 247.

¹ *State v. Richardson*, 39 Conn. 591.
² See Sir J. Stephen's testimony before House of Commons, quoted in *Whart. on Hom.* § 573.

killed him in revenge for such supposed injury, he would be liable to punishment." To the same effect speaks Chief Justice Shaw: ¹ "Monomania may operate as an excuse for a criminal act," when "the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

§ 38. So far as the law thus stated goes it has been recognized as authoritative in this country.² Even where there is no pretence of insanity, it has been held that if a man though in no danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defence;³ and though this proposition is too broadly stated, as is remarked by Bronson, J., when commenting on it in a later case in New York, and should be qualified so as to make it necessary that

Rule applies to all *bonâ fide* erroneous non-negligent convictions.

¹ Com. v. Rogers, 7 Met. 500.

² The supposed contradictions of the authorities on this point have arisen from an attempt to reduce into an inflexible code opinions which, while relatively true in their particular connection, were not meant for general application. Thus, for instance, when a defendant in whom there is no pretence of mania or homicidal insanity claims to be exempt from punishment on the ground of incapacity to distinguish right from wrong, the court very properly tells the jury that the question for them to determine is, whether he labors under such incapacity or not. The error has been to seize such an expression as this as an arbitrary elementary dogma, and

to insist on its application to all other cases. Or, take the converse, and suppose the defence is merely homicidal insanity. In such a case it would be proper to tell the jury that unless they believe the homicidal impulse to have been uncontrollable, they must convict; and yet nothing would be more unjust than to make this proposition, true in itself, a general rule to bear on such cases as idiocy. It is by confining the decisions of the courts to the particular state of facts from which they have been elicited that we can extract from the mass of apparently contradictory *dicta* the propositions given in the text.

³ Grainger v. State, 5 Yerger, 459. Infra, § 489.

there should be facts and circumstances existing which would lead the jury to believe that the defendant had reasonable ground (in proportion to his own lights) for his belief, yet with this qualification it is now generally received.¹ And, indeed, after the general though tardy acquiescence in Selfridge's case, where the same view was taken as early as 1805 by Chief Justice Parker, of Massachusetts, and after the almost literal incorporation of the leading distinctions of this case into the Revised Statutes of New York, as well as into the judicial system of most of the States, the point must be considered as finally at rest. Perhaps the doctrine, as laid down originally in Selfridge's case, would have met with a much earlier acquiescence had not the supposed political bias of the court in that extraordinary trial, and the remarkable laxity shown in the framing of the bill of indictment and in the adjustment of bail, led to a deep-seated professional prejudice, which reached even such parts of the charge as were sound. With these cases may be classed that of Levet,² who was in bed and asleep in his house when his maid-servant, who had hired A., the deceased, to help her to do her work, thought as she was going to let A. out about midnight, that she heard thieves breaking open the door, upon which she ran up stairs to the defendant, her master, and informed him thereof. Suddenly aroused, he sprang from his bed, and ran down stairs with his sword drawn, the deceased hiding herself in the buttery lest she should be discovered. The defendant's wife, observing some person there, and not knowing her, but conceiving her to be a thief, cried out, "Here are they who would undo us;" and the defendant, in the paroxysm of the moment, dashed into the buttery, thrust his sword at the deceased and killed her.³ The defendant was acquitted under the express instructions of the court, and the case has remained unquestioned for two hundred years, and in New York and Pennsylvania in particular, after very careful examination, has been solemnly reaffirmed.⁴ It is true that it has been held inadmissible to prove that the defendant was of weak

¹ See this question discussed at large *infra*, § 488; Whart. on Hom. § 490.

* See, for a fuller discussion of this case, *infra*, §§ 467, 495.

² Levet's case, Cro. Car. 538; 1 Hale P. C. 42, 474. *Infra*, § 492.

⁴ See cases cited *infra*, §§ 488 *et seq.*, note.

the evil is of a lesser grade, life-taking is an appropriate and just way of getting rid of it, he is entitled to such a verdict as will transfer him from the category of sane to insane criminals.¹ But the delusion must be *mental* not *moral*.²

¹ See *Wesley v. State*, 37 Miss. 327, where the position in the text is controverted at large.

² *R. v. Burton*, 3 F. & F. 772; *R. v. Townley*, 3 F. & F. 839; *Willis v. People*, 5 Parker C. R. 621. See 1 W. & S. Med. Jur. § 127 (1873).

That an insane delusion, as to the value or nature of human life, will have this effect, even though the party himself knows when committing the act that he is doing wrong, and is violating the laws of the land, is illustrated by Lord Erskine, in a well-known case: "Let me suppose," he said, "the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being (and such cases have existed), and that upon the trial of such a lunatic for murder, you, being on your oaths, were convinced, upon the uncontradicted evidence of one hundred persons, that he believed the man he had destroyed to have been a potter's vessel; that it was quite impossible to doubt that fact, although to other intents and purposes he was sane, — answering, reasoning, acting as men, not in any manner tainted with insanity, converse and reason and conduct themselves. Suppose, further, that he believed the man whom he destroyed, but whom he destroyed as a potter's vessel, to be the property of another, and that he had malice against such supposed person, and that he meant to injure him, knowing the act he was doing to be malicious and injurious; and that, in short, he had full knowledge of all principles of good and evil; yet would it be possible to convict such a person of murder, if,

from the influence of the disease, he was ignorant of the relation in which he stood to the man he had destroyed, and was utterly *unconscious* that he had struck at the life of a human being?" Winslow on Plea of Insanity, 6.

Again, in a case which has more than once occurred within the walls of a lunatic asylum, a man fancied himself to be the Grand Lama or Alexander the Great, and supposes that his neighbor is brought before him for an invasion of his sovereignty, and he cuts off his head or throttles him. He knows he is doing wrong; perhaps, from a sense of guilt, he conceals the body; he may have a clear perception of the legal consequences of his act. In such a case, however, criminal responsibility, in the full sense of the term, does not exist. It was in conformity with this view, in a case where it was proved that the defendant had taken the life of another under the notion that he was set about with a conspiracy to subject him to imprisonment and death, that Lord Lyndhurst told the jury that they might "acquit the prisoner on the ground of insanity, if he did not know, when he committed the act, what the effect of it was with reference to the crime of murder." What, therefore, he in fact decided was, that a man who, under an insane delusion, shoots another is irresponsible when the act is the product of the delusion. Such, indeed, on general reasoning, must be held to be the law in this country, and such will it be held to be when any particular case arises which requires its application.

In England this view has been recognized in several cases, notwith-

to believe that the whole thing was simulated; but, independently of this, the court was clear that as the mania, if real, had no connection with his crime, it formed no ground for a revision of the sentence.

§ 42. Nor should it be forgotten that a delusion, to be a defence to an indictment for crime, must be non-negligent. When there is reason sufficient to correct a delusion, then a person continuing to nourish it, when there is opportunity given him for such correction, is responsible for the consequences.¹

Delusion to exculpate must be non-negligent.

3. Irresistible Impulse.

§ 43. In order to clear the question now before us from ambiguities, it is proper to remark:—

(a.) "Irresistible impulse" is not "moral insanity," supposing "moral insanity" to consist of insanity of the moral system, coexisting with mental sanity. "Moral insanity," as thus defined, has no support, as will hereafter be seen,² either in psychology or law.

"Irresistible impulse" to be distinguished from "moral insanity," and from "passion."

(b.) Nor is "irresistible impulse" convertible with passionate propensity, no matter how strong, in persons not insane.³

§ 44. In other words, the "irresistible impulse" of the lunatic, which confers irresponsibility, is essentially distinct from the passion, however violent, of the sane, which does not confer irresponsibility.⁴ And when it is shown

Insane irresistible impulse a defence.

¹ See this argued at large, 1 W. & S. Med. Jur. (1873), § 137.

When an insane delusion is set up as a defence, it is admissible for the prosecution to offer evidence to prove that the delusion was sane, i. e. that it was an opinion that ordinary reasoning might have produced. *State v. Pike*, 49 N. H. 399. See 1 W. & S. Med. Jur. (1873), 144.

² See this discussed in 1 W. & S. Med. Jur. (1873), § 137.

³ *State v. Pike*, 49 N. H. 399. See 1 W. & S. Med. Jur. (1873), 144.

⁴ It should be remembered that passion is made irresistible by withdrawing from it the checks by which

it can be resisted. The first and most important of these checks is conscience. The second is fear. If conscience be torpid, and if the law of the land say that the irresistible impulse of a sane person is a defence, then criminal impulses would be irresistible simply because they would be without resistance. We may notice this in the case of young children, who, when not deterred from wrong acts by conscience, are deterred by fear of punishment. Nor does this characteristic belong only to children or to persons of low grade of intelligence. It was frequently said of Napoleon I., and of General Jackson, that each knew when

§ 45. In the enunciation of this conclusion there should be the strictest caution, and in the application of it the most jealous scrutiny. And in connection with it, it is always important to keep in mind the impressive lan- Caution requisite as to this defence.

guage,—*Was it his act? Could he help it? Did he know it was wrong?* He goes on further to say: "It would be absurd to deny the possibility that such (irresistible) impulses may occur, or the fact that they have occurred, and have been acted on. Instances are also given in which the impulse was felt and was resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse in question was irresistible as well as unresisted. *If it were irresistible, the person accused is entitled to be acquitted, because the act was not voluntary and was not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all.*"

In Sir J. Stephen's Digest, art. 27, it is stated that a person is irresponsible when prevented (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default. To this we have as a note:—

(4.) A. suddenly stabs B., under the influence of an impulse caused by disease, and of such a nature that nothing short of the mechanical restraint of A.'s hand would have prevented the stab. A.'s act is a crime if (c) is not law. It is not a crime if (c) is law.

(5.) A. suddenly stabs B., under the influence of an impulse caused by disease, and of such a nature that a strong motive—as, for instance, the fear of his own immediate death—would have prevented the act. A.'s act is a crime whether (c) is or is not law.

(6.) A. permits his mind to dwell

upon, and desire B.'s death; under the influence of mental disease this desire becomes uncontrollable, and A. kills B. A.'s act is a crime whether (c) is or is not law.

In *Com. v. Rogers*, 7 Met. 500 (tried in 1844), Chief Justice Shaw, who delivered the charge, begins by laying down two propositions of great breadth. "In order to constitute a crime," he says, "a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. These extremes," he then proceeds to state, "are easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging; or so perverted by insane delusion as to act under false impressions and influences." To such cases,—to those where the mind is not "incapable of judging," &c., and to those where it acts, "under false impressions and influences,"—and to such alone, he applies the "right and wrong" test; reserving to it a very small sphere of action, since the defence of insanity would scarcely be ventured where there was both a capacity to judge, reason, and remember, and a freedom from false "impressions and influ-

being an accountable being, that was an accountable being to the law of the land, a great confusion had pervaded the minds of

erined itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, *though aware of the heinous nature of the act*. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature." *Com. v. Mosler*, 4 Barr, 266.

In a still earlier case in Pennsylvania, Judge Lewis — then presiding in Lycoming County, and afterwards chief justice of Pennsylvania, a judge from whom the subject of medical jurisprudence has received peculiar and careful attention — recognized the same doctrine. "Moral insanity," *i. e.* "irresistible impulse," and not the "moral insanity" hereafter defined, "arises from the existence of some of the natural propensities in such violence that it is impossible not to yield to them. It bears a striking resemblance to vice, which is said to consist in an undue excitement of the passions and will, and in their irregular or crooked actions leading to crime. It is therefore to be received with the utmost scrutiny. It is not generally admitted in legal tribunals as a species of insanity which relieves from responsibility for crime, and it ought never

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to be admitted as a defence, until it is shown that these propensities exist in such violence as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield. Where its existence is fully established, this species of insanity relieves from accountability to human laws. But this state of mind is not to be presumed without evidence, nor does it usually occur without some premonitory symptoms indicating its approach." The same view was, some years after, repeated by the same judge. *Lewis Cr. Law*, 404; by Judge Edmunds (2 *Am. Jour. of Ins.*); by Judge Whiting (*Freeman's Trial— Pamph.*); and by the Supreme Court of Georgia (*Roberts v. State*, 3 *Georgia*, 310).

In 1862, the text with the cases given in it was cited with approval by the Supreme Court of Kentucky; and while irresistible impulse, as a distinct line of defence, was recognized, it was held that, to sustain it, "it must be known to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings." *Scott v. Com.* 4 *Metcalf*, 227. See also *Smith v. Com.* 1 *Duval*, 224; *Hopps v. People*, 31 *Ill.* 385. To the same effect is the judgment of the Court of Common Pleas of Philadelphia, in 1868, *Com. v. Haskell*, 2 *Brewster*, 491 (see also *Com. v. Freeth*, 5 *Clark*, Pa. L. J. R. 455); of the Supreme Court of Indiana, in 1869; *Steven v. State*, 31 *Ind.* 485 (see *Bradley v. State*, 31 *Ind.* 492); of Iowa, in 1868, *State v. Felter*, 25 *Iowa*, 67; of Illinois, in 1866, *Hopps v. People*, 31 *Ill.* 385; and of the Supreme Court of the United States, in 1872. *Life Ins. Co. v. Terry*, 15 *Wal.* 580. The doctrine, however, was em-

4. "Moral Insanity."

§ 46. "Moral insanity," in its distinctive technical sense, is a supposed insanity of the moral system coexisting with mental sanity. It is therefore to be distinguished from "insane irresistible impulse," which has just been no-

Moral insanity no defence.

Sir J. Stephen's testimony on this point before the Homicide Committee is as follows:—

"Sub-section D applies to a man prevented by disease affecting his mind 'from controlling his own conduct.' Now, that again is a case which it is said ought not to form part of the law, and I have often heard judges say that it is a monstrous thing for anybody to believe in what are called irresistible impulses, and that the doctors who give evidence upon these trials constantly put forward as irresistible an impulse which is not in fact resisted; and no doubt they do. I have had a great deal to do with cases of this kind. I had to try a case of that nature on the circuit last summer, and I have been counsel in them, and there is no doubt that doctors do come forward and make statements which seem to be extremely foolish on that subject. But it is not because a man makes a foolish statement on that subject that the law is to put itself in a false position. It seems to me that if the fact is that there are diseases of such a nature that my arm may suddenly rise and plunge a knife into some person near me, just as mechanically as if I were in a convulsive fit, to treat me as a murderer for doing it would be monstrous. And it also appears to me that the question whether or no such diseases do actually exist is a question of fact which the law ought not to prejudice in any way whatever; and if it be the case that there are such diseases, if that is proved by people who are skilful in these mat-

ters, I cannot see why that should not be left to the jury as well as any other fact, it being always pointed out to the jury by the presiding judge that it is one thing not to resist an impulse and another thing to be under the prey of an irresistible impulse in consequence of disease. Suppose a person rendered irritable by toothache were to go and kill somebody, I should say that that was no excuse at all. In the same way, if an insane desire arose in a man's mind, as in Dove's case, to kill another person, which was to some extent nourished by his own wickedness, I should say I would hang that man without mercy if he gratified that insane wish; but I would hang him, not because I should disregard an uncontrollable impulse, but because I should not believe that that impulse was uncontrollable, and because he gave way to a thing which he ought to have controlled and could have controlled. I recollect very well that in that case Baron Bramwell, who tried it, put this question to one of the doctors who was giving evidence that Dove could not help what he did: 'Supposing a man had been standing by him with a loaded pistol in his hand when he was going to poison his wife, do you think that he would have done it then?' 'No, I do not.' 'Then he ought not to have done it under these circumstances.' But supposing that the doctor was able to prove by referring to other instances that he would have been utterly unable to control himself, and that if you had put a rope round his neck ready to hang

in "moral insanity," by its very terms, the patient is always mentally sane; and (2.) "Irresistible impulse" is a special pro-

whether the disease was the efficient cause of the act, would be leaving the thing at large; I have never been able to assign a definition satisfactory to my own mind, and will not pretend to do so."

Bramwell, J., in the course of his examination before the same committee, in reference to the point immediately before us, said:—

"You ought to threaten every man sensible to the effect of a threat; and if this crazy fellow knows that what he thinks a virtuous and moral action is one which will cause him to be hung, I shall feel much more safety after having tried Fenians than I could otherwise feel. A similar reasoning seems to me to apply to sub-section D, 'from controlling his conduct.' I think that is a great mistake. I have sent into the Home Office this note: 'I vehemently protest against D. What is the meaning of a man being prevented controlling his conduct? When he is prevented, it is because the preventing motives are strong enough. When he is not prevented, it is because they are not strong enough. The effect of this would be to lessen the preventing motives.'

"A. wishes to commit a rape. Disease of mind weakens his power of acting on motives of chastity, religion, morality, goodness, &c., but fear of the law added to those motives makes him able to resist. The proposal is to take away one of his good motives. At least this should be qualified by saying 'from controlling his conduct by the ordinary motives of mankind.' Now, I should like to mention to the committee two things, if they would permit me. One is that this illustration of a rape is not an imaginative case, for I have positively tried a man

who I am certain had a mania on the subject.

"I can tell the committee the case if they are curious to hear it. It occurred in Monmouthshire, where there are a number of narrow valleys parallel to each other, with a considerable hill or mountain between them, and the people had occasion to go from one valley to the other; and this man was a most moral and religious collier; was deacon in his congregation, earned larger wages than anybody in the neighborhood, and had a first-rate character; but he had the infirmity of waiting on the top of these hills and knocking women down, and treating them with atrocious violence. There were nineteen indictments against him. I tried him on five, and on all he was convicted; the others would not come forward. So that this case of a rape is not an imaginary one. Then, as to men controlling their actions, I should like to tell the committee this case: I tried a man named Dove many years ago for murdering his wife; he called a number of witnesses for the purpose of proving that he could not control his actions; there was one of them who, to prove the state of this man's mind, proved that he had shot a cat in the presence of his wife, or something of that sort; and this man gravely said that he believed it was an uncontrollable impulse. I put this question to him (I did not let him see the difficulty it would land him in; I got his mind away from the particular answer that he had given): 'Now, suppose a policeman had been present when he shot that cat, do you think he would have been restrained,' and he said, 'Yes.' 'Well, then,' I said, 'according to your view an uncontrollable impulse is an impulse acting upon a

rests is hostile alike to the principles of law and the safety of society.¹

¹ R. v. Oxford, 9 C. & P. 525; R. v. Goode, 7 Ad. & El. 536; R. v. Barton, 3 Cox C. C. 275; R. v. Higginson, 1 C. & K. 129; R. v. Layton, 4 Cox C. C. 149; R. v. Hayne, 1 F. & F. 666; R. v. Townley, 3 F. & F. 839.

Shortly after Townley's case, on a trial for murder, before Erle, J., the defence relied on evidence showing a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance, causing fits of *delirium tremens*, the prisoner, however, not laboring under the effects of such a fit at the time of the act, and the circumstances showing sense and deliberation, and a perfect understanding of the nature of the act: it was held, that the evidence was not sufficient to support the defence, as it rather tended to show wilful excesses and extreme folly than mental incapacity. R. v. Leigh, 4 F. & F. 915. And see R. v. Southey, 4 F. & F. 864; R. v. Watson (1872), reported in 1 W. & S. Med. Jur. (1873), § 166; R. v. Edmunds, *Ibid.* § 167.

As American authorities may be cited the following: U. S. v. Schults, 6 McLean, 121; U. S. v. Holmes, 1 Clifford, 98; State v. Lawrence, 57 Me. 574; Com. v. Rogers, 7 Met. 500; Com. v. Heath, 11 Gray, 303; State v. Richards, 39 Conn. 591; Freeman v. People, 4 Denio, 9; Shorter v. People, 2 Comst. 193; McFarland's case, 8 Abbott Prac. Cas. N. S. 57; Flanagan v. People, 52 N. Y. 467; State v. Spencer, 1 Zabriskie, 196; State v. Windsor, 5 Harr. 512; Vance v. Com. 2 Va. Cases, 132; State v. Brandon, 8 Jones, 463; State v. Gardiner, Wright, 392; Farrer v. State, 2 Ohio St. R. 54; People v. Coffman, 24 Cal. 230; People v. M'Donell, 47 Cal. 134;

Choice v. State, 31 Ga. 424; Spann v. State, 47 Ga. 553. These cases, though in various terms, unite substantially in declaring, as the proposition is stated by an able jurist, Judge Thurman (Farrer v. State, 2 Ohio St. R. 54), "that there is no authority for holding that mere moral insanity, as it is sometimes called, exonerates from responsibility."

See also Flanagan v. People, 52 N. Y. 467, where it was said by Andrews, J.: "The argument proceeds upon the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts the consequences of which he anticipates but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law." S. P., People v. M'Donell, 47 Cal. 134; Cf. R. v. Haynes, 1 F. & F. 666.

A partial exception is to be found in some eccentric opinions delivered in the Court of Appeals of Kentucky; opinions, however, which do not appear to have been sustained by a majority of the court in which they were pronounced. Smith v. Com. 1 Duvall, 224; St. Louis Mut. Ins. Co. v. Graves, 6 Bush, 268. See 1 W. & S. Med. Jur. §§ 175-8, where these cases are discussed. As exhibiting a view diverging from the text, see Anderson v. State, 43 Conn. 514.

In vindication of the criticism of "moral insanity" expressed in the text, the following remarks may be here repeated:—

First, as to the consistency of this doctrine with the safety of the commu-

sponsible. This principle, however, is now abandoned as based on a psychological untruth. There are many degrees both of sanity and insanity; and the two states approach each other in imperceptible gradations, melting into each other, to adopt an illustration borrowed by Lord Penzance from Burke, as day melts into night.¹ There may, therefore, be phases of mind

allowing such persons to roam at large, executed as announced. In other words, supremacy of reason over passion, on the part of all persons possessing such reason, is essential to the safety of the State; and the State is bound to educate its subjects to the exercise of their reason to this extent. It needs careful engineers, careful sailors, careful superintendents, and careful workmen; and, to create this carefulness, it must impose penalties on carelessness. *A fortiori*, therefore, if it needs, among those concerned with its machinery, the capacity to control passion by reason, must it impose penalties on the yielding of reason to passion. This subordination among its subjects it is one of the highest offices of the State to create; and it must, for this purpose, in addition to education, call in the aid of penal discipline. Punishment can only, it is true, be imposed on a responsible being as an act of justice proportioned to wrong, but it must be dispensed in such a way as to plant the consciousness of responsibility in every reasoning breast. Reason, it must thus teach, is indissolubly associated with responsibility. See this argument more fully developed in 1 W. & S. Med. Jur. §§ 186 *et seq.*

Again, it is the duty of the State to require, on the part of all persons endowed with reason, the exercise, under penal discipline, of such reason, in all matters which concern the safety and health of the body politic. The State, in this respect, is a delicate machine, over whose mechanism every rational man has more or less control. It may seem hard, to adopt the analogy of a railroad, to make it an indictable offence for a brakeman simply to fall asleep at his post, or for the acting superintendent of a great corporation not to construct a time-table sufficiently lucid and accurate to prevent possible collisions. It may seem a hard thing to shoot an admiral of acknowledged bravery for indecision in action, or to cashier and imprison an engineer for a slight miscalculation as to the thickness of an iron plate. Yet we all feel the necessity of such hardness for the purpose of educating men at large in the exercise of all their faculties when in the discharge of public trusts. It is such discipline alone that makes railway travel practicable, and that prevents a nation's life from being carelessly sacrificed in war. Reason, in such cases, is called forth, nerved, and pointed, by the penalty the law imposes on its action. But the State cannot effectively punish by precept, or by mere expression of disapprobation. It must punish, if at all, by penal discipline; and this discipline, to have a moral effect, must be

executed as announced. In other words, supremacy of reason over passion, on the part of all persons possessing such reason, is essential to the safety of the State; and the State is bound to educate its subjects to the exercise of their reason to this extent. It needs careful engineers, careful sailors, careful superintendents, and careful workmen; and, to create this carefulness, it must impose penalties on carelessness. *A fortiori*, therefore, if it needs, among those concerned with its machinery, the capacity to control passion by reason, must it impose penalties on the yielding of reason to passion. This subordination among its subjects it is one of the highest offices of the State to create; and it must, for this purpose, in addition to education, call in the aid of penal discipline. Punishment can only, it is true, be imposed on a responsible being as an act of justice proportioned to wrong, but it must be dispensed in such a way as to plant the consciousness of responsibility in every reasoning breast. Reason, it must thus teach, is indissolubly associated with responsibility. See this argument more fully developed in 1 W. & S. Med. Jur. §§ 186 *et seq.*

¹ "We use no mere metaphor when we say that the intellect passes through innumerable gradations from the full glow of noonday to the depth of midnight. He who attempts to place a limit to the twilight on either side, attempting to fix a limit at which reason either suddenly ceases or suddenly begins, is in the quandary of those who

sibility not to attach where the delirium is the "remote consequence" of voluntary intoxication, "superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal," he proceeded to say, "in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed when Drew (the defendant) was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not then intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. The law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes which remotely produced it. Many species of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party; as from religious melancholy, undue exposure, extravagant pride, ambition, &c. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."¹ In a still earlier case of at least equal authority, the court told the jury that if they "should be satisfied by the evidence that the prisoner, at the time of committing the act charged in the indictment, was in such a state of mental insanity, not produced by the immediate effects of intoxicating drinks, as not to have been conscious of the moral turpitude of the act, they should find him not guilty."² And expressly to this very point is a more recent case, where a federal judge of high authority told the jury "that if the defendant was so far insane as not to know the nature of the act, nor whether it was wrong or not, he is not punishable, although such *delirium tremens* is produced by the voluntary use of intoxicating liquors."³

¹ U. S. v. Drew, *supra*.

² U. S. v. Clarke, 2 Cranch C. C. R. 158.

³ U. S. v. McGlae, 1 Curtis C. C. R. 1.

When *delirium tremens* is set up as a defence, the prisoner must show that he was under a delirium at the time the act was perpetrated, there being

no presumption of its existence from antecedent fits from which he has recovered. *State v. Sewell*, 3 Jones Law (N. C.), 245. See, as to presumption of continuance of insanity, Wharton *Crim. Ev.* § 730.

Where it is shown that the defendant's mind has been so far destroyed by long continued habits of drunken-

the first none. Caution may ward off the one, or innocence escape it; but to the other the most innocent and benevolent would be as likely to fall victim as the most depraved. The mind in the one case may be inflamed with revenge, — that “Wild Justice,” as Bacon calls it, — which, though no defence, is yet capable of being reached by reason and averted by care. But in the other, the impulse is mere gross sensual indulgence, and the blow cannot be anticipated by sagacity, or escaped by inflexibility. And as a mere matter of legal *policy*, the same position holds good. There rarely could be a conviction for homicide if drunkenness avoided responsibility.¹ Sir E. Coke tells us, calling in for the purpose the Roman law, by which he is fully sustained: “As for a drunkard who is *voluntarius daemon*, he hath, as has been said, no privilege thereby, but what hurt or ill soever he doth his drunkenness doth aggravate it. *Omne crimen ebrietas et incendit et detegit.*”² And although now drunkenness cannot be said to aggravate a crime in a judicial sense, yet it is well settled that it forms no defence to the fact of guilt. Thus Judge Story, in a case already cited, after noticing that insanity, as a general rule, produces irresponsibility, went on to say: “An exception is, when the crime is committed by a party while in a fit of intoxication, the law allowing not a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime.” Lord Hale said: “The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perpetual but temporary frenzy; but by the laws of England such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses.”³ And so Parke, B., a very authoritative English crown judge, said to a jury in 1837: “I must also tell you, that if a man makes himself voluntarily drunk it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go un-

¹ See 1 W. & S. Med. Jur. § 207.

² Co. Litt. 247 a.

³ 1 Hale, 7; 4 Black. Com. 26;

¹ Gabbett C. L. 9; and see a learned article in 6 Law Rep. (N. S.) 554.

prove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value when malice is proved to have preëxisted,¹ but that when there is no evidence of premeditation *aliunde*, and the defendant is proved at the time of the occurrence to have been in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show that the defendant was at the time in hot blood, making him peculiarly susceptible to supposed insult.² The same view is applicable to

¹ See *infra*, § 54.

² See cases discussed *infra*, § 54; and see *People v. Rogers*, 18 N. Y. 9; *Jones v. Com.* 75 Penn. St. 403; *Keenan v. Com.* 44 Penn. St. 55; *State v. Garvey*, 11 Minn. 154; *State v. McCants*, 1 Speers, 382; *Jones v. State*, 29 Ga. 594; *Malone v. State*, 49 Ga. 210; *Haile v. State*, 11 Humph. 154; *Dawson v. State*, 16 Ind. 428; *Cluck v. State*, 40 Ind. 263; *McIntyre v. People*, 38 Ill. 514; *People v. Williams*, 43 Cal. 344; *Ferrell v. State*, 45 Tex. 503; *Wenz v. State*, 1 Tex. Ap. 36.

In New York, on a trial of an indictment for murder with a club in a sudden affray, it was held admissible to prove that the prisoner was intoxicated at the time; and where a witness, then present, well knowing the prisoner, after describing his appearance and conduct, was asked to give his opinion whether the prisoner was intoxicated, and the court excluded such evidence, this was held ground for a new trial. *Eastwood v. People*, 3 Parker C. R. (N. Y.) 25. But see *Kenny v. People*, 4 Tiffany (31 N. Y.), 330.

So on a trial for murder, the defendant's counsel requested the court to charge "that if it appeared from the evidence that the condition of the prisoner from intoxication was such as to show that there was no motive or intention to commit the crime of murder, that the jury should find a ver-

dict of manslaughter." The court refused, and it was held that the charge should have been given, as the question of intent was material to the degree of the crime. *Rogers v. People*, 3 Parker C. R. (N. Y.) 632; S. C. in error, 18 N. Y. 9. For advanced doctrine as to same point, see *Smith v. Com.* 1 Duvall, 224; *Blimm v. Com.* 7 Bush (Ky.), 320; which, however, are greatly qualified in *Shannahan v. Com.* 8 Bush, 463. In the latter case, decided in 1871, the court, in an unanimous opinion, said: "We are not to be understood, however, as determining that the fact of drunkenness in a case like this is incompetent testimony before a jury upon the question of malice. Malice, express or implied, must be proven in order to constitute the crime of murder, and in the absence of this proof no conviction can be had for such an offence; and evidence as to the condition of the accused at the time of the killing, whether drunk or sober, should be permitted to go to the jury, in connection with other facts, in determining the question of malice. What we do adjudge is, that in the trial of a case like this, the fact of drunkenness, while it may be a circumstance showing the absence of malice, should not be singled out from the other proof, and the jury told that it mitigates the offence. The proper rule is, that one in a state of voluntary drunkenness is subject to the same

§ 53. The same considerations apply to the question of specific intent in other relations.¹ Thus in an Ohio case it was properly held, that when the charge was knowingly passing counterfeit money, with intent to cheat, the drunkenness of the defendant at the time of the offence was a fit subject for the consideration of the jury, there being no ground to suppose that the defendant knew the money to be counterfeit *before* he was drunk.² To perjury, also, drunkenness may be a defence.³ And when the defendant was indicted for an attempt to commit suicide by drowning, and it was alleged that she was at the time unconscious of the nature of her act from drunkenness, Jervis, C. J., said to the jury: "If the prisoner was so drunk as not to know what she was about, how can you find that she *intended* to destroy herself?"⁴ So, again, when the charge was assault with intent to murder, Patterson, J., said: "A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering the child, you may find them guilty of an assault."⁵

And so as to other questions of intent.

§ 54. Beyond this the advance has been fluctuating. The furthest step taken was in an English case, decided in 1819,⁶ where Holroyd, J., is reported by Sir W. Russell, who adopts his opinion as text law, to have said that the fact of drunken-

Penn. St. 403; Com. v. Hart, 2 Brewst. 546; Com. v. Jones, 1 Leigh, 598; Boswell v. Com. 20 Grat. 860; Rafferty v. People, 66 Ill. 118; Smith v. State, 4 Neb. 277; Swan v. State, 4 Humph. 136; Pirtle v. State, 9 Humph. 663; Haile v. State, 11 Humph. 154; State v. Bullock, 13 Ala. 413; Kelly v. State, 3 Sm. & M. 518; State v. Harlow, 21 Mo. 446; State v. White, 14 Kans. 538; People v. Williams, 43 Cal. 344. See *infra*, § 389. See, however, Estes v. State, 55 Ga. 30.

The question left to the jury in such cases is, whether the defendant's mental condition was such that he was

capable of a specific intent to take life.

¹ See *R. v. Monkhouse*, 4 Cox C. C. 55; *R. v. Stopford*, 11 Cox C. C. 648.

² *Pigman v. State*, 15 Ohio, 555, which case was afterwards considered and confined to its peculiar state of facts, in *Nichols v. State*, 8 Ohio St. 435. See, to the same point, *U. S. v. Roudenbush*, 1 Bald. 514. But see *State v. Avery*, 44 N. H. 392.

³ *Lytle v. State*, 31 Ohio St. 196.

⁴ *R. v. Moore*, 3 C. & K. 319; 6 Law Rep. (N. S.) 581.

⁵ *R. v. Cruse*, 8 C. & P. 541. See *Mooney v. State*, 33 Ala. 419.

⁶ *R. v. Grindley*, 1 Russ. on Cr. 12, note *l*.

man makes himself voluntarily drunk, that is no excuse for any crime he may commit while he is so; he must take the consequence of his own voluntary act, or most crimes would otherwise be unpunished. But drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given; because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger, excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So, where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse. You will decide whether the subsequent act does not furnish the best means of judging what the nature of the previous expression really was."¹ The American cases present the same general result, depending in principle, if not in terms, on the position that where the encounter was sudden, and the defendant, prior to such encounter, had no malice or old grudge, intoxication at the time of the encounter can be taken into consideration, to ascertain whether the defendant, when under a legal provocation, acted from malice or from sudden passion,² and whether there was deliberation, or a specific intention to take life.³ But under ordinary circumstances when malice is inferable *aliunde*, the court will tell the jury that voluntary intoxication does not lower the offence to manslaughter.⁴

¹ R. v. Thomas, 7 C. & P. 817.

² U. S. v. Roudenbush, 1 Bald. 514; Com. v. Hawkins, 3 Gray, 463; People v. Hammill, 2 Parker C. R. (N. Y.) 223; People v. Robinson, Ibid. 235; Keenan v. Com. 44 Penn. St. 55; Penn. v. M'Fall, Add. 255; Cornwall v. State, Mart. & Yer. 147; Kelly v. State, 5 Sm. & Mars. 518; State v. McCants, 1 Speers, 384; Pirtle v. State, 9 Humph. 663; Swan v. State, 4 Humph. 136; Haile v. State, 11 Humph. 154; State v. Harlow, 21 Mo. (6 Bennett)

446; Jones v. State, 29 Geo. 594; Golden v. State, 25 Geo. 527; State v. Bullock, 13 Ala. 413; Mooney v. State, 33 Ala. 419; People v. Belencencia, 21 Cal. 544; People v. King, 27 Cal. 507; People v. Williams, 43 Cal. 344; State v. Bell, 29 Iowa, 316.

³ Supra, § 52.

⁴ R. v. Carroll, 7 C. & P. 145; R. v. Meakin, 7 C. & P. 297; U. S. v. Cornell, 2 Mason, 91; Com. v. Hawkins, 3 Gray, 463; State v. Johnson,

7. *Practice in Cases of Insanity.*

§ 56. The mode of examining witnesses called to testify as to sanity is examined in detail in another work.¹

At present it may be sufficient to recapitulate the following conclusions: —

Witness may give opinion based on observation.

(1.) Non-experts as well as experts may be asked whether in their opinion a party whom they had the opportunity to observe was at the time drunk.

(2.) Such being the case, we must also hold that as to conditions equally patent to the lay mind, — *e. g.* stupor, dementia, amentia, paralysis, — a non-expert as well as an expert may give his opinion.

(3.) When acts of doubtful signification are put in evidence by a non-expert, he is not entitled to give his opinion as to sanity, since this is a matter of which the jury are as qualified to judge as he is.

(4.) As to hypothetical cases an expert may be examined, but not a non-expert.

(5.) The weight of authority is that intelligent attendants, who have lived continuously with a party, may give an opinion as to his sanity, though they are not specialists in psychological disease.

§ 57. Whatever may once have been thought, it is now settled that the defence of insanity may be taken by the friends and counsel of a prisoner, even though this course be objected to by himself.² Thus in an English case, a man was indicted for shooting at his wife with intent to murder her, and was defended by counsel who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane, and was allowed to suggest questions, to be put by the judge to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed to show that the defence was an incorrect one; but, on the contrary, their evidence tended to establish it more

Defence may be taken by friends of the accused.

¹ Whart. Crim. Ev. § 417.

² *State v. Patten*, 10 La. Ann. R. 299.

§ 59. If a party under sentence of death becomes insane after conviction, execution is to be deferred.¹ It has been ruled in such case that evidence of the convict's mental condition at the time of the commission of the crime is admissible to illustrate his present condition, provided there be other evidence of present insanity, but if there be no other evidence of present insanity it is not admissible.²

Insanity after conviction defers execution.

§ 60. By the common law, every man is presumed to be sane until the contrary be proved; and the better opinion is, that when insanity is set up by the defendant, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof.³ The finding of an acquisition of lunacy, which is admissible, shifts the burden.⁴

Burden is on party disputing sanity.

the defendant is sane enough to make a rational defence, the defendant is not entitled to peremptory challenges; but challenges for cause may be made.

and order his safe custody and removal to one of the state lunatic asylums," &c.

Ibid.

By the New York Revised Statutes, "no act done by a person in a state of insanity can be punished as an offence; and no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state. 2 Rev. Stat. 582-3. In the same State, by the Act of May 17, 1869, chap. 895, "if any person in confinement under indictment for the crime of arson, or murder, or attempt at murder, shall appear to be insane, the county judge of the county where he is confined shall institute a careful investigation, call two or more respectable physicians and other credible witnesses, invite the district attorney to aid in the examination, and if it be deemed necessary, call a jury, and for that purpose is fully empowered to compel the attendance of witnesses and jurors; and if it is satisfactorily proved that such person is insane, said judge may discharge such person from imprisonment,

In Pennsylvania, the revised act (1860) provides for a special verdict in case of insanity on a preliminary issue.

In Tennessee, under the statute, insanity, in order to justify confinement in the insane asylum, must be specially pleaded. *Coldwell v. State*, 3 Baxter, 418.

¹ Hale's Sum. 10; 1 Hawk. c. 1, § 3; 4 Black. Com. 24.

² *Spann v. State*, 47 Ga. 553.

In Pennsylvania, when insanity is set up as a bar to sentence, the question of a jury trial is at the discretion of the court. *Laros v. Com.* 84 Penn. St. 200.

It has been held not error to require a defendant to plead "not guilty," in addition to his special plea of insanity. *Long v. State*, 38 Ga. 491.

³ *Whart. on Crim. Ev.* § 336; *R. v. Stokes*, 3 C. & K. 188; *R. v. Taylor*, 4 Cox C. C. 155; *R. v. Haswell*, R. & R. 458; *Atty. Gen. v. Parnter*, 4 Brown C. C. 409; *R. v. Layton*, 4 Cox C. C. 149; *U. S. v. Lawrence*,

⁴ *McGinnis v. Com.* 74 Penn. St. 245; *Wheeler v. State*, 34 Ohio St. 394; *Whart. Crim. Ev.* § 336.

It has been said that where hereditary insanity is offered as an excuse for crime, it must appear that the kind of insanity proposed to be proven is no temporary malady, and that it is notorious, and of the same species as that with which other members of the family have been afflicted.¹ But this last qualification cannot be sustained, as insanity rarely descends in the same common type, but varies with individuals.²

Of course proof of hereditary insanity can only be admitted as cumulative evidence. By itself, the insanity of ancestors is no defence.³

Evidence that certain causes might induce insanity is not admissible without laying or offering to lay a basis of proof to show that insanity actually existed.⁴

7. Other Forms of Unconsciousness.

§ 66. Other forms of unconsciousness may be noticed as constituting a defence to a criminal charge. A man may commit an injury when asleep, as when in a state of sleep-walking or somnambulism.⁵ Or he may be under the influence of opium, or of ether, or other anodynes.⁶ The question then arises, was the defendant at the time of the act a free agent? If not, the act is not criminally imputable to him. But we have to keep in mind two possible conditions which may greatly vary the case. If the abnormal state was artificially induced in order to facilitate the commission of the crime, then the offence is malicious. If such state was negligently induced, then the defendant may be chargeable with a negligent offence.

9. Thus insanity of uncles has been received in evidence; *Baxter v. Abbott*, 7 Gray, 71; and even of collateral descendants from a common ancestor three generations back. *Com. v. Andrews*, cited 1 W. & S. Med. Jur. § 375; *Edmund's case*, *Ibid.*; and see *Com. v. Rogers*, 7 Met. 500.

¹ *State v. Christmas*, 6 Jones N. C. (Law) 471.

² 1 W. & S. Med. Jur. § 376; *Whart. Crim. Ev.* § 731.

³ See *Snow v. Benton*, 28 Ill. 306. In *Laros v. Com.* 84 Penn. St. 200, it is ruled that such evidence is not competent until evidence of the defendant's own insanity is given. See *People v. Pine*, 2 Barb. 566; *State v. Christmas*, 6 Jones N. C. 471.

⁴ *Sawyer v. State*, 35 Ind. 80; *Bradley v. State*, 31 Ind. 492.

⁵ See these cases discussed in 1 *Whart. & St. Med. Jur.* §§ 482-4.

⁶ *Rogers v. State*, 33 Ind. 543.

§ 68. Between the age of seven and fourteen responsibility is conditioned on capacity. If it appear that a child within these limits is *capax doli*, which is to be determined by the circumstances of the case, he may be convicted and condemned.¹

Between seven and fourteen an infant *capax doli* may be convicted.

It is a *prima facie* presumption of law that under fourteen the child is not *capax doli*. As to a child under seven, this presumption is irrebuttable. As to a child between seven and fourteen the presumption is rebuttable, the burden of overthrowing it being on the prosecution; the intensity of proof varying with age and other circumstances.²

avons rappelé plus haut que le droit romain et la loi anglaise plaçaient jusqu'à l'âge de sept ans les enfants à l'abri de toute poursuite. Le Code pénal d'Autriche a été plus loin encore . . . L'assentiment des législateurs proclame donc comme un fait qu'il est un âge (que cet âge se termine à sept, neuf ou dix ans) où l'enfant est irresponsable de tous ses actes. Et, en effet, on ne peut méconnaître qu'à cette époque de la vie, l'enfant, même le plus intelligent, n'a qu'une perception incomplète de l'action qu'il commet. Sans doute cette règle peut n'être pas d'une vérité absolue; sans doute quelques cas exceptionnels pourront être signalés : mais la sûreté publique ne sera point compromise, par cela seul que quelques coupables de cet âge échapperaient à la répression qu'ils auraient méritée; et l'on ne doit pas se hâter de flétrir dans son germe la vie de ces jeunes enfants dont il est difficile de prouver la criminalité. With this may be grouped the following from Rossi (Traité ii. p. 155): Mais tout en fixant à l'âge de seize ans environ le point de départ pour la présomption de responsabilité, il n'est pas rationnel de s'arrêter à cette unique distinction, et d'exposer un enfant de sept ou huit ans à être traduit en justice. . . . † Placer

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sur la selette un enfant qui n'a pas huit ou neuf ans accomplis, c'est un scandale, c'est un acte affligeant qui n'aura jamais l'assentiment de la conscience publique. C'est une éducation qu'il faut donner à ces petits infortunés; on ne peut songer à leur infliger une peine. . . . Qu'on ne dise pas que nos craintes n'ont aucun fondement, que des enfans de cet âge ne sont jamais poursuivis. Encore tout récemment les papiers publics nous ont appris qu'un enfant de sept ans avait été traduit devant un tribunal français.

¹ R. v. Groombridge, 7 C. & P. 582; R. v. Vanplew, 3 Fost. & F. 520; State v. Doherty, 2 Tenn. 80; State v. Guild, 5 Halst. 163; Willet v. Com. 13 Bush, 230; Godfrey v. State, 31 Ala. 323.

² Ibid.; Hale's Sum. 43; 1 Hawk. c. 1. s. 8; 4 Bla. Com. 24; R. v. Wild, 1 Mood. C. C. 452; R. v. Smith, L. & C. 607; R. v. Owen, 4 C. & P. 236; R. v. Smith, 1 Cox C. C. 260; Com. v. Elliot, 4 Law Rep. 329; State v. Learnard, 41 Vt. 585; Com. v. Mead, 10 Allen, 398; Willet v. Com. 13 Bush, 230. See note in 1 Green's Cr. R. 402.

According to an enlightened German jurist and statesman, the age of criminal responsibility is postponed in proportion to the extent to which the

case in Delaware, a boy just arrived at that age was convicted of the consummated offence.¹

§ 70. An infant, under the limitations which have been above expressed, may be guilty of forcible entry, if concerned in actual personal violence,² and the justices may fine him therefor; though it is doubtful whether under the old English statutes he could be imprisoned for this offence.³ As to other misdemeanors attended with a notorious breach of the peace, such as riot, battery, or the like, an infant is liable under the above limitations,⁴ and he is indictable for perjury or cheating.⁵ But it is otherwise as to *quasi* civil suits. Thus, an infant under twenty-one is not responsible for not repairing a bridge or highway, or other such acts of omission of civil duty,⁶ though he may be convicted on a penal statute.⁷ An infant under seven cannot be indicted for a nuisance on his land.⁸

§ 71. As will hereafter be seen, an infant over fourteen, who falsely claims to be of age, and thus obtains money, is indictable for false pretences.⁹ But this can only be done when there is nothing in the infant's appearance to put parties dealing with him on inquiry as to the true facts.

Infant's liability in special cases.

Infant liable for false representations as to age.

¹ State v. Handy, 4 Harrington, 566. *Infra*, § 551.

² 1 Hawk. c. 24, s. 35.

³ 1 Hawk. c. 64, s. 35.

⁴ 1 Hale, 20, 21; 4 Bla. Com. 22;

Bullock v. Babcock, 3 Wend. 391.

⁵ 3 Bac. Abr. Infancy (H.). *Infra*, §§ 1148-9.

⁶ R. v. Sutton, 5 N. & M. 353; Bla. Com. 22; Co. Lit. 257.

⁷ See 4 Bla. Com. 308; 2 B. & P. 58, 59; 2 T. R. 545.

⁸ People v. Townsend, 3 Hill N. Y. 479.

⁹ *Infra*, § 1149.

"The presumption of law in favor of infants under fourteen, and the necessity of satisfying the jury that the child, when committing the act, must have known that he was doing wrong, is well illustrated by the case of R. v. Owen, 4 Carrington & Payne, 236

(1830), where a girl ten years of age was indicted for stealing coals. It was proved that she was standing by a large heap of coals belonging to the prosecutor, and that she had a basket upon her head containing a few coals which the girl herself said she had taken from the heap. Littledale, J., in summing up to the jury, remarked: 'In this case there are two questions: First, did the prisoner take the coals? and second, if she did, had she at the time a guilty knowledge that she was doing wrong? The prisoner is only ten years of age, and unless you are satisfied by the evidence that, in committing this offence, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is, that he or she has not sufficient capacity to know

§ 73. When age can be ascertained by inspection, the court and jury must decide.¹ But ordinarily opinion of medical experts is admissible to prove age.² And age is generally inferable from circumstances.

Age is inferable from circumstances.

§ 74. We have elsewhere seen³ that no conviction should be permitted to rest on a confession without proof of the *corpus delicti*, and that a confession is dependent for credibility on the character and circumstances of the declarant. To children these cautions are peculiarly applicable, as from their immaturity and inexperience they are likely to indulge in loose talk. But a child's confessions, if not elicited by threats or promises, are technically admissible against him.⁴

Confessions of infants admissible.

III. FEME COVERTS.

§ 75. There is no technical objection to an indictment naming the wife singly. It is not necessary that the husband should be included as a joint defendant, even though he was living with her at the time,⁵ or was jointly participant with her in the offence.⁶ But it is right and proper, in the latter case, that there should be a joinder, and though a nonjoinder is no defence, and is not demurrable, the court may on motion compel it.⁷ The husband may be singly indicted for his wife's act done under his command.⁸ The indictment need not negative coercion.⁹

Indictment not bad on its face when against wife alone.

§ 76. Indictments against wife jointly with husband are undoubtedly good on their face, and will be sustained on demurrer, on arrest of judgment, or in error.¹⁰ And this

And so as to indictments

from evil; that this might be proved by extrinsic testimony, or it might arise from the circumstances of the case."⁵ Bost. L. Rep. N. S. 364.

¹ State v. Arnold, 13 Iredell, 184; People v. Townsend, 3 Hill (N.Y.), 479. See supra, § 70; Wh. Cr. Ev. § 310.

² State v. Smith, Phill. (N. C.) L. 302. ³ Whart. on Crim. Ev. § 532.

⁴ R. v. Wild, 1 Mood. C. C. 452; R. v. Upchurch, *Ibid.* 465; Mather v. Clark, 2 Aikens, 209; State v. Guild, 5 Halsted, 163; State v. Bostick, 4 Harring, 563.

⁵ R. v. Fenner, 1 Siderfin R. 410; 2 Keble, 468; R. v. Jordan, 2 Keb. 634; R. v. Foxby, 6 Mod. 178; R. v. Serjeant, 1 Ry. & Mood. 352; Com. v. Lewis, 1 Met. 151; State v. Collins, 1 McCord, 355.

⁶ Somerset's case, 2 St. Trials, 966 (1616); R. v. Crofts, 2 Strange, 1120.

⁷ Rather v. State, 1 Porter, 132. ⁸ See Com. v. Barry, 115 Mass. 146; Mulvey v. State, 43 Ala. 316.

⁹ State v. Nelson, 29 Maine, 329. ¹⁰ R. v. Hammond, 1 Leach, 499; R. v. Mathews, 1 Eng. L. & E. R.

against husband and wife jointly.

rule has been specifically applied to indictments for assault and battery;¹ for keeping a bawdy house;² for keeping a gaming house;³ for keeping a tippling house;⁴ for forcible entry and detainer;⁵ for stealing and receiving;⁶ for murder;⁷ and for treason.⁸

After a conviction of husband and wife jointly, the court may affirm the judgment as to the husband, and reverse as to the wife.⁹ But where the offence is joint, the wife cannot be convicted without the husband.¹⁰

§ 77. If a *feme covert* be indicted as a *feme sole*, her proper course is to plead the misnomer in abatement, for if she pleads over, she cannot take advantage of it.¹¹ She must aver her marriage in her plea, and prove it affirmatively.¹² The practice on such a plea is elsewhere discussed.¹³

Wife's misnomer must be pleaded in abatement.

§ 78. By the English common law, if a crime of minor grade be committed by a wife in company with or in the presence of her husband, it is a rebuttable presumption of law that she acted under his immediate coercion.¹⁴ It is, however, conceded, that if she commit a crime of her own voluntary act, or by the bare command of her husband in his absence, or, as it is held by the old

Wife presumed to be acting under her husband's coercion when co-operating in crime.

549; 1 Den. C. C. 596; R. v. Dixon, 10 Mod. 335; R. v. Cruse, 8 C. & P. 541; State v. Nelson, 29 Me. 329; Com. v. Trimmer, 1 Mass. 476; Com. v. Tryon, 99 Mass. 442; State v. Bentz, 11 Mo. 27; State v. Parkerson, 1 Strobb. 169.

¹ R. v. Cruse, 8 C. & P. 541; State v. Parkerson, 1 Strobb. 169.

² R. v. Williams, 10 Mod. 63; 1 Hawk. c. 1, s. 12; State v. Bentz, 11 Missouri, 27.

³ R. v. Dixon, 10 Mod. 335.

⁴ Com. v. Murphy, 2 Gray, 510. *Infra*, § 1509.

⁵ State v. Harvey, 3 N. H. 65.

⁶ R. v. M'Athey, 9 Cox C. C. 251.

⁷ R. v. Cruse, 8 C. & P. 541; Com. v. Chapman, Phil. Pamph. 1831.

⁸ Somerville's case, 1 Anderson R. 104.

⁹ R. v. Mathews, 1 Eng. L. & E. 549; 1 Den. C. C. 596.

¹⁰ Rather v. State, 1 Porter, 132.

¹¹ R. v. Jones, J. Kel. 37; Whart. Crim. Plead. & Prac. §§ 96, 423 *et seq.*

¹² R. v. Atkinson, 1 Russ. on Cr. 35; R. v. Hassall, 2 C. & P. 434; R. v. Woodward, 8 C. & P. 561; R. v. McGinnes, 11 Cox C. C. 391; R. v. Torpey, 12 Cox C. C. 45.

¹³ Whart. Crim. Plead. & Prac. § 423; Com. v. Neal, 10 Mass. 152; Com. v. Eagan, 103 Mass. 71.

¹⁴ *Infra*, § 210; 1 Hawk. c. 1; R. v. Smith, 8 Cox C. C. 27; Davis v. State, 15 Ohio, 72; Miller v. State, 25 Wis. 384. The Roman law thus speaks: L. 13. § 7. D. ad L. Iul. de adulter. (48. 5.) Si quis plane uxorem suam, quum apud hostes esset, adulterium commisisse arguat, benignius dicitur,

writers, if she be guilty of treason, murder, or robbery, or any other crime, *malum in se*, and prohibited by the law of nature, or which is heinous in its character or dangerous in its consequences, even in company with or by coercion of her husband, then she is punishable as much as if she were sole.¹ It may be questioned, however, whether the coercion and presence of the husband, if a defence at all, are not a good defence in all cases, and whether the exception taken as to the higher grades of felonies can be maintained.² The difficulty, however, is in finding, in the present state of society, when the husband is as likely to support the wife if she is engaged in doing wrong, as the wife is to support the husband, any reason on which the presumption is to rest.³

§ 79. In any view, presence of the husband at the time of the commission of the crime is necessary to enable this presumption to apply, but such presence by itself starts the presumption.⁴ It is sufficient if the presence is near

Presump-
tion is re-
buttable.

posse eum accusare iure viri; sed ita demum adulterium maritus vindicabit, si vim hostium passa non esset: ceterum quae vim patitur, non est in ea causa, ut adulterii vel stupri damnetur. cap. 41. De reg. iur. in vi. (5. 13.) Imputari non debet ei, per quem non stat, si non faciat, quod per eum fuerat faciendum.

¹ 1 Hale P. C. 45; Hawk. bk. i. c. 1; 1 Black. Com. 444; R. v. Knight, 1 C. & P. 116; Com. v. Neal, 10 Mass. 154.

² 1 Russ. on Cr., by Greaves, 18, 25, note; 1 Bishop's Criminal Law, 277; R. v. Manning, 2 C. & K. 887; R. v. Smith, 8 Cox C. C. 27; R. v. Wardroper, 8 Cox C. C. 284.

³ Sir J. Stephen, Dig. C. L. (note to article 30), writes: "Surely, as matters now stand, and have stood for a great length of time, married women ought, as regards the commission of crimes, to be on exactly the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured

by a rule which is tolerable only because it is practically evaded on almost every occasion where it ought to be applied."

⁴ 1 Hawk. c. 1, s. 9; 1 Hale, 47; Dalt. c. 157; 4 Bl. Com. 29; R. v. Cruse, 8 C. & P. 541; 2 Moody C. C. 53, S. C.; R. v. Dixon, 10 Mod. 335; R. v. Fenner, 1 Sid. R. 410; R. v. Jordan, 2 Keble, 634; R. v. Crofts, 2 Strange, 1120; R. v. Taylor, 3 Burr. 1679; R. v. Serjeant, 1 R. & M. 352; R. v. Price, 8 C. & P. 19; R. v. Brady, 3 Cox C. C. 425; R. v. Hill, 1 Den. C. C. 453; R. v. Cohen, 11 Cox C. C. 99; R. v. Hughes, 2 Lewin, 229; State v. Nelson, 29 Me. 329; State v. Harvey, 3 N. H. 65; State v. Potter, 42 Vt. 495; Com. v. Martin, 1 Mass. 348; Com. v. Trimmer, 1 Mass. 476; Com. v. Neal, 10 Mass. 152; Com. v. Lewis, 1 Met. 151; Com. v. Butler, 1 Allen, 4; Eagan v. Com. 103 Mass. 71; Uhl's case, 6 Gratt. 706; Davis v. State, 15 Ohio, 72; Jones v. State, 5 Blackf. 141; State v. Williams, 65 N. C. 399; State v. Collins, 1 McCord,

So, if a woman receive stolen goods into her house, knowing them to be such, or lock them up in her chest or chamber, her husband not knowing thereof; if her husband, so soon as he knows the fact, forsake his house and her company, and make his abode elsewhere, he is not to be charged for her offence; though the law otherwise will impute the fault to him, and not to her.¹

Durham Spring Ass. 1829; Matthew's Digest, 26; Conolly's case, 2 Lewin, 229.

¹ Dalt. c. 157.

Sir J. Stephen (Dig. Crim. Law, art. 30) summarizes the law as follows:—

"If a married woman commits a theft, or receives stolen goods, knowing them to be stolen, in the presence of her husband, she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case show that, in point of fact, she was not coerced.

"It is uncertain how far this principle applies to felonies in general.

"It does not apply to high treason or murder.

"It probably does not apply to robbery.

"It applies to uttering counterfeit coin.

"It seems to apply to misdemeanors generally."

In a note it is said: "As to high treason, murder, and robbery, see 1 Hale P. C. 45; Dalton, c. 157; 1 Hawk. P. C. 4; R. v. Buncombe, 1 Cox C. C. 183; but as to robbery, see Mr. Carrington's argument in R. v. Cruse, 8 C. & P. 556. In R. v. Torpey, the present recorder of London held that the doctrine applied to robbery. 12 Cox C. C. 45. As to misdemeanors in general, see note to R. v. Price, 8 C. & P. 20; and 1 Russ. Cr. p. 145,

note (b), 5th ed. See, too, R. v. Torpey, 12 Cox C. C. 45. As to uttering, see R. v. Price, 8 C. & P. 19. As to false swearing, R. v. Dicks, 1 Russ. Cr. 34, 4th ed.

In *Sellers v. People*, 19 Alb. L. J. 499, N. Y. Ct. App. May 27, 1879, the following points are given:—

"A wife will not be held responsible for a larceny committed by her by coercion of her husband, or in his company, which presumes coercion. But the coercion of his company is only presumed; and if it appears that she was urged to the offence by him, but was an inciter of it, she is as responsible as he. If she steals of her own will, or by the bare command or procurement of her husband, she is not excused. *Reg. v. Buncombe*, 1 Cox C. C. 183; *Rex v. Hughes*, 1 Russ. on Cr. *22 (41). As the man Brown, claimed to be the husband, was two hundred feet or more away from the prisoner at the time of the larceny, it was not error for the trial court to call the attention of the jury to the fact, and to charge that it was for them to say whether it did not rebut the presumption of coercion, and whether she was in his presence. A refusal to charge that the facts were proved from which coercion was to be presumed was proper, for the presence of Brown at the act was not proved."

Where a husband and wife were convicted jointly of receiving stolen goods, it was holden that the conviction of the wife could not be supported,

the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct.¹

§ 81. A wife living apart from her husband may be indicted alone, and punished for keeping a disorderly house, or house of ill-fame;² nor is it any defence that the husband was business manager of the house.³ So she may be indicted together with her husband, and punished with him, for the same offence; for the malfeasance relates to the government of the house, in which the wife has a principal share, and constitutes an offence which may generally be presumed to be managed by the intrigues of her sex.⁴ She may be indicted for keeping a gaming house,⁵ and when, in the absence of her husband, though in the house where they live and trade together, she sells intoxicating liquors under such circumstances as would, but for her coverture, prove her to be a common seller, she may be indicted as such, unless it appears that she acted by his command or under his coercion or influence.⁶

It has been already incidentally noticed that the "married women's" acts, conferring particular business privileges on mar-

¹ Charles Squire, and Hannah his wife, were indicted for the murder of a boy, who was bound as a parish apprentice to the prisoner Charles; and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed that, in his judgment, the boy died from debility and want of proper food and nourishment, and not from the wounds which he had received. Upon this Lawrence, J., directed the jury that, as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though if the husband had allowed sufficient food for

the apprentice, and she had wilfully withheld it from him, then she would have been guilty; but that here the fact was otherwise; and therefore, though *in foro conscientiae* the wife was equally guilty with her husband, yet, in point of law, she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment. *R. v. Squire & Wife*, Stafford Lent Assizes, 1799; Burn's Justice, 29th ed. tit. Wife.

² *R. v. Dixon*, 10 Mod. 335; *Com. v. Lewis*, 1 Met. 151; *State v. Collins*, 1 McC. 355; *State v. Bentz*, 11 Mo. 27. *Infra*, §§ 1455, 1509.

³ *Com. v. Cheney*, 114 Mass. 281.

⁴ 1 Hawk. c. 1, s. 12; *State v. Bentz*, 11 Mo. 27.

⁵ *R. v. Dixon*, 10 Mod. 335.

⁶ *Commonwealth v. Murphy*, 2 Gray (Mass.), 510. *Supra*, § 79.

IV. IGNORANT PERSONS.

§ 84. If ignorance of a law were a defence to a prosecution for breaking such law, there is no law of which a villain would not be scrupulously ignorant. The more brutal, in this view, a man becomes, the more irresponsible would he be in the eye of the law, and the worst classes of society would be the most privileged. No penal law could be enforced, because there is no penal law a knowledge of which, by a due degree of self-stupefaction, could not be precluded. As, however, it is a postulate of penal laws that they should be obeyed, it is a condition of those laws that ignorance of them should be no defence to an indictment for their violation.¹

Ignorance of law no defence to an indictment for a violation of law.

¹ See Whart. on Negligence, § 411, where this question is fully discussed; Wharton on Criminal Evidence, § 717, as to presumption of knowledge of law. For rulings to this effect in criminal cases see *R. v. Price*, 3 Per. & D. 421; 11 Ad. & E. 727; *R. v. Esop*, 7 C. & P. 456; *R. v. Good*, 1 Car. & K. 185; *R. v. Hoatson*, 2 C. & K. 777; *The Ann*, 1 Gallis. 62; *U. S. v. Anthony*, 11 Blatch. 200; *U. S. v. Learned*, 11 Int. Rev. 149; *State v. Goodenow*, 65 Me. 30; *Com. v. Bagley*, 7 Pick. 279; *Com. v. Elwell*, 2 Met. 190; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Emmons*, 98 Mass. 6; *People v. Powell*, 63 N. Y. 88; *Cutler v. State*, 36 N. J. L. 125; *Winehart v. State*, 6 Ind. 30; *State v. Boyett*, 10 Ired. 336; *Schuster v. State*, 48 Ala. 199; *Hoover v. State*, 59 Ala. 57; *Walker v. State*, 2 Swan, 287; *Whitton v. State*, 37 Miss. 379. See *Brent v. State*, 43 Ala. 297, to the effect that the presumption of knowledge of law does not extend to future contingent interpretations of statutes. That ignorance of law is no defence to an indictment for misconduct in office, or usurpation of office, see *infra*, § 1582. *Wayman v. Com.* 14 Bush, 467. As to conscientiousness as a defence, see *infra*, §§ 336, 1715; that a foreigner cannot set up this defence, see *R. v. Barronet*, Dears. 51; *R. v. Esop*, 7 C. & P. 456; *Cambiosio v. Maffett*, 2 Wash. C. C. 98.

Belief in the unconstitutionality of a law; belief in its violation of higher law; belief in its conflict with conscientious duty, will be no defence to an indictment for disobedience to such law. *U. S. v. Reynolds*, 98 U. S. 145. And even a conscientious belief that an act is right (*e. g.* labor by a Jew on Sunday in contravention of the Sunday laws) will not prevent such act from being indictable when made so by the State. *Com. v. Has*, 122 Mass. 40; *Specht v. Com.* 8 Penn. St. 312.

In this respect the Roman common law is tenderer than the English. When an offence is such *jure gentium*, then all persons are expected to have notice that it is prohibited, and are liable to punishment for its commission. But it is otherwise, by the Roman law, when a government makes an act, in itself innocent, penal. In this case *ignorantia et error juris* is a defence, unless there be notice either express or implied. See Savigny,

§ 85. A distinction, however, is to be noticed in respect to cases in which the *gravamen* is negligent ignorance of law. A public officer, or a lawyer, for instance, is charged with such negligent ignorance, producing injury to another. In such case he is bound to show that he had the knowledge of the law usual with good specialists of his class. On the other hand, if I throw business into the hands of an agent not professing to be a specialist in the law, he is not liable to me for negli-

But on indictments for negligence in application of law, non-specialist not chargeable with ignorance of speciality.

a principle in her own person. She takes the risk, and she ought not to shrink from the consequences. It is said — and some authorities are cited to sustain the position — that there can be no crime unless there is a culpable intent; to render one criminally responsible, a vicious will must be present. A. commits a trespass on the land of B., and B., thinking and believing that he has a right to shoot an intruder upon his premises, kills A. on the spot. Does B.'s misapprehension of his rights justify his act? Would a judge be justified in charging the jury that if satisfied that B. supposed he had a right to shoot A., that he was justified, and they should find a verdict of not guilty? No judge would make such a charge. To constitute a crime it is true that there must be a criminal intent, but it is equally true that knowledge of the facts of the case is always held to supply this intent. An intentional killing bears with it evidence of malice in law, and a desire to promote the welfare of the deceased by his transition to a better world would be no justification of the act were it committed by a sane man. Whoever, without justifiable cause, intentionally kills his neighbor, is guilty of a crime. The principle is the same in the case before us, and in all criminal cases. The precise question has been several times decided, viz.: that one illegally voting was bound and was assumed to know the law. (To this is cited *Hamilton v. People*, 57 Barbour, 625; *State v. Boyett*, 10 Ired. 336; *State v. Hart*, 6 Jones N. C. 389; *McGuire v. State*, 7 Humph. 54. And see *Com. v. Bradford*, 9 Met. 268.) No system of criminal jurisprudence can be sustained upon any other principle. Assuming that Miss Anthony believed she had a right to vote, that fact constitutes no defence if in truth she had not the right. She voluntarily gave a vote which was illegal, and thus is subject to the penalty of the law." The defendant was convicted, and shortly afterwards the inspectors of election, who registered the name and received the votes of Miss Anthony and her co-defendants, were placed on trial. The proof on the part of the prosecution was similar to that in the case of Miss Anthony. The defence proved the good faith of the parties accused in receiving the votes, and rested. The defendants' counsel asked the court to charge the jury, that if the jury believed that the defendants acted honestly and according to their best judgment, and had only erred in judgment, they should be acquitted. This the court refused. Judge Hunt then announced his decision, overruling the defence, and stated that instead of ordering a verdict of guilty, as he did in the case of Miss Anthony, he would submit the case to the jury, with the instructions that there was no

§ 85 a. Cases, also, may occur in which evil intent is a condition precedent to conviction, but in which a mistake of law, if proved, would negative such evil intent. Here it is admissible to prove such mistake of law.¹ Thus in larceny it is admissible to prove that the defendant took the goods under a claim of right, however erroneous;² or that he committed an assault under a mistaken conviction of his legal rights;³ or that an alleged perjury was under advice of counsel.⁴ If, however, the ignorance is the result of negligence, then the defendant may be indicted for the negligence.

§ 86. Publication is the mode by which the will of the sovereign, as expressed through statute, is made known to the subject. The mere passage of a statute is not supposed to be a publication until a sufficient period of time has elapsed to enable the statute to be made known to the persons affected by it.⁵

Mistake of law admissible to negative evil intent.

Statutes not operative until published.

¹ See *R. v. Langford*, C. & M. 602; *Cutler v. State*, 36 N. J. L. 125; *Dye v. Com.* 7 Gr. 662; *Whart. Crim. Ev.* § 724. "The fact that an offender is ignorant of the law is in no case an excuse for his offence, but it may be relevant to the question whether an act which would be a crime if accompanied by a certain intention or other state of mind, and not otherwise, was in fact accompanied by that intention or state of mind or not." *Stephen's Dig. Cr. Law*, art. 33, citing *Baronet's case*, 1 E. & B. 1, where it was held that if A., a foreigner, unacquainted with the law of England, kills B. in a duel in England, A.'s act is murder, although he may have supposed it to be lawful. Sir J. Stephen adds the following illustration: A., a poacher, sets wires for game, which are taken by B., a game-keeper, under the authority of an act of parliament (5 Anne, c. 14, s. 4), of the existence of which A. is ignorant. A. forcibly takes the wires from B., and is tried for robbery. His ignorance of the act is relevant to the question whether he

took the wires under a claim of right. *R. v. Hall*, 3 C. & P. 409. In *R. v. Reed*, Car. & Mar. 308, *Coleridge, J.*, said: "Ignorance of the law cannot excuse any person, but, at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind, as if a person takes what he believes to be his own, it is impossible to say he is guilty of felony." On the other hand, in *U. S. v. Reynolds*, 98 U. S. 145, *Waite, C. J.*, said: "Ignorance of a fact may sometimes be taken as a want of criminal intent, but not ignorance of the law."

² *Infra*, §§ 884-9. So as to malicious trespass, *Lossen v. State*, 62 Ind. 437.

³ *Infra*, §§ 455 *et seq.*

⁴ *Infra*, § 1249.

⁵ *R. v. Bailey*, R. & R. 1, where a pardon was recommended on this ground; *Ship Cotton Planter*, 1 Paine, 23; *U. S. v. 14 Packages*, *Gilpin*, 235; though see *The Ann*, 1 *Gallis*. 62; *Heard v. Heard*, 8 Ga. 330.

or if, under an erroneous impression that the act is necessary in self-defence, he kill the supposed aggressor, the case is not murder, but is manslaughter or excusable homicide.¹ So a taking by mere accident, or in a joke, or mistaking another's property for one's own, is not larceny;² nor is a false oath taken under advice of counsel, in the belief that the statement was true, perjury;³ nor is it extortion for an officer to receive money honestly believed to be due.⁴ It has also been held that where an innocent merchant vessel so conducts herself as to produce the belief she is piratical, a vessel capturing her is not liable to forfeiture.⁵ A prosecution, also, cannot be sustained for resisting an officer if it appear that the defendant honestly supposed the prosecutor to be a private person.⁶ On the other hand, we must remember that if an unforeseen consequence ensue from an act which is in itself unlawful, and its original nature wrong or mischievous, the actor may be criminally responsible for such consequences, although against the party's wish.⁷ We may therefore conclude that when a particular intent is necessary to constitute the offence (*e. g.* in larceny *animus furandi*; in murder, malice), then ignorance or mistake is evidence to cancel the presumption of intent, and to work an acquittal either total or

committit; furtum enim sine affectu furandi non committitur. § 1. I. de vi bon. rapt. (4. 2.) L. 25. § 6. D. de hered. petit. (5. 3.) Scire ad se non pertinere utrum is tantummodo videtur, qui factum scit, an et is, qui in iure erravit? Putavit enim recte factum testamentum, quom inutile erat, vel quom eum alius praeceperet agnatus, sibi potius deferri. Et non puto hunc esse praedonem, qui dolo caret, quamvis in iure erret. L. 36. § 1. L. 37. pr. D. de usurpat. (41. 3.)

¹ 2 Hale, 507. Infra, §§ 467-95.
² See also Com. v. Freshy, 14 Gray, 65.
³ See infra, §§ 884-85, 902. This has been held where an ignorant person, finding goods, honestly believes that they are his. R. v. Reed, C. & M. 306; Merry v. Green, 7 Mees & W. 623. See R. v. Matthews, 14 Cox C. C. 5.

⁴ U. S. v. Connor, 3 McLean, 573.

⁵ State v. Cutter, 7 Vroom, 125. Infra, § 1576.

⁶ The Marianna Flora, 11 Wheat. 1. See also Clow v. Wright, Brayt. 118; though see U. S. v. Malek Adhel, 2 How. 210.

⁷ Infra, § 649; R. v. Ricketts, 3 Camp. 68; Yates v. People, 32 N. Y. 509; Logue v. Com. 38 Penn. St. 265. Contra, R. v. Forbes, 10 Cox C. C. 362. See Com. v. Kirby, 2 Cush. 577; Com. v. Cooley, 6 Gray, 350; People v. Muldoon, 2 Parker C. R. 43; State v. Belk, 64 N. C. 10; Johnson v. State, 26 Tex. 117.

⁸ Infra, § 120. U. S. v. Liddle, 2 Wash. C. C. 205; U. S. v. Ortega, 4 Wash. C. C. 531; U. S. v. Benner, Baldwin, 234; 4 Bl. Com. 27.

partial. In testing this ignorance we must take as the standard *the defendant's own mind*. The question is, how did the facts and law, on this matter of intent, appear to *him*; not, how do they appear to the jury or judge.¹ But the error must be non-negligent. If there be opportunity to dispel it, and this opportunity is not used, the delusion is no defence.²

§ 88. When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact is no defence.³ Thus to an indictment for bigamy it is no defence that the defendant, a woman, honestly believed (within the limit of seven years from the time he was last heard from) that her husband was dead.⁴ And

But when scienter is irrelevant, ignorance or mistake of fact is no defence.

¹ As authorities to the effect that error of fact may be proved to negative evil intent, see *Broom's Leg. Max.* 190; *R. v. Thurborn*, 1 Den. C. C. 387; *R. v. Forbes*, 7 C. & P. 224; *R. v. Allday*, 8 C. & P. 136; *R. v. James*, 8 C. & P. 131; *R. v. Tinkler*, 1 F. & F. 513; *R. v. Cohen*, 8 Cox C. C. 41; *R. v. Sleep*, 8 Cox C. C. 472; *R. v. Wagstaffe*, 10 Cox C. C. 530; *U. S. v. Pearce*, 2 McLean, 14; *Com. v. Rogers*, 7 Met. 500; *Com. v. Kirby*, 2 Cush. 579; *Com. v. Stout*, 7 B. Mon. 247; *Farbach v. State*, 24 Ind. 77; *Stern v. State*, 53 Ga. 229. That the test is the defendant's apprehension, not that of jury, or of third person, see *infra*, §§ 488-91.

² See *infra*, § 492.

³ *Whart. Crim. Ev.* § 75; 1 *Stark. C. P.* 196; *Sedg. Stat. Law*, 2d ed. p. 80; *R. v. Myddleton*, 6 T. R. 739; *R. v. Jukes*, 8 T. R. 536; *State v. Mel-*

ville, 11 R. I. 417; *State v. Stimson*, 4 *Zabr.* 478; *State v. Heck*, 23 *Minn.* 549; *Farmer v. People*, 77 *Ill.* 322. As maintaining a view opposite to that in the text, see article by Mr. Bishop, 4 *South. Law Rev.* N. S. 158; and see also 12 *Am. Law Rev.* 469.

Sir J. Stephens (*Dig. Cr. Law*, art. 34) states the law as follows: "An alleged offender is, in general, deemed to have acted under that state of facts which he, in good faith and on reasonable grounds, believed to exist when he did the act alleged to be an offence; provided that, when an offence is so defined by statute that the act of the offender is not a crime unless some independent fact coexists with it, the court must decide whether it was the intention of the legislature that the person doing the forbidden act should do it at his peril, or that his ignorance as to the existence of the independent fact, or his

⁴ *Com. v. Mash*, 7 *Met.* 472. See *Com. v. Elwell*, 2 *Ibid.* 190.

"It was urged in the argument," said *Shaw, C. J.*, in *Com. v. Mash*, "that where there is no criminal intent there can be no guilt; and if the former husband was honestly believed to be dead, there could be no criminal intent. The proposition stated is un-

doubtedly correct in a general sense; but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does he of course intends. If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it."

an indictment has been sustained in Massachusetts against a man for marrying a woman who believed herself to be a widow, although eleven years had elapsed since she had last seen or heard from her husband, whom she had left,¹ it being held

mistaken belief, in good faith and on reasonable grounds, that it did not exist, should excuse him; provided, also, that voluntary or negligent ignorance of any such fact is no excuse for any such offence."

Of the last point he gives the following illustration: "A. abducts B., a girl under fifteen years of age, from her father's house, believing, in good faith and on reasonable grounds, that B. is eighteen years of age. A. commits the offence of abduction, although if B. had been eighteen years of age she would not have been within the statute." *R. v. Prince, L. R. 2 C. C. R. 154; S. C., 13 Cox C. C. 138.*

In *R. v. Prince*, above cited, it was said by Blackburn, J.:—

"It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutory age."

In England, we have *nisi prius* rulings by single judges to the effect that honest belief that the husband was dead would be a defence to an indictment against the wife for bigamy. *R. v. Turner, 9 Cox C. C. 145; R. v. Horton, 11 Ibid. 670*; but these decisions were subsequently overruled; *R. v. Gibbons, 12 Cox C. C. 237*. Afterwards, in *R. v. Moore, 13 Cox C. C. 534*, Denman, J., consulting with Amphlett, L. J., held that "honest belief" might in some cases be a defence. But in a still later case, *R. v. Bennett, 14 Cox C. C. 45 (1877)*, where honest belief of death within

the seven years was set up, Bramwell, L. J., said to the jury: "I cannot, and never do, recognize as a defence such a ruling as my brother Martin laid down in *R. v. Turner*. I shall therefore follow *R. v. Gibbons*, nor will I grant a case, but will ask the jury to convict the prisoner on the evidence before them." The defendant was convicted and sentenced to two years' penal servitude.

Sir J. Stephen, commenting on *R. v. Gibbons, 12 Cox C. C. 237*, says: "It seems to me that if the belief was founded on positive evidence the case would be otherwise. Suppose, *e. g.*, a woman saw her husband fall overboard in the middle of the Atlantic, and saw a boat go out to search for him and return without him; suppose that she took out administration to his estate, heard nothing of him for five years, and then married again; would she be guilty of bigamy if by some strange chance he had escaped? Surely not. I am informed this view was taken by Denman, J., and Amphlett, J., in a case (*R. v. Moore*) tried at Lincoln Spring Assizes, 1877. I think the proviso in 24 & 25 Vict. c. 100. s. 57 (art. 257), ought clearly to be read, not as excluding the general common law principle stated in this article, but as supplementing and completing it, by providing that a second marriage, after seven years' ignorance as to the life of the first husband or wife, shall not be criminal, although the party so marrying has no positive reason to believe, and perhaps does not believe, that the absent person is dead."

¹ *Com. v. Thompson, 6 Allen, 591; Com. v. Thompson, 11 Ibid. 23.*

and the same rule applies to all cases of dealing illegally with minors.¹

It is also no defence to an indictment for selling to persons of intemperate habits that the defendant did not know that the vendee was of intemperate habits;² though it is otherwise when the statute makes the offence to be selling to persons of *known* intemperate habits, in which case knowledge is an ingredient of the prosecutor's case.³

Analogous cases have arisen under statutes making it indictable to abduct, seduce, or violate girls under a specific age. Here, also, it is no defence that the defendant mistook the girl's age.⁴ We have recently had a signal illustration of this application, where the rule was affirmed by the great majority of the English judges. The defendant was convicted under 24 & 25 Vict. of unlawfully taking an unmarried girl under sixteen years out of her father's possession and against his will. It was proved by the defendant that he *bonâ fide* believed, and had reasonable grounds for believing, that the girl at the time of the act was over sixteen. Cockburn, C. J., Kelly, C. B., Bramwell, Cleasby, and Amplett, BB.; Blackburn, Mellon, Lush, Grove, Quain, Denman, Archibald, Field, and Lindley, JJ., held that the defence was of no avail, and that the conviction was right. The sole dissident was Brett, J.⁵ A similar ruling is to be found in the Iowa reports. It has been held in that State that knowledge that a child is under ten years is not necessary to convict a defendant of the statutory offence of assaulting a child under ten years.⁶

400; *State v. Hause*, 71 N. C. 518.

Aliter under Georgia and Indiana statutes. *Stern v. State*, 53 Ga. 229; *Brown v. State*, 24 Ind. 113; *Farbach v. State*, 24 *Ibid.* 77; *Goetz v. State*, 1 *Ibid.* 162.

¹ *State v. Cain*, 9 W. Va. 559.

² *State v. Heck*, 23 Minn. 594;

Farmer v. People, 77 Ill. 322. *Contra*, *Crabtree v. State*, 30 Ohio St. 382.

³ *Smith v. State*, 55 Ala. 1. See *Crabtree v. State*, 30 Ohio St. 382.

⁴ *R. v. Booth*, 12 Cox C. C. 231;

R. v. Olfifer, 10 *Ibid.* 402; *R. v. Robinson*, 1 C. & K. 456; *State v. Ruhl*, 8

Ohio, 447; *Lawrence v. Com.* 40 Grat. 845.

Hence knowledge that a child was under ten years is not necessary to convict a defendant of the statutory offence of assaulting a child under ten years. "The crime does not depend upon the knowledge of defendant of the fact that the child was under ten years of age, but upon the fact itself. So the statute provides." *Beck, J., State v. Newton*, 44 Iowa, 45, citing *Jamison v. Burton*, 43 Iowa, 282.

⁵ *R. v. Prince*, L. R. 2 Cr. Cas. Res. 154; S. C., 13 Cox C. C. 138.

⁶ *State v. Newton*, 44 Iowa, 45.

type. James G. Birney, conspicuous in the old anti-slavery agitation, was indicted, in 1837, for harboring a fugitive slave.¹ The statute under which the prosecution was instituted did not make either the *scienter* or the intent essential to the offence, though it might well be argued that as this was a statute in derogation of liberty, and as in a free State no one has a right to view another man as other than a free man, the case was exceptional, and notice of the enslaved status of the fugitive must be brought home to the defendant in order to charge him with the statutory offence. Under the pressure of this argument the Supreme Court held, that, to make out the case of the prosecution, it was essential to prove that the defendant knew that the party harbored by him was a fugitive slave. In a subsequent case this ruling was held to establish the general principle that there can be no conviction of a criminal offence without proof of guilty knowledge, and hence of guilty intent.² The same view has been taken in Indiana,³ and in Georgia.⁴

That to constitute an offence at common law it must be shown that the defendant acted either negligently, or with evil intent, may be considered as settled. The question before us, however, is, whether the legislature may constitutionally make an act indictable irrespective of guilty knowledge. It will scarcely be doubted that this is the case with police offences.⁵ It may be indispensable to public safety that storing of gunpowder or of highly inflammable oils in exposed localities should be prohibited; and as in such cases the statutes could be easily eluded if a *scienter* be requisite to conviction, the policy that requires the enactment of the statute requires also that the statute should relieve the prosecution from proving a *scienter*. Sometimes this is done by an express clause in the statute, as where a woman concealing the death of a bastard child was, by the old statutes, "deemed" to have been concerned in killing it, and where it is provided that persons selling spirituous liquors shall be "deemed" common sellers of the same, or that delivery of such liquors shall be proof of sale,⁶ or that persons carrying concealed weapons shall be pre-

¹ Birney v. State, 8 O'io, 231.

² Crabtree v. State, 30 Ohio St. 382;

Farrell v. State, 32 Ohio St. 456.

³ Brown v. State, 24 Ind. 113; Far-

bach v. State, 24 Ibid. 77; Goetz v. State, 41 Ibid. 162.

⁴ Stern v. State, 53 Ga. 229.

⁵ Supra, § 23 a.

⁶ Infra, § 1528.

thing. That in the former case it is conceded that such ignorance is no defence shows that honest belief that an illegal act is legal is no necessary ground for acquittal. We cannot, therefore, lay down the rule that ignorance of inculpatory facts shall be always a defence, without extending the same immunity to ignorance of inculpatory law. And if we cannot so extend this immunity, then we must hold that ignorance does not necessarily acquit when *scienter* is not an essential of the offence.

§ 89. Even where, as affecting intent, ignorance of fact is set up, the defence is unavailable where the defendant, by the exercise of due diligence, could have become aware of his mistake.¹ Of course, if the defendant was ignorant of facts from a knowledge of which only could malice be inferred, he cannot be convicted of a malicious crime. But in such case he may be convicted of negligence when his ignorance was culpable, and was productive of harm. A man who negligently mistakes a visitor for a burglar, and kills the visitor, cannot, indeed, be convicted of murder, but he can be convicted of manslaughter. And, as a general rule, if the defendant is chargeable with negligence in not acquainting himself with the true facts of the case, his ignorance is no defence.² It is no defence, for instance, to a physi-

And so where the fact is one of which the defendant ought to have been cognizant.

¹ *Infra*, § 492.

² See Whart. on Negligence, § 415; *Hudson v. MacRae*, 4 B. & S. 585; *Com. v. Viall*, 2 Allen, 512; *People v. Reed*, 47 Barb. 235.

In *Bonker v. People*, 37 Mich. 4, it was held that under a statute forbidding any person to join others in marriage, knowing he is not authorized to do so, or knowing of any legal impediment to the proposed marriage, actual personal knowledge is not required; but it was held that if a party so officiating neglects to take the testimony which he is required to take, and relies upon less satisfactory oral statements, such neglect will be imputed to illegal intent. "No doubt," said Cooley, C. J., "where guilty knowledge is an ingredient in the offence, the knowledge must be found;

but actual, positive knowledge is not usually required. In many cases to require this would be to nullify the penal laws. The case of knowingly passing counterfeit money is an illustration; very often the guilty party has no actual knowledge of the spurious character of the paper, but he is put upon his guard by circumstances which, with felonious intent, he disregards. Another illustration is the case of receiving stolen goods knowing them to be stolen; the guilt is made out by circumstances which fall short of bringing home to the defendant actual knowledge. He buys, perhaps, of a notorious thief, under circumstances of secrecy and at a nominal price; and the jury rightfully hold that these circumstances apprise him that a felony must have been

§ 90. In prosecutions for negligent exercise of a specialty, a person is not required to know facts outside of his profession. A person, for instance, not claiming to be skilled in medicine, and giving notice of his ignorance, cannot, if called upon to act as a medical attendant, be made responsible for his ignorance of the specialty, unless it appear that he displaced, by his rash acceptance of the post, a more competent person from undertaking its duties.¹ And generally, we may hold that where a person is employed, not as a specialist, but as a non-specialist, undertaking a business of which he professes to know nothing, he then can only be held liable for gross negligence, or *culpa lata*, consisting of ignorance of facts which every ordinary person ought to know.²

In prosecutions for negligence party is not required to know facts out of his specialty.

V. CORPORATIONS.

§ 91. In the ancient case of *The Abbot of St. Bennet's v. The Mayor, &c., of Norwich*,³ Pigot said *arguendo* that a "corpora-

ists when the means used by the actor glance from the intended object, and injure an unintended person. As to the first case, we may generally remark that when the object actually injured has the same legal consequence as the object intended; then, at common law, the fact that there was a mistake as to the victim is no defence. See *infra*, §§ 109, 120.

As to the *aberratio delicti* more intricate questions arise which will also be hereafter considered. As a general rule we may here say that an injury designed for B., which is accidentally diverted from B. and falls on C., cannot logically be regarded as malicious so far as concerns C. Under such circumstances, A. may be indictable for a malicious attempt to injure B., and for a negligent injury of C. *Infra*, §§ 110, 111, 120, 317, 318.

collectively commit no crime, and could not therefore be subjected to penal discipline. *Nov. Maior. vii. § 11.* *Nunquam curiae a provinciarum rectoribus generali condemnatione muldentur, quum utique hoc et aequitas suadeat et regula iuris antiqui, ut noxa tantum caput sequatur, ne propter unius fortasse delictum alii dispendiis affligantur. cap. 5. de sentent. excomm. in vi. (5. 11.)* In universitatem vel collegium proferre excommunicationis sententiam penitus prohibemus, volentes animarum periculum vitare, quod exinde sequi posset, quum nunquam contingeret, innoxios huiusmodi sententia irretiri: sed in illos duntaxat de collegio vel universitate, quos culpabiles esse constiterit, promulgetur.

See the following, — *Livius viii. 37. M. Flavius tribunus plebis tulit ad populum, ut in Tusculanos animadverteretur, quorum eorum ope ac consilio Veliterni Privernatesque populo Romano bellum fecissent.*

Political disabilities, however, were

¹ Whart. on Neg. §§ 730-7.

² Whart. on Neg. §§ 26-45-48.

³ Y. B. 21 Ed. 4, 7, 13. By the Roman common law, corporations could

ever, received considerable qualification in modern times, and is now limited to cases of felonies, assaults, riots,¹ and malicious wrongs.² We may therefore hold that a corporation may be indicted for a breach of duty imposed on it by law, though not for a felony or for public wrongs involving personal violence, as riots or assaults.³ Thus an indictment will lie at common law against a corporation for not repairing a road, a bridge, or a wharf, where by statute or prescription it is bound so to do; ⁴ or for disobedience to an order of justices for the construction of works in pursuance of a statute.⁵ And this, though a specific remedy be given for the breach of duty, by the act of incorporation, if there be no negative words.⁶ In some jurisdictions in this country, it is true,⁷ it has been held that a corporation cannot be indicted for a nuisance in obstructing highways or rivers by its agents.⁸ But in England,⁹ after a full consideration of the authorities, a contrary principle was established. It was ruled there that an indictment lay at common law against an incorporated railway company for cutting through and obstructing a highway, in a manner not conformable to the powers conferred on it by act of parliament. The case was put on general grounds; and the distinctions which had been attempted between nonfeasance and misfeasance over-

Corporations indictable for breach of duty.

bers, see further, *Kane v. The People*, 3 Wend. 363; *State v. Godfrey*, 12 Maine, 361; *Edge v. Com.* 7 Barr, 275; *R. v. R. R. Co.* 9 Q. B. 315. As to form of indictment, see Whart. Crim. Plead. & Prac. § 100.

¹ *Kyd on Corporations*, 225-6; *R. v. Birmingham R. R.* 3 Q. B. 223; 9 C. & P. 469.

² *R. v. Willcox*, 1 Sim. N. S. 301; *Com. v. Proprietors*, 2 Gray, 389.

³ *Per Patteson, J.*, 3 Q. B. 232; *State v. Great Works Co.* 20 Maine, 41; *Com. v. Worcester Turnpike Co.* 3 Pick. 327; *People v. Corporation of Albany*, 11 Wend. 539; *People v. Long Island R. R.* 4 Parker C. R. 602;

Louisville R. R. v. State, 3 Head, 523; *State v. Murfreesboro'*, 11 Humph. 217; *Barnett v. State*, 54 Ala. 579.

⁴ *Ibid.*; *Lyme Regis v. Henley*, 3

B. & Adol. 77; *Rex v. Birm. R. R. Co.* 3 Q. B. 223; 3 Railw. Cas. 148; *S. C.*, 9 C. & P. 469; *Rex v. Severn R. R. Co.* 2 B. & Ald. 646; *Rex v. Commissioners*, 2 M. & S. 80; *Simpson v. State*, 10 Yerg. 525; *State v. N. J. Turnpike Co.* 1 Harr. N. J. 222; *State v. Patton*, 4 Ired. (N. C.) 16. See *Anon. Loft*, 556.

⁵ *Rex v. Birm. R. R. Co. ut supra.*

⁶ *Susquehanna Road v. The People*, 15 Wend. 267; but see *Com. v. Turnpike Co.* 2 Virg. Cas. 362.

⁷ *State v. Great Works Co.* 20 Maine, 41. See *Com. v. Turnpike Co. ut supra*; *State v. R. R.* 23 Ind. 362.

⁸ See, to same point, 6 Vin. Abr. 309, Corp. Z. pl. 2.

⁹ *R. v. Great North of Eng. Railway*, 9 Q. B. 315.

§ 92. The proper mode of proceeding against a corporation as such, to compel an appearance to an indictment, is by distress infinite.¹ A fine is the usual penalty inflicted,² though according to Lord Holt, in an indictment against the inhabitants of a county for not repairing, an attachment may go against all to "catch as many as one can of them."³ In such case, however, the indictment is against the inhabitants individually.

Penalty is fine and distress.

§ 93. *Quasi* corporations, as counties, townships, parishes, have long been held subject to indictment for a neglect of the duties imposed on them by law; as for not maintaining a road or bridge,⁴ or for not opening them when laid out.⁵ In two old cases, acts of misfeasance, as digging in the highway in one, and levying a nuisance in the other, were charged in the indictment, but both went off on other points.⁶

Quasi corporations indictable for breach of duty.

VI. PERSONS UNDER COMPULSION.

§ 94. "An act," says Sir J. Stephen, "which, if done will-ingly, would make a person a principal in the second degree, or an aider and abettor in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because, during the whole of the time in which it is being done, the person who does it is

Persons under compulsion irresponsible.

used as a process against a corporation, guilty of negligence through its agents." See *Com. v. Boston & Low. R. R.* 126 Mass. 61; *People v. Cent. R. R.* 74 N. Y. 302.

¹ *R. v. Birming. R. R. Co.* 3 Q. B. 223, per Patteson, J.; S. C., 9 C. & P. 469, per Parke, B. See 6 *Viner Abr.* 310, and *Angell & Ames Corp.* § 526, 2d ed.

² *R. v. Birming. R. R. Co. ut supra.*
³ *R. v. Wilts, Cas. Temp. Holt,* 339. But see *Morgan v. Corporation of Carmarthen*, 3 Keble, 350.

⁴ *Infra*, §§ 1473, 1584 a; *R. v. Wilts*, 6 Mod. 307; *R. v. Dixon*, 12 Mod. 198; *R. v. Strington*, 2 Wms. Saunders, 167, notes; *R. v. Clifton*, 5 T. R. 498; *R. v. Sheffield*, 2 T. R. vol. 1.

106; *R. v. Ibid.* 573; *R. v. Mayor, &c.* 3 East, 86; *R. v. Lancashire, B. & Ad.* 813; *R. v. Hendon*, 4 B. & Ad. 628; *R. v. Devonshire*, 2 N. & M. 212; *R. v. St. Giles*, 5 M. & S. 260; *State v. Whitingham*, 7 Vt. 391; *State v. Town of Fletcher*, 13 Vt. 124; *State v. Dover*, 10 N. H. 394; *Mower v. Leicester*, 9 Mass. 247; *Biddle v. Proprietors*, 1 Mass. 169. And see *Com. v. Wilmington*, 105 Mass. 599; *State v. Commis. Walk. (Miss.)* 366; and cases cited at large in *Whart. Neg.* §§ 250 *et seq.*, 959 *et seq.*

⁵ *State v. Kittery*, 5 Greenleaf, 254.
⁶ *R. v. Shelderton*, 2 Keb. 221; *R. v. Vill. of Hornsey*, 1 Roll. R. 406. See *Whart. Crim. Plead. & Prac.* § 100.

As will hereafter be seen,¹ the hostile act of a belligerent under his sovereign's orders, if not directed by private malice, is imputable to the sovereign.

The subject of marital compulsion has just been considered.² The compulsion of a master is no defence to a servant, when charged with crime, unless such compulsion deprived the servant of his free agency.³

VII. PERSONS UNDER NECESSITY: SELF-DEFENCE.

§ 95. Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.⁴ Homicide through necessity — i. e. when the life of one person can be saved only by the sacrifice

Necessity a defence when life or other high interests are imperilled.

837, 838. The language of Willes, J., in this case, seems to be a little too wide, unless it is taken in connection with the particular facts.

(3.) (SUBMITTED.) A., a civil magistrate, directs B., a military officer, to order his men to fire into a mob. B. gives the order. It is obeyed, and C., a common soldier, shoots D. dead. The question whether A., B., and C. respectively committed any offence depends on the question whether each of them respectively had reasonable grounds to believe, and did in fact believe, in good faith that what they did was necessary to suppress a dangerous riot. A.'s direction to B., and B.'s order to C., would not necessarily justify B. or C. in what they did, but would be facts relevant to the question whether they believed upon reasonable grounds as aforesaid. Whether C. would commit a military offence if he refused to obey B.'s order, because he rightly thought it unreasonable, is a question which would have to be decided by a court-martial. I should suppose that cases might be imagined in which even a court-martial would hold that a military inferior might and

ought to disobey orders on the ground of their illegality."

For malicious acts the subaltern is personally responsible. *Infra*, § 411.

¹ *Infra*, §§ 283, 310.

² *Supra*, § 78.

³ See *Com. v. Hadley*, 11 Met. 66; *Com. v. Drew*, 3 Cush. 279; *Com. v. Gillespie*, 7 S. & R. 469; *State v. Matthis*, 1 Hill (S. C.) 37; *State v. Bryant*, 14 Mo. 340. *Infra*, § 1504.

⁴ *Stephen's Crim. Dig.* art. 32. See *R. v. Stratton*, 21 St. Tr. 1045, cited by Sir J. Stephen.

Necessity has been frequently spoken of as Right against Right, though, according to the more recent opinion in Germany, it is more properly Privilege against Privilege, or Goods against Goods. (*Gut gegen Gut.*) When two privileges, equally protected by the law, collide, the question arises which is to yield. And the answer is, the lesser must yield to the greater. The greater is that which includes and conditions the other; the present and immediate is greater than the future and possible; if both are equal, self-sacrifice may require the possessor of the one to yield to the

§ 96. It has been sometimes said that necessity can never be advanced as a defence when the necessity is the result of the defendant's own culpable act.¹ This, however, as Berner² demonstrates, cannot be accepted as universally true. Thus a person who negligently causes a house to catch fire will not, by this negligence, be barred from setting up necessity as a defence, if, in rushing from a burning chamber, he should crush another in the throng; nor would a trespasser, who, upon stealing fish, should fall overboard, and in his struggle to save himself upset a boat, be barred from setting up necessity, if life should thereby be accidentally lost, because his act which put him in this situation was wrongful. But if the necessity be rashly rushed into, it may cease to be a defence.³

§ 97. The distinction between necessity and self-defence consists principally in the fact that while self-defence excuses the

motive which immediately prompts to theft; but it is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man into a condition in which no law will keep him from committing theft. We can hardly conceive a law more injurious to society than one which should provide that as soon as a man who had neglected his work, or who had squandered his wages in stimulating drugs, or gambled them away, had been thirty-six hours without food, and felt the sharp impulse of hunger, he might, with impunity, steal food from his neighbors. We should, therefore, think it in the highest degree pernicious to enact that no act done under the fear even of instant death should be an offence. It would a fortiori be absurd to enact that no act under the fear of any other evil should be an offence."

It is true that in the great majority of cases of this class the person maintaining, as against another, his own right, might act in accordance with a higher morality if he should sacrifice himself instead of maintaining his own

right to the injury of another. But the State does not exact heroism from its subjects, nor does it undertake to teach self-sacrifice. It permits, as much for the interests of good order as from its inability to teach pure morality, its subjects to repel, under due restrictions, assaults on their persons or property, even though in repelling these assaults the aggressor is put in danger of his life. But self-defence, it must be remembered, is not limited to assaults. A person whose house is on fire may seize, without incurring the charge of felony, the hose of a neighbor as a means of extinguishing the fire. A person who is bathing, and whose clothes have been stolen, may snatch up clothing he may find on a clothes-line, so as not to be obliged to enter into a village naked. For these two examples I am indebted to Berner, § 85.

¹ See, to this effect, *The Argo*, 1 Gal. 150; *R. v. Dunnett*, 1 C. & K. 425.

² *Lehrbuch d. Strafrechts* (1871), 140.

³ *The Joseph*, 8 Cranch, 451; *The New York*, 3 Wheat. 59.

§ 97 a. As will hereafter be seen more fully, the right of self-defence can only be appealed to to ward off a danger that is

such powers as are committed to it. All other powers are reserved. This is the view of Locke, and, as amplified by Kant, has been accepted by the school that follows this great master. The practical consequences of this view are important. If it be correct, wherever the State has not power to defend us, we can defend ourselves. A threatened attack, therefore, can be averted by violence in a thinly settled country, in which preventive justice could not be efficiently invoked; while in a country where the police is active and available, preventive violent private action would not be justifiable. The objection to this view, however, lies in the assumption that the State rests upon a social contract. No doubt our modern constitutions are the results of contracts between the parties by whom they were established. This was eminently the case with the English settlement which called William III. to the throne. The resolutions of the convention which determined his title were as much the results of a compromise between the parties who were represented in the convention as are the terms of any business contract by which several competing parties agree to settle their differences. The same observations apply to the Constitution of the United States, so often called a "compact" by its most eminent expositors. But does the State owe its *institution* to social contract? Did not the English State exist before the convention of 1688, and did not our own States exist before they agreed to establish the Federal Constitution? Is not some kind of organization a condition precedent to a contract by members of the organization? When two men meet together to establish obligatory rela-

tions, does not this presuppose an arbitrator? Was there ever a time when government of some kind did not exist; and if we have to go back to the time when the family was the sole State, was not the family under the government of its head? There is no era, therefore, so it is argued, to which we can penetrate, in which men, without government, agreed to create a government with particular limitations; and it is clear we cannot point to the time in which this right of self-defence was specifically reserved. Certainly this right, springing as it does from necessity, existed before any of those modern constitutions which are on their face based on contract; and it is absurd to suppose that it was made a contractual part of patriarchal and other despotisms, whose distinctive peculiarity is that they were based on nature, or force, but not on contract. If, therefore, so it is insisted, the right of self-defence rests solely upon social contract, then it must fall with the fiction on which it is so made to rest.

II. The second view, which is taken by Hegel, and is adopted, though in varying terms, by many able writers, is, that self-defence is a retributive act. All wrong, so it is argued, is on moral grounds to be resisted. It is a negation of right, — so is this expressed by Hegel, — and it must be put down, and the right it would overthrow reestablished. We need not, however, fall back on this peculiar phraseology in order to sustain the view now before us. Justice, it may well be argued, is presupposed by government. To yield to wrong, to refuse to resist wrong, is in itself a wrong. It is true that the State may restrict this right of the individual to resist

The fact, however, that an attack has been expected does not preclude me from repelling it when it comes. A public man,

self-defence is not an original, natural right, independent of the State. But this does not conflict with self-defence being a right licensed, and hence authorized by the State. If, in its exercise, the rights of others—their property or their persons—be necessarily impaired, this is incident to the discharge of the functions which the State thus imposes. The party under this necessity is the agent of the State in hindering an unlawful act. It is not necessary, in order to enable him to intervene, that his mode of defence should be proportioned to the value of the interests attacked, or that the attack should have been unforeseen by him, or that it should have been impossible for him to have avoided the collision." [The above is a condensed translation of the position taken by Janka, in his treatise on *Nothstand*. Erlangen, 1878.]

Let us next consider what acceptance the theories just stated have met with in the United States.

I. *The social-contract theory*, which was generally adopted by the English Whigs, was brought by the colonists to this country, and is frequently referred to by our early writers as the basis of government. So far as the *origin* of government is concerned, this theory, as we have seen, cannot be sustained. So far from government being started by contract, there is no contract that does not presuppose a government. But all governments must rest, mediate or immediately, on the will of the people, and are susceptible of modification, from time to time, as this will prescribes. And all governments with which we have to do, are more or less limited. Certain specified powers are vested in the government, and all others are reserved. This is emi-

nently the case in the United States. By express limitations of the Federal Constitution, "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people;" and "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Analogous provisions are contained in the several state Constitutions.

Government in this way being confined to the exercise of certain specified powers, the right to exercise all other functions remains to the people; and as one of these functions may be mentioned self-defence. Not merely may the person be thus defended from assault; not only may property be thus secured; but nuisances may be abated by any member of the community whom they affect. In fact, when we glance at the cases in which invasions of rights are repelled, we find that, in by far the greater number of instances, this repulsion is by private act. A libel, for instance, is rarely met by public prosecution; the party libelled, if repelling the attack at all, usually repels it by denial and retort. A stone lies in my path in a public highway; I throw it off the path, without calling on the public authorities to effect a removal. Deodorizing compounds are used in multitudes of cases, by private persons, to correct unhealthy exhalations outside of their premises, though in most of these cases prosecutions for nuisance might lie to abate the nuisance. An unwelcome visitor in a house can be ejected by force if he refuse to leave peaceably. *Collins v. Thomas*, 1 F. & F. 416; *Overdeer v.*

there are few attacks which the injured party could not have more or less clearly expected, it would be incumbent on him, if the position here contested is sound, to call on the government for protection in every case, or else to lose his right. But to call on the government for aid is only necessary when such aid can be promptly and effectively given. There are many cases of suspicion, also, in which a prudent man would decline to call in governmental aid, feeling that the case is not sufficiently strong to justify so extreme a remedy. As a rule, therefore, we cannot say that self-defence cannot be resorted to when the party asserting the right could have protected himself by calling in the government.¹ Of this position we have abundant illustrations in cases of nuisance which a private citizen is authorized to abate without appealing to the law.² "At common law," so speaks a learned New Jersey judge,³ "it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. . . . This common law right still continues. Any citizen, acting either as an individual or as a public official under the orders of local or municipal authorities, . . . may abate what the common law deems a public nuisance."⁴ We must not push this right so far as to sustain deliberate aggressions on others. But we ought to maintain it so far as is proper for the defence of self. There is no pebble in our way on the highway that we could not remove by action of law. But there is no pebble on the highway as to which an action of law would not be absurd. We kick it out of the way, just as we exert the right of self-defence in innumerable other cases in which going to law would be equally absurd. And we may in like manner forcibly remove an intruder from a house or a railway car without stopping to call in a magistrate.⁵ If so we may defend life and limb, though the attack is one we may have so far anticipated as to have been able to call in official aid in advance.⁶

¹ It was on this reason that the clause in the German Code, limiting in this respect the right of self-defence, was ultimately stricken out. See Berner, § 86; and see *infra*, § 487. Evers *v. People*, 6 Thomp. & C. 156; 3 Hun, 716; *State v. Doty*, 5 Oregon, 491.

² See *infra*, § 1426.

³ *Manhattan Man. Co. v. Van Keuren*, 23 N. J. Eq. 251.

⁴ See *Brightman v. Bristol*, 65 Me. 426; *Earp v. Lee*, 71 Ill. 193.

⁵ *Infra*, §§ 621-22; *Overdeer v. Lewis*, 1 W. & S. 90.

⁶ As illustrating the principle in the text may be mentioned a case in North

§ 100. We must remand to future sections the discussion of the question, what degree of violence may be used in defence of home.¹ It is only necessary here to repeat what has just been said, that the right to property of all kinds may be forcibly defended when it is forcibly attacked, and that the degree of force to be used is to be measured not by the value of the article, but by the degree of force used in the attack. Were it otherwise, the property of the poor would be discriminated against, and the right to defend property limited only to those rich enough to possess property of value. Nor is it possible to gauge our attachment to any piece of property by its mere money standard. An article of no money value may conduce greatly to my comfort and happiness; and beside this, I have a right to repel spoliation even of things of little value, on the ground that yielding to spoliation in little things is a yielding to spoliation in all things.

The right extends also to mere possession, so that the bare possessor of a thing has a right forcibly to repel a forcible attempt to take it from him.² Thus, a party having a right to the use of a well, though such right be not exclusive, may repel by force an intruder attempting to draw from it.³

§ 101. An interesting question, which will be hereafter more fully discussed, arises as to the extension of the right of self-defence to injuries to honor. The cases which have heretofore been adjudicated in this relation have been mainly those in which persons whose character has been assailed have assaulted or killed the assailant. On these facts it

But not violent defence of honor.

¹ See *infra*, §§ 495-508, 1112. That an assault in defence of personal right is justifiable, see *infra*, §§ 501, 621. *R. v. Mitton*, 3 C. & P. 31; *R. v. Driscoll*, C. & M. 214; *State v. Elliot*, 11 N. H. 540; *State v. Miller*, 12 Vt. 437; *Com. v. Kennard*, 8 Pick. 183; *Com. v. Clark*, 2 Met. (Mass.) 23; *Com. v. Power*, 7 Met. (Mass.) 596; *Com. v. Dougherty*, 107 Mass. 243; *Com. v. Mann*, 116 Mass. 58; *Filkins v. People*, 69 N. Y. 101; *Parsons v. Brown*, 15 Barb. 590; *State v. Gibson*, 10 Ired. 214; *State v. Covington*, 70 N. C. 71. See, however, *Hendrix v. State*, 50 Ala. 148. The law is thus stated by Sir J. Stephen (*Steph. Dig. Cr. L. art. 200*): "Any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm; and if the assault upon him is, notwithstanding, continued, he is in the position of a person assaulted in the employment of lawful force against the person of another." *Infra*, § 486 a.

² See *infra*, § 501.

³ *Roach v. People*, 77 Ill. 25.

has been uniformly held, as an elementary principle, that no words, no matter how insulting, will excuse an assault.¹ At the same time insults of all kinds, words as well as blows, are to be taken into consideration in determining how far hot blood can be considered to exist.² It is easy, also, to conceive of cases in which a party insulted is entitled to remove the instrument of insult; and we may adopt as sound law the rulings of a German court,³ that a person insulted by a libel has a right to remove it from a wall on which it is posted.⁴

§ 102. A future danger, as we will hereafter see, cannot be anticipated by an attack upon the expected aggressor, unless this be the only means of warding off the attack.⁵ Nor is the party attacked excusable in using greater force than is necessary to repel the attack,⁶ remembering that the danger of the attack is to be tested, as will be hereafter noticed, from the stand-point of the party attacked, not from that of the jury or of an ideal person. Whoever, by his misconduct, puts another in a condition in which the mind cannot act with reasonableness, cannot complain that such reasonableness is wanting. If the injured party acts negligently or unfairly in coming to the conclusion that he is in danger of life, then he is liable for the consequences if he exceed the limit of self-defence; but if his conclusion be honest and non-negligent, then the party assailing him must bear the consequences of the mistake. This view has been maintained by the German courts;⁷ and will be vindicated fully hereafter.⁸ The same lim-

¹ See *infra*, § 619.

² *Infra*, §§ 455 *et seq.*

³ *Archiv*. 1848, p. 575.

⁴ See also *Du Bost v. Beresford*, 2 *Camp.* 511; cited *Whart. on Evid.* § 253; and *infra*, § 501.

⁵ See *infra*, §§ 484, 493, 498.

⁶ *Com. v. Dougherty*, 107 *Mass.* 243; *State v. Ross*, 26 *N. J. L.* 224; *State v. Lazarus*, 1 *Const. C. R.* 34. *Infra*, § 624.

⁷ *Archiv*. 1848, p. 592.

⁸ See *infra*, §§ 488-491.

In the same connection we may notice the following striking remarks

from a leading German commentator:—

If the State would not expose to spoliation the rights she undertakes to protect, — rights such as life, limb, freedom, honor, chastity, property of all kinds, family relationships, — she must leave the limits of self-defence to be determined, not by the tribunal by whom the case is ultimately to be coolly tried, but by the individual assaulted himself, according to his capacity as exercised in the excitement, the confusion, and the surprise of the attack. It is particularly to be kept in mind that in self-defence the con-

itation, prohibiting an excess of force, applies to the private abatement of nuisances.¹

When the danger is over, it is scarcely necessary to add, the right of self-defence ceases.² It follows that when a thing which is the object of attack is finally taken from him, the loser cannot ordinarily use violence to recover it. For this purpose he must resort to process of law. The technical right extends to the defence of a thing before it is taken; not to its recovery after it is taken. "*Quamvis vim vi repellere omnes leges et omnia jura permittant, — tamen id debet fieri cum moderamine inculpatæ tutelæ, non ad eumendam vindictam, sed ad propulsandam injuriam.*"³ If, however, he can retake it without undue violence he may do so.⁴ But an assault on his person he cannot punish when the danger is over. His right is defence, not retribution.⁵

§ 103. The inference to be drawn from the weapon used⁶ applies with peculiar force to cases of self-defence. A man who, when attacked, draws out a pistol and shoots down his assailant, cannot, under ordinary circumstances, claim that he was surprised by the attack. No

Inference to be drawn from weapon.

diet is not simply between power against power, but between superior and prepared against inferior and unprepared power; that the assailant is rarely able to convince the assailed that the attack has an object less destructive than at the first glance it appeared to be; that the assailant knew this when he made the venture; that he in this way knowingly exposed his life and limbs to the violence, wild and frantic as it would necessarily be, which he himself called forth in the person assailed. Schaper, in Holtz. Straf. ii. 139.

¹ *Infra*, § 1426. See *State v. Paul*, 5 R. I. 185; *State v. Parrott*, 71 N. C. 311.

² See *infra*, §§ 484 *et seq.*

³ C. 2. x. De homic. v. 12. c. 18. *cod. Berner*, § 88. *Infra*, § 462.

⁴ *State v. Elliot*, 11 N. H. 540.

⁵ See *infra*, § 487. *R. v. Driscoll*, C. & M. 214; *R. v. Mitton*, 3 C. & P. 31; *Com. v. Ford*, 5 Gray, 475; *People v. Caryl*, 3 Parker C. R. 326; *State v. Lawry*, 4 Nev. 161; *Territory v. Drennan*, 1 Montana, 41.

The right (self-defence) can only be exercised at the moment of the attack. It cannot, therefore, be exercised against the absent, though they be instigators of an actual attack. But between those present and acting among the assailants the assailed is not bound to distinguish between the several degrees of activity or responsibility. Nor is he bound to call upon any of them to say what their purpose, and in what way they mean to carry out their purpose, since this depends upon contingencies which no one of them can preascertain. Nor does retreat of the assailant by itself neces-

⁶ *Infra*, § 122.

CHAPTER IV.

MALICE.

<p>Malice is evil intent, and is convertible with <i>dolus</i>, § 106.</p> <p>To <i>dolus</i>, will, object, and causation are essential, § 107.</p> <p>Sufficient if assailant contemplated a fatal result as a contingency, § 108.</p> <p><i>Dolus</i> classified as <i>determinatus</i> and <i>alternativus</i>, § 109.</p> <p><i>Dolus determinatus</i> is where a single object is persistently pursued, § 110.</p> <p><i>Dolus alternativus</i> is where the purpose is capable of alternate realization, § 111.</p> <p>In English law "malice" may be general or special, § 112.</p> <p>Fallacy of distinction between malice express and implied, § 113.</p> <p>Malice presumed to be continuous, § 114.</p>	<p>But duration to be inferred from facts, § 115.</p> <p>Premeditation requires no fixed period, § 116.</p> <p>Intent at time of action enough, § 117.</p> <p>Malice does not require physical contact, § 117 a.</p> <p>In cases of doubt, verdict is taken for the lower degree, § 118.</p> <p>Mixture of intents no defence, § 119.</p> <p>Unintended injury derives its character from purpose to which it is incidental, § 120.</p> <p>Motive need not be proportionate to heinousness of crime, § 121.</p> <p>Malice inferable from facts, § 122.</p> <p>Consciousness of unlawfulness not essential, § 123.</p>
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§ 106. MALICE may be defined as evil intent; and may, for the purposes of this treatise, be regarded as having the same meaning as *dolus*. *Dolus*, also, includes the idea of fraud, which in our present legal use is not convertible with malice; but so far as concerns injuries effected by force, *dolus* and malice are equivalent terms. A wound, which by our law would not be regarded as malicious, would not by the Roman law be regarded as caused by *dolus*. A wound, to whose author the Roman law does not impute *dolus*, would not be regarded by our law as malicious. Between *dolus* and *culpa* the line is drawn in the Roman law in the same way as in our own law the line between malice and negligence. There is, however, this difference between the two jurisprudences: to *dolus*, as a psychological study, the Roman jurists devoted great attention; to malice, as a psychological study, our jurists have given but little attention, contenting themselves in dealing curtly with the subject in the concrete.¹

Malice is evil intent, and is convertible with *dolus*.

¹ See Austin's Jurisp. ii. 327. This looseness of definition is deplored by vol. I.

1. The internal will.
2. The external act.
3. The causal relation of the will to the act.

lows the wounding not *per se*, but *per accidens*.

Leyser (1688-1752), a professor in Wittenberg, and author of a valuable exposition of the Pandects, *Meditationes ad Pandectas*, xi. vol., Leipzig, 1741, spent some years of study in England, and discussed the question of *dolus* no doubt with a full knowledge of the old English doctrine of the tacking of collateral felonious intent. He advances on the propositions of Carpov, by holding that to *dolus generalis* it is not essential that there should be *propositum vulnerandi aut corpus laedendi*, but that it is enough if there be *animus quomodocunque laedendi*.

To *Nettlebladt* (1719-1791), a professor at Halle, we are indebted for a *Dissertatio juridica de homicidio ex intentione indirecta commisso*, in which the immediate topic before us is minutely discussed. According to the view here propounded, guilt (*Schuld*), in its general relations, is a *defectus rectitudinis actionis (convenientiae cum omnibus determinationibus hominis essentialibus) vincibilis*. *Culpa*, in specie, is a *defectus rectitudinis actionis quoad intellectum vincibilis*; while *dolus* is a *def. rect. actionis quoad voluntatem vincibilis*. *Culpa* assumes inaction both as to knowing and willing; *dolus* assumes that the act is done both knowingly and willingly. In other words, negligence is a defect of the intellect; malice, a defect of the heart. Negligence is lack of attention; malice, an evil intention. Here, then, we strike upon the important distinction between direct and indirect malice (*dolus directus* and *dolus indirectus*), which in substance, though not in terms, is

now agitating both in England and in America those concerned in shaping criminal law. See particularly testimony before the House of Commons' Homicide Committee.

Dolus directus, according to the author immediately before us, is when the result is specifically intended; as when A. kills B., intending at the time to kill. *Dolus indirectus* exists when the result is not specifically intended, but when it is as incident to the means adopted by him as if it were specifically willed; as when A. wounds B., intending only to wound him, but when death naturally follows the wound. Anticipating the distinction of the Pennsylvania and other American statutes, a lighter punishment is to be assigned to *dolus indirectus*, where there is no specific intention to take life, than to *dolus directus*, where there is such an intention. To *dolus indirectus*, the following conditions are requisite:—

1. The result should follow from a voluntary act or omission of the assailant.
2. There must be an intention to hurt the individual killed, excluding, therefore, the cases where the intent is to commit a collateral felony.
3. On the other hand, a direct purpose to kill must not exist, for then we would have *dolus directus*; yet such direct purpose is only to be inferred when to the means of violence, as they are knowingly and wilfully adopted by the assailant, death is to be imputed as an unavoidable consequent.
4. There must exist a probability that death would follow from the violent act of the assailant in the same way that there existed a probability

neously to meet new contingencies as they arise. The old are much less rapid in coming to a conclusion than are the young. Persons with mechanical aptitudes are more rapid in deciding as to mechanical acts than are persons without such aptitudes. A soldier would require less time to deliberate as to the use of a gun, a chemist as to the preparation of a poison, than would a person not accustomed to fire-arms or poisons. No limit as to premeditation can be arbitrarily imposed by the law. Whether there has been premeditation must be determined by the concrete case.

As to the relations of premeditation to hot blood the following points may be noticed : —

(1.) The fact that passion intervenes after a premeditated offence has been undertaken, does not sustain the defence of hot blood.

(2.) A crime conceived in hot blood, but executed coolly, and with deliberation, is to be regarded as premeditated.

(3.) On the other hand, the fact that a crime may have been contemplated vaguely beforehand does not make it premeditated if its execution took place in hot blood or sudden passion.¹

§ 117. It is constantly laid down that intent at the time of action is enough. It is not meant to assert by this Intent at time of action enough. that a person who, under a sudden impulse, kills another is guilty of murder. To say this would be unwarranted, for the reason that we have no means of saying that a particular impulse is sudden. What we have a right, however, to say, and what the law means by this maxim to say, is this, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer (as a presumption of fact, but not of law) that the blow was intended prior to the striking, although it may be at a period of time inappreciably distant.²

¹ See *infra*, §§ 380, 480; and see Berner, 9th ed. § 94. As to cooling time, see *infra*, § 450; and see, as to time necessary to intention, Whart. *Crim. Ev.* §§ 738, 816.

² *Infra*, § 380; *R. v. Noon*, 6 Cox C. C. 137; *U. S. v. Cornell*, 2 Mason, 91; *U. S. v. McGlue*, 1 Curt. C. C. 1; *Lanergan v. People*, 50 Barbour, 266; *People v. Clark*, 7 N. Y. 385; *People*

ment for embezzlement; ¹ scientific enthusiasm, no defence to an indictment for disinterring a corpse; ² intending to restore lost goods on a reward, no defence to an indictment for larceny; ³ intending to notify of a fire, no defence to an indictment for arson; ⁴ intending to rid the community of a bad man, no defence to an indictment for homicide; ⁵ intending to pay a debt, no defence to forgery. ⁶ No matter what other intents existed, if the intent to do the particular unlawful act is either proved or implied, the offence, if committed, is complete. If the law were otherwise, there would be few convictions of crime, for there are few crimes in which extraneous motives are not mixed up with the particular evil intent. ⁷

Mixture of intents no defence.

§ 120. When an intent exists to do wrong, and an unintended illegal act ensues as a natural and probable consequence, the unintended wrong derives its character from the general evil intent. ⁸ A general malevolent purpose to break the law, for instance, or to inflict injury irrespective of any particular malice, gives color to a particular wrongful act committed in execution of the general malevolent purpose. A man out of general malignity may fire on a crowd, or may displace a rail on a railway; and then, if any life be lost, he is responsible for murder, though he may have

Unintended injury derives its character from purpose to which it is incidental.

¹ *Infra*, § 1053.

² *Com. v. Cooley*, 10 Pick. 37; 1 Russ. 464. *Infra*, § 1432 a.

³ *Infra*, § 906.

⁴ *R. v. Regan*, 4 Cox C. C. 335.

⁵ *Infra*, §§ 488 et seq.

⁶ *Infra*, § 718.

⁷ See *infra*, §§ 122, 1168; Whart. Crim. Ev. § 734, et seq. See especially remarks on motives in 14 Wh. & St. Med. J. §§ 399-405. "Who would dare," asks a great German jurist, "to determine how far a single morbid tendency is isolated from all other tendencies in a particular person, so as to attach to it exclusively certain evil consequences; and who could shape a procedure, even if there could be such a severance, by which such tendency could be separately put on

trial?" Ideler, *Lehrbuch*, pp. 254-266. La Rochefoucauld gives us the converse when he says, "Nous aurions souvent honte de plus belles actions si le monde voyait tous les motifs qui les produisent." The point of this, as is well remarked (*Spectator*, July 26, 1879), is in the word *tous*. If all the motives of our best acts were known we would feel humiliated. It is not that many of the motives were not good, or that the preponderating impulse may not have been good. But it is that in the well of human intention there is always a mingling of good with bad or bad with good. If, however, a motive impelling to an unlawful act is evil, then there is malice.

⁸ See *supra*, §§ 107-110.

had no intention of taking any particular life.¹ It has been further ruled that if a man shoots A. by mistaking the person, when intending to shoot B., he is responsible for shooting A., under statutes which make it penal to shoot at another with *intent to kill the person shot at*.² And so has it been held with regard to murder at common law.³ We have the same distinction taken as to burglary, when the intent was to steal something different from that actually stolen;⁴ and as to arson, where the intent was to get a reward by giving the earliest information of a fire at the police station, and not to injure the owner.⁵ And so if there be a deliberate intent, when taking lost goods, to steal, no matter who may be the owner, this intent may be tacked to an intent to steal from A., when A. is subsequently discovered as owner.⁶

In other words, when there is a general intent to do evil, of which evil the wrong actually done may be looked upon as a probable incident, then the party having such general intent is to be regarded as having intended the particular wrong. A man using a deadly weapon in a crowd, intending to kill, must be regarded as intending to kill all within the range of the weapon, whether as a primary object, or as incidental to such primary object. And a general intent to do evil, such as to cover all the natural probable consequences of the act, may be inferred from the circumstances of the case.⁷ If, however, as will hereafter be seen, it is plain that the offender's will was directed exclusively to a particular end, in which he failed, and that the act done by him was unintended in any sense, and was not a natural or probable result of his misconduct, then the more logical course is to

¹ See *supra*, § 110; *infra*, §§ 186, 319.

² *R. v. Smith*, Dears. C. C. 559; 33 Eng. Law & Eq. 567; *R. v. Jarvis*, 2 Mood. & R. 40; *Callahan v. State*, 21 Ohio St. R. 306; *Walker v. State*, 8 Ind. 290; *People v. Torres*, 38 Cal. 141.

³ See *infra*, §§ 317-320, 645 *a*; *R. v. Saunders*, 2 Plow. 473; *Com. v. McLaughlin*, 12 Cush. 615; *Angell v. State*, 36 Tex. 542.

⁴ See *infra*, § 810.

⁵ *R. v. Regan*, 4 Cox C. C. 335.

⁶ *R. v. Moore*, L. & C. 1; 8 Cox C. C. 416.

⁷ *Supra*, §§ 110-11. See fully cases cited *infra*, §§ 317 *et seq.* Thus he who sets fire to his own house, intending to defraud the insurers, and burns his neighbor's house by the communicating of the fire, is indictable for maliciously burning the latter house. *R. v. Proberts*, 2 East P. C. 1030. *Infra*, § 830. But see *R. v. Faulkner*, 13 Cox C. C. 550.

indict him for a malicious attempt to do the unperformed act and for negligence in the act performed.¹ A third contingency arises when A., looking out for B., sees C., whom he mistakes for B., and whom he kills. This is murder, because his intent to kill, however mistaken his reasoning, was really pointed at C.²

§ 121. It is sometimes argued, "Is it likely that one man should kill another for so small an object? Are we not to infer, when there is a homicide which is followed by the stealing of a mere trifle, that the homicide was the result of sudden passion, rather than *lucri causa*? Or for a mere prejudice or spite is it likely that one

Motive need not be proportionate to heinousness of crime.

¹ As to concurrence of malice and negligence, see *infra*, § 128. And see further *infra*, §§ 317-322; *State v. Smith*, 32 Me. 369. In *R. v. Hewlett*, 1 F. & F. 91, the defendant was indicted for wounding A. with intent to do him bodily harm. The evidence showed that the defendant, intending to wound B., unintentionally wounded A. This was held a fatal variance. *S. P., Com. v. Morgan*, 11 Bush, 601; *Barcus v. State*, 49 Miss. 17; *Morgan v. State*, 13 Sm. & M. 242. See, however, comments in *R. v. Stopford*, 11 Cox C. C. 643. These cases are noticed *supra*, § 107; *infra*, § 645 a.

² See *infra*, §§ 317-18.

The controversy as to *error in objecto*, and as to *aberratio ictus*, as it is called, relates to the effect and not to the character of malice. As to this controversy, Meyer (*Lehrbuch*, 1875, § 30), makes the following observations:—

(1.) Where the actor errs in the execution of the act, and hurts a person other than he intended (error in persons), the true view is that the mistake is no defence. The actor is responsible, even when he had no desire to injure the person hurt, and would never have attacked such person. It is enough, to impute the crime to him, that he intentionally attacked an object under the protection of the law,

and it is immaterial whether or no he effected his particular purpose. The opposite view, which in such cases holds the error to be essential, determining the defendant to be guilty of a negligent offence as to the injured party, and of an attempt as to the non-injured party, fails from its mistaking the period in which the offence took shape. That period is the time immediately before the commission of the act; and when in this period the actor willed to injure the object before him, and did injure that object, this completes the offence; and the error he was in as to the identity of the object is as immaterial as error as to any other motive for action.

(2.) On the other hand, where the intention is aimed at a specific object, and if by circumstances independent of his will another object of like character is struck (*aberratio ictus*), in this case the offence is not single and complete in itself, but (a) the attempt of a delict as to one object, and (b) negligent or casual injury in respect to the other object. In this case the effect produced was not intended by the defendant, while in the former case the effect was intended, and would only not have been intended had the defendant not erred as to the identity of the object.

CHAPTER V.

NEGLIGENCE: AND HEREIN OF OMISSIONS.

Negligence is the omission of usual care, § 125.

Negligence is an intellectual, malice a moral defect, § 126.

Tests of indictable negligence, § 127.

Concurrence of malice and negligence, § 128.

Negligence cannot constitute accessoryship, § 129.

Omission, to be indictable, must be defective discharge of duty, § 130.

Omissions are breaches of affirmative commands; commissions of negative commands, § 130 a.

Classification of indictable omissions, § 131. Omissions may be malicious as well as negligent, § 131 a.

Mere omissions to render help not indictable, § 132.

Omission to guard dangerous agency indictable, § 133.

Not necessary that negligence should be subject to civil suit, § 134.

Master may be liable for servant's negligence, § 135.

[As to contributory negligence, see *infra*, §§ 162-3.]

§ 125. A NEGLIGENT offence is an offence which ensues from a defective discharge of a duty, which defect could have been avoided by the exercise, by the offender, of that care which is usual, under similar circumstances, with prudent persons of the same class.¹ Negligence is of two kinds: *culpa levis*, which is the lack of the diligence and care usual with good specialists of the particular class under the circumstances; and *culpa lata*, which is the lack of the diligence and care exercised by honest and worthy non-specialists, dealing with similar objects.² In criminal cases this distinction operates mainly to determine the degree of evidence required to convict. A non-specialist (*e. g.* a person not claiming to be a physician or a lawyer) cannot be convicted on proof of want of or failure to apply due qualifications; while a person claiming to be a specialist can be convicted on such proof.³ *Culpa levissima*, or that slight aberration from duty incident to all human action, is not punishable, since, as there are no persons to whom such negli-

¹ Whart. on Neg. chap. i.

² See Whart. on Neg. §§ 27, *et seq.*

³ Whart. on Neg. § 26.



gence is not imputable, there are no persons, unless we recognize its non-culpability, who could escape punishment.¹

§ 126. Malice, as is elsewhere noticed,² arises from an evil purpose, negligence from a failure of purpose; malice is imputable to a defect of heart, negligence to a defect of intellect.³ If what results corresponds to what was intended, then the offence is malicious; if it does not correspond to what was intended, then, if the actor did not at the time exercise due care, the offence is negligent. On what we may call, therefore, the subjective side of an offence, there are two phases of indictability, the malicious and the negligent, corresponding to the ancient *dolus* and *culpa*. Unless either malice or negligence be proved, an indictable offence is not made out.

§ 127. Not every negligent act is necessarily indictable. The following incidents, however, may be noticed as involving indictability: —

Tests of indictable negligence.

(1.) *Infractions of police order.* — By statute, and sometimes by common law, specific duties become incumbent on all citizens. For non-performance of such duties, unless another special remedy be provided, an indictment may lie.⁴

(2.) *Imperfect discharge of official duty.* — Wherever a specific duty is imposed on a public officer, there a negligent defect

¹ Whart. on Neg. § 26. Sir J. Stephen defines negligent offences as follows: —

“Every one upon whom the law imposes any duty, or who has by contract, or by any wrongful act, taken upon himself any duty tending to the preservation of life, and who neglects to perform that duty, and thereby causes the death of (or bodily injury to) any person, commits the same offence as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty.”

² Provided, that no one is deemed to have committed a crime only because he has caused the death of, or bodily injury to, another by negligence which

is not culpable. What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case.

³ “Provided, also, that no one is deemed to have committed a crime by reason of the negligence of any servant or agent employed by him.” Dig. Cr. L. art. 212. See *R. v. Allen*, 7 C. & P. 153; *R. v. Barrett*, 2 C. & K. 343; *R. v. Conrah*, 2 *Craw. & Dix Ir. C. R.* 86; *R. v. Tindall*, 1 *Nev. & P.* 719; 6 *A. & E.* 143.

⁴ *Supra*, § 106; and see Wharton on Negligence, § 7.

⁵ See *State v. Smith*, 65 *Me.* 257.

⁶ *Supra*, § 24.

§ 129. Negligent coöperation cannot constitute accessoryship in a malicious act, although a party occupying an official situation may be liable for negligence in the non-arrest of a criminal. To constitute the offence of accessoryship there must be malice, and malice cannot be inferred in any case where the coöperation is purely negligent. On the other hand, to negligent acts there may be malicious accessories; though, unless these acts are felonies by statute, all concerned, under the rule that in misdemeanors all parties are principals, are to be treated as principals. A curious and interesting question arises where one person intentionally puts another in the position of doing a negligent act, as where fire-arms are mischievously placed in the hands of a negligent or inexperienced person, or when the superintendent of a railroad knowingly and maliciously places a locomotive under the control of an engineer whom the superintendent knows to be incompetent. In such cases there is good ground for maintaining that the person thus designing the harm is liable for the consequences of the negligence of the immediate operator. But as a general rule negligence, to be imputable, must be the misconduct of the party charged, and must stand in causal relation with the negligent act which is the object of the indictment. A person, therefore, who by negligence produces another's negligence cannot, as we have seen, be chargeable with the consequences of the latter's negligence. Morally reprehensible, also, as may be he who by negligence induces another to perform a guilty act, he cannot be made responsible without unduly enlarging the range of criminal law. And even he who negligently induces another to injure himself is not responsible for such injury.¹

Negligence cannot constitute accessoryship.

§ 130. Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested.²

An omission to be indictable

offender should design malicious mischief to property, and then, without intending it, carry it away, the offence would not be larceny. See infra, §§ 883 *et seq.*

¹ Meyer, Lehrbuch, § 32. See infra, § 230.

² R. v. Gray, 4 F. & F. 1098; R. v. Lowe, 4 Cox C. C. 449; R. v. Vann, 2 Den. C. C. 325; 5 Cox C. C. 379; State v. Bailey, 1 Fost. N. H. 185; State v. Berkshire, 2 Ind. 207. Infra, §§ 331 *et seq.*

§ 183. Where a party puts a dangerous instrument in motion and then leaves it, penal responsibility is not diverted by the fact that the immediate injury is caused by an omission or negation of action; ^{Omission to guard a dangerous agency indictable.} ¹ as where a party after putting poisoned food on his enemy's table, waits until the latter himself takes the food; or where, as we have just seen, a skilful swimmer, by false promises, entices another in deep water, and then leaves him to drown; or where a midwife, after cutting the umbilical cord, does not bind it up, so that the child bleeds to death.² In all such cases of withdrawal of action, after the destructive agency has been put in motion, there is no question of mere omission (*Unterlassung*). Such withdrawal of action, so argues a German jurist,³ closes almost all crimes of commission; for the actor brings his train of causes just to the point where that train can be left to itself; and even when he shoots at an opponent, he simply *lets it happen* (*lasst es nur geschehen*) that the ball goes on its mission, and perforates its object, so that the latter by his wound loses his life.⁴ And it may be held generally that it is the legal duty of a person putting in action a dangerous agency to prudently guard such agency, and if he fail to do so, he is responsible penally for the consequences.⁵

any body else. But this, by destroying all specialty in business, would destroy all business that is made up of specialties. No public enterprise (e. g. a railroad when in working order) could be carried on safely if every one who conceives something to be wrong in it is required to rush in and rectify the supposed mistake. No man could courageously and consistently discharge his special office if all other persons were made both his coadjutors and overseers. Industry, also, would cease if the consequences of idleness were averted by making almsgiving compulsory; and finally, by requiring by law that alms should be given to all that need, there would be

none who would not be too needy to give alms.

¹ See *infra*, § 166.

² *Infra*, §§ 156, 337, 393; Berner, *Lehrbuch*, p. 434.

³ Berner, *ut supra*.

⁴ It has been held in England, that on an indictment for manslaughter by causing a fire, it is necessary, in order to sustain the case by an exhaustive process of proof, to show that the fire could not have arisen from any other cause than that charged; it is necessary to leave no considerable interval of time in which some other cause might have acted. *R. v. Gardner*, 1 F. & F. 669.

⁵ *Infra*, §§ 337-43; *Com. v. Bost. & Low. R. R.* 126 Mass. 69.

men under the circumstances, be imputable to the master, he is not criminally responsible for the servant's misconduct in matters not incidental to the service.¹

¹ *R. v. Bennett*, Bell C. C. 1; 8 *State v. Privett*, 4 Jones N. C. (L.) Cox C. C. 74; *R. v. Wilmett*, 3 Cox 100; *Hipp v. State*, 5 Blackf. 149; C. C. 281; *Com. v. Mason*, 12 Allen, *Anderson v. State*, 39 Ind. 558; and 185; *Barnes v. State*, 19 Conn. 398; cases cited infra, §§ 247, 1503.

CHAPTER VI.

FITNESS OF OBJECT OF OFFENCE.

I. PHYSICAL UNFITNESS.

To a crime a fit object is necessary.
Objects physically unfit, § 136.

II. JURIDICAL DEFECTS.

Object may be juridically unfit, § 137.
Outlaws are still under protection of the law, § 138.

Convicts can only be punished according to law, § 139.

An assailant may divest himself of legal protection, § 140.

A party may by assent to an injury bar a prosecution — *Volenti non fit injuria*, § 141.

But not as to public criminal immoralities, § 142.

Nor as to inalienable rights, § 143.
Consent will not excuse the taking of life, § 144.

Nor the deprivation of liberty, § 145.
Nor waive constitutional rights of trial, § 145 a.

Capacity to consent a prerequisite, § 146.

Contributory negligence may be a defence, § 147.

Laches on prosecutor's part may be a defence, § 148.

Trap laid by prosecutor not ordinarily a defence, § 149.

Consent obtained by fraud is no defence, § 150.

I. PHYSICAL UNFITNESS.

§ 136. THE object of an intended crime may be such as to relieve the party charged from indictability. A., for instance, intending to murder B., may run his sword through a bolster, dressed in B.'s clothes, and placed in B.'s bed. This, if preceded by steps taken to kill B., may be an attempt to kill, but would not constitute a consummated offence. We can, in addition, conceive of cases in which shooting at a shadow on the roadside, supposing it to be a man, or at a scarecrow in a field, under the same supposition, would not even be an attempt. Or, to recur to a case elsewhere mentioned, a lady in crossing the British channel carries with her what she supposes to be Brussels lace, which she intends to smuggle into England. The lace, however, turns out to be of English manufacture, and therefore not an article susceptible of being smuggled into England.¹

¹ As to attempts to effect non-existent objects, see *infra*, § 186.

II. JURIDICAL DEFECTS.

§ 137. The object on which the alleged offence is committed may be not only existing, but may be that which the accused supposes it to be, and yet it may have juridical defects which withdraw it from the category of objects protected by the law. An impersonal object is only so protected when it belongs to the State, or to a juridical person. Waifs (unless belonging to the State), animals *ferae naturae*, the water of the ocean and of navigable streams, are not the objects of larceny. It is not necessary, however, in order to throw the shield of juridical protection over a right, that it should be corporeal. A man's reputation is his right in such a sense that he who wantonly assails it is open to an indictment for libel. This, however, is because the rights of the individual are guaranteed by the State, the State intervening to protect the rights which it guarantees. It follows that a criminal prosecution lies for threatening to attack, at least by arms, the State itself, though no physical hurt be inflicted on individuals; the treason being an invasion of the direct rights of the State. But offences against religion and morals, unless injuring individuals, or affecting the social fabric, and thereby assailing the State, are not indictable crimes.

§ 138. *Infamous persons*, no matter how great may be their degradation, are still under the protection of the law. An outlaw, or a person fleeing from justice, may be arrested, as is elsewhere seen, without a warrant,¹ but he cannot be personally hurt (unless such hurt be necessary to his arrest) without exposing the party injuring to criminal prosecution. Nor does any degree of collateral criminality in a party justify the infliction on him of injury by individuals.²

§ 139. *Persons condemned to death* are under the protection of the law until the period comes for their execution, and the executioner undertakes the work. "Non licet privata potestate hominem occidere vel nocentem."³ To the executioner alone is public authority to kill given, and this authority he is bound to execute in the way the law re-

¹ See Whart. Cr. Pl. & Pr. §§ 1 et seq.

² See *People v. Stetson*, 4 Barb. 151.

³ Can. 9. Caus. 23. qu. 5.

have frequent illustrations in the following pages. Thus, consent by an owner to the taking of goods is a defence to a prosecution

τις, ἀδικεῖται δ' οὐθείς ἐκόν. Ethic Nicom. v. 13. But this maxim was held in the lowest view, not to include inalienable rights; while the better opinion is, that so far as concerns the State, no private individual can, by consenting that a crime shall be committed on him, estop the State from prosecuting. The Code on this point is clear. L. 38. D. de pact. (2. 14.) Ius publicum privatorum pactis mutari non potest. L. 45. § 1. D. de reg. iur. (50. 17.) Privatorum conventio iuri publico non derogat. L. 6. C. de pact. (2. 3.) Pacta, quae contra bonos mores fiunt, nullam vim habere, indubitati iuris est. L. 13. pr. D. ad L. Aquil. (9. 2.) Liber homo suo nomine utilem Aquiliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur.

But the Roman law cautiously limits the maxim to cases where, as in theft, &c., "against the will" is an essential ingredient of the offence, and in which there is no breach of the peace or public scandal. L. 46. § 8. D. de furt. (47. 2.) § 8. I. de oblig. quae ex delict. (4. 1.) Sed et si credit aliquis invito domino se rem commodatam contrectare, domino autem volente id fiat, dicitur furtum non fieri. L. 1. § 5. D. de iniur. (47. 10.) . . . quia nulla iniuria est, quae involentem fiat. cap. 27. de reg. iur. in VI. (5. 13.) Scienti et consentienti non fit iniuria. L. 1. § 5. D. quod. vi aut clam. (43. 24.) Quid sit vi factum videamus. Vi factum videri Quintus Mucius scripsit, si quis contra, quam prohiberetur, fecerit. L. 145. D. de reg. iur. (50. 17.) Nemo videtur fraudare eos, qui sciunt et con-

sentiunt. L. 3. § 5. D. de hom. lib. exhib. (43. 28.) Si quis volentem retineat, non videtur dolo malo retinere. L. 6. § 2. D. de L. Fab. de plagiar. (48. 15.) Lege Fabia cavetur, ut liber, qui hominem ingenuum, vel libertinum invitum celaverit, . . . eius poena teneatur. L. 3. § 4. D. ad L. Iul. de vi public. (48. 6.) See Lorimer's Inst. (1874) p. 32. As to consent to attempts, see *infra*, § 188.

According to an able German writer the following rights cannot be alienated by the individual:—

1. Rights which the State, on account of their value to the community, requires him to retain. His assent, therefore, will be no defence to a third party who assails such rights.

2. Rights of individuals, the maintenance of which rights the State puts under the protection of the penal law, and which no person is entitled to injure or impair in such a way that they will be totally lost. The consent of the possessor of these rights will be no defence to an indictment for their destruction, though it may mitigate the punishment.

3. Rights of the individual to which the State awards penal protection may nevertheless, if he be of full age and privileged to dispose of them, be exposed by him to such impairment as does not involve their entire destruction, unless the State has for peculiar reasons made it penal to solicit the possessor to consent to their impairment. The only right which, in the sense in which the term is here used, is susceptible of absolute destruction, is the right to live; and no consent by the owner of this right will be a defence to a party by whom its destruction is effected or attempted. Ac-

profligate dealings with minors. The reason is that parties cannot by consent cancel a public law necessary to the safety and morality of the State. *Jus publicum privatorum voluntate mutari nequit.*¹

§ 143. The distinction between alienable and inalienable rights is asserted in the Declaration of Independence, and in the Bills of Rights of most of the United States. Inalienable rights as thus generally defined are life, liberty, and the pursuit of happiness. The distinction, however, is not modern; it lies at the basis of the penal sections of the canon law, and from that law is more or less fully absorbed into the common law of continental Europe.²

§ 144. *Life* is the first of these inalienable prerogatives. Thus, a man who kills another with the latter's consent is guilty of homicide.³ Although some of the jurists of the stoical school here argued in the negative, the affirmative was determined under the Justinian Code; and by the English common law the criminality of the act is such that the consent of the party slain does not even lower the degree. And this rule exists not only in cases where there is malice, but where no malice exists, as in agreements for concurrent suicides.⁴ Yet we may readily conceive of cases where the degree of guilt would be greatly reduced. A physician, at the request of a dying man suffering intolerable agonies, may, from humane motives, precipitate death; or a soldier on the battle-field, after urgent appeals, may with intense agony on his own part, yet from the same humane motives, take the same course as to a dying comrade. Yet even here the maxim *Volenti non fit injuria* cannot be applied. There can be nothing to bar a verdict of guilty. That verdict, however, would be for the lowest form of voluntary manslaughter, and could properly be followed by executive pardon.

We may, therefore, justly argue that if life be an inalienable

¹ See Berner's *Lehrbuch des Strafrechts*'s (1871), 132. *Infra*, §§ 451-2. And see *R. v. Bennett*, 4 F. & F. 1105; *R. v. Sinclair*, 13 Cox C. C. 28; and cases cited *infra*, §§ 577, 636.

² See *infra*, §§ 451-2.

³ *Com. v. Parker*, 9 Met. 263. See this question discussed as to suicide, *infra*, §§ 451-2.

⁴ See *infra*, §§ 451-2.

As will hereafter be more fully illustrated, consent will authorize a surgical operation, in cases of danger, though the effect of such operation may be fatal.¹

§ 145. *Deprivation of liberty*, no matter on what pretext, rests on the same principles. No man has a right to take away another's liberty, even though with consent, except by process of law. And the reason is that liberty is an inalienable prerogative of which no man can divest himself, and of which any divestiture is null.² Undoubtedly this in one relation conflicts with the attitude once assumed by English and American courts, when maintaining that the slave trade is not piracy by the law of nations. But the abolition of slavery in the United States, and the civil rights amendments and enactments that followed, relieve the courts in this country from the pressure of the precedents referred to, and restore the old doctrine of inalienability of liberty. It is true that cases of this class are not very likely to arise. But should it appear that incarcerations are effected, even by consent, by ecclesiastical or medical authority, of persons whose liberty is thus wrongfully destroyed, the fact of consent could not, if the doctrine here advanced be correct, be used as a defence, when such party seeks release. And *a fortiori* would it be no defence to an indictment for kidnapping Africans, that the Africans consented to be kidnapped.³

§ 145 a. Constitutional rights to trial by an independent jury, whose deliberations are to be guarded against

Nor waive constitutional

¹ *Infra*, § 362. Steph. Dig. C. L. art. 205.

² Of this we have a remarkable illustration in a Pennsylvania case, in 1826, in which it was held that an agreement not to bring a writ of error in a criminal case, especially one of high degree, does not estop the defendant from bringing such writ. The question arose after a conviction of burglary, where it was alleged that the defendant had agreed in writing not to bring a writ of error, and where a motion to quash the writ was on this ground made. But Tilghman, vol. 1.

C. J., in refusing the motion, said: "What consideration can a man have received, adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement, yet the principle is, in both cases, the same." *Smith v. Com.* 14 S. & R. 69; and see Whart. on Crim. Plead. & Prac. § 351.

³ See *State v. Weaver*, Busbee, 9, *contra*; a decision which cannot now be sustained.

§ 155. Suppose that A. maliciously aims a blow at B., which stuns B., and A., thinking B. to be dead, buries B., and B. dies from being buried alive. Several cases of this kind (*e. g.* one of infanticide) have arisen in Ger- Otherwise when a subsequent condition

tions, — a distinction of which Dr. Wharton maintains, and of which Mr. Mill (see his *Logic*, vol. i. p. 398, &c.) denies, the solidity. For practical purposes, I think the article in the text is sufficient. And if this were the proper place, I should be disposed to discuss some of Dr. Wharton's positions."

In the text of the present work, I have somewhat modified the positions to which Sir J. Stephen refers; and the conclusion is substantially the same as that reached by himself in the following paragraph:—

"Killing is causing the death of a person by an act or omission but for which the person killed would not have died when he did, and which is directly and immediately connected with his death. The question whether a given act or omission is directly and immediately connected with the death of any person is a question of degree, dependent upon the circumstances of each particular case.

"(SUBMITTED.) But the conduct of one person is not deemed, for the purposes of this article, to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other.

"This article is subject to the provisions contained in the next two articles.

Illustrations.

"(1.) A. substitutes poison for medicine which is to be administered to C. by B. B. innocently administers the poison to C., who dies of it. A. has killed C. Donellan's case. See my *Gen. View*, Cr. L. 398.

"(2.) A. gives a poisoned apple to his wife, B., intending to poison her. B., in A.'s presence, and with his knowledge, gives the apple to C., their child, whom A. did not intend to poison. A. not interfering, C. eats the apple and dies. A. has killed C. Saunders' case, 1 Hale P. C. 436.

"(3.) A., an iron-founder, ordered to melt down a saluting cannon which had burst, repairs it with lead, in a dangerous manner. Being fired with an ordinary charge, it bursts and kills B. A. has killed B. *R. v. Carr*, 8 C. & P. 163.

"(4.) A., B., and C., road trustees under an act of parliament, and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and D. passing along it is killed. A., B., and C. have not killed D. *R. v. Pocock*, 17 Q. B. (N. S.) 34.

"(5.) A., by his servants, makes fire-works in a house in London contrary to the provisions of an act of parliament (9 & 10 Wm. 3, c. 77). Through the negligence of his servants, and without any act of his, a rocket explodes and sets fire to another house, whereby B. is killed. A. has not killed B. *R. v. Bennett*, Bell C. C. 1.

"(6.) A. tells B. facts about C. in the hope that the knowledge of those facts will induce B. to murder C., and in order that C. may be murdered; but A. does not advise B. to murder C. B. murders C. accordingly. A. has not caused C.'s death within the meaning of this article."

that a dangerous instrument if negligently used should produce dangerous results.¹

§ 160. The interposition of concurrent wills, in pursuance of a common plan, makes each confederate liable for the act of his associates. It is otherwise, however, when responsibility is based, not on intentional, but on negligent injuries. As to these the rule is that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent in a particular subject matter. Another person moving independently comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to the party whom my negligence leads into difficulty, but I am not liable to others for the negligence which he alone was the

Interposition of independent responsible will breaks causal connection.

¹ When it appeared that the death was caused by a blow on the back of the neck, and that the deceased was not at the time in a good state of health, and that she was desired to remain in a hospital where she could be attended to, but would not, Parke, B., said: "It is said that the deceased was in a bad state of health, but this is perfectly immaterial; as if the prisoner was so unfortunate as to accelerate her death, he must answer for it." *R. v. Martin*, 5 C. & P. 128.

Where a husband was indicted for the manslaughter of his wife by accelerating her death by blows, malice not being pretended; and it appeared that she was at the time in so bad a state of health that she could not possibly have lived more than a month or six weeks under any circumstances; Coleridge, J., told the jury that if a person inflicted an injury upon a person laboring under a mortal disease, which

caused that person to die sooner than he otherwise would have done, he was liable to be found guilty of manslaughter, there being no intent to kill; and the question for them was, whether the death of the wife was caused by the disease under which she was laboring, or whether it was hastened by the ill-usage of the prisoner. *R. v. Fletcher*, 1 Russ. on Cr. 507.

In *R. v. Johnson*, 1 Lewin C. C. 164, the deceased died from a blow received in a fight with the prisoner; a surgeon expressed an opinion that a blow on the stomach, in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober at the time. An acquittal was ordered by Hallock, B., on the ground that the court could not apportion the causes, or determine which of them was operated. This, however, cannot be sustained. *Roscoe's Cr. Ev.* 7th ed. 718.

insane medium is responsible, we will hereafter have occasion fully to see.¹ The same rule exists when the agent is compelled to commit the crime.²

§ 162. *The fact that another person contributed either before the defendant's interposition or concurrently with such interposition in producing the damage is no defence.*³ —

Indeed, this proposition, instead of conflicting with the last, goes to sustain it. A. negligently leaves certain articles in a particular place. B. negligently meddles with them. Supposing B.'s negligence to be made out, and he be a responsible person under the limitations above expressed, he cannot set up A.'s prior negligence as a defence. *A fortiori*, he cannot set up the concurrent negligence of D., a third person, who may simultaneously join him in the final negligent act.⁴

§ 163. It has been said that contributory negligence is no defence to a criminal prosecution.⁵ This, however, is not correct, since a person who negligently rushes into danger, such action not being incident to a lawful business, cannot afterwards prosecute, either criminally or civilly, the person producing the danger.⁶ A common illustration of this principle will be found in the cases, elsewhere noticed, of prosecutions for malpractice, in which it is held a defence that the patient's misconduct was the immediate cause of his injury.⁷ On the one side, we can conceive of cases where a party, after his wound, commits suicide; and in which, as the death was caused by the suicide, and not by the wound, the allegation in the indictment, that the deceased died of the wound, could not be sustained.

Concurrent negligence of another no defence.

An injured party's contributory negligence may break causal connection.

Where the deceased deliberately and unnecessarily hast-

¹ As to indictment for action through an irresponsible agent, see *infra*, § 522. As to liability for principal for irresponsible agent, *infra*, § 207. And see, as to dangerous agencies, *infra*, §§ 343 *et seq.*

² *Blackburn v. State*, 23 Ohio St. 146. *Infra*, § 216.

³ See *infra*, § 363.

⁴ *Whart. on Neg.* § 144. *Infra*, § 363. See *R. v. Pym*, 1 Cox C. C. 339; 1 Russ. Cr. 702; *Com. v. M'Pike*, 3

Cush, 181; *State v. Bantley*, 44 Conn. 537.

⁵ *R. v. Longbottom*, 3 Cox C. C. 439; *R. v. Hutchinson*, 9 Cox C. C. 555; *R. v. Kew*, 12 Cox C. C. 355.

⁶ *Supra*, § 147. See *R. v. Walker*, 1 C. & P. 320; *R. v. Williamson*, 1 Cox C. C. 97; *R. v. Longbottom*, 3 Cox C. C. 439. Compare *infra*, §§ 358, 1188; *State v. Preslar*, 3 Jones Law, N. C. 421; *State v. Weaver*, *Busbee*, 9.

⁷ See *infra*, § 363.

is no defence that the deceased or his companions by their own negligence contributed to the result, if that result was precipitated by the malicious or reckless misconduct of the defendant.¹

Contributory negligence, it is to be added, is to be determined by the standard of the party to whom it is imputed.²

§ 166. A party who places poison in such a position that in the ordinary course of things it is likely to be unconsciously and non-negligently taken by passers-by is liable for the consequences.³ But he is not responsible for the acts of an assassin, who, independently of him, takes and administers the poison to the deceased; for here again, though the preparing of the poison is a condition of the killing, it is not its juridical cause.⁴

Persons leaving dangerous agencies where they are likely to be unconsciously meddled with are responsible for the consequences.

The master of a house who leaves powder unlawfully and carelessly on his premises is not liable for its negligent misuse by his servants, who are capable of judging as to the danger,⁵ though it would be otherwise if the powder were left in a place frequented by children, who ignorantly meddle with it, and thereby produce damage;⁶ or if the powder were left in such a disguised state that a person of ordinary intelligence would not be able to detect its character;⁷ or if the poison be given to a party compulsorily.⁸

¹ See *R. v. Kew*, 12 Cox C. C. 355; 1 Green's C. R. 95; *R. v. Longbottom*, 3 Cox C. C. 439; *R. v. Swindall*, 2 C. & K. 230; *R. v. Walker*, 1 C. & P. 320; *R. v. Haines*, 2 C. & K. 368; *R. v. Murton*, 3 F. & F. 492.

² *Infra*, § 488.

³ *Supra*, §§ 133, 161; *infra*, §§ 206, 226, 346. See *R. v. Cheverton*, 2 F. & F. 833; *R. v. Michael*, 9 C. & P. 356; 2 M. C. C. 120; *R. v. Chamberlain*, 10 Cox C. C. 486; *Harvey v. State*, 40 Ind. 516.

⁴ See *Com. v. Campbell*, 7 Allen, 541; *State v. Seates*, 5 Jones (N. C.), 420. *Supra*, § 160.

⁵ *R. v. Bennett*, Bell C. C. 1; 8 Cox C. C. 74.

⁶ Whart. on Neg. § 161.

⁷ See 1 Hale, 431; *R. v. Michael*, 9 C. & P. 356; 2 M. C. C. 120. *Infra*, § 346.

⁸ *Blackburn v. State*, 23 Oh. St. 146. See *infra*, §§ 216, 226.

"If B.," as is argued in another work (Wh. on Neg. § 91), "negligently sells poison, under the guise of a beneficial drug, to A., he is liable for the injury done to A.; or to those to whom A. innocently gives the poison. But suppose that A. has ground to suspect that the drug is poisonous, and then, instead of testing it, sells it or gives it to C.? Now, in such a case there can be no question that A. is liable for the damage caused by his negligence. But

duce death by incantations, and if so, is to be convicted of murder. But in 1750 the statutes against witchcraft were swept away, and in 1765 Blackstone, in his Commentaries, rejects the hypothesis as absurd. At the beginning of the present century we have the current opinion, expressed in the following passage in Mr. Edward Livingston's Penal Code:—

"It [homicide] must be operated by some act; therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce, and do produce, some act which is the immediate cause of death, it is homicide. *A blind man or a stranger in the dark directed by words only to take a drug he falls and is killed*; a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule."

The farthest limit which has been reached in this direction is to be found in a Massachusetts case,¹ in which it was held that a person who shoots a gun at a wild fowl, with knowledge and warning that the report will affect injuriously the health of a sick person in the neighborhood, and such effect is produced by the discharge, is guilty of an indictable offence.²

we should call it, Draft of a Proposed Code, introducing the following clauses:—

"Where a man doth use or practice any manner of witchcraft, whereby any person shall be killed, wasted, or lamed in his body, it is felony.

"Where a man practiceth any witchcraft to discover treasure hid, or to discover stolen goods, or to provoke unlawful love, or to impair or hurt any man's cattle or goods, the second time, having been once before convicted of like offence, it is felony."

Coke's authority is to the same purport. Indeed, by statute 33 Hen. VIII. c. 8, all witchcraft or sorcery was made felony; and by 1 Jac. I. c. 12, this was extended so as to include the "hurting any person" by the "infernal arts" of "witchcraft, sorcery, charm, or enchantment." Under this statute

occurred the trial of Mary Smith in 1616 for witchcraft. She was convicted and executed, confessing her guilt. The evidence against her was chiefly to the effect that by some occult power of will she brought sickness and death upon certain persons who had incurred her enmity. This was held murder.

¹ Com. v. Wing, 9 Pick. 1.

² In this case Parker, C. J., said: "Now the facts proved in this case, namely, the defendant's previous knowledge that the woman was so affected by the report of a gun as to be thrown into fits, the knowledge he had that she was in hearing, the earnest request made to him not to discharge his gun, show such a disregard to the safety or even the life of the afflicted party, as makes the firing a wanton and deliberate act of mis-

arise in the immediate case. The consequences of negligence are almost invariably surprises. A man may be negligent in a

by the act of another, and this swallowing is an act performed by Z. himself.

"The reasonable course, in our opinion, is to consider speaking as an act, and to treat A. as guilty of voluntary culpable homicide if by speaking he has voluntarily caused Z.'s death, whether his words operated circuitously by inducing Z. to swallow poison, or directly by throwing Z. into convulsions."

Sir James Stephen, in his testimony in 1874, before the Homicide Committee of the English House of Commons, proposed the following additional illustrations:—

"Suppose a man wants to murder his wife, and suppose that she is ill, and the doctor says to him, 'She is in a very critical state; she has gone to sleep, and if she is suddenly disturbed she will die, and you must keep her quiet.' Suppose he is overheard repeating this to another man, and saying, 'I want to murder her, and I will go and make all the noise I possibly can for the purpose of killing her.' You may imagine the evidence to be quite conclusive on that point: he goes into the room, makes a noise, and wakes her up with a sudden start, and frightens her, and she does die according to his wish. It seems to me that that act is as much murder as if he had cut her throat. Or suppose a case like this: a man has got aneurism of the heart, and his heir, knowing that, and knowing that any sudden shock is likely to kill him, suddenly goes and shouts in his ear, and does so with the intent to kill him, and does so kill him. It seems to me that if that man is not punished it is a very great scandal, for the act is just as bad as if he had killed him in any other manner. The fact is,

that the objection to treating such cases as either murder or manslaughter arises from this, that in a general way, in such a case as unkindness, or many other cases of the same kind, you could never prove that the man intended either to kill or cause harm, or that it was common knowledge that there would be harm or death caused; and therefore in all those cases in which you would not wish to punish, the person would escape on account of the difficulty of proof. The only cases in which you would ever want to punish would be cases in which the difficulty of proof, by some such means as I have suggested, would be got over." See, however, *Fairlee v. People*, 11 Ill. 1.

"With this we may consider the remarks of Judge Erskine (a son of Lord Chancellor Erskine) some years since, when charging a jury in a homicide trial: 'A man may throw himself into a river under such circumstances as render it not a voluntary act — by reason of force applied either to the body or the mind. It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was *no* other way of escape, but that it was such a step as a reasonable man might take.' *R. v. Pitts*, C. & M. 284. But the last qualification cannot be sustained. No one can doubt that it would be murder to entice an insane man over a precipice, and thus to kill him. Indeed, as we shall see, what is done through an insane agent is regarded as done directly by the principal." The doctrine of nervous causation

particular matter a thousand times without mischief; yet, though the chance of mischief is only one to a thousand, we would con-

was advanced to a questionable extreme in an English case, tried before Denman, J., in the Northern Circuit, in February, 1874. *R. v. Towers*, 12 Cox C. C. 530. The evidence was that T., the defendant, unlawfully and violently assaulted G., a young girl, having in her arms H., the deceased, a child four months and a half old. The child, which was previously very healthy, was greatly alarmed at the defendant's violence, accompanied as it was by the screams of G., its nurse; and it became "black in the face, and ever since that day it had convulsions, and was ailing generally from a shock to the nervous system." It died thirty-two days after the assault. Medical testimony was adduced to show that the death was traceable to the sudden fright. Denman, J., said that he "should leave it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be of the nature of accident. The case was different from other causes of manslaughter, for here the child was not a rational agent, and it was so connected with the girl that an injury to the girl became almost in itself an injury to the child." In charging the jury he said: "Mere intimidation, causing a person to die from fright, by working on his fancy, was not murder. But there were cases in which intimidations have been held to be murder. If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe his life was in danger, and he were then to back away from them and tumble down a precipice to avoid them, then murder would be committed. Then, did or did not this principle of law apply to the case

of such tender years as the child in question. For the purposes of this case he would assume it did not; for the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question which would be for them to decide, whether the death was directly the result of the prisoner's unlawful act — whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that under all the circumstances of the case. . . . *If the man's act brought on the convulsions, or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter.*" The verdict was not guilty, so that the case was not subjected to further judicial consideration. But in harmony with the views heretofore expressed on this topic, I must come to a conclusion different from that expressed by Judge Denman on both the points raised by him.

1. I can see no difference between an infant and an adult so far as concerns physical injury self-inflicted in consequence of fright. If the child, frightened by the attack, convulsively jumped from the nurse's arms and was killed, then the defendant was as much responsible for the child's death as he would have been for the death of the nurse, if, in the terror of the shock, she had jumped convulsively from a window, and had been killed. In either case the question would be whether the deceased's death was a natural consequence of the defendant's violence. And the inference that it was would be stronger in the child's case than in the nurse's.

tinue to hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held, that it is no defence that a particular injurious consequence is "improbable,"

2. If, however, the child's death was produced by merely nervous causes, — *e. g.* fright, there being no physical shock communicated to it, — then there should have been a verdict of not guilty, for the reason that the law has no means of determining the causal connection between a shock purely nervous and physical death. It would have been otherwise, however, had a blow struck at the nurse been communicated through the nurse's body to the child's, as a blow to the nearest in a series of attached balls communicates itself to the furthest. Then, if this blow threw the child into convulsions, causing its death, the case was one of manslaughter.

3. If the convulsions were caused by the nurse's screams, then, if these screams were not the natural results of the defendant's violence, the causal connection between that violence and the death, even supposing such connection existed, was broken.

In *Kirland v. State*, 43 Ind. 146, it was held that the beating by the defendant of a horse which the prosecutor was driving was not assault and battery on the prosecutor.

On the topic in the text, Sir J. Stephen thus writes, Dig. C. L. art. 221: "Lord Hale's reason is that 'secret things belong to God; and hence it was that before 1 Jas. I. c. 12, witchcraft or fascination was not felony, because it wanted a trial' (*i. e.*, I suppose, because of the difficulty of proof). I suspect that the fear of encouraging prosecutions for witchcraft was the real reason of this rule. Dr. Wharton rationalizes the rule thus: 'Death from nervous causes does not involve penal consequences.' This

appears to me to substitute an arbitrary quasi-scientific rule for a bad rule founded on ignorance now dispelled. Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him; might not this be murder? Suppose a man kills a sick man, intentionally, by making a loud noise which wakes him when sleep gives him a chance of life; or suppose, knowing that a man has aneurism of the heart, his heir rushes into his room and roars in his ear, 'Your wife is dead!' intending to kill and killing him; why are not these acts murder? They are no more 'secret things belonging to God' than the operation of arsenic. As to the fear that by admitting that such acts are murder, people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct, gradually 'breaking a man's heart,' could never be the 'direct or immediate' cause of death. If it was, and it was intended to have that effect, why should it not be murder? In *R. v. Towers*, 12 C. C. 530, a man was convicted before Denman, J., of manslaughter, for frightening a child to death. See *Whar. on Hom.* § 372, on this case.

"Lord Hale doubts whether voluntarily and maliciously infecting a person of the plague, and so causing his death, would be murder, *i. 492*. It is hard to see why. He says that 'infection is God's arrow.' A different view was taken in the analogous case of *R. v. Greenwood*, 1 Russ. Cr. 100; 7 Cox C. C. 404."

videtur. In eodem crimine est, et qui non observavit, ne ignis longius est procederit. *At si omnia quae oportuit observavit, vel subita vis venti longius ignem produxit, caret culpa.*"¹ But *casus* is no defence if it was provoked by the defendant. He who exposes a helpless person in a cold night when a storm intervenes cannot set up as a defence that it was a storm that did the hurt.²

¹ L. 39. § 3. D. de Leg. Aq.; Paulus, lib. 22. ad edict. See fully Whart. on Neg. § 116.

² Supra, § 166.

CHAPTER VIII.

ATTEMPTS.

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I. OFFENCES GENERALLY.

§ 173. AN indictable attempt has been defined to be a deliberate crime which is begun, but, through circumstances independent of the will of the actor, left unfinished.¹ More strictly, it is such an intentional preparatory act as will apparently result, if not extrinsically hindered, in a crime which it was designed to effect.

An attempt is an unfinished crime, and is indictable at common law.

¹ See Berner, Lehrbuch, § 166.

By the English common law it is a misdemeanor to attempt to commit either a felony,¹ or a malicious misdemeanor, whether common law or statutory.² Hence it is an indictable attempt falsely to accuse another of crime, if any step be taken which, in the usual course of events, would lead to a conviction, even though the accusation take not the form of libel. In this view, the fabrication of mechanical inculpatory evidence is a substantive misdemeanor,³ and *a fortiori*, the attempt to bribe a witness.⁴

§ 174. Mere words, unless they are libellous, seditious, obscene, or provocative of breaches of the public peace, are not the subject of penal judicial action. Even when they express illegal purposes, they are often merely speculative; are uttered often by weak men as braggadocio; and always belong to a domain which criminal courts cannot invade without peril to individual freedom, and to the just and liberal progress of society. This liberty to express thought is recognized in all systems of civilized jurisprudence. "Cognitionis poenam nemo patitur," was a maxim of the Roman law,⁵ which is now accepted as part of the judicial system of all

Mere words do not constitute an attempt.

¹ Hawk. P. C. 55; R. v. Higgins, 2 East R. 5; R. v. Kinnersley, 1 Strange, 196; Com. v. Barlow, 4 Mass. 439; State v. Danforth, 3 Conn. 112; Randolph v. Com. 6 S. & R. 398; Hackett v. Com. 15 Penn. St. 95; State v. Boyden, 13 Ired. 505; State v. Jordan, 75 N. C. 27; Griffin v. State, 26 Ga. 493.

² R. v. Higgins, 2 East R. 5; R. v. Phillips, 6 East R. 464; R. v. Chapman, 2 C. & K. 846; 1 Den. C. C. 432; R. v. Williams, 1 Den. C. C. 39; R. v. Butler, 6 C. & P. 368; R. v. Roderick, 7 C. & P. 795; R. v. Goff, 9 Up. Can. C. P. 438; R. v. Watson, 2 T. R. 199; R. v. Roberts, Dears. 539; 39 Eng. Law & Eq. 553; State v. Keyes, 8 Ver. 57; Com. v. Kingsbury, 5 Mass. 106; State v. Murray, 15 Me. 100; Com. v. Harrington, 3 Pick. 26; People v. Washburn, 10 Johns. R. 160; Demarest v. Haring, vol. L.

6 Cow. 76; Com. v. Smith, 54 Penn. St. R. 209; State v. Maner, 2 Hill S. C. 453; Berdeaux v. Davis, 58 Ala. 611; Ross v. Com. 2 B. Monr. 417.

³ R. v. Simmons, 1 Wils. 329.

⁴ *Infra*, § 1332.

According to Sir J. Stephen (*Dig. art. 49*), "an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted." This definition has two defects. In the first place it does not include attempts with unsuitable and yet apparently effective means, which would not, even if uninterrupted, result in a consummated crime. *Infra*, § 182. In the second place, it includes attempts voluntarily abandoned.

⁵ L. 18. D. de Poenis, xviii. 19.

procured for publication) takes it into his head to publish them, but does not actually publish.¹

§ 177. It has been further held that an attempt to commit a mere police offence, involving no malice, is not indictable.² And this principle covers the attempting to sell liquor in illegal measures.³ When an attempt is made maliciously to violate the law in this respect, and when the attempt is put into such a shape as, by the natural course of events, to produce a violation of such law, then the attempt is indictable. But when between the attempt and the execution is interposed the volition of an independent moral agent, then, by stress of the definition just given, an indictable attempt is not made out.

§ 178. The distinction between *conditions* and *causes* has been already largely discussed;⁴ but a recurrence to the principles heretofore expressed is essential to the elucidation of this branch of jurisprudence. To enable a gunshot wound to be inflicted, an almost innumerable series of conditions is necessary. It is necessary that the gun should be procured by the assailant. It is necessary that that gun

And so as to attempts at police offences.

The attempt must have causal relation with act.

¹ Jervis, C. J., Robert's case, Dears. C. C. 553.

While there can be no such thing as a purely negligent attempt, since an attempt cannot exist without design, it is argued that there may be a concurrence in a single act of a negligent offence and of an attempt. A common illustration offered of this is where A. strikes B., conceiving B. to be C. Here it is said the offence is an attempt as to C., and negligence as to B. But to this it is answered that at the moment of the injury A.'s intention to hurt was actually directed against B., and that if we allow his mistake as to B.'s person to change the offence from malicious to negligent, we must allow the same effect to other mistakes he might make as to B., in which case there could be scarcely any conviction of a malicious crime. The case is that of the *aberratio delicti a persona in personam*, or a *re in rem*,

which has been already discussed; and in which it is plain that the party offending is responsible for the malicious injury of the person whom he strikes.

It is otherwise, however, so is it argued, with the *aberratio ictus*, in which, through some extrinsic agency, the blow falls upon a person other than the one intended. A. shoots at B., and C. passes in the line of the shot and is wounded. Here the will and the act do not coincide. The offence, it is argued, is an attempt as to B., and a negligent wounding as to C. *Supra*, §§ 120, 128.

² *Com. v. Willard*, 22 Pick. 476; *Dobkins v. State*, 2 Humph. 424; *Pulse v. State*, 5 Humph. 108; *Ross v. Com.* 2 B. Monr. 417. See *R. v. Upton*, 2 Strange, 816; *R. v. Bryan*, 2 Stra. 866.

³ *Infra*, § 1529.

⁴ *Supra*, §§ 152 *et seq.*

§ 179. Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when their object is to provoke a breach of the public peace, as is the case with challenges to fight and seditious addresses.¹ They are also indictable when their object is interference with public justice; as where a resistance to the execution of a judicial writ is counselled;² or perjury is advised;³ or the escape of a prisoner is encouraged;⁴ or the corruption of a public officer is sought,⁵ or invited by the officer himself.⁶ But are they in respect to other offences? Of course, where the solicited offence is consummated, then he who solicited it is an accessory before the fact in felony, or a principal in misdemeanor.⁷ But if the offence be not consummated, or if the solicitation be not directed to the procurement of some specific crime, when some progress is made to the commission,⁸ the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative. For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed. It would be hard, also, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers of Byron's "Don Juan," of Rousseau's "Emile," or of Goethe's "Elective Affinities." Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women; Lord Chesterfield, on the reasoning here contested, would be indictable for solici-

Solicitations not indictable.

ference between the preparation antecedent to an offence and the actual attempt; but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime."

¹ *Infra*, § 1773; *U. S. v. Ravara*, 2 Dallas, 297; *Com. v. Whitehead*, 2 Boston Law Rep. 148; *Cox v. People*, 82 Ill. 191; *State v. Farrier*, 1 Hawks, 487; *State v. Taylor*, 3 Brev. 243; *State v. Tibbs*, 1 Dana, 524.

² *State v. Caldwell*, 2 Tyler, 212.

³ See *infra*, §§ 1328, 1329 *et seq.*

⁴ *People v. Washburn*, 10 Johns. R. 160.

⁵ *Infra*, § 1857.

⁶ *Walsh v. People*, 65 Ill. 58; *contra*, *Hutchinson v. State*, 36 Tex. 293.

⁷ *Higgins' case*, 2 East, 5. See *R. v. Schofield*, Cald. 400. *Infra*, § 225.

⁸ This was the case in *R. v. Ransford*, 31 L. T. (N. S.) 488; 13 Cox C. C. 9, cited at the close of this section.

as independent offences. And we must also keep in mind that if the solicitation involves the employment of means to effect the illegal end, it may become substantively indictable.¹

§ 180. In answering the interesting question whether the mere preparations for a crime are indictable, we must first put aside those preparations which by statute or otherwise are substantive crimes (*delicta sui generis*); among which we may mention the carrying of concealed weapons, the unlawful concoction or secreting of poison or powder, and the collection of materials for forging.² These acts, when prosecuted, should be charged as consummated offences. Their punishability is independent of the existence of any subsequent conditions. For instance, the carrying of concealed weapons, under the statutes, is equally indictable, whether or no the weapons were used for unlawful purposes. So, also, as to the possession of implements of forgery, and preparations for treasonable acts.

But if the preparation is not of itself indictable, or will not of itself, if uninterrupted extraneously, result in crime, the weight of reasoning is that it cannot be made *per se* indictable as an attempt.³ For, *first*, there is no evidence, as a general rule,

¹ Collins v. State, 3 Heisk. 12; R. v. Hickman, 1 Moody, 34; R. v. Clayton, 1 C. & K. 128; Penns. v. McGill, Add. 21. It has, however, been ruled that to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. Higgins' case, 2 East R. 5. R. v. Ransford, 31 L. T. (N. S.) 488; 13 Cox C. C. 9, was a case of solicitation of a man to a boy to commit sodomy, and Kelly, C. B., affirming a conviction, said: "I am of opinion that to incite or even solicit another to commit a felony, or to do any act with intent to induce another person to commit such offence, is a misdemeanor." Brett, J., said: "The inciting a person to commit a felony

is a misdemeanor. The case in 2d East's R. is an authority for that point." But in this case the person solicited was a boy of twelve, and there was the overt act of the publication of a scandalous letter.

² Com. v. Newell, 7 Mass. 245; Casels v. State, 4 Yerger, 149. Peculiarly is this the case with the procuring and retaining dies and other machinery for counterfeiting. It is on this ground we may sustain both the conclusion and the reasoning in R. v. Roberts, 33 Eng. Law & Eq. 539; Dears. 553; in which it was held that the procuring of dies wherewith to forge coin is an indictable offence. It is undoubtedly is; but it is so because it is an independent misdemeanor, and not an attempt.

³ R. v. Eagleton, Dears. 515; R. v. Meredith, R. & R. 46; 8 C. & P.

indictable as an attempt,¹ but aiming it is.² So owning a false weight is not itself indictable, but using it as a means of cheating is evidence, when connected directly with the proposed act, of an attempt to cheat.³ So to purchase iron to use in making false keys is not an attempt at a particular larceny; but it is otherwise when an impression is taken of a particular warehouse key, and a key, counterfeiting it, made, with the intent to steal from such warehouse, and the larceny is begun.⁴ In other words, to make the act an indictable attempt, it must be a *cause* as distinguished from a *condition*.⁵ And it must go so far that it would result in the crime unless frustrated by extraneous circumstances.⁶

offence." So also said Lord Abinger, in *R. v. Meredith*, 8 C. & P. 589:

"Suppose a man intended to carnally abuse a child, and was to take his horse and ride to the place where the child was, that would be a step towards the commission of the offence, but would not be indictable." See an interesting extension of this principle in *R. v. McCann*, cited *infra*, § 187; and also *R. v. Taylor*, 1 F. & F. 511; *Roberts' case*, *Dears. C. C.* 556. So, under a statute prohibiting entering a building, climbing up a roof, and then making a hole, is an attempt. *R. v. Bain*, L. & C. 129; 9 Cox C. C. 98.

¹ It would be otherwise if the gun were used under any circumstances prohibited by law. *Roberts' case*, *Dears. C. C.* 539.

² See argument of Chief Justice Field, in *People v. Murray*, 14 Cal. 159, 160; a case, however, in which sending for a magistrate to contract an incestuous marriage, followed by elopement, was held, by an undue extension of the above doctrine, not to constitute an attempt to contract such marriage.

³ *R. v. Cheeseman*, L. & C. 140, stated *supra*, § 178.

⁴ *Griffin v. State*, 26 Ga. 493. See

R. v. Roberts, 7 Cox C. C. 39; *Dears. C. C.* 559.

⁵ *Supra*, § 178.

⁶ In *R. v. Taylor*, 1 F. & F. 511, cited *infra*, § 187, Pollock, C. B., said: "It is clear that every act committed by a person with the view of committing the felonies therein mentioned is not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. If two persons were to agree to commit a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." On the other hand, in *R. v. St. George*, 9 C. & P. 483, the prisoner was indicted under the 7 Will. 4 and 1 Vict. c. 85, s. 4, for an attempt to shoot; and the proof was that he had put his finger on the trigger of a loaded fire-arm with the intention of shooting, but was prevented from doing so. This was held by

a man, when assaulted, is entitled to ward off by blows an attempt at violence, which is apparent only, but not real, is deci-

and the lip there may not be a slip. There can be no certainty that the means will operate until there has been a trial of the means. The attempt which is made with unsuitable means, and that which is made with inadequate means, are, objectively considered, of the same character. Neither is adapted to effect the desired end. Neither is actually "dangerous." An insufficient dose of poison may be not only innocent, but beneficial, and hence not a poison at all. An insufficient dose of arsenic may be as ineffective as a sprinkling of sugar, and hence, not merely "inadequate," but "unsuitable." If, therefore, an attempt with "inadequate" means is indictable, so must be an attempt with "unsuitable" means; if an attempt with "unsuitable" means is not indictable, neither should be an attempt with "inadequate" means. The same observation is extended to means whose failure is imputable to the defective action of the offender himself. The ball, which fails because the gun is badly aimed, is as ineffective as the ball aimed from too great a distance. A false belief that the powder with which a gun is loaded is sufficient to make the ball effective is as potent in defeating the offender's purpose as is the false belief that an unloaded gun is loaded. An error as to the length of a ladder to be used in entering a house, or as to the fitness of a skeleton key, operates to defeat the criminal purpose as effectively as does an error as to the explosive capacity of a powder to be used to burst open a gate.

To this it is replied, to follow Schwarze's compendium of the arguments on both sides of this interesting question, that the use of an instru-

ment in itself obviously unfit leaves us no means of determining what was the intention of the party charged. What right have we to assume that a person aiming a broom at another is attempting to shoot? To prove the criminal intention it is necessary to put in evidence acts consistent with such intention, not acts to which the hypothesis of such an intention is repugnant. A mere *confession* of the party cannot convict when it is a confession that plainly shows there is no offence. If A. says, "I meant to shoot B. with the broom-stick," this confession is a confession of something that whatever it is is not an attempt to shoot with a gun. A person confessing that he gave another sugar, believing it to be such or not knowing it to be poison, cannot, on his confession, be convicted of an attempt to poison.

To this it is replied that the existence of a criminal will, and of an act performed with the intention to effectuate this will, is as much present when unsuitable means are used as when inadequate means are used. The former is an error as to quality, the latter as to quantity. Want of accuracy of perception in the one case is no more a defence than defective appreciation of the quantity required is a defence in the other case. It is true that from the use of absolutely unsuitable means we may infer that the intention charged did not exist. This exception, however, does not apply to cases in which the means used, though really unsuitable, did not appear so to the party employing them, as where sugar is used supposing it to be arsenic. A person goes to an apothecary to buy arsenic in order to poison another. The apothecary, suspecting the object, gives the

after all is unreal though apparent.¹ But why? Simply because the levelling of an unloaded gun at another person in such a way as to produce terror in the latter is a breach of the public peace, as well as an invasion of the rights of the individual. The law, therefore, declares the attempt which is the subject of legal intervention to include that which is made with means apparently adequate, whether or no these means are actually such as to be necessarily successful if employed.² The same distinction is applicable on principle to indictments for attempts to poison.³

are we to find a test as to the efficiency of the poison? Suppose that, with intent to sweep away a whole family, poison is introduced into a tureen of soup of which the family in common is about to partake. The poison would be sufficient to kill the children of the family, but not the adults. Shall we say, supposing the attempt to be frustrated, that the offender is indictable for an attempt to kill the children, but not for an attempt to kill the adults? Or at what age of a child does an attempt to poison it cease to become indictable? Or how can we determine, if the test be capacity to resist poisons, what is the capacity in any particular case?

The true theory, it is therefore insisted, is the *relative subjective*; that is to say, the test is, did the offender intend to hurt, and did he take means apparently calculated to effect his end. If so, the unsuitableness of the means makes no defence. To this rule an exception is to be made, excluding cases where unsuitable superstitious agencies are employed. And the validity of this exception is conceded in cases in which the agency of supernatural beings is invoked, it being left discretionary with such beings to intervene or not. Hence the adherents of the subjective

theory concede that it is not an indictable attempt for a person, intending thereby to kill another, to resort to incantations or invocations of supposed magicians or malevolent spirits.

¹ See fully infra, §§ 606, 642; and see *Com. v. White*, 110 Mass. 407.

² As sustaining the argument of the text, see *R. v. St. George*, 9 C. & P. 483; *R. v. Lallemond*, 6 Cox C. C. 204; *R. v. Cluderay*, 1 Den. C. C. 515; 2 C. & K. 907; *U. S. v. Bott*, 11 Blatch. 346; *Com. v. McDonald*, 5 Cush. 365; *Com. v. Jacobs*, 9 Allen, 274; *O'Leary v. People*, 4 Parker C. R. 187; *Slatterly v. People*, 58 N. Y. 354; *People v. Lawton*, 56 Barb. 126; *Mullen v. State*, 45 Ala. 43; *Tarver v. State*, 43 Ala. 354; *Kunkle v. State*, 32 Ind. 220; overruling *State v. Swails*, 8 Ind. 524; *State v. Shephard*, 10 Iowa, 126; *Allen v. State*, 28 Ga. 395; *Tyra v. Com.* 2 Metc. (Ky.) 1; *State v. Hampton*, 63 N. C. 13; *State v. Davis*, 1 Iredell, 125; *State v. Rawles*, 65 N. C. 334; *People v. Yslas*, 27 Cal. 630; *Long v. State*, 34 Tex. 566. See also infra, § 606. We have a parallel rule laid down in cases of forgery. *Infra*, §§ 700 *et seq.* In apparent conflict with the text is a group of English cases on statutes. In one of these

³ See *R. v. Cluderay*, 1 Den. C. C. 515; 2 C. & K. 907; *State v. Clarissa*, 11 Ala. 57.

ready been touched upon in its general relations. It is enough now to view it simply in relation to *rape*. If there be *juridical* incapacity for the consummated offence (*e. g.* infancy), there can be no conviction of the attempt; and therefore, a boy under fourteen cannot be convicted of an attempt to commit a rape.¹ It is otherwise when the incapacity is merely nervous or physical. A man may fail in consummating a rape from some nervous or physical incapacity intervening between attempt and execution. But this failure would be no defence to the indictment for the attempt. At the same time there must be *apparent* capacity.²

§ 185. That capability of success is essential to an attempt has been proclaimed by high English authority,³ Lord Chief Justice Cockburn saying "that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged." This limitation, however, has already been shown to be erroneous, it being clear that apparent adaptation may constitute the attempt.⁴ And in conflict with the above expressions of Chief Justice Cockburn is a subsequent case, in which the same court held that an attempt to produce miscarriage can exist when the attempt was made on a woman not pregnant.⁵ Certainly an attempt to suborn a witness would be indictable, though such witness was of a character so high as to make success impossible, or though the witness was incompetent.⁶ And so has it been ruled expressly that the taking a null false oath before an incompetent officer is an indictable attempt,⁷

¹ R. v. Eldershaw, 3 C. & P. 396; Cox C. C. 40; S. C., 1 Den. C. C. 187, and under name R. v. Goodchild, 2 R. v. Phillips, 8 C. & P. 736. See, however, *contra*, Com. v. Green, 2 Car. & K. 293; Wilson v. State, 2 Pick. 380; People v. Randolph, 2 Ohio St. 319; State v. Howard, 32 Vt. Parker C. R. 213; Williams v. State, 380; though see Com. v. Wood, 11 14 Ohio, 222. And see supra, §§ 69, Gray, 85.

² *Infra*, § 554; State v. Elick, 7 Jones N. C. 68; Lewis v. State, 35 Ala. 380.

³ R. v. Collins, L. & C. 471.

⁴ *Supra*, § 182.

⁵ *Infra*, § 596; R. v. Goodall, 2

⁶ *Infra*, §§ 1254, 1271.

⁷ *Infra*, § 1328.

In New York, on the trial of an indictment under the statute for an attempt to commit arson, it was shown that the prisoner solicited one K. to set fire to a barn, and gave him ma-

German case, in which the assumption was that the object the thieves had in view, in an attempted entrance in a building, was some grain they believed to be stored there, which grain had been previously removed. It was held, however, that the attempt was to *steal*, and that when there is such an attempt the thief would look forward to taking whatever he could get.¹

But more difficult questions arise when the object is absolutely non-existent. Suppose a man takes aim at a shadow or a tree, imagining it to be an enemy. The guilty intent here exists; but is there such an overt act as to make up an attempt? According to the definition of attempt heretofore given (a deliberate crime which is begun, but through circumstances independent of the will of the actor is left unfinished), we must answer this question in the negative.² To shoot at a shadow or a tree is not an indictable offence, unless under circumstances disturbing public peace.³

This reasoning, however, does not apply where there is an actual injury attempted to the person or property of another, though, from circumstances exterior to the actor's will, this injury does not produce its immediately contemplated result. Thus, as has been seen, an attempt at miscarriage may be proved, though it turns out the woman was not actually pregnant;⁴ and

¹ See Schwarze, *ut supra*; and see remarks of Coleridge, J., in *R. v. Clarke*, 1 C. & K. 421, as sanctioning this; and *Spears v. State*, 2 Ohio St. 585; *Hamilton v. State*, 36 Ind. 280; and cases cited *infra*, § 820.

² See *R. v. Lovel*, 2 M. & R. 39. See *supra*, §§ 107-111.

In *R. v. M'Pherson*, D. & B. 201, Bramwell, B., argued that if A. mistakes a log of wood for B., and intending to murder B., strikes the log with an axe, this is not an attempt to murder B. This is adopted by Sir J. Stephen. *Dig. Cr. Law*, art. 49. But how if A. had shot at the log. See, for criticisms on the conclusions in the text, *Cent. Law Jour.* July 18, 1879.

³ An analogy may be found in cases of forgery, which ceases to be indictable when the person whose paper is

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forged is absolutely and notoriously non-existent. *Infra*, §§ 693-696.

Lady Eldon, when travelling with her husband on the Continent, bought what she supposed to be a quantity of French lace, which she hid, concealing it from Lord Eldon in one of the pockets of the coach. The package was brought to light by a custom officer at Dover. The lace turned out to be an English manufactured article, of little value, but of course not subject to duty. *Lady Eldon* had bought it at a price vastly above its value, believing it to be genuine, intending to smuggle it into England. Here was an attempt to smuggle, though the object was one not susceptible of being smuggled.

⁴ *R. v. Goodall*, 2 Cox C. C. 40; 1 Den. C. C. 187; 2 C. & K. 293.

but it is otherwise when the process of execution is in such a condition that it proceeds in its natural course, without the attempter's agency, until it either succeeds or miscarries.¹ In such a case, no abandonment of the attempt, and no withdrawal from its superintendence, can screen the guilty party from the results.²

¹ In the issue of voluntariness we may consider the following contingencies:—

Suppose that a burglar finds that the window he expected to enter has been blocked up during the night. Or suppose, as was the case in one of the attempts on the life of William III., the assassins, as they approach, see in the distance a regiment of cavalry encircling their intended victim. Or suppose that the pickpocket, just as he is inserting his hand, is arrested by a police officer. No one would doubt that in all these cases the consummation of the offence was hindered by causes outside of the will of the offender. He was physically prevented from effecting the purpose. He could not have penetrated the wall, or broken through the line of cavalry, or picked the pocket when in the policeman's grasp.

But a much more difficult question arises when the attempt is not *physically* interrupted by extraneous conditions, but where these conditions are such as to induce the offender to withdraw. Suppose that instead of finding the window walled up he sees some slight disarrangement in the premises which leads him to suspect that he is watched. Suppose that instead of seeing the line of cavalry in his way, he finds a change has taken place in the appointments of the palace, from which he infers that the plot has been discovered. Suppose that instead of being caught by the policeman he sees somebody in the distance, a good deal like a detective, curiously

inspecting him. Certainly we cannot consider his withdrawal under such circumstances voluntary. And so speak the cases cited.

But suppose the hindrance which caused the offender to back out was imaginary. It was not a cause outside of himself. Here, again, we are entangled in a metaphysical discussion. Are what we see in any case real existences, or can our impressions of them be at the utmost anything more than mirrors within ourselves? But if all abandonment is voluntary when produced by impressions within ourselves, there can be no involuntary abandonments, since there are no abandonments not so produced. Such is the reply we may make, taking even the most realistic metaphysical theorists as our guides, to those who argue that an unreal impression of danger is not an effective condition. It is enough, however, to say that as in other cases (*e. g.* self-defence) unreal impressions are regarded as effective conditions, they may be so regarded in this case.

² See *R. v. Taylor*, 1 F. & F. 511; *R. v. Sharpe*, 3 Cox C. C. 288; *State v. Blair*, 13 Rich. 93. Thus in treason, which is a high grade of attempt, where the attempt is frustrated by extraneous interruption, then such frustration is no defence. *U. S. v. Fryor*, 3 Wash. C. C. 234. But in such case (*e. g.* an abortive attempt to communicate intelligence, or to furnish supplies to an enemy) the proper course is to indict for the attempt. But see *contra*, *U. S. v. Fryor*, *supra*,

when in process of execution, are not disavowed. There must be substantive acts showing that the abandonment was real, just as there must be substantive acts showing the attempt was real.

It should be remembered, also, that if such abandonment is caused by fear of detection it is no defence, if the attempt progress sufficiently towards execution to be *per se* indictable before such abandonment. Thus if a thief, when moving his hand towards a pocket, desists on seeing a detective, the offence is made out. To the same effect, perhaps, may be cited two American decisions, in which attempts at rape, abandoned before consummation, were held indictable.¹ It is true that it may be observed that in these cases the offence of felonious assault was complete, prior to the period of abandonment. More exactly illustrative of the principle is an English case tried before Chief Baron Pollock, in which it appeared that the defendant, having lighted a lucifer match to set fire to a stack, desisted on discovering he was watched. It was held, and properly, that this abandonment of purpose was no defence.² It must also be remembered that if an attempt — *e. g.* an assault — is frustrated by force, such frustration is no defence.³

¹ *Lewis v. State*, 35 Ala. 380; *State v. Elick*, 7 Jones N. C. 68. See also *State v. McDaniel*, 1 Winston, 249. And see, as qualifying above, *Kelly v. Com.* 1 Grant (Penn.), 484. See *infra*, § 279.

² *R. v. Taylor*, 1 F. & F. 511. See *supra*, § 181.

³ *Stephen v. Myers*, 4 C. & P. 349. *Infra*, § 604.

In an Upper Canada prosecution for an attempt to commit burglary, it was proved that two defendants agreed to commit the offence on a certain night, together with C., who, however, was detained at home by his father, who suspected the design. The defendants were seen about midnight entering a gate fifty feet from the house; they came towards the house to a picket fence in front, in which

there was a small gate, but there was no proof that they came nearer the house than twelve or thirteen feet, nor did they pass the picket gate. They went, as it was supposed, to the rear of the house, and were not seen afterwards. It was held by the Queen's Bench that there was not sufficient establishment of a persistence in the attempt to justify a conviction, the attempt appearing to have been voluntarily abandoned before any mischief was done. It was added, however, that if it appeared that such abandonment was not voluntary, but caused by surprise and interruption from others, and that but for such surprise and interruption they would have carried out their burglarious design, there was ground for a conviction. *R. v. McCann*, 28 Up. Can. Q. B. 517.

ously steal from the house of A. B.,¹ or "to commit a rape" on A. B.,² is good. But this does not touch the question at common law.

§ 192. At common law such facts must be set forth as show that the attempt is criminal in itself. Attempts may be merely in conception, or in preparation, with no causal connection between the attempt and any particular crime; in which case, as has been seen, such attempts are not cognizable by the penal law. On the other hand, when an attempt stands in such connection with a projected, deliberate crime, that the crime, according to the usual and likely course of events, will follow from the attempt, then the attempt is an offence for which an indictment lies. Now it is a familiar principle of criminal pleading, that when an act is only indictable under certain conditions, then these conditions must be stated in the indictment in order to show that the act is indictable. Nor does it make any difference that the offence is made so by statute.³ Thus statutes make indictable revolts and obtaining goods by false pretences; yet an indictment, charging simply that the defendant "made a revolt," or "obtained goods under false pretences," would be scouted out of court.⁴ On the same reasoning, in an indictment for an attempt to commit a crime, it is essential to aver that the defendant did some act, which, directed by a particular intent, to be averred, would have apparently resulted, in the ordinary and likely course of things, in a particular crime.⁵

Indictment must aver circumstances of attempts.

¹ R. v. Johnson, 1 L. & C. 489.

² See Lewis v. State, 35 Ala. 380.

³ Whart. Crim. Plead. & Prac. § 151.

⁴ Ibid. §§ 151-2. *Infra*, § 1227.

⁵ See, as sustaining the conclusions of the text, R. v. Marsh, 1 Den. C. C. 505; R. v. Powles, 4 C. & P. 571; U. S. v. Ulrich, 3 Dillon, 532; State v. Wilson, 30 Conn. 500; Randolph v. Com. 6 S. & R. 398; Mears v. Com. 2 Grant, 385; Clark's case, 6 Grat. 675; State v. Brannan, 8 Nev. 238; Anthony v. State, 29 Ala. 27; Beasley v. State, 18 Ala. 555; Trexler v. State, 19 Ala. 21; Lewis v.

State, 35 Ala. 380 (under a special statute); State v. Johnston, 11 Tex. 22.

The question, it should be remembered, depends largely on the construction of the statute. In Massachusetts, it is not necessary, in an indictment for an attempt to commit a crime, within the Rev. Stat. c. 133, § 12, that it should be directly charged that the act attempted was a crime punishable by law, provided it appear to be so from the facts alleged. In an indictment for an attempt to burn a building, it is not necessary to describe the combustible materials used for the

§ 193. The cumulation of facts, therefore, to show the criminal character of the intent, is not duplicity. Thus a Massachusetts indictment under Rev. Stat. 133, § 12, is not bad for duplicity, when, besides setting forth an "attempt" to set fire to a building, it avers a breaking and en-

Cumulation of facts not duplicity.

purpose. *Com. v. Flynn*, 3 Cush. 529. See *Com. v. McDonald*, 5 Cush. 365; *Com. v. Sherman*, 105 Mass. 169. An indictment has been sustained which charged that the defendant, with intent to steal the personal property of a certain woman, the property "being in her pocket and on her person," did "thrust, insert, put, and place his hand upon the dress, near and into the pocket of the said woman, without her knowledge, and against her will," &c. *Com. v. Bonner*, 97 Mass. 587. The Supreme Court of the United States (*U. S. v. Simmons*, 96 U. S. § 360) held that in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in its commission, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. Harlan, J., citing *Wh. C. L.* 7th ed. § 292; *U. S. v. Gooding*, 12 Wheat. 460; *U. S. v. Ulrici*, 3 Dillon, 535. See, to same effect, *State v. Dent*, 3 Gill & J. 8.

In Virginia, an indictment simply averring that the defendant "did attempt feloniously to maim," &c., C. R., was said to be not sufficiently precise. Clark's case, 6 Grat. 675. The indictment "should allege," said Leigh, J., "some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment." And in Pennsylvania, the same rule exists in reference to common law indictments for attempts. *Randolph v. Com.* 6 S. & R. 398.

In Pennsylvania, an indictment charging that S. A., on, &c., "in the

night-time of the said day aforesaid, at, &c., did attempt to commit an offence prohibited by law, to wit: with force and arms, with an axe, &c., with a wicked intent on the dwelling-house of D. H., &c., in the night-time, feloniously and burglariously did break and enter, and with the intent with the said axe to open and enter," &c., and steal, "but said S. H. did then and there fail in the perpetration of said offence," was held good as an indictment for an attempt to commit burglary at common law. *Hackett v. Com.* 15 Penn. St. 95. But see *Mears v. Com.* 2 Grant, 385.

In England an indictment stated that the prisoner "did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain from the Agricultural Cattle Insurance Company a large sum of money, to wit, the sum of £22 10s., with intent thereby then and there to cheat and defraud the said company," &c. It was held: 1st. That the nature of the attempt was not sufficiently set forth; 2d. That the indictment did not contain facts amounting to a statement of a misdemeanor, as the money was not laid to be the property of any one. *R. v. Marsh*, 1 Den. C. C. 505. See also *R. v. Cartwright*, R. & R. 106.

It is enough in England to charge that the defendant "the goods and chattels of C. D., in the dwelling-house of the said C. D., situate in the borough of B., did attempt feloniously to steal, take, and carry away." *R. v. Johnson*, 1 L. & C. 489. See *R. v. Bullock*, Dears. 653; *R. v. Marsh*, 1 Den. C. C. 505; 3 Cox C. C. 570. So

tering of the building.¹ Hence the attempt may be alleged to be to commit more offences than one.²

III. JURISDICTION.

§ 195. The question of jurisdiction, when an attempt is pursued through two or more distinct sovereignties, is elsewhere discussed.³

It is clear that such attempt is cognizable in the place where, if not interrupted, it would have been executed; ⁴ and from the very nature of things, it must be cognizable in the place where the preliminary overt acts constituting the attempt are committed. Attempts cognizable in place of consummation.

IV. EVIDENCE.

§ 196. As in consummated crimes the intent, which is here essential, may be inferred by the jury from facts.⁵ Thus when an indictment alleges that a party attempted to set fire to a dwelling-house, with intent to burn it, by attempting to set fire to another building, the jury are authorized to infer the alleged intent from the evidence of the attempt to set fire to the other building.⁶ It has been ruled, however,⁷ where a prisoner burned a hole in the guard-house where he was confined, in order to escape, and with no intent to consume or generally injure the building, that this was not an attempt to burn the house.⁸

Whether when the intention is to hurt B., and the hurt falls on C., the defendant is indictable for an attempt to hurt C., has been already incidentally noticed.⁹

§ 197. If the instrument by which an attempt is effected is apparently adapted to the end (*e. g.* a gun to shooting), this is a sufficient *prima facie* case. Adaptation makes a *prima facie* case.

also in New York. *People v. Bush*, 4 Hill, 133. *Contra*, *State v. Wilson*, 80 Conn. 500; *Clark's case*, 6 Grat. 675.

¹ *Com. v. Harney*, 10 Met. 422.

² *Ibid.*; *R. v. Fuller*, 1 B. & P. 180.

³ See *infra*, § 288; and see *Griffin v. People*, 26 Ga. 493.

⁴ *R. v. Collins*, L. & C. 471; 9 Cox C. C. 497.

⁵ See *supra*, § 176.

⁶ *Com. v. Harney*, 10 Met. 422.

⁷ *Jenkins v. State*, 53 Ga. 33.

⁸ But see *Luke v. State*, 49 Ala. 30.

⁹ *Supra*, §§ 109-120.

VII. PUNISHMENT OF ATTEMPT.

§ 200. For the reasons heretofore given, the punishment of an attempt should be less than that of the consummated crime. The attempt involves neither the duration of premeditation, nor the obduracy of purpose, which belong to the crime when complete. And the policy of the law is, by assigning more lenient punishment to the incomplete offence, to arrest offences in the process of completion. This view, so long neglected in English law, and which English and American judges, acting on what is called the preventive policy, even now sometimes lose sight of,¹ is essential to a sound ethical jurisprudence.²

¹ *Supra*, § 10.

² See Geib, *ut supra*, § 99. Plato de legg. ix. p. 876, sq. : *ἐάν τις δαναοηθεῖς τῇ Βουλῆσει κταίνα τὰ φίλων, πλὴν ὃν ὁ νόμος ἐξίει, τρώσῃ μὲν, ἀποκτείνειν δὲ ἀδυνατήσῃ, τὸν δαναοηθέντα τε καὶ τρώσαντα οὐτως οὐκ ἔξιν ἐλεεῖν, οἷδὲ ἀλόου- μενον ἄλλως ἢ καθὼς ἀποκτείναντα, ὑπέ- χων τὴν ἀκρὴν φόνου ἀναγκάζειν. τὴν δὲ σὺ παντάσῃ κακῇ τύχῃν αὐτοῦ σεβόμενον, καὶ τὸν δαίμονα, ὃς αὐτὸν καὶ τὸν τρωθέντα ἐλέσθαι ἀπίτροπος αὐτοῖς ἐγένετο, μὴ τῷ μὲν ἀνάτοιον ἔλωσ γενέσθαι, τῷ δὲ ἐπάρατον τύχῃν καὶ συμφορὰν, τοῦτω δὲ χάριν τῷ δαίμονι δίδόντα, καὶ μὴ ἐναντιούμενον, τὸν μὲν θάνατον ἀφέλειν τοῦ τρώσαντος, μετασ- τασὸν δὲ εἰς τὴν γείτονα πόλιν αὐτῷ γιγνεσ- θαι, διὰ βίον καρπούμενον ἅπασαν τὴν αὐτοῦ εἰρήνην.* So Beccaria dei delitti e delle pene, § 37. (§ 14.) p. 139: "Perchè le leggi non puniscono l'intenzione, non è però che un delitto, che cominci con qualche azione, che ne manifesti la volontà di eseguirlo, non meriti una pena, benchè minore all' esecuzione medesima del delitto. L'importanza di prevenire un attentato autorizza una pena; ma siccome tra l'attentato e l'esecuzione vi può essere un intervallo, così la pena maggiore riserbata al delitto consumato può dar luogo al pentimento." So Rossi *Traité de droit*

pénal, ii. pp. 318-394; iii. pp. 7-12 :

"La tentative est suspendue par un événement fortuit; mais sans cet événement le crime aurait-il été consommé? Cela est possible; si l'on veut, probable; mais rien de plus: car, si c'est une vraie tentative, l'auteur pouvait aussi se désister. Ce surplus de volonté, de degré ultérieur de persévérance, et d'iniquité comment l'imputer? Point de fait révélateur. Ainsi toute la partie de l'imputation qui dépasse l'instant de la suspension de la tentative, est une imputation hasardée; c'est impartir ce que l'on ignore; c'est punir la pensée par conjecture. Cependant si la peine doit être la même que celle du crime consommé, il faut la même certitude non-seulement sur la volonté de l'agent, mais sur la persévérance de cette volonté. Sans cela, on peut croire faire une loi utile; mais il ne faut point parler de justice. . . . De l'autre côté, si l'on prend en considération le mal matériel produit par la tentative, comment en conclure qu'elle doit être punie comme le crime même? La violation du droit menacé n'est pas accomplie; peut-être même n'y a-t-il encore d'autre mal objectif que le

danger et l'alarme. Ainsi, soit qu'on considère la partie morale, soit qu'on s'arrête à la partie matérielle de l'acte, rien ne justifie aux yeux de la justice humaine la prétendue parité de la tentative et du crime. La loi qui la sanctionne n'est donc plus qu'une mesure d'utilité et de convenance."

CHAPTER IX.

ACCESSARYSHIP, AGENCY, MISPRISION.

I. STATUTORY CHANGES.

Common law recently modified by statutes, § 205.

II. PRINCIPALS.

Principal in first degree is actual perpetrator, § 206.

Presence is not necessary when causal connection is immediate, *e. g.* when agent is irresponsible, § 207.

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Non-resident party may be liable for agent's acts, § 209.

Wife not ordinarily co-principal with husband, § 210.

Principals in the second degree are those present aiding and abetting, § 211.

If principal is irresponsible, indictment should not be for aiding and abetting, § 212.

Confederacy with constructive presence may constitute principal, § 213.

But act must result from confederacy, § 214.

In duels all are principals, § 215.

Persons abetting suicide are principals in murder, § 216.

Persons executing parts of crime separately are principals, § 217.

Persons outside keeping watch are principals, § 218.

An abettor must be near enough to give assistance, § 219.

Persons confederating for wrongful purpose are chargeable with incidental felony, § 220.

Distinction between two degrees only essential when punishment varies, § 221.

Conviction of principal in the first degree not a condition precedent to

trial of principal in second degree, § 222.

In misdemeanors all are principals, § 223.

And so as to treason at common law, § 224.

III. ACCESSARIES BEFORE THE FACT.

Commanding and counselling constitute accessoryship before the fact, § 225.

Several instigators may be combined, § 225 *a.*

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Silent acquiescence is not counselling, § 227.

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Assistance must be rendered knowingly and really, § 231.

May be accessory before the fact to manslaughter, § 232.

Accessory before the fact need not be originator, § 233.

Quantity of aid immaterial, § 234.

Conditions of time immaterial, § 235.

Grade of guilt not necessarily the same, § 236.

Conviction of principal no longer a prerequisite, § 237.

Indictment must particularize offence, § 238.

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Attempts, § 240.

IV. ACCESSARIES AFTER THE FACT.

An accessory after the fact is one who subsequently assists or comforts the felon, § 241.

Knowledge of principal's guilt is essential, § 242.

Wife is not so liable, § 243.
 Conviction of principal *prima facie*
 evidence of guilt, § 244.
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V. PRINCIPAL'S LIABILITY FOR AGENT.
 Where the agent acts directly under
 principal's commands, principal lia-
 ble, § 246.

So when agent is in line of principal's
 business, § 247.
 Non-resident principal infra-territo-
 rially liable, § 248.

VI. MISPRISION.
 Misprision of felony is concealment of
 felony, § 249.

I. STATUTORY CHANGES.

§ 205. BY the English common law, whenever there is a stat-
 utory distinction of punishment between principals in
 the first and principals in the second degree, a party
 charged as principal in the first degree cannot be con-
 victed on evidence showing him to be principal in the second de-
 gree. By the same common law, there can be no conviction of
 an accessory on an indictment charging him as principal. The
 obstructions of justice caused by these subtleties have long been
 deplored; and while in several of the States of the American
 Union it is already provided by statute that accessories before
 the fact are to be proceeded against as principals, in other States,
 and in England, the change will probably not be long delayed.
 So far as concerns principals in the first and principals in the
 second degree, the distinction is now almost universally obliterated.
 In the present chapter, however, in view of those juris-
 dictions in which the common law in this relation remains, the
 topic will be discussed as at common law.

Common
 law recent-
 ly modified
 by statute.

II. PRINCIPALS.

§ 206. A principal in the first degree, at common law,
 is one who is the actual perpetrator of the act.¹

§ 207. To constitute, however, this grade of offence,
 it is not necessary that the party should have com-
 mitted the act with his own hands, or be actually pres-
 ent when the offence is consummated; for, if one lay
 poison purposely for another, who takes it and is killed,
 he who laid the poison, though absent when it was
 taken, is a principal in the first degree.² Such, also, is
 the case with a party who maliciously turns out a wild

Principal
 in first de-
 gree is ac-
 tual per-
 petrator.

Presence
 not neces-
 sary when
 causal con-
 nection is
 immediate,
 e. g. when
 agent is ir-
 responsible.

¹ 1 Hale, 233, 615; Stephen's Dig.
 art. 35.

² Vaux's case, 4 Co. 44 b; Ste-
 phen's Dig. art. 35; Fost. 349; R. v.

beast, intending to kill any one whom the animal may attack.¹ A party, also, who acts through the medium of an innocent² or insane medium,³ or a slave,⁴ is guilty as principal in the first degree.⁵ Thus, in Sir William Courtney's case, Lord Denman, C. J., charged the jury: "You will say whether you find that Courtney was a dangerous and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and conferring in his acts; and if you do, you will find them guilty, for they are then liable as principals for what was done by his hand."⁶ If a child under the age of discretion, or any other person excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the incitor, though absent when the act was committed, is *ex necessitate* liable for the act of his agent, and a principal in the first degree.⁷ So if A., by letter, desire B., an innocent agent, to write the name of "W. S." to a receipt on a post-office order, and the innocent agent do it, believing that he is authorized so to do, A. is a principal in the forgery; and it makes no difference that by the letter A. says to B. that he is "at liberty" to sign the name of W. S., and does not in express words direct him to do so.⁸ But if the agent be aware of the consequences of his act, he is a principal in the first de-

Harley, 4 C. & P. 369; R. v. Kelly, 2 C. & K. 379; R. v. Holloway, 2 Den. 287; R. v. Williams, 1 C. & K. 589; 1 Den. C. C. 39; People v. Bush, 4 Hill, 133. See Pinkard v. State, 30 Ga. 757; Green v. State, 13 Mo. 382; Collins v. State, 3 Heisk. 14.

¹ Fost. 349; 1 Hale, 514.

² Supra, § 161; R. v. Mazeau, 9 C. & P. 676; R. v. Michael, 9 C. & P. 356; S. C., 2 Moody C. C. 163; R. v. Clifford, 2 Car. & Kir. 201; Com. v. Hill, 11 Mass. 36; People v. Peabody, 25 Wend. 472; Adams v. People, 3 Comstock, 173; Collins v. State, 3 Heisk. 14; State v. Fulkerson, Phillips N. C. 233.

³ 1 Hale, 19; 4 Bla. Com. 23; R.

v. Giles, 1 Moody C. C. 166; R. v. Tyler, 8 C. & P. 616; Blackburn v. State, 23 Ohio St. 146.

⁴ Berry v. State, 10 Georgia, 511.

⁵ Supra, § 161.

⁶ Hawk. c. 1, s. 7; R. v. Mears, 1 Boston Law Rep. 205.

⁷ Fost. 340; 1 East P. C. 118; 1 Hawk. c. 31, s. 7; R. v. Palmer, 1 N. R. 96; 2 Leach, 978; R. v. Giles, 1 Mood. C. C. 166; R. v. Michael, 2 Mood. C. C. 87; 9 C. & P. 356; R. v. Manley, 1 Cox C. C. 104; Com. v. Hill, 11 Mass. 136; Collins v. State, 3 Heisk. 14. Supra, § 161.

⁸ R. v. Clifford, 2 C. & K. 201. See also R. v. Palmer, 1 Russ. Cr. 53; Stephen Cr. Law, art. 36.

gree, and the employer, if he be absent when the act is committed, is an accessory before the fact.¹

Accessory before the fact cannot be convicted as principal.

§ 208. At common law, one indicted as principal cannot be convicted on proof showing him to be only an accessory before the fact,² nor the converse.³

Non-resident party may be liable for agent's acts.

§ 209. A non-resident party, though at the time an inhabitant of a foreign State, may be liable as principal for his agent's criminal acts in a particular jurisdiction.⁴ And a party who, thirty miles off, and in another county, signals to another, by fire on a mountain, when to commit a highway robbery, is principal in the robbery.⁵

Wife not ordinarily co-principal with husband.

§ 210. If a husband and wife commit a murder jointly, they may be regarded, so it has been held, as co-principals, on the ground that the doctrine of presumed coercion does not apply to murder.⁶ And so a wife may be convicted, it is said, as an accessory before the fact to the husband.⁷ But the weight of opinion is to require proof of independent consent on part of the wife.⁸

III. PRINCIPALS IN THE SECOND DEGREE.

§ 211. Principals in the second degree are those who are present aiding and abetting the commission of the offence. As has been elsewhere shown,⁹ the assistant (principal in the second degree) is distinguished from the principal in the first degree in this, that the latter *directs* the unlawful act, the former *assists* it; the action of the latter is primary, that of the former is subsidiary. Hence the principal in the first degree is spoken of by the old writers as

¹ R. v. Soares, R. & R. 25; R. v. Stewart, R. & R. 363; or, if he be present, a principal in the second degree. Fost. 349.

² R. v. Fallon, 9 Cox C. C. 242; State v. Wyckoff, 2 Vroom, 65; Hughes v. State, 12 Ala. 458; Josephine v. State, 39 Miss. 613; Walrath v. State, 8 Neb. 80. See for other cases *infra*, §§ 238-245.

³ 1 Leach, 515; 1 East P. C. 352; R. v. Plant, 7 C. & P. 575; State v. Lar-

kin, 49 N. H. 39. See State v. Dewey, 65 N. C. 572; Hately v. State, 15 Ga. 346.

⁴ *Infra*, §§ 278-280.

⁵ State v. Hamilton, 13 Nev. 386.

⁶ R. v. Manning, 2 C. & K. 887.

⁷ *Ibid.*

⁸ *Supra*, §§ 78 *et seq.* See R. v. Smith, 8 Cox C. C. 27; R. v. Wardroper, 8 Cox C. C. 284.

⁹ 9 Cent. L. J. 205.

causa principalis, while the principal in the second degree is spoken of as *causa secundaria*, or secondary cause. The principal in the second degree, or assistant, is distinguished from the accessory before the fact, not merely because the former is present, the latter absent, at the commission of the offence, but because the accessory before the fact, or instigator, acts deliberately, and so, with premeditation, though it may be not so cool and long, does the principal in the first degree; while the idea of such extended premeditation is not necessary to the principal in the second degree, or assistant, who is not supposed, as is the instigator, to exercise an organizing influence on the principal in the first degree, and who may be employed or induced to assist the latter without any previous conception of what the criminal act is intended to be. It is, of course, possible for a person to be at once instigator and assistant in the perpetration of a particular crime. But ordinarily the action of the assistant is subordinate to that of the principal. He is present at the perpetration, but present only as an auxiliary. The distinction however, under our present mode of pleading, is one that goes only to the adjustment of punishment, when that is discretionary with the court. Merely witnessing a crime, without intervention, does not make a person a party to its commission, unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime.¹ A person, for instance, in order to produce a collision on a railroad, starts a car on the top of a high grade. A switch-tender, appointed to watch and adjust a particular switch, could avoid a collision by turning the switch, but intentionally refuses to do so. In such case he is an assistant in the homicide, if a homicide ensue. A watchman appointed to guard a bank sees burglars approach, and lets them pursue their work without interruption. By so doing he becomes assistant in

¹ *Infra*, § 227.

A distinction is taken between physical and intellectual help, the latter being supposed to be help purely in words, or signs of encouragement. It should be observed, however, that all physical help is intellectual. A participant in a fight, for instance, to take an extreme case, sees a weapon shown to him by a person who is in-

visible. Here is physical aid in its most naked shape, since the person offering the aid is not even seen. But it is at the same time intellectual aid (or psychical, to take the German term), since it gives the combatant reason to believe that he has a friend near ready to see him through. It is encouragement as well as assistance.

pal in the second, but as principal in the first degree. Hence, if a principal in a transaction be not liable under our laws, another cannot be charged merely for aiding and abetting him, unless the other do acts himself which render him liable as principal.¹

indictment should not be for aiding and abetting.

§ 213. Any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in the second degree, as to any crime committed in execution of the plan.² Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of others with the possession of the goods, and then another of the party entice the owner away that he who has the goods may carry them off, all are guilty as principals.³ So, it has been ruled, that to aid and assist a person to the jurors unknown, to obtain money by ring-dropping, makes the party principal in the second degree, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of this practice.⁴

Confederacy with constructive presence may constitute principal.

§ 214. But the act must be the result and in execution of the confederacy;⁵ and if the crime is committed by a confederate as collateral to an escape;⁶ or if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a

But act must result from confederacy.

¹ U. S. v. Libby, 1 W. & M. 221.

See U. S. v. Crane, 4 McLean, 317.

² *Infra*, § 1404; Stephen's C. L.

27; *Sinninghurst's case*, 1 Hale P. C.

462; *R. v. Manners*, 7 C. & P. 801;

Com. v. Knapp, 9 Pick. 496; *Norton*

v. People, 8 Cow. 187; *Breese v. State*,

12 Oh. St. 146.

³ *R. v. Standley*, R. & R. 305; 1

Russ. 24; *R. v. Passey*, 7 C. & P.

282; *R. v. Lockett*, *Ibid.* 300.

⁴ *R. v. Moyre*, 1 Leach, 314; *R. v.*

Standley, R. & R. 305; *R. v. Passey*,

7 C. & P. 282; *R. v. Lockett*, *Ibid.* 300.

In *R. v. Jefferies*, 3 Cox C. C. 85,

Creswell, J., after conferring with

Paterson, J., held that if one of two

confederates unlock the door of a room

in which a larceny is to be completed, and then go away, and the other confederate comes and steals the goods, the former is not a principal in the theft. This, however, is disapproved in *State v. Hamilton*, 13 Nev. 385, and is in conflict with cases above stated.

⁵ See *infra*, § 397; *R. v. Hodgson*, 1 Leach, 7; *Duffey's case*, 1 Lew. 194; *R. v. Cruse*, 8 C. & P. 541; *R. v. Taylor*, L. R. 2 C. C. 147; *People v. Knapp*, 26 Mich. 112; *People v. Woodward*, 45 Cal. 293.

⁶ *R. v. Collison*, 4 C. & P. 565; *R. v. Howell*, 9 C. & P. 437; *People v. Knapp*, 26 Mich. 112.

"There can be no criminal responsibility for anything not fairly within

pursuer to avoid being taken; the others are not to be considered principals in such act.¹ Persons, also, interfering in hot blood in a fight, which was started by the immediate parties deliberately, may be guilty only of manslaughter, while the immediate parties are guilty of murder.² And when H. and S. broke open a warehouse and stole thereout thirteen firkins of butter, &c., which they carried along the street thirty yards, and then recalled the prisoner, who was apprised of the robbery, and he assisted in carrying the property away; he was held not a principal, the felony being complete before he interfered.³

Even confederates in a riot, as will presently be seen more fully, are not responsible for crimes which are the result of collateral collisions, in no way within the purview of the confederacy, and in no sense encouraged by the parties charged.⁴ And mere mental approval or sympathy does not make a person an accomplice or confederate.⁵

§ 215. In the case of murder by duelling, in strictness, all parties, as will be more fully seen, are technically principals.⁶ And all persons present at a prize-fight, having gone thither for the purpose of seeing the prize-fighters strike each other, are principals in the breach of the peace.⁷

In duels all are principals.

the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. In other words, the principle is quite analogous to that of agency, where the liability is measured by the express or implied authority. And the authorities are quite clear, and reasonable, which deny any liability for acts done in escaping, which were not within any joint purpose or combination." Campbell, J., *People v. Knapp*, 26 Mich. 112.

B. is indicted for inflicting on C. an injury dangerous to life, with intent to murder. A. is indicted for aiding and abetting B. A. must be shown to have known that it was B.'s intent to murder C., and it is not enough to show that A. helped B. in what he did. Steph. Crim. Dig. art. 37, citing *R. v. Cruse*, 8 C. & P. 546.

¹ *R. v. White*, Russ. & R. C. C. 99; *R. v. Skeet*, 4 F. & F. 931; *R. v. Colison*, 4 C. & P. 565; *R. v. Howell*, 9 C. & P. 437.

² *State v. King*, 2 Rice's S. C. Dig. 106.

³ *R. v. King*, Russ. & R. C. C. 332; *R. v. McMakin*, Russ. & R. C. C. 333.

⁴ See *infra*, § 220; citing *R. v. Murphy*, 6 C. & P. 103; *R. v. Skeet*, 4 F. & F. 931; *R. v. Price*, 8 Cox C. C. 96; *U. S. v. Jones*, 8 Wash. C. C. 209; *Com. v. Campbell*, 7 Allen, 541; *Watts v. State*, 5 W. Va. 532; *People v. Knapp*, 26 Mich. 112; *State v. Stalcup*, 1 Ired. 30. See *R. v. Colison*, 4 C. & P. 565; and see *infra*, § 397.

⁵ *State v. Cox*, 65 Mo. 29; *Connaughty v. State*, 1 Wis. 169. *Infra*, § 1400.

⁶ See fully *infra*, § 614.

⁷ *R. v. Perkins*, 4 C. & P. 537; *R.*

§ 216. If one encourage another to commit suicide, and is present aiding him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but the latter fail in an attempt upon himself, he is principal in the murder of the first.¹ Whether the influence of the defendant was the exclusive cause of the suicide is immaterial.² All present at the time of committing the offence are principals, although only one acts, if they are confederates, and engaged in the common design of which the offence is a part.³ Where, however, the act is done in the absence of the party who incites it, the latter has been held in England not to be amenable to indictment as a principal, because he was not present; nor as an accessory before the fact at common law, because the principal cannot be convicted;⁴ nor as guilty of a substantive felony under 7 Geo. 3, c. 64, s. 9, because that statute is to be considered as extending to those persons only who, before the statute, were liable either with or after the principal, and not to make those liable who before could never have been tried.⁵ But by subsequent statutes the English law in this respect is materially changed.⁶ That an attempt to commit suicide may be indictable at common law is elsewhere seen.⁷

A party who compels another to take poison, so as to produce death, is responsible for the murder as principal in the first degree.⁸

Persons
abetting
suicide are
principals
in murder.

¹ Murphy, 6 C. & P. 103; R. v. Young, 8 C. & P. 645. See Com. v. Dudley, 6 Leigh, 613.

² See more fully infra, §§ 448 et seq.; R. v. Dyson, Russ. & R. C. C. 523; R. v. Russell, 1 Moody C. C. 356; R. v. Allison, 8 C. & P. 418; Blackburn v. State, 23 Oh. St. 165.

³ Com. v. Bowen, 13 Mass. 356; Whart. Prec. 107.

⁴ Green v. State, 13 Mo. 382. See supra, §§ 206-208.

⁵ R. v. Fretwell, 9 Cox C. C. 152; L. & C. 161.

⁶ See R. v. Leddington, 9 C. & P. 79; R. v. Russell, 1 Moody C. C. 356.

⁷ See infra, §§ 448 et seq.

⁷ Supra, § 175.

⁸ Thus, in a case tried in 1872 in Ohio (where suicide is not a crime, there being in that State no common law crimes), the evidence was that the defendant, Blackburn, gave to the deceased, Mary Jane Lowell, poison, to be taken by her; and there was evidence tending to show that the defendant, by threats of violence or otherwise, forced her to swallow the poison, or forced it down her throat. There was also evidence of a mutual agreement between the parties to commit suicide. The defendant was convicted of murder in the second degree, under the Ohio statute making killing

§ 217. If part of a crime be committed in one place and part in another, each person concerned in the commission of either part is liable as principal.¹ Hence if several combine to forge a document, and each executes, by himself, a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.² And if A. counsel B. to make the paper, C. to engrave the paper, D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C., and D. may be indicted for forgery, and A. as an accessory;³ for if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others.⁴

§ 218. It has been already seen that actual immediate presence at the injury is not necessary: (1.) when the defendant acts through an irresponsible agent (*e. g.* through a lunatic or infant); and (2.) when he acts through a material agent, such as poison, which does not require the presence of a guilty director to make it effective. Nor is it necessary that the party should be actually present, an ear or eye-witness of the transaction, in order to make him principal in the second degree; he is, in construction of law, present

by administering poison murder. This was sustained in the Supreme Court. "To force poison down one's throat," said Welch, J., "or to compel him by threats of violence to swallow it, is an administering of poison. Neither deception nor breach of confidence is a necessary ingredient in the act. It matters not whether the poison be put into the hand or into the stomach of the party whose life is to be destroyed by it." *Blackburn v. State*, 23 Oh. St. 146.

In a reserved case before the English judges, the evidence showed that the prisoner had procured certain drugs and gave them to his wife, with intent that she should take them in order to procure abortion. She took

them in his absence and died from their effects. On an indictment against him for manslaughter, it was objected that he was only an accessory before the fact, and that in law cannot be an accessory before the fact to manslaughter. It was held that a conviction for manslaughter was proper. *R. v. Gaylor*, 7 Cox C. C. 253; *Dears. & B. C. C.* 288.

¹ *R. v. Kelly*, 2 C. & K. 379. See *R. v. Lockett*, 7 C. & P. 300; *R. v. Whittaker*, 1 Den. C. C. 310.

² *R. v. Bingley*, Russ. & R. C. C. 446; *R. v. Kelley*, Russ. & R. C. C. 421.

³ *R. v. Dale*, 1 Moody C. C. 307.

⁴ *R. v. Kirkwood*, 1 Moody C. C. 304. See *R. v. Kelly*, 2 Cox C. C. 171.

aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it should the occasion arise. Thus, if he be outside of an enclosure, watching, to prevent surprise, or for the purpose of keeping guard, while his confederates are inside committing the felony, such constructive presence is sufficient to make him a principal in the second degree.¹ No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of a felony, and all take their part in furtherance of the common design, all are liable as principals.² Actual presence is not necessary if there is direct connection between the actor and the crime. Turning out a wild beast with intent to do mischief, so that thereupon death ensues, involves, as we have seen, the guilt of a principal;³ and the same grade of guilt is imputable to him who, intending to kill, sets a spring-gun, or explosive machine.⁴ A person, however, is not constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to do so if necessary.⁵

§ 219. But persons not actually assisting are not principals, conjointly with parties by whom the act is consummated. Thus, where Brighton uttered a forged note at Portsmouth, the plan was concerted between him and two others, to whom he was to return, when he passed the note, and divide the proceeds. The three had before been concerned in uttering another forged note; but at the time this note was being uttered in Portsmouth, the other two stayed at Gosport. The jury found all three guilty, but, on a case reserved, the judges were clear that as the other two were not present, nor sufficiently near to assist, they could not be deemed principals, and, therefore, they were recommended for a pardon.⁶

An abettor must be near enough to give assistance.

¹ Fost. 347, 350. See *R. v. Borthwick et al.* 1 Doug. 207; 1 Leach, 66; 2 Hawk. c. 29, ss. 7, 8; 1 Russ. 31; 1 Hale, 555; *R. v. Gogerly*, Russ. & R. C. C. 343; *R. v. Owen*, 1 Mood. C. C. 96; *Com. v. Knapp*, 9 Pick. 496; *Com. v. Lucas*, 2 Allen, 170; *Ruloff v. People*, 45 N. Y. 213; *State v. Hardin*, 2 Dev. & Bat. 407; *State v. Coleman*, 5 Porter, 32; *State v. Town, Wright's Ohio R.* 75; *Breese v. State*,

12 Ohio St. R. 146; *Tate v. State*, 6 Blackf. 110; *Doan v. State*, 26 Ind. 495; *State v. Squires*, 2 Nev. 226; *Selvidge v. State*, 30 Texas, 60.

² *Supra*, §§ 209-213; *R. v. Standley*, Russ. & R. C. C. 305.

³ Fost. 349; 1 Hale, 514.

⁴ See *supra*, §§ 161, 166.

⁵ *United States v. Burr*, 4 Cranch, 492.

⁶ *R. v. Soares, Atkinson & Brighton*,

Going towards the place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal, if he were at such a distance at the time of the felonious taking as not to be able to assist in it.¹ And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals in cases where the felony is immediately executed by responsible agents, but are accessaries before the fact.² Presence, however, during the whole of the transaction, is not necessary; for, as we have already seen, if several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals.³ And presence is not to be determined by mere contiguity of space. A man who, on a mountain top at a distance of thirty miles, assists a highway robber, by a signal, in making an attack, is a principal in the robbery.⁴

§ 220. All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof involves in the nature of things the commission of a felony; and continue together abetting one another, till they have actually put their design into execution; and also all those who are present when the felony is committed, and abet the doing of it, are principals in the felony.⁵ Thus, if several persons come armed to a house with intent to commit an affray (such affray having bloodshed as a probable incident); and a homicide ensues while the assailants are engaged in riotous or illegal proceedings, then even those

² East P. C. 974; Russ. & Ry. C. C. 25, S. C.; and see R. v. Stewart and others, Russ. & R. C. C. 363; R. v. Badcock and others, Russ. & R. C. C. 249; R. v. Manners, 7 C. & P. 801. *Infra*, § 710.

¹ R. v. Kelly, R. & R. 421.

² R. v. Soares, R. & R. 25; R. v. Davis, *Ibid.* 113; R. v. Elsee, *Ibid.* 142; R. v. Badcock, *Ibid.* 249; R. v. Manners, 7 C. & P. 801.

³ R. v. Bingley, R. & R. 446. See

2 East P. C. 768. See *supra*, § 217.

⁴ State v. Hamilton, 13 Nev. 386. *Infra*, § 280.

⁵ Fost. 351, 352; 2 Hawk. c. 29, s. 9; R. v. Howell, 9 C. & P. 437; Brennan v. People, 15 Illinois, 511; Carrington v. People, 6 Parker C. R. 336. *Infra*, § 1536.

who are in different rooms will be principals in the murder.¹ And where persons combine to stand by one another in a breach of the peace, with a general resolution to resist to the death all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view.² Thus where a number of persons combine to seize with force and violence a vessel, and run away with her, and, if necessary, to kill any person who should oppose them in the design, and murder ensues, all concerned are principals in such murder.³ It is not necessary that the crime should be part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose.⁴ Thus where A. and B. go out for the purpose of robbing C., and A., in pursuance of the plan, and in execution of the robbery, kills C., B. is guilty of the murder.⁵ In such cases of confederacy all are responsible for the acts of each, if done in pursuance of the common design. This doctrine may seem hard and severe, but, as has been well argued, has been found necessary to prevent persons engaged in riotous combinations from committing murder with impunity. For where such illegal associates are numerous, it would scarcely be practicable to establish the identity of the individual actually guilty of a specific wrong.⁶ Where, however, a homicide is committed collaterally by one or more of a body unlawfully associated, from causes having no connection with the common object, the responsibility for such homicide attaches exclusively to its actual perpetrators.⁷ And if the of-

¹ Dalt. J. c. 161; 1 Hale, 439; Hawk. b. 2, c. 29, s. 8.

² R. v. Howell, 9 C. & P. 437; Com. v. Hare, 4 Penn. L. J. 257; *Ruloff v. People*, 45 N. Y. 213; *Williams v. State*, 54 Ill. 422; *Miller v. State*, 25 Wis. 384. See, however, qualification stated by Bigelow, C. J., Com. v. Campbell, 7 Allen, 541.

³ U. S. v. Ross, 1 Gallison, 624. See *Brennan v. People*, 15 Illinois, 511.

⁴ See cases cited *infra*; and see R.

v. Tyler, 8 C. & P. 616; *R. v. Bernard*, 1 F. & F. 240; *R. v. Cooper*, 1 Cox C. C. 266; *R. v. Caton*, 12 Cox C. C. 624; *Ferguson v. State*, 32 Ga. 658; *Beets v. State*, Meigs, 106.

⁵ *R. v. Jackson*, 7 Cox C. C. 857.

⁶ *R. v. Murphy*, 6 C. & P. 103; *Com. v. Daly*, 4 Penn. Law Journal, 156; *Com. v. Neills*, 2 Brewster, 553; *People v. Knapp*, 26 Mich. 112; *Moody v. State*, 6 Coldw. (Tenn.) 299.

⁷ *Ibid.*; *supra*, § 214; *R. v. Mur-*

fence is only manslaughter in the person striking the blow, it is only manslaughter in those engaged with him with the like temper and purpose; ¹ though if there be malice proved as to any one party, he may be found guilty of murder.² It must also be remembered that a rioter is not responsible, on an indictment for murder, for a death accidentally caused by officers engaged in suppressing the riot; ³ nor, in an affray, are the original parties responsible for a death caused by strangers breaking independently into the ring.⁴

§ 221. The distinction between principals in the first and second degree, it has been said, is a distinction without a difference; and, therefore, it need not be made in indictments.⁵ Such is only the case, however, where the

Distinction
between
two de-
grees only
essential

phy, 6 C. & P. 108; *R. v. Collison*, 4 C. & P. 565; *R. v. Skeet*, 4 F. & F. 931; *People v. Knapp*, 26 Mich. 112. See *R. v. McPhane*, C. & M. 212.

¹ *R. v. Murphy*, 6 C. & P. 103.

² *R. v. Caton*, 12 Cox C. C. 624.

³ *Com. v. Campbell*, 7 Allen, 541.

⁴ *R. v. Murphy*, 6 C. & P. 103. See fully supra, § 214, and infra, § 397.

If, as it was laid down in another case, during a scene of unlawful violence, an innocent third person is slain, who had no connection with the combatants on either side, nor any participation in any of their unlawful doings, such a homicide would be murder, at common law, in all the parties engaged in the affray. "It would be a homicide, the consequence of an unlawful act, and all participants in such an act are alike responsible for its consequences. If the law should be called upon to detect the particular agents by whom such a slaying has been perpetrated, in a general combat of this kind, it would perpetually defeat justice and give immunity to guilt. Suppose, for instance, a fight with fire-arms between two bodies of enraged men should take place in a public street, and, from a simultaneous fire, innocent persons, their wives or

children, in their houses, should be killed by some of the missiles discharged; shall the violators of the public peace, whose unlawful acts have produced the death of the unoffending, escape, because from the manner and time of the fire it is impossible to tell from what quarter the implement of death was propelled? Certainly not. The law declares to such outlaws, You are equally involved in all the consequences of your assault on the public peace and safety. Is there any hardship in this principle? Does not a just regard to the general safety demand its strict application? If men are so reckless of the lives of the innocent as to engage in a conflict with fire-arms in the public highway of a thickly populated city, are they to have the benefits of impracticable niceties, in order to their indemnity from the consequences of their own conduct?" *Com. v. Hare*, 4 Penn. Law Journ. 257.

⁵ *R. v. O'Brien*, 1 Den. C. C. 9; 3 C. & K. 115; *R. v. Crisham*, C. & M. 187; *State v. McGregor*, 41 N. H. 407; *Com. v. Chapman*, 11 Cush. 422; *Com. v. Fortune*, 105 Mass. 592; *State v. Hill*, 72 N. C. 345; *State v. Jenkins*, 14 Rich. S. C. 215; *State v.*

punishment is the same for both degrees.¹ But where, by particular statute, the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors.² Where no such statute exists, in an indictment for murder, if several be charged as principals, one as principal perpetrator, and the others as aiding and abetting, it is not material which of them be charged as principals in the first degree, as having given the mortal blow; for the mortal injury given by any one of those present is, in contemplation of law, the injury of each and every of them.³ An exception to the rule just stated, however, may be found in rape, in which assistants, though present, can be charged only as principals in the second degree.⁴

§ 222. If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of the crime, may be indicted as principals; and though the indictment should state the mortal injury was committed by him who is absent or dead, yet if it be substantially alleged that those who were indicted were present at the perpetration of the crime, and did kill and murder the deceased by the mortal injury so done by the actual perpetrator, it shall be sufficient.⁵ So the party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted.⁶ And on an indictment for murder the court may, in their discretion, try the principal in the second degree before the principal in the first degree.⁷

Anthony, 1 McCord, 285; State v. Flew, 2 Brevard, 338; State v. Green, 4 Strobbart, 128; Hatley v. State, 15 Ga. 346; State v. Davis, 29 Mo. 391; People v. Ah Fat, 48 Cal. 61. See *infra*, § 522.

¹ 2 Hawk. c. 25, s. 64; Mackally's case, 9 Co. 67 b; Fost. 345.

² 1 East P. C. 348, 350; R. v. Home, 1 Leach, 473. See Rasnick's case, 2 Virg. Ca. 356; Hoffman v. Com. 6 Randolph, 685; Warden v. State, 24 Oh. St. 143.

³ *Infra*, § 522; Whart. Crim. Ev. § 102; Foster, 551; 1 East P. C. 350;

R. v. Gutch, M. & M. 433; R. v. Borthwick, 1 Doug. 207; State v. Mairs, 1 Cox's R. 453; State v. Flew, 2 Brevard, 338.

⁴ *Infra*, § 553 a.

⁵ State v. Flew, 2 Rice's S. C. Digest, 104; 2 Brevard, 338.

⁶ R. v. Taylor, 1 Leach, 360; Benson v. Offley, 2 Shaw, 270; 3 Mod. 121; R. v. Wallis, Salk. 334; R. v. Towle, R. & R. 314; 3 Price, 145; 2 Marsh. 465; Archibald's C. P. 6; Brown v. State, 28 Geo. 216; State v. Ross, 29 Mo. 32.

⁷ Boyd v. State, 17 Geo. 194.

§ 223. At common law, in misdemeanors, there are no accessories, all concerned being principals.¹ Thus, the master who knowingly permits his servant, while under his control, to retail liquor, in a house belonging to the master, is himself guilty of the offence of keeping a tippling-house, and liable to the penalty.² If A. counsel and encourage B. to set fire to a malt-house, and B. attempt to set it on fire, both may be jointly indicted as principals in the misdemeanor of attempting to set the malt-house on fire, although A. was not present at the time of the attempt.³ A man who, though at a distance, is concerned in the furnishing of lottery tickets to another, to be sold in a place where their sale is prohibited, is guilty as principal in such sale.⁴ So, in New York, it is ruled that there are no accessories in petit larceny; but all concerned in the commission of the offence are principals.⁵ From this doctrine it follows that an averment of the commission of a misdemeanor by a principal is sustained by proof of its commission by an agent.⁶ An exception to the rule is taken in liquor cases, in which it is held that a vendee is not indictable under the statutes.⁷ And, generally, accessories to police offences are not indictable.⁸

§ 224. The old text writers above cited unite in holding that

¹ 3 Inst. 21, 438; 1 Hale, 233, 613; Dalt. J. c. 161; Fost. 341; 12 Co. 812; Co. Lit. 57; Hawk. b. 2, c. 29, s. 1; 4 Bla. Com. 34; Cro. C. C. 49; R. v. Greenwood, 9 Eng. Law & Eq. 535; 2 Den. C. C. 453; R. v. Williams, C. & M. 259; R. v. Dyson, R. & R. 523; U. S. v. Morrow, 4 Wash. C. C. 733; U. S. v. Mills, 7 Peters, 138; U. S. v. Hartwell, 3 Cliff. 221; U. S. v. Harries, 2 Bond, 311; Com. v. Macomber, 3 Mass. 254; Com. v. Nichols, 10 Met. 259; Lowenstein v. People, 54 Barb. 299; Com. v. Gillespie, 7 S. & R. 469; Stratton v. State, 45 Ind. 468; Stevens v. People, 67 Ill. 587; Curlin v. State, 4 Yerger, 143; Com. v. McAtee, 8 Dana, 28; Com. v. Major, 6 Dana, 293; Com. v. Burns, 4 J. J. Marshall, 182; State v. Westfield, 1 Bailey, 132; State v. Goode, 1 Hawks, 463; State v. Bardon, 1 Devereux, 518; State v. Cheek, 13 Ired. 114; Schmidt v. State, 14 Mo. 137; Williams v. State, 12 S. & M. 587; Whitney v. Turner, 1 Scam. 253; Sanders v. State, 18 Ark. 198.

² Com. v. Major, 6 Dana's Kentucky R. 293. See *infra*, §§ 247, 1503; *supra*, § 135.

³ R. v. Clayton, 1 Car. & Kir. 128.

⁴ Com. v. Gillespie, 7 Serg. & Rawle, 469.

⁵ Ward v. State, 6 Hill, N. Y. R. 144; and see State v. Goode, 1 Hawks, 463.

⁶ *Infra*, § 1792.

⁷ *Infra*, § 1529.

⁸ See *supra*, § 23 a.

in treason, also, there are no accessories.¹ Under the Constitution of the United States, however, it has been argued that the reason of the common law doctrine, that in treason all are principals, fails, and therefore that a person counselling or advising treason against the United States is an accessory before the fact.² The principle, on the other hand, is said by an elementary writer of much learning to be in force in the several States; and he consequently argues that, in treason against the State of Virginia, accessories do not exist.³ But where the Constitution provides, as does the Constitution of the United States, that treason shall consist *only* in levying war against the State, or adhering to its enemies, accessoryship after the fact, which contains neither the element of levying war nor that of adhering to a public enemy, which is construed to mean exclusively a foreign power, cannot be claimed to constitute treason.⁴

And so as to treason at common law.

III. ACCESSARIES BEFORE THE FACT.⁵

§ 225. An accessory before the fact is one who, though absent at the commission of the felony, procures, counsels, or commands another to commit said felony subsequently

Commanding and counselling

¹ See 1 Hale P. C. 233, 613; 3 Inst. 138; though see 2 Hale P. C. 223.
² U. S. v. Burr, 4 Cranch, 472, 501; though see U. S. v. Hanway, 2 Wal. Jr. 139; charge on treason, 2 Wal. Jr. 134.
³ Davis's Criminal Law, 38. *Infra*, § 1812.
⁴ See *infra*, § 1793.
⁵ For indictments under this head see Wharton's Precedents as follows: Against accessory before the fact, together with principal, 97. Against an accessory before the fact, the principal being convicted, 98. Against accessory after the fact, with the principal, 99. Against accessory after the fact, the principal having been convicted, 99. Against accessory before the fact, generally in Massachusetts, 101. Against accessory before the fact in murder, at common law, 102. Against accessory before the fact in murder, in

Massachusetts, 103. Against an accessory for harboring a principal felon in murder, 104. Against an accessory after the fact in burglary, 105. Against principal and accessories before the fact in same, 106. Against accessory before the fact to suicide. First count, against suicide as principal in the first degree, and against party aiding him as principal in the second degree, 107. Second count, against defendant for murdering suicide, 108. Against a defendant in murder, who is an accessory before the fact in one county to a murder committed in another, 109. Against principal and accessory before the fact in larceny, 111. Against accessory for receiving stolen goods, 112. Against accessory for receiving principal felon, 113. Against accessories in homicide, 132, 156. Against accessory to piracy, 1080, 1081.

constitute an accessory-ship before the fact. perpetrated in consequence of such procuring, counsel, or command.¹ To constitute such an accessory, it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, principal. The accessory is liable for all that ensues as incident to the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C. so as to inflict grievous bodily harm, and he beat C. so that C. dies, A. is accessory to the murder, if the offence be murder in B.² So if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house.³ And if the offence commanded be effected, although by different means from those commanded; as, for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him, J. W. is, nevertheless, liable as accessory.⁴

As we have already seen, the common law has recently been changed in several States so as to treat accessories before the fact as principals.⁵ In many jurisdictions, however, the offences continue distinct, so that acquittal as a principal does not bar a prosecution as accessory.⁶

¹ 1 Hale, 615. The meaning of the word "command" will be more fully considered in note to § 226. See *State v. Mann*, 1 Hayw. N C. 4.

A. supplies B. with corrosive sublimate, knowing that B. means to use it to procure her own abortion, but being unwilling that she should take the poison, and giving it to her because she threatened to kill herself if he did not. B. does so use it, and dies. Even if B. is guilty of murdering herself, A. is not an accessory before the fact to such murder. *Steph. Crim. Dig.* citing *R. v. Fretwell*, L. & C. 161; compare *R. v. Cooper*, 5 C. & P. 535; *R. v. Gordon*, 1 Leach, 515; 1 East P. C. 352.

² 4 Bl. Com. 37; 1 Hale, 617.

³ *Ibid.*; *Fost.* 370.

⁴ *Fost.* 369.

⁵ *Supra*, § 205.

⁶ See *Wh. Crim. Pl. & Pr.* § 458; *Com. v. Pettes*, 126 Mass. 242.

As is observed in another place (see article in 9 *Central L. J.* 183), the law of accessoryship involves one of the most difficult metaphysical problems. If the will is free, how can we punish the instigator of a crime as equally guilty with the perpetrator? The latter, it is assumed, acted with perfect freedom; we may therefore punish the instigator for giving bad counsel, as we would punish the publishers of bad books, but we cannot charge him with doing an act at whose commission he was not present, which he had no power to order, but whose performance is imputable to the free and independent will of another person. On the other hand, if the will is necessitated, we certainly cannot punish the agent whose action is deter-

§ 225 a. As has been elsewhere noticed,¹ cases frequently occur in which two or more instigators coöperate in procuring one or more agents to act in the perpetration of a crime. Such cases may be classified as follows :² (1.) The instigators may act concurrently with the perpetrator. In such case the ordinary law of conspiracy applies. The parties must be intentional participants in a common unlawful design. It is not enough that they are casual, incidental coöperators. To charge a party with an intentional coöperation, he must know that the others are working with him for the same criminal purpose, and he must contribute something to the common effort. If this is not done, he cannot be regarded as an instigator, or accessory before the fact. (2.) Instigation may not be concurrent, but successive. In other words, A. may instigate B. to instigate C. In such case, supposing the causal relation be established, and C. is really induced to act by A., through B.'s

mined by another. But, illogical as it may be, we punish both. Each, we say, is responsible for the act, and by no other view could public justice be subverted. Unless the perpetrator is responsible, there is no law by which injuries can be redressed; unless the instigator is responsible, there is no law by which right can be vindicated. In other words, if the perpetrator is not made responsible, there can be no retribution for wrong acts; if the instigator is not made responsible, there can be no retribution for wrong agents. In the one case there would be no responsibility for conduct, in the other there would be no responsibility for impulse. We therefore punish the instigator as if he were free while the perpetrator was coerced, while we punish the perpetrator as if he were free and the instigator did not exist. Nor is this strange, for the same solution is accepted by us in all other lines of moral judgment. We condemn the tempted, when he yields on the ground that he yields voluntarily;

we condemn the tempter on the ground that he caused the yielding. Sir W. Hamilton treats this as one of the illustrations of the practical harmony between necessity and free will. If we reject determinism, there is no law by which man can be ruled; if we reject free agency, there is no man to be ruled by the law. And in our doctrine as to principal and accessory, we treat the principal both as free and as coerced; as free when we prosecute him individually, as coerced when we prosecute his instigator. The topic, in this connection, has been discussed by Volkmann, *Grundriss der Psychologie*, 1856, pp. 374, 397; Wahlberg, *das Princip der Individualisierung in der Strafrechtspflege*; and by Drobisch, in *die moralische Statistik und die menschliche Willensfreiheit*, p. 28. See Geyer in *Holzen-dorff's Strafr. ii.* 340, who takes the necessitarian side of the controversy.

¹ 9 Cent. L. J. 205.

² See Holtz. *Strafr. ii.* 377.

agency, A. is as much responsible as if he induced C. to act by letter.

When procurement is by an intermediate agent, the accessory leaving it to such agent to find a perpetrator, it is not necessary that the accessory should be cognizant of the name of the perpetrator.¹

§ 226. The procurement need not be tactual, it being sufficient if one or more persons become the medium through whom the work is done.² It makes no matter how long a time or how great a space intervenes between the advice and the consummation,³ provided that there is an immediate causal connection between the instigation and the act.⁴

¹ R. v. Cooper, 6 C. & P. 535; R. v. Williams, 1 Den. C. C. 39.

² Fost. 125; R. v. Somerset, 19 St. Tr. 804; R. v. Cooper, 5 C. & P. 535. Supra, § 225 a.

³ See infra, § 280.

⁴ R. v. Sharpe, 3 Cox C. C. 288; R. v. Blackburn, 6 Cox C. C. 333; Com. v. Glover, 111 Mass. 395.

In Saunder's case, Plowd. 475; 1 Hale P. C. 431, as condensed by Sir James Stephen (Steph. Dig. art. 41): "A. advises B. to murder C. (B.'s wife) by poison. B. gives C. a poisoned apple, which C. gives to D. (B.'s child). B. permits D. to eat the apple, which it does, and dies of it. A. is not accessory to the murder of D." "This decision," adds Sir James Stephen, "is of higher authority than Foster's *dicta*, and marks the limit to which they extend, if it does not throw doubt upon them." The proper solution in such case is that A. is indictable for an attempt to kill C.; but that there is no causal connection between his act and the killing of D. See Whart. on Neg. §§ 90, 91; supra, §§ 160, 161.

Modes of Instigation. — 'Procure' is the first term used in the ordinary definition of our old accessoryship

before the fact. The most obvious mode of procuring is by hiring. The instigator takes the agent into his service, and engages him for a reward to commit the proposed crime. The 'procuring,' however, must be *before* the act. It has been much discussed whether promising a reward to a person already resolved on the act constitutes an instigation. But the better opinion is that it does in cases where the perpetrator is strengthened in his purpose by the reward.

'Counselling,' to come up to the definition, must be special. Mere general counsel, for instance, that all property should be regarded as held in common, will not constitute the party offering it accessory before the fact to a larceny; 'free-love' publications will not constitute their authors technical parties to sexual offences which these publications may have stimulated. Several youthful highway robbers have said that they were led into crime by reading Jack Sheppard; but the author of Jack Sheppard was not an accessory before the fact to the robberies to which he thus added an impulse. Under the head of 'counsel' may be included advice and instruction as to the modes of

§ 227. Counselling is said in the old books to be either direct or indirect; direct consisting in express counsels, indirect in the intimation of approval or desire.¹ But concealment of the knowledge that a felony is about to be committed does not constitute such accessoryship, nor does mere momentary acquiescence in the proposed felonious plan.² But any specific contribution of advice, afterwards acted

Silent acquiescence is not counselling.

committing particular crimes, *e. g.* pocket-picking. General instruction, it is true, could not be 'counselling' in the sense before us; though it is otherwise with special instructions as to the management of a particular case. — *Persuading* and *tempting* to a particular crime falls under this head. The modes in which this kind of counselling may be manifested are numerous. The counsel need not be exclusively in words. It may consist, at least in part (*e. g.* Faust and Mephistopheles), in the exhibition of some object of desire. It is possible, also, to conceive of cases in which there is no immediate communication between the seducer and the seduced. Third persons may be used as innocent or compulsory go-betweens. *Infra*, § 231.

'Command' is a term borrowed from the Roman *mandatum*, which is frequently used in this connection. Viewing the term nakedly, it describes few cases of accessoryship. Men are rarely to be found who would commit a crime because 'commanded' to by another, unless they are under special obligations to such other. Among such obligations we may primarily notice that of wife to husband, which the law recognizes in some cases as a defence to the wife when on trial. Next to this may be enumerated the obligation of child to parent, of servant to master, of subordinate to superior. These obligations do not constitute a legal excuse unless the perpetrator acts under compulsion, — *vis*

compulsiva, — or unless the command generates in him an error of fact which induces him to regard the act as innocent. Military command, also, may be an excuse to the subaltern, when he acts *bonâ fide* under the command, and not in satisfaction of any special private malice of his own. *Supra*, § 94. A police officer is in the same way protected, provided he acts within the range of his office, and executes what he believes to be an official duty for a public end. It is otherwise when he knowingly executes a command issued for extortionate or other unlawful purposes. A command need not be in words. It may be in signs. See Holtzen. Strafr. ii. 353.

'Advising' may be by a process of deception, by a misrepresentation of facts. A. contrives to induce B. to believe he has received an injury from C., which it is B.'s duty to avenge by taking C.'s life. Supposing A. to act in this way with the malicious purpose of killing C. by the agency of B., A. is guilty at common law as accessory before the fact, or, under our recent statutes, as principal. 9 Cent. L. J. 204.

¹ Hale, 616.

² 1 Hale, 616; 2 Hawk. c. 29, s. 23.

B. and C. agree to fight a prize-fight for a sum of money; A., knowing their intention, acts as stake-holder. B. and C. fight, and C. is killed. A. is not present at the fight, and has no concern with it except being stake-holder. Even if in such a case there can be an

on, constitutes the offence. It is necessary, as has been seen, that the solicitation be made, either directly or indirectly, to the person committing the act.¹ But knowingly to invite a person to a place so that he may be there murdered constitutes, when he is murdered accordingly, the offence.² Accessaryship cannot be based on negligence.³

§ 228. If the advice of the accessory be countermanded before it operates in any way, he is relieved from responsibility;⁴ and if an instigator, when withdrawing, not merely expresses his disapproval of the crime, but takes all the measures in his power to prevent its consummation, and such measures fail because of *casus*, or some new intermediate impulse, then his criminality ceases. But it does not cease simply because, after starting the ball, he changes his mind, and tries, when too late, to stop it. To emancipate him from the consequences, not only must he have acted in time, and done everything practicable to prevent the consummation, but the consummation, if it takes place, must be imputable to some independent cause. On the other hand, it is plain that

accessary before the fact, A. is not accessory before the fact to the manslaughter of C. Steph. Dig. art. 39, citing *R. v. Taylor*, L. R. 2 C. C. R. 147.

¹ *R. v. Blackburn*, 6 Cox C. C. 333.

² *R. v. Manning*, 2 C. & K. 887.

³ *Supra*, § 129.

When the question of *punishment* comes up, it is not unimportant to inquire to what extent the perpetrator was overborne by the superior will of the instigator, and how far the latter is to be considered as the exclusive contriver of the crime. As has been well said, when a bandit, whose trade is assassination, offers himself for this purpose to a rich signior, the case is very different from that of an unsophisticated and comparatively innocent agent who is led by the protracted and subtle wiles of a Mephistopheles into a path of guilt he never would otherwise have approached. Geyer,

in Holtz. Straf. ii. 353. A distinction, also, is to be made between a single hasty and ill-considered word (as was alleged by Queen Elizabeth to have been the case with her order for the execution of Queen Mary), and a chain of cool and deliberate directions. But these distinctions do not go merely to the question of degree of punishment. The amount of potency which the instigation was applied has much to do with determining whether there was really a causal relation between the instigation and the criminal act. The former may have been merely a strong expression of emity, or a strong opinion as to the right to do a particular thing, without any intention that the criminal act should result from the expression. If so, the criminal act is not imputable to the alleged instigator. Cent. L. J. 1879, p. 184.

⁴ *Supra*, § 187; 1 Hale, 618.

when the perpetrator changes his mind, after having gone as far as an attempt, and abandons a further prosecution of the design, he is indictable for the attempt. It has been argued that if the frustration of the attempt is due to his interposition, consequent upon his repentance, he is relieved from all prosecution. But it is hard to see how his repentance, *subsequent* to the attempt, can cancel his responsibility for the guilt of the attempt; though it would be otherwise if he intervened prior to the attempt.¹

§ 229. While an accessory before the fact (or instigator) is responsible for all crimes incidental to the criminal misconduct he counsels,² it is otherwise as to collateral crimes.³

Accessory
not liable
for collat-
eral crimes.

¹ Cent. L. J. 1879, p. 203. For further views see *supra*, § 187.

² See *supra*, § 120; Steph. Dig. art. 41.

³ *Supra*, § 214; *People v. Knapp*, 26 Mich. 112; *Watts v. State*, 5 W. Va. 532. See Foster, 370; 1 Hale, 687; 3 Inst. 51.

The question in the text is considered by me in the *Central Law Journal* for 1879, where the views of the later German authorities are given. From this I condense the following:—

Suppose the perpetrator, undertaking to execute the purpose of the instigator, commits acts, while performing his mandate, in excess of such purpose. Is the instigator responsible for the excess?

If we relied solely on the analogies from the civil side of the law, we would say that the principal or master is liable for all such acts when done in the discharge of the agency or service, though these acts were expressly forbidden by the principal or master. This rule holds good on the criminal side of the law, so far as concerns indictments for negligence. But it cannot be extended to indictments for malicious acts. A counsels B. to commit a specific crime. B., in committing

this crime, maliciously commits another collateral crime, not within the scope of A.'s counsel, and, it may be, forbidden by A. A. cannot, at common law, be convicted of doing intentionally and maliciously this collateral act, which he never intended, and which he had even forbidden. Of negligence in putting these powers in his agent's hands, or of negligence as incidental to the working of the illegal instrumentality he put in motion, he may be convicted, but not of designing something he did not design. Of negligence he may be certainly convicted, if the crime, though unforeseen by him, is incidental to one procured by him: as when he sends a servant out to steal property in the night, and the servant, in striking a match, sets fire to the house.

Quantitative variations in the mode of executing a crime are not to be viewed as excesses in the sense above stated. A homicide, for instance, is imputable to the instigator, though executed with a cruelty in excess of that commanded. So if A. directs B. to inflict on C. an injury whose probable consequences will be death, A., as we have seen, is as chargeable, if death ensues, as is B., with the homicide. *Supra*, § 214. As to *minor* crimes,

§ 230. The question of the relative guilt of the accessory before the fact and the instigator has been elsewhere discussed.¹ It is argued on the one side that instigation, from the nature of things, involves more design, premeditation, coolness, and intelligence than does perpetration. The instigator bears to the perpetrator the relation of the seducer to the seduced. The instigator would have perpetrated the crime anyhow; the perpetrator would not have perpetrated it without the instigation. To this it is answered that instigation does not necessarily involve premeditation, but that premeditation is necessarily involved in perpetration. Instigation may consist in the expression of a momentary petulant desire, as was the case with Henry II., when saying he wished he was rid of Becket, or of advice which the adviser himself never expected to have embodied in action. Perpetration, on the other hand, when in obedience to a plan previously entertained, involves not merely premeditation, but action as a realization of this premeditation. Not only is the criminal design harbored, but it is unflinchingly matured and executed. Nor is the relation of instigator and perpetrator always that of seducer and seduced. The relation may be that of confederate with confederate. Each enters into the partnership of crime; and the chief difference between the two is that the instigator is not present at the act which the perpetrator commits. The perpetrator may be as much the seducer of the instigator, as the instigator of the perpetrator. Henry's barons in taunting him with Becket's insults, and offering themselves as the avengers of those insults,

instigation to commit a greater crime covers instigation to commit a lesser crime. If A., for instance, counsels B. to commit highway robbery, which results in larceny, A. is accessory before the fact to the larceny. But it is otherwise as to minor offences not included in the major. Thus counselling to commit larceny would not involve accessoryship to the offence of cheating by cards, though part of the same transaction.

As is seen above, the accessory before the fact is not liable for any

malicious excursions made, outside of the range of the employment, by the perpetrator. It should be remembered, however, that the instigator may often use ambiguous terms: 'Get me this thing anyhow;' or, 'Bring me this man alive or dead.' If so, the instigator is chargeable with any misconstructions the ambiguity may produce. It is in this sense that James II. and Louis XIV. are chargeable with instigation in the attempted assassinations of William III.

¹ See Central L. J. for 1879, p. 183.

may have been the tempters who led Henry to utter the fatal wish, and thus have been the original planners as well as the final perpetrators of the crime to which he gave a hasty intermediate assent. "Instigation" does not necessarily involve "origination." The accessory before the fact may be really the agent of the principal. To this it is rejoined that what we have to do with is instigation in its logical sense, as the origination of a crime to be effected through another; and that this involves a double criminality, that of the instigator himself and that of the perpetrator; that the instigator is in this respect a free agent, bringing into effect an act doubly criminal as infringing the rights of the object of the crime, and as steeping in guilt its agent. At common law, the assumption was that the guilt of the perpetrator (principal) was imputable to the instigator (accessory before the fact), and hence the conviction of the latter was to depend on the conviction of the former, as a condition precedent, and must be of the same grade of offence. Where under recent legislation, however, the instigator (accessory before the fact) is treated as principal, there principal and accessory before the fact (or instigator and perpetrator) may, as we will presently see more fully, be convicted of different grades.¹

§ 231. The assistance must be rendered knowingly. It is not necessary, indeed, that the principal should know all the conditions of the help rendered to him, but it is necessary for the accessory to know the guilty purpose he contributes to help. The chief of a plot, for instance, is not bound to know a coöperator in order to implicate the latter as accessory; but the coöperator cannot be convicted unless he is shown to have been acquainted with the character of the plot.²

Assistance
must be
rendered
knowingly
and really.

A detective entering into a conspiracy to commit a crime for the purpose of exploding it is not an accessory before the fact.³ For it should be remembered that detectives, when acting as decoys, may instigate or *provoke* the crime; but the essential element of *dolus*, or malicious determination to violate the law, is wanting in their case. And it is only the *formal* and not the

¹ *Infra*, §§ 232, 236.

² *Supra*, § 129.

³ *Campbell v. Com.* 84 Penn. St. 187. *Supra*, § 149. See *Wh. Cr. Ev.* § 440.

substantial part of the crime that they provoke. They provoke, for instance, in larceny, the asportation of the goods, but not the ultimate loss by the owner. They may be actuated by the most unworthy of motives, but the *animus furandi* in larceny is not imputable to them; and it is in larcenous cases or cheats alone that their employment can be conceived. For, should they act as instigators of an irreparable crime (*e. g.* murder), they may become liable as accessaries to the crime. They may also become liable for negligence in their conduct, when it leads to injuries which prudence on their part might have avoided; as when they instigate an ambush which results in a homicide.

§ 232. It has been doubted whether there can be an accessory before the fact to manslaughter, since accessaryship presupposes premeditation, and premeditation is incompatible with manslaughter.¹ But, as will be seen, an instigator may stimulate a person incensed with another to execute a deed of vengeance on such other, when the offence of the perpetrator would be only manslaughter; and we may also hold that an instigator may be guilty of murder in instigating another to commit manslaughter by the rash use of dangerous instrumentalities.² *A fortiori* there may be an accessory before the fact to murder in the second degree.³

§ 233. It is not material that an accessory should have originated the design of committing the offence. If the principal had previously formed the design, and the alleged accessory encouraged him to carry it out by stating falsehoods, or otherwise, he is guilty as accessory before the fact.⁴

§ 234. The *quantity* of aid rendered is of no consequence. A counterfeiting raid, for instance, may have a hundred persons concerned as accessaries, some contributing very little aid. All, however, are technically guilty.⁵

¹ See *R. v. Taylor*, L. R. 2 C. C. R. 147. Compare 2 Hawk. P. C. p. 444, s. 24.

² See, to same effect, Steph. Dig. C. L. art. 229, citing *R. v. Gaylor*, D. & B. 288; *R. v. Taylor*, L. R. 2 C. C. R. 147.

³ *Infra*, § 546. That there may be

accessaries *after* the fact to manslaughter, see *R. v. Greenacre*, 8 C. & P. 35; *R. v. Richards*, 13 Cox C. C. 611.

⁴ *Keithler v. State*, 10 S. & M. 192. See *R. v. Tuckwell*, C. & M. 215.

⁵ See *supra*, § 217.

What distinguishes the act of the accessory from that of the principal is that the accessory, while concerned in facilitating the execution of the guilty purpose, takes no part in this execution, saving it to the principal.¹

§ 235. There is no particular period of time to which accessoryship is limited. It may take place when the guilty act is concocted, when it is prepared, or when it is executed, provided that in the latter case there is not actual presence. And it may be coupled with accessoryship after the fact.²

Conditions
of time
immaterial.

§ 236. A question of considerable interest has arisen as to the extent to which the principal's personal relations are to be imputed to the accessory. A public officer, for instance, committing a specific act, is liable to a severer punishment than would be a private citizen. Is a private citizen, who is an accessory to an officer in such an offence, chargeable with the same grade of guilt? Or is an accessory to a trustee, who is guilty of embezzlement, to be charged with the same grade of guilt as would the trustee? On this question were the following possible theories:³—

Grade of
guilt not
necessarily
the same.

1.) The accessory is absorbed in the principal, so that the principal's personal relations, in respect to the crime, are imputed to the accessory.

2.) Each offender is chargeable only for what he really is. Thus, the non-public officer cannot be punished as a public officer, and the non-trustee cannot be punished as a trustee. Hence, according to this view, where a principal in a homicide, from an act of his bearing a particular relation to the deceased, would be guilty of murder in the first degree, an accessory not bearing such relation would be guilty only of murder in the second degree.

3.) We may distinguish, as do several codes, between those theories which establish or cancel, and those which increase or diminish, punishability. As to the first, the personal relations of the principal are the standard. As to the second, each offender is to be judged according to his own peculiar relations. As to the last case, an accessory to a murder, is to take up the last case, an accessory to a murder,

¹ See supra, § 206.

² See Blackson, 8 C. & P. 43.

³ Berner, § 111.

whose grade is determined by the personal qualities of the perpetrator, is to be judged from his own and not his principal's relations. A non-officer, also, who aids an officer in an offence, whose grade is increased by the official relation, is liable only for the lower grade of the offence. On the other hand, a non-officer who aids in a purely official crime (*e. g.* acceptance of a bribe by a judge) is, by the force of the distinction before us, liable as accessory to the crime.

Another question arises in homicides when the accessory and the principal are acting under different degrees of passion. Under the old law, the defendant was first convicted, and then the accessory was charged with being accessory to the offence which the conviction covered. But now that instigation is a substantive offence, it must be remembered that the offence of the instigator is not necessarily of the same grade as that of the perpetrator. The instigator may act in hot blood, in which case he will be only guilty of manslaughter, while the perpetrator may act coolly, and thus be guilty of murder. The converse, also, may be true: the instigation may be cool and deliberate, the execution in hot blood by a person whom the instigator finds in a condition of unreasoning frenzy. A person desiring coolly to get rid of an enemy, for instance, may employ as a tool some one whom that enemy has aggrieved and who is infuriated by his grievance. Hence an accessory before the fact (or to adopt the terms of recent codes, an instigator) may be guilty of murder, while the principal (or perpetrator) may be guilty of manslaughter; or the accessory before the fact (instigator), acting in hot blood, may be guilty of manslaughter, while the perpetrator (principal), acting with deliberate malice, may be guilty of murder.¹

§ 237. At common law, the conviction of some one who has committed the crime must precede that of one charged as accessory.² A prisoner does not waive his right to

¹ That joint participants may be guilty of different degrees, see *Fost.* 106, 129; *Whart. Cr. Pl. & Prac.* §§ 307, 753; *Klein v. People*, 31 N. Y. 229; *Mask v. People*, 32 Miss. 405.

² See *U. S. v. Crane*, 4 McLean,

317; *Com. v. Andrews*, 3 Mass. 126; *Com. v. Briggs*, 5 Pick. 429; *Com. v. Phillips*, 16 Mass. 423; *Com. v. Woodward*, Thacher's C. C. 63; *Baron v. People*, 1 Parker C. R. 246; *Sampson v. Com.* 5 W. & S. 385; *Com. v. Williamson*, 2 Va. C. 211.

call for the record of such conviction, by pleading.¹ Conviction of the principal is not admissible evidence, until judgment has been rendered on the verdict.² The record must be proved in the usual mode.³ But even at common law, where there are two principals, and only one convicted, the other being dead, the accessory must answer notwithstanding the non-conviction of the second.⁴ By statutes, however, now almost universally adopted, the offence of an accessory is made substantive and independent, and consequently the accessory may be tried independently of the principal, though in such case the guilt of the principal must be alleged and proved.⁵

¹ Post. 360; 1 Hale, 623; U. S. v. Burr, 4 Cranch, 502.

In North Carolina, the principle has been somewhat expanded, it having been there held that the accessory is not liable to be tried while the principal is amenable to the laws of the State and is still unconvicted. State v. Groff, 1 Murphy's R. 270. See State v. Goode, 1 Hawks, 463; Harty v. State, 3 Blackford, 386.

² State v. Duncan, 6 Iredell, 236.

³ People v. Gray, 25 Wend. 465.

⁴ Com. v. Knapp, 10 Pick. 477.

⁵ See State v. Ricker, 29 Me. 84; Pettes v. Com. 126 Mass. 242; People v. Gray, 25 Wend. 465; Holmes v. Com. 25 Penn. St. 221; Brown v. State, 19 Oh. St. 496; Noland v. State, 19 Oh. 131; Ulmer v. State, 14 Ind. 52; Baxter v. People, 3 Gilman, 368; Yoe v. People, 49 Ill. 410; State v. Comstock, 46 Iowa, 265; Ogden v. State, 12 Wis. 532; Jordan v. State, 56 Ga. 92; People v. Campbell, 40 Cal. 129; State v. Cassidy, 12 Kans. 550. As to English statute, see R. v. Hughes, Bell C. C. 242; R. v. Gregory, L. R. 1 C. C. 77.

At common law an accessory is discharged by the acquittal of his principal on those charges whereon the indictment against himself is founded. U. S. v. Crane, 4 McLean, 317.

Even in a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny, the judges, it is said, were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should be acquitted also. R. v. Dannelly, R. & R. 310; 2 Marsh. 571.

When principal and accessory are tried separately, conviction of the principal is *prima facie* evidence of his guilt, on the trial of the accessory, and may be collaterally disputed when the issue is the guilt of the accessory. R. v. Turner, 1 Moody, 347; U. S. v. Hartwell, 12 Int. Rev. Rec. 72; S. C., 3 Cliff. 221; State v. Ricker, 29 Me. 84; State v. Rand, 33 N. H. 216; Com. v. Knapp, 10 Pick. 477; Com. v. Stow, 1 Mass. 54; People v. Buckland, 13 Wend. 592; State v. Duncan, 6 Iredell, 236; Keithler v. State, 10 Sm. & M. 192. *Infra*, § 244.

It should be observed that the statute of 7 Geo. 4, c. 64, s. 9, which several American statutes copy, only ap-

Under the recent statutes, which treat principals and accessaries before the fact as confederates, the declarations and acts of the one, in furtherance of the common plan, are admissible against the other.¹ It is otherwise when the conspiracy is terminated,² the accessory being tried for a substantive offence, and the principal's confessions, after the joint action is closed, not being receivable against him.³

§ 238. At common law it is not necessary, in an indictment against an accessory before the fact in a felony, to set out the conviction or execution of the principal. It is enough to aver the latter's guilt.⁴

The indictment must show the commission of the offence as particularly as is necessary in an indictment against the principal.⁵ In States where it is provided by statute that an accessory before the fact shall be deemed and

Indictment
must par-
ticularize
offence.

plies where the accessory might at common law have been indicted with or without the conviction of the principal; and, therefore, where a defendant was indicted as accessory before the fact to the murder of S. N., she having, by his procurement, killed herself, it was ruled that the statute did not apply. *R. v. Russell*, 1 Mood. C. C. 356; *R. v. Gaylor*, 7 Cox C. C. 253; *Dears. & B. C. C.* 288.

At common law where the principal and accessory are tried together, if the principal plead otherwise than the general issue, the accessory is not bound to answer, until the principal's plea be first determined. 9 H. 7, 19; 1 Hale, 624; 2 Inst. 184. Where the general issue is pleaded, however, the jury must be charged to inquire first of the principal, and if they find him not guilty, then to acquit the accessory; but if they find the principal guilty, they are then to inquire of the accessory. 1 Hale, 624; 2 Inst. 184. See *Holmes v. Com.* 25 Penn. St. 221.

In Massachusetts an accessory before the fact may be tried in the county of the consummated act, though the

act of accessoryship was committed elsewhere. *Com. v. Pettes*, 114 Mass. 307. See *infra*, §§ 279, 287.

In Tennessee, where a principal to a murder was sentenced to imprisonment for life, in accordance with the statute of 1838, c. 29, an accessory before the fact, subsequently tried and convicted (the jury bringing in a general verdict of guilty, without finding mitigating circumstances), was held to be properly sentenced to imprisonment for life. *Nuthill v. State*, 11 Humph. 247.

An accessory cannot take advantage of an error in the record against the principal. *State v. Duncan*, 6 Ir. dell, 236; *Com. v. Knapp*, 10 Pick. 477.

¹ See *infra*, § 1405.

² *R. v. Turner*, 1 Moody C. C. 347;

State v. Newport, 4 Harring. 567.

³ *Ibid.*; *Ogden v. State*, 12 Wis.

532. See, as taking a less restricted view of admissibility, *U. S. v. Hartwell*, *supra*; *R. v. Blick*, 4 C. & P. 377.

⁴ *State v. Sims*, 2 Bail. S. C. Rep.

29; *State v. Evans*, *Ibid.* 66; *Holmes v. Com.* 25 Penn. St. 221.

⁵ *Com. v. Dudley*, 6 Leigh's Va. R.

considered as principal and punished accordingly, an accessory may be indicted and convicted as a principal.¹ It is otherwise at common law,² and in States where this law prevails, an accessory before the fact, though by statute punishable as principal, must nevertheless be indicted, not as principal, but as accessory before the fact.³

§ 239. At common law, the verdict must specify the grade, and under a verdict of "guilty as accessory," the defendant cannot be sentenced as accessory before the fact.⁴ As has just been seen, accessory and principal (or instigator and perpetrator) may, under recent codes, be convicted of different grades. Verdict must specify grade.

§ 240. If the felony is not committed, he who counsels or commands its commission is not liable as accessory before the fact, but he may be convicted for the attempt as a substantive misdemeanor, if steps were taken to consummate the offence.⁵ Attempt.

VI. ACCESSARIES AFTER THE FACT.

§ 241. Although in other jurisprudences he who directs or counsels a specific offence is involved in the same penalty as the actual perpetrator, the English common law stands alone in assigning the same grade of guilt to those who conceal or protect the perpetrator after the commission of the offence.⁶ That such

614; *Jordan v. State*, 56 Ga. 92. See 39 Miss. 613; *Walrath v. State*, 8 Nebr. 80. For other cases see *infra*, § 245.

¹ *Cathcart v. Com.* 37 Penn. St. 108; *Campbell v. Com.* 84 Penn. St. 187; *Raiford v. State*, 59 Mich. 106; *Jordan v. State*, 56 Ga. 92; *Baxter v. The People*, 3 Gilman, 368; *State v. Zeibart*, 40 Iowa, 169; *Dempsey v. People*, 47 Ill. 323; *Yoe v. People*, 49 Ill. 410; *State v. Cassidy*, 12 Kans. 550. See *infra*, § 245; and see *Wh. Pl. & Pr.* § 458; *Ward v. Com.* 14 Bush, 232.

² *E. v. Fallon*, 9 Cox C. C. 242; *R. v. Plant*, 7 C. & P. 575; *State v. Wyckoff*, 2 Vroom, 65; *Hughes v. State*, 12 Ala. 458; *Josephine v. State*,

³ *Pettes v. Com.* 126 Mass. 242; *People v. Campbell*, 40 Cal. 129. See *People v. Gassoway*, 28 Cal. 404; *People v. Shepardson*, 48 Cal. 189. *Infra*, § 245.

⁴ *State v. Rose*, 20 La. An. 143.

⁵ 2 East R. 5; Ch. C. L. 264. *Supra*, § 173.

⁶ What we call accessoryship after the fact is punished in Germany and France as an independent offence, in the nature of our Escape, or Prison Breach. See *Berner, Lehrbuch*, 1877, pp. 196, 197.

In England, the old common law has been modified by stat. 24 & 25

persons should be punished is eminently just; but it is eminently unjust that they should be punished in the same way as the criminal whom they shelter.

By the English common law, however, a person who, when knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon,¹ whether he be a principal or an accessory before the fact merely, is an accessory after the fact, involved in the same penalty as the principal.² Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient, it is held, to make a man an accessory after the fact; as, for instance, that he concealed him in his house,³ or shut the door against his pursuers, until he should have an opportunity of escaping,⁴ or took money from him to allow him to escape,⁵ or supplied him with money, a horse, or other necessaries, in order to enable him to escape,⁶ or that the principal was in prison, and the defendant, before conviction, bribed the jailer to let him escape, or supplied him with materials for the same purpose,⁷ or in any way aided in compassing his escape.⁸ Merely suffering the felon to escape, being but an omission, however, it is held will not impute the guilt of

Vict., which limits the punishment to imprisonment for four years. See *R. v. Fallon*, L. & C. 217; 9 Cox, 242.

Receiving stolen goods does not, at common law, constitute accessoryship after the fact to the larceny. It was otherwise by the statute 3 Will. & Mary. In most jurisdictions, however, the reception of stolen goods is now an independent crime. See *infra*, §§ 982 *et seq.*

Receiving money, knowing that it was obtained by robbery, does not constitute accessoryship after the fact at common law. *Williams v. State*, 55 Ga. 391.

¹ 1 Hale, 618; 4 Bl. Com. 37; Roscoe's Cr. Ev. 184; *R. v. Lee*, 6 C. & P. 536.

A man who employs another person to harbor the principal may be convicted as an accessory after the fact,

although he himself did no act to relieve or assist the principal. *R. v. Jarvis*, 2 Moo. & R. 40. So it appears to be settled that whoever rescues a felon imprisoned for the felony, or voluntarily suffers him to escape, is guilty as accessory. *Hawk. P. C. b. 2, c. 29, s. 27*. See *Roscoe's Cr. Ev. 184*; and see generally as to how far "concealing" constitutes accessoryship after the fact, *White v. People*, 81 Ill. 333.

² *Wren v. Com.* 26 Grat. 952; *Taylor v. Com.* 11 Bush, 154; 2 *Hawk. c. 29, s. 1*; *P. Wms. 475*.

³ *Dalt.* 530, 531. *Infra*, § 652.

⁴ 1 Hale, 619.

⁵ 9 H. 4, 1.

⁶ *Hall's Sum.* 218; 2 *Hawk. c. 29, s. 26*.

⁷ 1 Hale, 621; *Hawk. b. 2, c. 29, s. 26*; *Archbold*, by *Jervis*, 9.

⁸ See *infra*, § 1677.

accessaryship to the party so doing.¹ And it is conceded that if a person supply a felon in prison with victuals or other necessaries, for his sustenance;² or succor and sustain him if he be bailed out of prison;³ or professionally attend a felon sick or wounded, although he know him to be a felon;⁴ or speak or write in order to obtain a felon's pardon or deliverance,⁵ or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly;⁶ or even if he himself agree, for money, not to give evidence against the felon;⁷ or know of the felony and do not disclose it;⁸ these acts will not be sufficient to make the party an accessary after the fact. In fact, the harshness of the old doctrine which subjected accessaries of this class to the same punishment as the principal offender has caused it to be so much restricted as to be virtually obsolete. Even interference with public justice by promoting the escape of a criminal is now tried as an independent offence.⁹

§ 242. Two things are laid down in the books as necessary to constitute a man accessary after the fact to the felony of another.

Knowledge of principal's guilt essential.

1. The felony must be complete.¹⁰
2. The defendant *must know that the felon is guilty*;¹¹ and this, therefore, is always averred in the indictment.¹² And though

¹ Hale, 619; *Wren v. Com. ut supra*; *Taylor v. Com.* 11 Bush, 154.

² 1 Hale, 620. See *R. v. Chapple*, C. & P. 355.

³ 1 Hale, 620.

⁴ 1 Hale, 332.

⁵ *Ibid.*

⁶ 3 Inst. 139; 1 Hale, 620.

⁷ *Moore*, 8. See *Wren v. Com.* 25 Grat. 789.

⁸ 1 Hale, 371, 618.

⁹ *Infra*, § 1677; *Com. v. Miller*, 2 Ashm. 61.

¹⁰ 1 Ch. C. L. 264; 1 Hale, 622; 2 Hawk. c. 29, s. 35; *Harrol v. State*, 89 Miss. 702.

¹¹ 1 Hale, 622; Hawk. b. 2, c. 29, s. 32; *Com. Dig. Justices*, T. 2. See *R. v. Butterfield*, 1 Cox C. C. 93; *R. v.*

Greenacre, 8 C. & P. 35; *Wren v. State*, 26 Grat. 952.

¹² Hawk. b. 2, c. 29, s. 33.

It is sometimes said that the inception of the offence of accessaries after the fact must be subsequent to that of the principal offence. This, however, is not necessarily the case. A receiver, for instance, may make his arrangements to receive the goods obtained by a projected larceny. If he does not act in concert with the principal offender,—in other words, if the principal does not know that he is thus acting,—he is an accessary after the fact. But it is otherwise if his reception is in consequence of a previous engagement. If he should say, "Go ahead; I will stand by you,

it has been intimated that constructive notice of the felony will, in some cases, suffice: as where a man receives a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety;¹ yet the better opinion is that there should be laid such a basis of inculpatory facts as properly to raise the presumption of knowledge.²

§ 243. The only relation, so it is said, which excuses the harboring a felon is that of a wife to her husband, because Wife is not so liable. she is considered as subject to his control, as well as bound to him by affection.³ But by the English common law no other ties, however near, will excuse; for if the husband protect the wife, a father his son, or a brother his brother, they contract the guilt, and are liable to the punishment, of accessaries to the original felony.⁴

§ 244. At common law, as we have seen,⁵ the conviction of the principal is a necessary prerequisite to the conviction of the accessory. Where the principal and accessory are joined in an indictment, and tried separately, the record of the principal's conviction is *prima facie* evidence of his guilt, upon the trial of the accessory; and as the burden of proof is on the accessory, he must show clearly that the principal ought not to have been convicted.⁶ But the accessory, in such case, is not restricted to proof of facts that were shown on the former trial, but may prove others which are incompatible with the guilt of the principal.⁷

Indictment must be specific. § 245. An accessory after the fact cannot be convicted on an indictment charging him as principal.⁸

and take care of the things after you get them," he is accessory before the fact, or instigator, and hence, by recent legislation, principal. He encourages the thief, and becomes therefore a party to theft.

¹ Dyer, 355; Staunf. 41 b.

² 1 Hale, 323, 622; R. v. Burrigge, 3 P. Wms. 475; Tully v. Com. 13 Bush, 142.

³ 1 Hale, 621; Hawk. b. 2. c. 29, s. 34; 4 Bla. Com. 39; Com. Dig. Jus. T. 2.

⁴ Ibid. In Massachusetts this is expanded by statute.

⁵ Supra, § 237.

⁶ Com. v. Knapp, 10 Pick. 484; State v. Chittem, 2 Devereux, 49; State v. Duncan, 6 Iredell, 236. See supra, § 237.

⁷ Com. v. Knapp, 10 Pick. 484. See State v. Sims, 2 Bail. S. C. Rep. 29; State v. Crank, Ibid. 66.

⁸ Supra, § 238; R. v. Fallon, 9 Cox C. C. 242; R. v. Soares, R. & R. 25; State v. Wyckoff, 2 Vroom, 65; Reynolds v. People, 83 Ill. 479; McCoy v. State, 52 Ga. 287; Hughes v. State, 12 Ala. 458; Josephine v. State, 39 Miss. 613; People v. Campbell, 40

The question of jurisdiction is hereafter considered.¹

V. LIABILITY OF PRINCIPAL FOR CRIMINAL ACT OF AGENT.

The cases under this head may be classed as follows :—

(a.) *Where the Agent acts directly under the Principal's Commands.*

§ 246. In this case there is no doubt as to the principal's liability. In misdemeanors the act may be charged to have been done by the principal himself, without reference to an agent.² Such, also, is the case in felonies, where the agent is innocent, insane, or a slave, in which case the party commanding the felony to be done, though absent at the time of its commission, is principal in the first degree.³

(b.) *Where the Agent is acting at the Time in the Line of the Principal's Business, but without Specific Instructions.*

§ 247. A principal is *prima facie* liable for the alleged acts of an agent done in a general course of business authorized by the principal,⁴ and this is eminently the case in indictments for nuisances, which could not be abated if the master was not liable for the servant's acts, if in general furtherance of the master's plan.⁵ And the rule applies to all cases where a master inflicts indictable injury through a servant. Thus, where a bar-keeper in a hotel sells liquor, or a salesman in a bookstore in the usual course of business sells a libellous book, or where a clerk publishes a libel in a newspaper, the principal is responsible, and, if there be no other evidence, may be convicted.⁶ Even the fact that the principal, who was the publisher of a newspaper, was

Cal. 129. Under statutes, see *supra*, § 238.

¹ *Infra*, § 287.

² *Sloan v. State*, 8 Ind. 312. For master's liability for servant's negligent act, see *supra*, § 135; *infra*, §§ 341, 1422, 1503.

³ *Supra*, § 223; *infra*, § 341; *R. v. Michael*, 2 M. C. C. 120; 9 C. & P. 350; *R. v. Spiller*, 5 C. & P. 333.

⁴ *R. v. Dixon*, 3 M. & S. 11; *Rob-*

erts v. Preston, 9 C. B. (N. S.) 208; *Com. v. Nichols*, 10 Met. 259.

⁵ *R. v. Stephens*, L. R. 1 Q. B. 702-10.

⁶ *R. v. Almon*, 5 Burr. 2686; *R. v. Dodd*, 2 Sessions Cases, 33; *R. v. Gutch*, *Moody & M.* 433; *U. S. v. Nunnemacher*, 7 Biss. 111; *Com. v. Park*, 1 Gray, 553; *Com. v. Nichols*, 10 Met. 259; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Met. R. R.* 107

living at the time one hundred miles distant from the place of publication, was sick and entirely ignorant of the libel's being published, is at common law no defence.¹ A master, also, may be liable for the negligence of a servant whom he negligently appoints or negligently controls.² But it is otherwise if the agent be without authority, express or implied, and the act be not in the range of the agent's business, and against the principal's express and *bonâ fide* commands.³ It should be added that, at common law, a master who commands a servant to perpetrate a felony is indictable, in case of perpetration, as accessory before the fact, while as to misdemeanors he is principal.⁴

(c.) *When the Principal resides out of the Jurisdiction.*

§ 248. When the principal resides out of the jurisdiction of the court trying the offence, he is chargeable in the particular venue for his acts done in it, notwithstanding his non-residence.⁵

Non-resident principal intrajurisdictionally liable.

VI. MISPRISION.

§ 249. At common law a party is guilty of misprision of felony who stands by at the commission of the felony without endeavoring to prevent it, and who, knowing of its commission, neglects to prosecute the offender.⁶ Misprision, as a substantive offence, however, is practically

Misprision of felony is concealment of felony.

Mass. 236; Com. v. Boston R. R. 126 Mass. 61; State v. Smith, 10 R. I. 258; Com. v. Gillespie, 7 S. & R. 469; State v. Mathis, 1 Hill S. C. 37; Britain v. State, 3 Humph. 203; Com. v. Major, 6 Dana, 293; 1 Bennett & Heard Lead. Cas. 241. Infra, §§ 341, 1422, 1503.

¹ R. v. Gutch, Moody & M. 433.

² Supra, § 135.

³ See supra, § 135; infra, § 1503; R. v. Bennett, Bell C. C. 1; 8 Cox C. C. 74; Com. v. Nichols, 10 Met. 259; Barnes v. State, 19 Conn. 398; State v. Dawson, 2 Bay, 360; Hipp v. State, 5 Blackf. 149. As to liability for co-conspirators, see infra, § 1405.

⁴ Supra, §§ 223, 225.

⁵ See infra, §§ 279, 280, 287; R. v. Garrett, 22 Law & Eq. 607; 6 Cox C. C. R. 260; U. S. v. Davis, 2 Sumn. 482; Com. v. Pettes, 114 Mass. 307; People v. Adams, 3 Denio, 190; Adams v. People, 1 Comstock, 173; Com. v. Gillespie, 7 S. & R. 469.

⁶ Hawk. P. C. b. 1. c. 59, s. 2; 1 Hale P. C. 431-448.

According to Sir J. Stephen, Dig. C. L. art. 156, "Every one who knows that any other person has committed high treason, and does not within a reasonable time give information thereof to a justice of assize or a justice of the peace, is guilty of misprision of

obsolete. The same end, so far as is consistent with the general policy of society, is reached by the rule noticed in another work, which makes it incumbent on all persons present when an unlawful act is attempted to take part with the officers of the law in the prevention of such act.¹

treason, and must, upon conviction thereof, be sentenced to imprisonment for life, and to forfeit to the queen all his goods and the profits of his lands during his life.

"Every one who knows that any other person has committed felony and conceals or procures the concealment thereof, is guilty of misprision of felony, and, upon conviction thereof, the

offender, if a sheriff, coroner, or their bailiff, 'shall have one year's imprisonment and after make a grievous fine,' at the discretion of the court, 'and if they have not whereof they shall have imprisonment of three years.' In other cases the offender is guilty of a misdemeanor."

¹ See Whart. Crim. Plead. & Prac. §§ 10 *et seq.*

CHAPTER X.

IN WHAT COURTS INDICTMENTS ARE COGNIZABLE.

- I. JUDICIAL POWERS SETTLED BY FEDERAL CONSTITUTION.**
Summary of federal judicial powers given by Constitution, § 252.
Prevalent view is that federal judiciary has no common law criminal jurisdiction, § 253.
Conflict of early rulings on this topic, § 254.
Rulings do not shut out common law as a standard of interpretation, § 255.
Conclusion is that no jurisdiction is given of exclusively common law offences, § 256.
Statutory jurisdiction of federal courts, § 257 —
Includes offences against law of nations, § 258.
Also offences against federal sovereignty, § 259.
Also offences against individuals on federal soil or on ships, § 260.
Also offences against property of federal government, § 261.
Also against public federal justice, § 262.
- II. IN WHAT COURTS OFFENCES AGAINST FEDERAL GOVERNMENT ARE TO BE TRIED.**
State courts have not concurrent jurisdiction unless given by statute, § 264.
Conflict of opinion as to state jurisdiction, § 265.
As to offences distinctively against U. S. the States are independent sovereigns, § 266.
- III. CONFLICT AS TO HABEAS CORPUS.**
Right of the courts to discharge from federal arrests, § 267.
Federal courts have statutory power of *habeas corpus* in federal cases, § 268.
- IV. CONFLICT AND CONCURRENCE OF JURISDICTIONS.**
1. Offences at Sea.
Offences at sea cognizable in country of flag, § 269.
Federal courts have jurisdiction of crimes on high seas out of state jurisdiction, § 270.
Sovereign has jurisdiction of sea within cannon shot from shore, § 270 a.
2. Offences by Subjects abroad.
Subjects may be responsible to their own sovereign for offences abroad, § 271.
Apportionment of this sovereignty between federal and state governments, § 272.
Also over political offences abroad, § 274.
Political extra-territorial offences by subjects are punishable, § 275.
Perjury and forgery before consular agents punishable at home, § 276.
Homicide by subjects abroad punishable in England, § 277.
3. Liability of Extra-territorial Principal.
Extra-territorial principal may be intra-territorially indictable, § 278.
Agent's act in such case imputable to principal, § 279.
Doubts in cases where agent is independently liable, § 280.
4. Offences by Aliens in Country of Arrest.
Aliens indictable in country of arrest by Roman law, § 281.
So in English and American law, § 282.
So as to Indians, § 282 a.
But not so as to belligerent insurgents, § 283.

5. *Offences by Aliens abroad.*

Extra-territorial offences against our rights may be intra-territorially indictable, § 284.

Jurisdiction claimed in cases of perjury and forgery before consuls, § 285.

Punishment in such cases, § 286.

6. *Offences committed part in one Jurisdiction and part in another.*

Accessories and co-conspirators liable in place of overt act, § 287.

In continuous offences each place of overt act has cognizance, § 288.

Adjustment of punishment in such cases, § 289.

Offences in carriages and boats, § 290.

In larceny, thief liable wherever goods are brought, § 291.

In homicide, statutory jurisdiction is given to country of death, § 292.

7. *Offences against two Sovereigns.*

The first prosecuting an offence absorbs it, § 293.

I. JUDICIAL POWERS SETTLED BY FEDERAL CONSTITUTION.

§ 252. THE powers given to Congress under this head are:—

To provide for the punishment of counterfeiting the securities and current coin of the United States.¹

Summary of federal judicial powers given by Constitution.

To define and punish piracies, felonies committed on the high seas, and offences against the law of nations.²

To make rules for the government of the land and naval forces.³

To provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States.⁴

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;⁵ and to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.⁶

choice of the means best calculated to exercise the powers they possess; and under this construction it has been held that Congress have power to inflict punishment in cases not specified by the Constitution, such power being implied as necessary and proper to the sanction of the laws, and the exercise of the delegated powers. M'Cul-

¹ Art. 1, § 8, cl. 6.

² *Ibid.* cl. 10.

³ *Ibid.* cl. 14.

⁴ *Ibid.* cl. 16.

⁵ Art. 1, § 8, cl. 16.

⁶ *Ibid.* cl. 18.

In this section the word *necessary* has been construed to mean *needful, requisite, essential, and conducive to*, and gives Congress the

§ 253. It is said in a case which will presently be more fully noticed, and which is assumed to have settled the law on this important question, that although it may be that the Supreme Court possesses jurisdiction derived immediately from the Constitution, of which the legislative power cannot deprive it, all other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be invested with none but what the power ceded to the general government authorizes Congress to confer. Certain implied powers, it is admitted, must necessarily result to courts of justice from the nature of their institution; as to fine for contempt, to imprison for contumacy, and to enforce obedience to order; but jurisdiction of crimes against the State, it is held, is not among these powers. Before an offence can become cognizable by the United States courts, so it is concluded, the legislative authority of the Union must first recognize it as such, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.¹

§ 254. The first case which involved the question of the common law criminal jurisdiction of the federal courts was that of Henfield, tried for illegally enlisting in a French privateer; a case tried in 1793, but for the first time fully reported in 1850.² In this case Chief Justice Jay, Judge Wilson, and Judge Iredell, of the Supreme Court, and Judge Peters of the District Court, concurred in holding that all violations of treaties, of the law of nations, and of the common law, so far as federal sovereignty is concerned, are indictable in the federal courts without statute. Almost at the same time before Judge Iredell, Judge Wilson, and Judge Peters, an American citizen was convicted, at common law, for sending a threatening letter to the British Minister.³ Then came Isaac Williams's case, where the same law was held by Chief Justice Ellsworth.⁴

Such was the state of the law when Judge Chase, in *Worrall's* *loch v. State of Maryland*, 4 Wheat. 416; *U. S. v. Bevans*, 3 Wheat. 336; *Martin's Lessee v. Hunter*, 1 Wheat. 304; *Ex parte Bollman*, 4 Cranch, 73; *U. S. v. Fisher*, 2 Cranch, 358, 396.

¹ *U. S. v. Hudson and Goodwin*, 7 Cranch, 32; *U. S. v. Coolidge*, 1

Wheat. 416. See *Duponceau on Jurisdiction of U. S. Courts*.

² *Wharton's State Trials*, 49.

³ *U. S. v. Ravara*, *Wharton's St. Tr.* 91; 2 *Dallas*, 297.

⁴ *Wharton's State Trials*, 651.

case¹ (Chief Justice Jay, Judge Wilson, and Judge Iredell being no longer on the bench, and Chief Justice Ellsworth being abroad), without waiting to learn what had been decided by his predecessors, startled both his colleague and the bar by announcing that he would entertain no indictment at common law. No reports being then, or for some time afterwards, published, of the prior rulings to the contrary, it is not to be wondered that the judges who came on the bench after Judge Chase supposed that he stated the practice correctly. In this view Judge Washington seems to have held that there could be no indictment for perjury at common law in the courts of the United States;² and Chief Justice Marshall,³ in more than one case, treats the same point as if settled by consent.⁴ But in a case which occurred in the Circuit Court of Massachusetts⁵ in 1813, on an indictment for an offence committed on the high seas, the question arose whether the Circuit Court had jurisdiction to try offences against the United States, which had not been defined, and to which no punishment had been affixed. Judge Story, admitting that the courts of the United States were of limited jurisdiction, and could exercise no authority not expressly granted to them, contended that when an authority was once lawfully given, the nature and extent of that authority, and the mode in which it should be exercised, must be regulated by the rules of the common law; and that, if this distinction was made, it would dissipate the whole difficulty and obscurity of the subject. Congress, he said, might, under the Constitution, confide to the Circuit Courts, jurisdiction of all offences against the United States, and they had conferred on them jurisdiction of almost all; that by the judiciary act the Circuit Courts have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where that or another statute of the United States otherwise provides; that in order to ascertain what are crimes and offences against the United States, recourse must be had to the common law, taken in connection with the

¹ 2 Dall. 297; Wharton's St. Tr.

189.

² See 1 W. C. C. R. 84; the report of which case appears to be defective in the conclusion of Judge Washington's opinion.

³ U. S. v. Burr, 4 Cranch, 500.

⁴ U. S. v. Bevens, 3 Wheat. 336; U. S. v. Wiltberger, 5 Wheat. 76.

⁵ U. S. v. Coolidge, 1 Gall. 488.

Constitution; and that Congress has provided for the punishment of many crimes which it has not defined, an explanation and definition of which can only be found in the common law. The inference, he urged, was plain, that the Circuit Courts have cognizance of all offences against the United States; that what these offences were depended upon the common law, applied to the powers confided to the United States; that the Circuit Courts, having such cognizance, might punish by fine and imprisonment where no punishment was specially provided by statute; that the admiralty was a court of extensive criminal as well as civil jurisdiction; and that offences of admiralty were exclusively cognizable by the United States, and punishable by fine and imprisonment, where no other punishment was specially prescribed. The district judge dissenting, the case came before the Supreme Court of the United States; and it is evident, from the report¹ that a strong desire existed in the minds of the judges to hear the whole question of the extent of jurisdiction reargued. The attorney general, however, declining to do so, being unwilling to attempt to shake *The United States v. Hudson and Goodwin*,² by the authority of that case the court felt themselves bound, and so certified to the Circuit Court.³

§ 255. But even assuming, as was said on another occasion,⁴ that the doctrine that the common law, as a source of jurisdiction, does not control the federal courts is now finally established, it by no means follows that the common law, as a rule for the exercise of a jurisdiction previously given, does not apply undiminished, except

Rulings do not shut out common law as a standard of interpretation.

¹ 1 Wheat. 415.

² 7 Cranch, 32.

³ Chancellor Kent does not seem to think that the case of *U. S. v. Coolidge* should be governed by the same principle as those of *U. S. v. Hudson* and *U. S. v. Worrall*, — the one a libel and the other an attempt to bribe a commissioner of the revenue, — the two latter being decided on the ground that the Constitution had given to the courts no jurisdiction in such cases; whereas the case of *Coolidge* was one of admiralty, over which the federal

courts seem to have a general and exclusive jurisdiction. Kent's *Comm.* vol. i. p. 338. As following *U. S. v. Coolidge*, and denying jurisdiction, see *U. S. v. Maurice*, 2 Brock. 96; *U. S. v. Scott*, 4 Bis. 29; *U. S. v. Babcock*, 4 McLean, 113; *U. S. v. Taylor*, 1 Hughes, 514. To same effect, see argument of Clifford, J., in *U. S. v. Cruikshank*, 92 U. S. 564. But otherwise as to offences on high seas and places within exclusive jurisdiction. *U. S. v. Shepherd*, 1 Hughes, 520.

⁴ Wharton St. Tr. 87.

so far as interferes with positive statutes. Thus it may be argued, that as Congress has power to "define and punish offences against the law of nations," the jurisdiction of the States is thereby divested of the particular subject matter; and that, consequently, as the jurisdiction exists somewhere, it exists in the federal courts, ready to be exercised through the statutory medium, when Congress specifies the procedure, but when no legislation has taken place, through the agency of the common law forms. *Marbury v. Madison*¹ tends to the doctrine that the federal jurisdiction in this and kindred cases is exclusive; and such is the express ruling of *Com. v. Kosloff*,² where Chief Justice Tilghman refused to take cognizance of a suit respecting a consul. The pregnant inquiry pressed home in the latter case, "Is the Constitution to be so construed as to exclude the jurisdiction of all inferior courts, and yet suffer the authority of the Supreme Court to be dormant until called into action by law?" gives no obscure intimation of the leaning of that wise and clear-headed judge on this very point. It is not inconsistent, therefore, with the doctrine discarding the common law as an origin of jurisdiction to the federal courts, to hold that where an express subject matter is ceded to the federal government by the Constitution, that subject matter is to be acted upon through the medium of common law forms.³

¹ 1 Cranch, 137.

² 5 S. & R. 545.

³ This distinction is dwelt upon by the late Mr. Duponceau, in his notice of Henfield's case.

"Judge Wilson, who presided at this trial, in his charge to the jury, took the ground of its being also an offence at *common law*, of which the law of nations was a part, and maintained the doctrine that the *common law* was to be looked to for the definition and punishment of the offence. This ground has not been adverted to in the argument, or, at least, very slightly. But it would seem that the *common law*, considered as a municipal system, had nothing to do with this case. The law of nations, being the common law of the civilized world,

may be said indeed to be a part of the law of every civilized nation; but it stands on other and higher grounds than municipal customs, statutes, edicts, or ordinances. It is binding on every people and on every government. It is to be carried into effect at all times, under the penalty of being thrown out of the pale of civilization or involving the country in a war. Every branch of the national administration, each within its district, and its particular jurisdiction, is bound to administer it. It defines offences and affixes punishments, and acts everywhere *proprio vigore*, whenever it is not altered or modified by particular national statutes or usages not inconsistent with its great and fundamental principles. Whether there is or not

Hence we may hold that the court may draw from the common law system of the State where it sits the meaning of the penal terms with which it deals.¹

§ 256. Supposing that Henfield's case is in such direct conflict with *United States v. Coolidge* and *United States v. Hudson*, that either the former or the two latter must fall, the question arises, which is to be considered as law? Henfield's case, it is true, was not reviewed by the court in banc, but the ruling of the court at the trial was made after a full and ample discussion by counsel distinguished for their learning and sagacity, and received the assent both of Judge Peters, as the district judge, and of all the judges of the Supreme Court but one. Chief Justice Jay, to whom of all the judges who sat on that bench the character of a contemporaneous expositor most properly belongs, announced the jurisdiction in advance with great solemnity, in a charge which exhibits grave deliberation.² Judge Wilson and Judge Iredell, both of whom sat in the constitutional convention, proclaimed the same doctrine at the trial. The prosecution was instituted by Mr. Edmund Randolph certainly not of that class which leaned to an enlarged view of the judicial power, and his off-

a national common law in other respects, this *universal common law* can never cease to be the rule of executive and judicial proceedings until mankind shall return to the savage state. Judge Wilson therefore, in my opinion, rather weakened than strengthened the ground of the prosecution in placing the law of nations on the same footing with the municipal or local *common law*, and deriving its authority exclusively from the latter. It was considering the subject in the narrowest point of view." Dup. Jur. 3.

A distinction of a parallel character is taken by Mr. Dallas, in his speech in Worrall's case, where he argues that in the case in question the defendant was indicted for an infraction of a treaty, which is the supreme law of the land, and that, consequently, that case is no authority for the position

that at common law alone any offence against the sovereignty of the United States is indictable. There are, however, great difficulties in the way of giving the federal courts criminal jurisdiction over infractions of treaties, or of the law of nations, and at the same time refusing them such jurisdiction over common law offences. If the common law is inadmissible to execute the jurisdiction in the latter case, the question is a critical one, whether the former can be taken in to help out the jurisdiction of the latter; and such, in fact, appears to have been the view of Judge Wilson, who, declining to place the case on the narrow ground of the law of nations alone, declared the offence to be cognizable at common law.

¹ See *U. S. v. Shepard*, 1 Abb. U. S.

431.

² Wharton's St. Trials, p. 49.

cial opinion as attorney general was given beforehand, that the offence was one which the federal courts have power to punish. Mr. Jefferson, almost at the same moment, in substance directed Mr. Morris to explain to the British court, that the acquittal arose, not from want of power to punish, but a doubt in the minds of the jury as to the guilty intent;¹ and Chief Justice Marshall, many years afterwards, lamented the verdict of the jury, not as the necessary result of a lack of jurisdiction, but as a melancholy exhibition of party zeal.² By none of these is there the least intimation of a doubt as to the jurisdiction of the court; and when the character of the men themselves is recollected,—the sound, wary, and experienced judgment of Chief Justice Jay; the singular sagacity of Mr. Jefferson in every branch of our system, and his peculiar sensitiveness to judicial encroachments; and the excellent capacity and long experience of Judge Iredell, Judge Wilson, and Judge Peters,—it cannot now be said that the jurisdiction was assumed inconsiderately or acquiesced in blindly. It undoubtedly was exercised in conformity with the then unquestioned construction of the Constitution. It was exercised in conformity with the opinion announced by Washington in his proclamation of neutrality,—a paper unanimously adopted by the cabinet as a correct exposition to foreign States of the power of the federal government,—that the federal government in such cases could, through its courts, punish the offender.³ But whatever may be our opinion as to the principle involved, the line of recent decisions puts it beyond doubt that the federal courts will not now take jurisdiction over any crimes which have not been placed directly under their control by act of Congress.⁴

§ 257. It remains to consider such offences as are brought within the jurisdiction of the federal courts by act of Congress. The offences thus particularly enumerated by Congress may be collected under five general heads: Statutory jurisdiction of federal courts.

¹ Wharton's St. Trials, p. 89.

² *Ibid.*

³ 10 Wash. Writ. by Sparks, 535; Wharton's St. Trials, pp. 87, 88. Another remarkable instance of this jurisdiction being accepted as a matter of course is found in *United States v. Meyer*, cited Whar. Prec. 955, note.

⁴ *U. S. v. Babcock*, 4 McLean, 113; *Anon.* 1 Wash. C. C. 84; *U. S. v. Maurice*, 2 Brock. 96; *U. S. v. New Bedford Bridge*, 1 Woodb. & Minot, 401; *U. S. v. Lancaster*, 2 McLean, 431; *U. S. v. Barney*, 5 Blatch. C. C. 294; *U. S. v. Scott*, 4 Bis. 29; and cited to § 254

first, those against the law of nations; secondly, those against federal sovereignty; thirdly, offences against the persons of individuals; fourthly, offences against property; and fifthly, offences against public justice.

§ 258. (a.) Under the first head, namely, offences against the law of nations, may be classed, the accepting and exercising, by a citizen, a commission to serve a foreign State against a State at peace with the United States;¹ fitting out and arming, within the limits of the United States, any vessel for a foreign State to cruise against a State at peace with the United States;² increasing or assisting, within the United States, any force of armed vessels of a foreign State at war with a State with which the United States are at peace;³ setting on foot, within the United States, any military expedition against a State at peace with the United States;⁴ suing forth or executing any writ or process against any foreign minister, or his servants, the writs being also declared void;⁵ and violating any passport; or in any other way infracting the law of nations, by violence to an ambassador, or foreign minister, or their domestics.⁶

§ 259. (b.) Under the second head, namely, offences against federal sovereignty, may be classed, treason against the United States and misprision of treason;⁷ holding any treasonable correspondence with a foreign government;⁸ recruiting soldiers to serve against the United States;⁹ enlisting by a citizen within, or going out of the United States with intent to enlist in the service of any foreign State;¹⁰ fitting out and arming a vessel by a citizen of the United States, out of the United States, with intent to cruise against citizens of the United States;¹¹ illegally holding office;¹² false personation in naturalization;¹³ offences against the elective franchise;¹⁴ false personation of owners of stock or other claim against the

¹ Rev. Stat. U. S. 1878, 5281.

² Ibid. 5286.

³ Ibid. 5285.

⁴ Ibid. 5286.

⁵ Ibid. 4062.

⁶ Ibid. 4064.

⁷ Ibid., 5331-8. As to subsequent statutes, see *infra*, "Treason."

⁸ Ibid. 5335.

⁹ Ibid. 5337.

¹⁰ Ibid. 5287.

¹¹ Ibid.

¹² Ibid. 1787.

¹³ Ibid. 5424.

¹⁴ Ibid. 5425-9, 5506, 5511-19, 5520, 5529, 5532.

United States; ¹ obstructing officers executing warrant under civil rights law; ² conspiring to prevent a person from holding or accepting federal office; ³ injuring a person so holding office; ⁴ offences against Indians; ⁵ offences on Guano Islands; ⁶ political offences against the federal government committed by subjects abroad; ⁷ perjury and forgery abroad; ⁸ and the various offences defined in the statutes relating to the post-office; ⁹ to counterfeiting, ¹⁰ to piracy, revolt, and the slave-trade. ¹¹

§ 260. (c.) Under the third head, namely, offences against the persons of individuals, may be classed, subjecting any person to deprivation of rights under color of law; ¹² depriving any person of equal protection of law; ¹³ murder, or manslaughter, in any fort, dock-yard, or other place or district of country under the sole and exclusive jurisdiction of the United States; ¹⁴ causing death on ship by explosive substances; ¹⁵ murder, manslaughter, or rape, upon the high seas, or in any river, haven, basin, or other like place out of the jurisdiction of the United States, &c.; ¹⁶ the offences covered by the statutes protecting persons on the high seas, or arms of the sea, or river or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of particular States; ¹⁷ and kidnapping persons with intent to enslave. ¹⁸

Also offences against individuals on federal soil, or on ships, or depriving individuals of civil rights.

¹ Rev. Stat. U. S. 1878, 5435-8.

² *Ibid.* 5516.

³ *Ibid.* 5518.

⁴ *Ibid.* 5518.

⁵ *Ibid.* 2128, 2146, 2150.

⁶ *Ibid.* 5576.

⁷ *Infra*, § 274.

⁸ *Infra*, § 276.

⁹ Rev. Stat. U. S. 1878, 5463 *et seq.*

¹⁰ *Ibid.* 5457.

¹¹ See Rev. Stat. U. S. 1878, 5413-

¹² *Ibid.* 5510.

¹³ *Ibid.* 5519.

¹⁴ *Ibid.* 5389.

This jurisdiction is exclusive, unless there is a reservation to the State in the act of cession. *U. S. v. Bevans*, 3 Wheat. 336; *U. S.*

v. Cornell, 2 Mason, 60; *U. S. v. Davis*, 5 Mason, 356. But the U. S., by buying lands for other than the purpose of governing the same, do not exclude state jurisdiction. See *Wills v. State*, 3 Heisk. 141.

¹⁵ Rev. Stat. U. S. 1878, 5355.

¹⁶ *Infra*, § 269. See *R. S. of U. S.*

§§ 5339-40.

¹⁷ Rev. St. U. S. 1878, 5346 *et seq.*;

R. S. U. S. §§ 5339-40. An offence at sea within cannon shot of the shore is cognizable in the federal courts. *U. S. v. Grush*, 5 Mason, 290; *U. S. v. Holmes*, 5 Wheat. 412. But a ship lying at anchor between Boston and Chelsea, off Constitution Wharf, at the distance of one fourth or one third

¹⁸ Rev. St. U. S. 1878, 5525.

§ 261. (*d.*) Under the fourth head, namely, offences against property, may be classed, embezzling or purloining any arms or other ordnance belonging to the United States, by any person having the charge or custody thereof, for purposes of gain, and to impede the service of the United States; ¹ custom-house frauds; ² frauds in stealing implements used in printing obligations, or papers of importance; ³ burning, or aiding to burn, any dwelling-house, store, or other building, within any fort, dock-yard, or other place under the jurisdiction of the United States; ⁴ setting fire to, or burning, or aiding to set fire to, or burn, any arsenal, armory, &c., of the United States, or any vessel built or building, or any materials, victuals, or other public stores; ⁵ taking and carrying away, with intent to steal, the personal goods of another, from within any of the places under the sole and exclusive cognizance of the United States, or being accessory thereto; ⁶ and the various forms of robbery and larceny on the high seas.

Also offences against property of federal government, or on federal soil, or on ships.

§ 262. (*e.*) Under the fifth head, namely, offences against public justice, may be classed, bribing any United States judge or legislator with intent to obtain any opinion, judgment, or vote, in any suit depending before him; ⁷ receiving such bribe; ⁸ extortion of any kind; ⁹ embezzlement by public officers; ¹⁰ other forms of official misconduct; ¹¹ obstructing any officer of the United States in the service of any legal writ or process whatsoever; demanding and receiving, by reason of his office, any greater fees than those allowed by law, by a public officer, or his deputy; ¹² endeavoring to impede, intimidate, or influence any juror, witness, or officer in any court

Also against public federal justice and policy.

of a mile from said wharf, in water of the depth of four or five fathoms at low tide, and between one third and half a mile's distance from the navy-yard in Charlestown, is within the body of the county of Suffolk; and an offence so committed on board a merchant ship so situate, owned by a citizen or citizens of the United States, is exclusively cognizable by the courts of the State. *Com. v. Peters*, 12 Met. 387. See *infra*, §§ 270, 270 *a.*

¹ Rev. Stat. 1878, 5439, 5456.

² *Ibid.* 5441.

³ *Ibid.* 5453-4.

⁴ *Ibid.* 5385

⁵ *Ibid.* 5386.

⁶ And see *Com. v. Gaines*, 2 Va. Cas. 172.

⁷ Rev. Stat. 1878, 5451.

⁸ *Ibid.* 5500-2.

⁹ *Ibid.* 5481-7.

¹⁰ *Ibid.* 5486.

¹¹ *Ibid.* 5482 *et seq.*

¹² *Ibid.* 5481.

of the United States in the discharge of his duties, or by threats or force obstructing or impeding, or endeavoring to impede the due administration of justice therein; ¹ committing perjury, or causing another to do so, in any suit or controversy depending in any of the courts of the United States, or in any deposition taken in pursuance of the laws of the United States; ² taking other forms of false oaths forbidden by acts of Congress; ³ endeavoring to defeat the course of justice; ⁴ circulating obscene literature through the mail or custom-house.⁵

§ 263. By clauses in several of the acts referred to, it is expressly declared that nothing therein shall be construed to deprive the courts of the individual States of jurisdiction under the laws of the several States, over offences made cognizable by these acts. Such is the case, as has been noticed, with the crimes of forging, coining, and counterfeiting.⁶ By the act establishing and regulating the Post-office Department, authority is given to the federal officers to prosecute in the state courts offences against the department.⁷

II. IN WHAT COURTS OFFENCES COGNIZABLE BY THE UNITED STATES ARE TO BE TRIED.

When the State and the Federal Courts have Concurrent Jurisdiction.

§ 264. Under the Federal Constitution, exclusive jurisdiction is vested in the federal courts of all offences cognizable under the authority of the United States, unless where the laws of the United States shall otherwise direct.⁸ In the language of Judge Washington, in delivering the opinion of the Supreme Court in a leading case, "Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal courts."⁹

State courts have not concurrent jurisdiction, unless given by Congress.

¹ Rev. Stat. 1878, 5404-6.

² *Ibid.* 5392.

³ *Infra*, § 276.

⁴ Rev. Stat. 1878, 5407.

⁵ *Ibid.* 1785.

⁶ See *infra*, § 748.

⁷ Rev. Stat. U. S. 1878, 3833.

⁸ *Houston v. Moore*, 5 Wheat. 27.

⁹ *Houston v. Moore*, 5 Wheat. 27.

See *U. S. v. Ames*, Boston L. Rep.

§ 265. Statutes having been enacted by Congress giving, as to several lines of offences, concurrent jurisdiction to the state courts, it has been held in several of the States, not without the sanction of repeated intimations of the Supreme Court of the United States, that although the state courts may exercise jurisdiction in cases authorized by the laws of the States, and not prohibited by the exclusive jurisdiction of the federal courts, yet it cannot be considered obligatory on the state tribunals to exercise such jurisdiction.¹ On the other hand, as will be seen, we have cases in which state courts of high authority have accepted this jurisdiction.

§ 266. Of the vexed questions here involved we may venture to accept the following solutions:—

1. Congress cannot constitutionally confer on a state court jurisdiction over offences against the federal government. Statutes conferring such jurisdiction do not and cannot bind the state courts as such.
2. Offences which are directed against the sovereignty of a State are punishable in such State, notwithstanding the fact that such offences are also directed against the sovereignty of the federal government.

Whether one sovereign, by prosecuting an offence thus indictable both by itself and by another sovereign, bars a prosecution by such other sovereign, is elsewhere discussed.²

3. Offences exclusively against the United States are exclusively cognizable in the federal courts; and offences exclusively against the States are exclusively cognizable in the state courts.³

vol. ix. p. 295. As to concurrent jurisdiction, see Whart. Crim. Plead. & Pr. § 242.

¹ Prigg v. Com. 16 Peters, 539, 630.

² Infra, §§ 273, 293. And see particularly Wh. Cr. Pl. & Pr. § 441. As to treason, see infra, §§ 812-18. As to coining, in addition to points in note, see infra, § 749.

³ The propositions in the text are dependent upon principles of constitutional construction, which it is out of the range of the present treatise to discuss. If, however, as is here as-

sumed, each State is sovereign as to all powers not ceded to the federal government, the State has jurisdiction of all crimes committed within its borders unless the exclusive jurisdiction of such crimes is ceded to the federal government. And if each State is sovereign as to its own functionaries, these functionaries cannot accept any jurisdiction conferred on them by the federal government, unless the right to impose this jurisdiction is ceded by the States to the federal government. Otherwise the

III. CONFLICT AS TO HABEAS CORPUS.

§ 267. For many years after the adoption of the Federal Constitution the state courts claimed to have the right to issue writs of *habeas corpus* to examine the validity of commitments under federal process.¹ We have had, it is true, rulings by federal judges, that they have *exclusive* jurisdiction on *habeas corpus*, whenever the appli-

Right of state courts to discharge from federal arrests.

federal legislature could appropriate to itself the time, the duty, and the allegiance of state officials, and thereby put them under its immediate control.

Among the rulings bearing on this topic may be cited the following:—

In Massachusetts, it is said that the enactment of a federal statute directing the punishment of a crime, as against the United States, excludes all state jurisdiction, unless the concurrent jurisdiction of the States be saved in the statute. "By the terms of the Judiciary Act," said Ames, J., in the Supreme Court of Massachusetts, in reference to this point, "the courts of the United States are vested with the exclusive cognizance of all crimes that are made punishable by act of Congress, *except where the act of Congress makes other provision*: and it would therefore seem that the crime of embezzlement by a cashier of a national bank located within our territory is taken out of the jurisdiction of our courts. This is at least strongly

implied in *Com. v. Tenney* (97 Mass. 50), and in fact is conceded by the learned attorney general in the argument of this case." *Com. v. Felton*, 101 Mass. 204. See *Com. v. Fuller*, 8 Met. 313; *State v. Tuller*, 34 Conn. 280. *Infra*, § 1041.

Hence even an accessory to an embezzlement of the funds of a national bank by one of its officers cannot be tried in Massachusetts, even though the offence of an accessory is not provided for by the federal statutes. *Com. v. Felton*, 101 Mass. 204.

On the other hand, it has been held in the same State (*Com. v. Barry*, 116 Mass. 1) that a larceny committed by an officer of a national bank of the property of the bank may be punished in a state court, notwithstanding that he may also be subject to punishment for embezzlement under the United States statute. "The fact," so it is argued in the opinion of the court, "that Hine was teller of the bank subjects him to the punishment imposed for his breach of trust in that

¹ See Sergeant's Const. Law, 236, 287; *State v. Dimmick*, 12 N. H. 194; *Com. v. Chandler*, 11 Mass. 83; *Com. v. Harrison*, 11 Mass. 63; *Com. v. Downes*, 24 Pick. 227; *Sanborn v. Carlton*, 15 Gray, 399; *McConologue's case*, 107 Mass. 154; *New York R. S. vol. ii. 563*, § 22; 3 *Hall's L. J.* 206; 5 *Hall's L. J.* 497; *Lanahan v. Birge*, 30 Conn. 438; *Husted's case*, 1 Johns.

Cas. 136; *Stacy, in re*, 10 Johns. 328; *U. S. v. Wyngall*, 5 Hill, 16; *Barlow's case*, 8 West. Law J. 567; *Com. v. Camac*, 1 S. & R. 87; *Com. v. Fox*, 7 Penn. St. 336; *Com. v. Wright*, 3 Grant, 437; *Mason, ex parte*, 1 Murphy, 336; *Disinger's case*, 12 Ohio St. 256; *Higgins' case*, 16 Wis. 351; though see *Spangler's case*, 11 Mich. 298; *Willis, in re*, 38 Ala. 429.

cant s restrained, illegally or otherwise, under authority of the United States, whether by virtue of a formal commitment or

capacity, under the statute of the United States; it does not relieve him from his liability to punishment for the larceny at common law, or under statutes of the State. There is no identity in the character of the two offences, although the same evidence may be relied upon to sustain the proof of each. An acquittal or conviction of either would be no bar to a prosecution for the other." See *Com. v. Carpenter*, 100 Mass. 204; *Morey v. Com.* 108 Mass. 433. To the same effect is *State v. Tuller*, 34 Conn. 280, where it was held that while the state courts cannot exercise jurisdiction of the offence of embezzlement by an officer of a national bank of the property of a bank, they have jurisdiction of the larceny or purloining by such officer of the property of others left with the bank for safe-keeping.

"It is theft by our law," so speaks the court, "to steal from a national bank; it is burglary to break into one for the purpose of stealing; and it is cheating to obtain money from one by false pretences. As a corporate being, located in the State, its property and interests and business are protected by state laws and subject to state legislation, and so it is competent for the legislature to protect its customers, the citizens of the State, in their *business dealings* with it, whatever they may be, whether constituting the relation of borrower and lender, or special or general depositor and bailee; and they may be controlled and protected by penal enactments without interference with the laws of Congress."

In *Com. v. Tenney*, 97 Mass. 50, it was held that a state court has jurisdiction of an indictment against an officer of a national bank for fraudulently converting to his own use the

property of an individual deposited in the bank, under a state statute making such fraudulent conversion "larceny."

Perjury in naturalization proceedings, no matter what may be the court in which the false oath is taken, is held to be an offence against the general government, and not punishable in state courts. *People v. Sweetman*, 3 Parker C. R. 358; *State v. Adams*, 4 Blackf. 146; *People v. Kelly*, 38 Cal. 145; *State v. Kirkpatrick*, 32 Ark. 117. See *infra*, §§ 1041, 1275. By other courts, however, for the reason that perjury in such cases strikes at state as well as federal integrity, this view is denied. *Infra*, § 1275; *State v. Whittemore*, 50 N. H. 245; *Rump v. Com.* 30 Penn. St. 475. See *U. S. v. Bailey*, 9 Pet. 238. Yet we may agree that the state courts have no jurisdiction of perjury before federal land officers (*People v. Kelly*, 38 Cal. 145; see also *State v. Pike*, 15 N. H. 83; *State v. Adams*, 4 Blackf. 146); and of perjury in federal judicial investigations. *Bridges, ex parte*, 2 Woods, 428.

In Ohio, on an information for selling distilled liquors without a license, contrary to the act of Congress, it was held by all the judges that the United States could not prosecute in the state courts. In a previous case, on a similar question, the court had been equally divided. *U. S. v. Campbell*, 6 Hall's L. J. 113.

In Virginia, it has been decided that the courts of that State have no jurisdiction of stealing packages from the mail, that being an offence created by act of Congress; *Com. v. Feely*, 1 Va. Cases, 321; and the same view was taken in an action brought to recover a penalty for a breach of the revenue laws, notwithstanding such

otherwise.¹ But such claim was not recognized by the state courts, and cases are not infrequent in which by the latter tri-

penalty being expressly made recoverable in the state courts. *Serg. Cons. Law*, 280.

In *Kentucky (Haney v. Sharp*, 1 Dana, 442), in an action to recover a penalty under an act of Congress, for a refusal to make return to the marshal of a list of the defendant's family, it was held that, as no tribunal of the State had an inherent or concurrent jurisdiction in such cases, the jurisdiction of the courts of the federal government must necessarily be exclusive, and that the state courts could take no cognizance.

In *Connecticut (Ely v. Peck*, 7 Conn. 240), upon an action brought to recover damages under an act of Congress for the government and regulation of seamen in the merchant service, against the mate, for a desertion, the court felt themselves bound by the case of *Martin v. Hunter's Lessee*, 1 Wheat. 304; and declared that Congress could not vest any portion of the judicial power of the United States except in a court ordained and established by itself, and that no part of the criminal jurisdiction of the United States could, consistently with the Constitution, be delegated to state tribunals. On a writ of error to the Superior Court of the same State, from a decision of a county court awarding a penalty for a violation of an act relating to the Post-office Department (Act of March 3, 1825), the case was reviewed and confirmed. *Ibid.* And in this State, as well as in Massachusetts, it is now held that criminal offences against the federal government are exclusively cognizable in federal courts, unless by federal statutes it is

otherwise provided. *State v. Tuller*, 34 Conn. 280. See *infra*, § 1041.

In *Missouri*, it has been even said that the power to punish counterfeiting current coin is, notwithstanding the statute, vested exclusively in Congress; that the States have no concurrent legislation on the subject; and that a statute of a State providing for the cognizance and punishment of such crimes is void. *Mattison v. State*, 3 Mo. 421. See *State v. Shoemaker*, 7 *Ibid.* 177. As to coining, see generally *infra*, § 748.

Of coining and counterfeiting, however, the state courts, it is generally agreed, have concurrent jurisdiction, the offence being one which, at least in some of its aspects, is directed against the sovereignty of the particular States, and the jurisdiction originally existing in the state courts, and not being formally ceded to the general government. *Prigg v. Com.* 16 Pet. 630; *Fox v. Ohio*, 5 How. (U. S.) 410; *State v. Randall*, 2 Aikens, 89; *Com. v. Fuller*, 8 Met. 313; *Manley v. People*, 3 Seld. 295; *U. S. v. Smith*, 1 Southard, 33; *Buckwalter v. U. S.* 11 S. & R. 193; *Rump v. Com.* 30 Penn. St. 475; *Sutton v. State*, 9 Oh. 132; *Hendrick v. Com.* 5 Leigh, 707; *Jett v. Com.* 18 Grat. 933; *State v. Pitman*, 1 Brev. 32; *State v. Antonio*, 3 Brev. 562; *Waldo v. Wallace*, 12 Ind. 569; *Chess v. State*, 1 Blackf. 198; *Snoddy v. Howard*, 51 Ind. 411; *Harlan v. People*, 1 Dougl. Mich. 207; *Sizemore v. State*, 3 Head, 26; though see *Rouse v. State*, 4 Ga. 136.

In *South Carolina*, the courts at one time went the extreme length of

¹ *Farrand*, in re, 1 Abbott U. S. Reg. 662; *Ferrand v. Fowler*, 2 Am. L. J. Rep. 4.
140; *McDonald*, ex parte, 9 Am. L. L. J. Rep. 4.

bunals persons held by the military authorities of the United States, under color of illegal enlistments, have been discharged.¹

saying that every offence against the laws of the United States is an offence against the laws of South Carolina, and that she has a right to punish all violations of her law, unless the exclusive power to punish it has been delegated by the Constitution of the United States to the judiciary established by it. *State v. Wills*, 2 Hill S. C. 687. Such, however, seems now no longer the law in that State. *State v. McBride*, Rice, 400.

In *Bletz v. Columbia Bank*, 87 Penn. St. 87, we have the following from Agnew, C. J.: "We may now refer to some of our own decisions and laws. Thus it was held that our courts had jurisdiction of a forgery of power of attorney to obtain a pension under an act of Congress. *Commonwealth v. Shaffer*, 4 Dallas, App. xxvi. In *White v. Commonwealth*, 4 Binney, 418, this court decided that passing a counterfeit note of the Bank of the United States was indictable under the Act of 22d April, 1794, specially including the notes of that bank. *Buckwalter v. United States*, 11 S. & R. 193, was the case of penalty under an act of Congress sued for in the name of the United States. Justice Duncan said: 'On the matter of jurisdiction it is sufficient to observe this court has often sustained actions on penal acts of Congress, where the penalty is recoverable in the state courts; and though convenience is no justification for the usurpation of power, yet as the court does not see how this conflicts with the Constitution of the United States, the inconvenience may be considered, and it

would be an intolerable inconvenience and grievance in an action for a penalty to drag a man from the most remote corner of the State to the seat of the federal judiciary.' The remark of Justice Strong in *Huber v. Reily*, 3 Smith, 118, was not intended to overrule *Buckwalter's* case, but to distinguish it, as shown by his own language, that the latter was an action for penalties *declared to be recoverable as other debts*; while he was treating of the disfranchisement of a deserter, and the necessity of conviction by a court-martial, before the disability could be enforced.

"The case of *Houston v. Moore* has been already cited, where a penalty was inflicted under an act of Congress by a state court-martial. The legislation of our State has run in the same direction. In 1829, Judge King, Thomas I. Wharton, and Judge Shaler reported the penal act of that year. The Act of 23d April, 1829, provided for forging and uttering any gold or silver coin then or thereafter passing or in circulation in this State, and for forging, counterfeiting, or uttering a counterfeit note of the Bank of the United States. In 1860 the same great criminal lawyer, Judge King, with Judge Knox and another, was upon a commission to codify the criminal law, and reported the new sections of the Act of 31st March, 1860, from 156 to 163 inclusive, punishing offences relating to the coin; and in the report referred to the laws of the United States, and the case of *Fox v. Ohio*, 5 Howard, 410, deciding upon an elaborate argument

¹ *Reynolds*, ex parte, 6 Parker C. R. 276. See also *Hamilton*, ex parte, 1 Ben. 455; but see *Norris v. Newton*,

5 McLean, 92; *U. S. v. Rector*, *Ibid.* 174; *Veremaitre's case*, 13 Am. Law Rep. 608.

On the other hand, it was at one time held in New York that a state court will not, on *habeas corpus*, review the legality of the arrest of an alleged deserter by a provost marshal of the United States;¹ though this point was subsequently reconsidered, and it was held that the court would issue the writ to direct a provost marshal to produce an infant, under eighteen years, whom he claimed to hold as a soldier and deserter.²

In 1867 a case of collision arose in New York between the federal and state courts on this issue, under the following circumstances: A commander in the army of the United States made return to a writ of *habeas corpus* issued by the state court, that he held the petitioner as a recruit in the United States army, and pursuant to laws of the United States regulating enlistments. The state court examined the validity of the enlistment, determined it to be invalid, and directed the recruit to be discharged. The officer refused to discharge him, and the state court committed the officer for contempt. The commander sued out a *habeas corpus* in the District Court of the United States, who discharged him, holding that the state court exceeded its jurisdiction in examining the validity of the enlistment; and that it had no power to proceed beyond ascertaining that the officer held the recruit by color of authority from the United States.³ It is, no doubt, clear that a *habeas corpus* issued by a state judge has no authority within the limits of the sovereignty assigned by the Constitution to the United States;⁴ but at the same time each court, on application made to it for this writ, is

that the clauses of the Constitution of the United States, relating to the power to coin money and regulate its value, do not prevent the State from enacting a law to punish the offence of passing counterfeit coin of the United States. These laws have remained unquestioned, yet I do not assert that none of the provisions applied to the coin of the United States can be questioned. In view of *Fox v. Ohio*, and other cases, there may be a doubt whether the provisions against making and debasing these coins can be sustained as to the question of ju-

risdiction. This, however, does not touch the present inquiry, which concerns only the *civil* jurisdiction of the state courts."

¹ *Hopson, in re*, 40 Barb. (N. Y.) 34; *S. P., Anderson, ex parte*, 16 Iowa, 595.

² *Barrett, ex parte*, 42 Barb. 479. See *People v. Gaul*, 44 Barb. 98; *Martin, in re*, 45 Barb. 142.

³ *Farrand, in re*, 1 Abbott United States, 140.

⁴ *Ableman v. Booth*, 21 Howard, 506; *Sifford, ex parte*, 5 Am. L. Reg. 659; *Kelly, ex parte*, 37 Ala. 474.

compelled to determine where the limits of such sovereignty are to be placed.¹ It is conceded on all sides that the state courts cannot, on *habeas corpus*, examine whether a particular offence, charged in an indictment found in a federal court, is or is not an offence against the United States, or go beyond such indictment.² And in 1871 the question was settled, so far as concerns enlistments, by an express ruling of the Supreme Court of the United States to the effect that state courts have no jurisdiction to discharge in such cases by *habeas corpus*, the exclusive jurisdiction being in the federal courts.³

§ 268. In the Revised Statutes of the United States (edition 1878), compiling the previous statutes on this subject the following provisions are made as to writs of *habeas corpus* : —

Federal courts have statutory powers of *habeas corpus* in federal cases. (751.) "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*.⁴

(752.) "The several justices and judges of the said courts,

¹ Though see Farrand, in re, 1 Abbott U. S. 140.

² Hill, ex parte, 5 Nev. 154.

³ Tarble's case, 13 Wallace, 399.

⁴ Under this provision are cited the acts of Sept. 24, 1789; April 10, 1869; March 2, 1833; Feb. 5, 1867; Aug. 29, 1842, and the following cases: U. S. v. Hamilton, 3 Dall. 17; Ex parte Burford, 3 Cr. 448; Ex parte Bollman, 4 Cr. 75; Ex parte Wilson, 6 Cr. 52; Ex parte Kearney, 7 Wh. 38; Ex parte Watkins, 3 Pet. 193; Ibid. 7 Pet. 168; Ex parte Milburn, 9 Pet. 704; Holmes v. Jennison, 14 Pet. 540; Ex parte Barry, 2 How. 65; Ex parte Dorr, 3 How. 103; Barry v. Mercein, 5 How. 103; In re Metzger, 5 How. 176; In re Kaine, 14 How. 103; Ex parte Wells, 18 How. 307; Ex parte Milligan, 4 Wall. 2; Ex parte McCordle, 6 Wall. 318; Ibid. 7 Wall. 506; Ex parte Yerger, 8 Wall. 85; Ex parte Lange, 18 Wall. 163; In re Heinrich, 5 Blatch. 414; Ex parte Keeler, Hamps. 306; U. S. v. William-

son, 3 Am. L. Rep. 729; Bennet v. Bennet, 1 Dedy, 299; Ex parte Evarts, 7 Am. L. Rep. 79; Norris v. Newton, 5 McLean, 22; U. S. v. Rec- tor, 5 McLean, 174; Veremaitre's case, 13 Am. Law Rep. 608; Ex parte Sifford, 5 Am. Law. Rep. 659; Ex parte McCan, 14 Am. L. Rep. 158; U. S. v. French, 1 Gallis. 1; U. S. v. Anderson, Cooke, 143; Ex parte Chee- ney, 5 Law Rep. 19; Ex parte Des Rochers, 1 McAllis. 68; Ex parte Pleasants, 4 Cr. C. C. 314; Ex parte Turner, 6 Int. Rev. Rec. 147; Ex parte Jenkins, 2 Wall. Jr. 521; Ex parte Robinson, 6 McLean, 355; Ex parte Smith, 3 McLean, 121; Meade's case, 1 Brock. 324; Fisk v. Un. Pac. R. R. 10 Blatch. 518; In re Joseph Stupp, 11 Blatch. 124; In re Mac- Donnell, 11 Blatch. 79, 170; In re Thomas, 12 Blatch. 370; In re Giac- amo, 12 Blatch. 391; In re Stupp, 12 Blatch. 501; In re Bird, 2 Saw. 33; In re Bogart, 2 Saw. 396.

within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.¹

(753.) "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."²

The courts of the United States have, it is ruled, jurisdiction to inquire, on *habeas corpus*, not merely into the legality of all commitments under federal process, civil or military,³ but may

¹ Under this provision are cited the acts of Sept. 24, 1789; April 10, 1869; March 2, 1833; Feb. 5, 1867; Aug. 29, 1842.

² Under this provision are cited the acts of Sept. 24, 1789; March 2, 1833; Feb. 5, 1867; Aug. 29, 1842, and the following cases: Ex parte Dorr, 3 How. 103; Ex parte Barnes, 1 Sprague, 183; Ex parte Bridges, 2 Woods, 428. See Rev. Stat. U. S. 1878, 763.

By the Act of March 27, 1868, the appeal to the Supreme Court of the United States was restricted.

Under the Act of 1867, a person held under arrest, by order of a state tribunal, in violation of any law of the United States, may be released by a federal court. Seymour, ex parte, 1 Ben. 348. See also Robinson, ex parte, 6 McLean, 355; Jenkins, ex

parte, 2 Wall. Jr. 521; Des Rochers, ex parte, 1 McAllist. 68.

The Act of March 27, 1868, taking away an appeal to the Supreme Court of the United States, has been held only to apply to proceedings under the Act of February 5, 1867. See Rev. Stat. U. S. 1878, 763. The prior appellate jurisdiction in *habeas corpus* remains. McCardle, ex parte, 7 Wall. 506. And hence the Supreme Court of the United States has appellate jurisdiction, on *habeas corpus*, to relieve from unlawful imprisonment one committed for trial by a military tribunal, and remanded, after a hearing by a district court. Yerger, ex parte, 8 Wall. 85.

³ Milligan, ex parte, 4 Wallace, 2; Meade's case, 1 Brock. 324; Keeler, ex parte, Hemp. 306.

issue the writ to discharge a federal officer arrested on state process, for his conduct in executing a federal writ.¹

The writ, however, will be refused when the object is to review commitments under state penal process conflicting with no federal law.² And the federal courts, on *habeas corpus*, will not inquire into the validity of convictions and sentences of state courts acting *de facto*, though not *de jure*.³

IV. CONFLICT AND CONCURRENCE OF JURISDICTIONS.

1. *Offences at Sea.*

§ 269. As a rule, a ship is viewed as part of the country whose flag she bears; ⁴ and in conformity with this principle, all offences committed on shipboard are regarded

Offences on
shipboard
cognizable

¹ Jenkins, *ex parte*, 2 Wall. Jr. 521; Robinson, *ex parte*, 6 McL. 355; Sifford, *ex parte*, 5 Am. L. R. 659; Farrand, *in re*, 1 Abbott U. S. 140.

² Dorr, *ex parte*, 3 Howard U. S. 103; Norris *v.* Newton, 5 McLean, 92; U. S. *v.* Rector, *Ibid.* 174.

³ Chase, C. J., giving unanimous judgment of Supreme Court U. S., Richmond, April, 1869; Griffin, *in re*, 25 Texas (Sup.) 623.

In 1842 in the United States Circuit Court for Illinois, upon a *habeas corpus*, where the party had been arrested by the sheriff of Sangamon County upon a warrant by the governor of Illinois, on a requisition by the governor of Missouri, demanding him as a fugitive from justice, the court held that the courts of the United States have jurisdiction in the premises, and may order a person so arrested to be discharged; but whether the state courts have jurisdiction, or whether it is competent for either court to inquire into facts behind the writ on *habeas corpus*, was doubted. *Ex parte* Joe Smith, 3 McLean, 121; 6 Law Rep. 57. And the federal courts, it may be generally said, have

jurisdiction to issue the writ of *habeas corpus* when parties are held in custody under state laws, for acts done by virtue of requisitions by the executive of one State upon the executive of a sister State. In such cases it is said that it is proper to allow the relators to go behind the indictment for the purpose of showing: 1. The identity of the parties; and 2. That the relators were indicted for acts alleged to have been done under a requisition of the executive of one of the States of the Union; but it is incompetent in such cases to show that the indictment, upon which the requisition was issued, was procured improperly, or upon insufficient evidence. U. S. *v.* McClay, Dundy, J., Cent. L. J. 1878, 255; citing U. S. *ex rel.* Roberts *v.* Jailer of Fayette County, 2 Abb. U. S. 265; *Ex parte* Robinson, U. S. Marshal, 1 Bond, 39; *Ex parte* Jenkins et al. 2 Wall. Jr. 521; *In re* Neill, 8 Blatch. 156; *Ex parte* Joseph Smith, 3 McLean, 121; U. S. *v.* Rector, 5 McLean, 174. See, as to tradition generally, Whart. Crim. Pl. & Prac. §§ 34 *et seq.*

⁴ Wh. Con. of L. § 356.

as cognizable by the sovereign to whom the ship belongs, no matter to what nationality belongs the offender.¹ In England, it is true, all rivers in the country, until they flow past the furthest point of land next the sea, are held within the jurisdiction of the courts of common law, and not of the Court of Admiralty;² and where the sea flows in between two points of land in the country, a straight imaginary line being drawn from one point to the other, the common law is held to have jurisdiction of all offences committed within that line;³ the Court of Admiralty of all offences without it.⁴ But of crimes not merely on the high seas, but on creeks, harbors, ports, &c., in foreign countries, the Court of Admiralty is held to have undoubted jurisdiction, and such offences may consequently be piracies. Thus, where on an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; the judges held that the admiralty had jurisdiction, it being a place where great ships go.⁵ As to offences committed on the coasts, the admiralty is ruled to have exclusive jurisdiction of offences committed beyond low-water mark; and between that and the high-water mark, the admiralty jurisdiction is asserted over all offences done upon the water when the tide is in; it being admitted that courts of common law have jurisdiction over offences committed upon the strand when the tide is out. All the other parts of the high sea are indisputably within the jurisdiction of the admiralty.⁶

Since the passage of the Merchants' Shipping Act, in 1854, British jurisdiction is pushed so far as to embrace offences committed by British seamen abroad, in port as well as on ship. Since this act, also, it has been held that the English common law courts have jurisdiction of offences committed on British ships in foreign rivers, or at sea, though the offenders be foreigners.⁷

¹ *R. v. Lopez*; *R. v. Sattler*, Dears. & B. C. C. 525; 7 Cox C. C. 431.

² See 1 Co. 175; 3 Inst. 113; 3 T. R. 113; 1 Hawk. c. 37, s. 11.

³ See as to the U. S., 1 Kent Com. 30; *Com. v. Gaines*, 2 Va. Cas. 172.

⁴ But see *R. v. Bruce*, R. & R. 242.

⁵ *R. v. Allen*, 1 Mood. C. C. 494.

⁶ Wharton's Prec., notes to form 1067.

⁷ *R. v. Anderson*, Law Rep. 1 C. C. R. 161; 11 Cox C. C. 198. See Lewis on For. Jur. p. 25.

The same general principles are admitted in German and French jurisprudence.¹

§ 270. In the United States, by statute,² the federal courts have jurisdiction not only of all piracies, revolts, homicides; robberies, and malicious injuries to vessels, and of other crimes, on the high seas, by all persons without regard to nationality, but of offences committed in American ships in foreign ports; "and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may be first brought."³ And this act gives concurrent jurisdiction to the place of arrest, and that in which the defendant is first brought.⁴

Federal courts have jurisdiction of crimes on high seas and out of state jurisdiction.

In connection with the text may be noticed the much discussed case of *The Franconia*, 36 L. T. (N. S.) 640; a case also reported in 2 L. R. Adm. Div. 163; 46 L. J. Adm. Div. 33; 25 W. R. 796. In this case the admiralty branch of Pr. & Adm. Division had refused a motion to set aside so much of a writ of summons *in rem* as claimed compensation for the loss sustained by the plaintiff in consequence of the death of a person of whom she was administratrix, and who, whilst serving on board a British ship, had lost his life through a collision between his vessel and a foreign ship on the high seas, caused by the negligence of those on board the foreign ship. On appeal, it was held by James and Bagallay, L. JJ. (approving the decision of the court below), that the judge of the Admiralty Division has jurisdiction to entertain a suit *in rem* under Lord Campbell's Act. It was, however, ruled by Bramwell and Brett, L. JJ. (disapproving the decision of the court below), that the jurisdiction given by the Admiralty Court Act, 1861, s. 7, does not in-

clude claims under Lord Campbell's Act. The appeal was dismissed.

In has been also ruled in England that the Court of Criminal Appeal has no jurisdiction to try a foreigner, who, in a foreign ship, is chargeable with a negligent collision, producing death in the colliding English ship, though the collision was within three miles of the English coast. *R. v. Keyn*, 13 Cox C. C. 403; aff. *Cockburn*, C. J., Kelly, C. B., Bramwell, J. A., Lush, J., Pollock, B., Field, J., and Sir R. Phillimore; diss. Lord Coleridge, C. J., Brett, J., Amphlett, J. A., Grove, Denman, and Lindley, JJ.

¹ Wh. Con. of L. § 861.

² Brightly, pp. 207-209; Rev. Stat. U. S. 1878, 5372.

³ Wh. Con. of L. § 862, citing *Bollman*, ex parte, 1 Cranch, 373; U. S. v. *Magill*, 1 Wash. C. C. 463; U. S. v. *Thompson*, 1 Sumner, 168. In this country a vessel lying in an open roadstead of a foreign country is held to be on the high seas. U. S. v. *Gor-don*, 5 Blatch. C. C. 18; and so, also, of a vessel lying in a harbor, fastened to the shore by a cable, and

⁴ U. S. v. *Baker*, 5 Bl. C. C. 6.

§ 270 a. What is the jurisdiction of a State over the ocean? To this question, which is of importance in view of the distinction noticed in the last section, we may reply that a sovereign has jurisdiction of the sea bounding his coast to the distance of a cannon shot from low-water mark ¹

Sovereign has jurisdiction of sea within cannon shot from shore.

2. Offences by Subjects abroad.

§ 271. It is generally conceded that subjects should be held responsible to the courts of their country for offences committed in barbarous or unsettled lands.² In England, the right to exercise extra-territorial jurisdiction over subjects is assumed to be an essential attribute of sovereignty.³ Mr. Wheaton states the principle very

Subjects may be responsible to their own sovereign for offences abroad.

communicating with the shore by boats, and not with any enclosed dock, or at any pier or wharf. U. S. v. Seagrist, 4 Bl. C. C. 420. With us it is not necessary, to give the federal courts jurisdiction, that the vessel should have belonged to citizens of the United States; it is enough if she had no national character, but was held by pirates, or persons not lawfully sailing any foreign flag. And the offence is equally cognizable by the United States courts, if committed on board of a foreign vessel by a citizen of the United States, or by a foreigner on board of an United States vessel; or by a citizen or foreigner on board of a piratical vessel. U. S. v. Furlong, 5 Wheat. 183; Ex parte Bollman, 1 Cranch, 373; U. S. v. Kessler, 1 Baldwin, 20. But it is otherwise with acts of piracy committed by citizens of a foreign country in foreign vessels. Ibid.; U. S. v. Palmer, 3 Wheat. 632.

¹ Lawrence's Wheat. 321, 715, note. See Com. v. Peters, 12 Met. 387, cited supra, § 260; Manley v. People, 3 Seld. 295.

² See Wh. Con. of L. § 71.

But the authorities go beyond this limit. "Where an act," said Judge Vredenburg (State v. Carter, 3 Dutch. 501), in 1859, in the Supreme Court of New Jersey, "*malum in se*, is done in solitudes, upon land where there has not yet been formally extended any supreme human power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water."

³ Lewis on Foreign Jurisdic. &c. p. 14, citing acts of 6 & 7 Victoria, c. 94. As to bigamy, see *infra*, §§ 1685-1696.

In 1878 the British government went so far as to sustain the execution, on board the ship *Beagle*, at sea, of a South Sea Islander, charged with the murder on shore of an Englishman. See Sat. Rev. Aug. 10, 1878, 169. And see this case discussed by me in 4 South. Law Review, 676, and

largely. "This" (the territorial) "principle is peculiar to the jurisprudence of Great Britain and the United States; and even in those two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes by which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the courts of that country to which the party owes allegiance, and whose laws he is bound to obey."¹ Mr. Wheaton does not here notice the provision of the Federal Constitution, which guarantees to each accused party a trial in the State and district where the crime was committed. But it is easy to reconcile his statement as above given with this provision, by adopting the view of the Federal Supreme Court, that the Constitution has application only to offences committed on the soil of the United States.²

§ 272. With regard to the particular States of the American Union, complicated constitutional questions may here arise. Is a domiciled citizen of Massachusetts, for instance, when travelling abroad, responsible, on the general hypothesis of extra-territorial penal power of sovereigns over subjects abroad, to the United States, or to Massachusetts, or to both? The better opinion is that he is responsible to them penally, when he is abroad, under the same conditions and limitations as he was when he was at home.³

§ 273. By the Revised Statutes⁴ the ministers and consuls of the United States, in pursuance of treaties with China, Japan, Siam, Egypt, and Madagascar, are "fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offences against law, committed in such countries."⁵ By a subsequent section the same jurisdiction is ex-

also infra, § 284, note. The jurisdiction is doubted in *Rosc. Crim. Ev.* pp. 246, 247.

¹ Dana's *Wheaton*, § 113.

² *U. S. v. Dawson*, 15 Howard, 467.

³ *Com. v. Macloon*, 101 Mass. 1; *Com. v. Gaines*, 2 Virg. Cas. 172; *State v. Carter*, 3 Dutcher, 501; *State v. Main*, 16 Wis. 398; though see, as

denying state extra-territorial jurisdiction, *Tyler v. People*, 8 Mich. 320; *State v. Knights*, 2 Hayw. 109. As a *nisi prius* decision, compare *People v. Merrill*, 2 Parker C. R. 590. For bigamy, see infra, §§ 1685-1698.

⁴ Ed. of 1878, 4084.

⁵ See *Stubbs in re*, 11 Blatch.

tended to "consuls and commercial agents of the United States at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States."¹ This, it will be seen, is a positive claim of the United States government to exercise extra-territorial jurisdiction over its own citizens in uncivilized countries, independent of any treaty authorization. The jurisdiction, however, is limited to persons owing allegiance to the United States.²

A similar jurisdiction is asserted by both German and French jurists over their subjects in barbarous or desert lands.³

§ 274. The Act of January 30, 1799, provides that if any "citizen of the United States, whether he be actually resident or abiding within the United States, or in any foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly commence or carry on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States," he shall be guilty of a high misdemeanor, and subjected to a fine not exceeding five thousand dollars, and imprisonment for not less than six months or over three years. This act still remains among the statutes of the United States;⁴ and its continued existence is the strongest of all illustrations that the power of Congress to "define and punish offences against the law of nations" is maintained by the government of the United States to authorize it to punish at home political offences committed by its citizens abroad.

The Act of February 25, 1863,⁵ making correspondence with rebels a misdemeanor, declares that "where the offence is committed in a foreign country, the District Court of the United States for the district where the offender shall be first arrested shall have jurisdiction thereof."

¹ Rev. Stat. 4088.

² See 11 Opinions Att'y Gen. 474.

³ As to bigamy, see infra, §§ 1685-1696.

⁴ Wh. Con. of L. § 866; Fœlix, ii.

p. 294. See Bar, § 138.

⁵ Brightly, p. 201; Rev. Stat. 1878,

5335. See President's Message of Dec. 3, 1798; Mr. Jefferson to Mr. Madison, Jan. 3, 1799; Randall's Life of Jefferson, iii. p. 467.

⁶ Brightly, Fed. Stat. ii. 154.

§ 275. By the English law, all offences by subjects against the government are cognizable by English courts, no matter where the defendant may have been at the time of the offence resident,¹ and by the jurists of continental Europe this view is accepted as universally authoritative.² Nor does it exclude the jurisdiction of the offended State, that a foreign country, within whose bounds the offence was organized, had concurrent jurisdiction of the offence. It is a fundamental principle of international law that each State is primarily authorized to punish offences against itself. Of course it cannot invade the territory or the ships of another country in order to arrest the offender.³ But the arrest may be made whenever the offender is found in the territory of the offended sovereign.

Political extra-territorial offences by subjects are punishable.

§ 276. The Act of Congress of August 18, 1856,⁴ authorizes secretaries of legation and consular officers to administer oaths and perform notarial duties, and makes perjury or subornation of perjury abroad before such officers punishable "in any district of the United States, in the same manner, in all respects, as if such offence had been committed in the United States." This act is not confined to persons owing allegiance to the United States, but includes aliens committing the designated offences. The same act makes penal the forgery abroad of consular papers. And at common law it is argued that a State may punish perjury committed before one of its own commissioners to take testimony in a foreign State.⁵

Perjury and forgery before consular agents abroad, punishable in the home courts.

The same view is taken by German and French jurists.⁶ In England, in indictments for administering or taking unlawful oaths, the venue may be laid in any county in the realm, though the offence was committed abroad.⁷ In indictments for forgery,

¹ Wendell's Blackstone, iv. p. 305; R. v. Azzopardi, 1 C. & K. 203; R. v. Anderson, 11 Cox, 198; L. R. 1 C. C. 161. *Infra*, §§ 276-284. See Sir Geo. Cornwall Lewis's work on Foreign Jurisdiction, &c. p. 20. As to bigamy, see *infra*, §§ 1685, 1696.

² Bar, p. 530, § 138; Ortolan, No. 880.

³ See this discussed in the Kozta case, and Trent case, in Woolsey, § 81.

⁴ Brightly, 180. See Rev. Stat. U. S. 1878, 4083-4130.

⁵ See *Phillipi v. Bowen*, 2 Barr, 20. *Infra*, § 1264.

⁶ *Infra*, § 284. See Wh. Con. of Laws, § 874.

⁷ 37 Geo. 3, c. 123, § 6; 52 Geo. 3, c. 104, § 7.

the venue may be laid, and the offence charged to have been committed, in any county where the offender was apprehended or in custody.¹

§ 277. In England, in indictments for murder or manslaughter, or for being accessory before or after the fact to murder or manslaughter, the offence being committed by a British subject on land out of the United Kingdom, the venue may by statute be laid in any county appointed by the Lord Chancellor in the commission issued for the trial of the offender.² This provision applies to homicides committed by British subjects within the dominions of a foreign sovereign;³ but, until afterwards amended, not to offences by foreigners, though committed on Englishmen, and on board English ships.⁴

Homicides
by subjects
abroad
punishable
in Eng-
land.

8. Liability of *Extra-territorial Principal*.

§ 278. Cases can easily be conceived in which a person, whose residence is outside a territory, may make himself, by conspiring extra-territorially to defeat its laws, intra-territorially responsible. If a forger, for instance, should establish on the Mexican side of the boundary between the United States and Mexico a manufactory for the forgery of United States securities, for us to hold that when the mischief is done he would not be liable to arrest on extradition process, and that he could even take up with impunity his residence in the United States, would not merely expose us to spoliation, but bring our government into contempt.

Extra-ter-
ritorial
principal
may be
intra-ter-
ritorially in-
dictable.

To reply that in such case the Mexican government can be relied upon to punish, is no answer: because, first, in countries of such imperfect civilization penal justice is uncertain; secondly, because Mexico holds that we have jurisdiction, and that therefore she will not exert it; thirdly, because in cases where, in such countries, the local community gains greatly by the fraud, and suffers by it no loss, the chances of conviction and punish-

¹ Will. 4, c. 66, § 44; Rus. & Ry. C. C. 112; 7 C. & P. 558.

² 9 Geo. 4, c. 31, § 7.

³ R. v. Sawyer, Rus. & Ry. C. C. 284; R. v. Azzopardi, 1 C. & K. 203; R. v. Anderson, 11 Cox C. C. 198. See R. v. Mattos, 7 C. & P. 458.

⁴ R. v. Depardo, 1 Taunt. 26; Rus. & Ry. C. C. 134; R. v. Mattos, *ut supra*.

See article in London Law Magazine for 1868, p. 124. For subsequent statute see *supra*, § 269.

ment would be slight; and fourthly, because all that the offender would have to do to escape justice in such a case would be to walk over the boundary line into the United States, where on this hypothesis he would go free. In political offences there is this consideration to be added, that it is now an accepted doctrine of international law that no government will punish a refugee for treason against his sovereign;¹ and hence a government, on the hypothesis here disputed, would have no redress for offences directed abroad by refugees against its sovereignty, even though the offenders were its own subjects, and should, after the commission of the offence, return to its soil.

§ 279. The principle is now generally accepted in England and the United States, that a non-resident principal is penally liable for acts committed by his agent.² Thus, it has been held that the originator of a nuisance to a stream in one country, which affects such stream in another country, is liable to prosecution in the latter country;³ that the author of a libel uttered by him in one country and published by others in another country, from which he is absent at the time, is triable in the latter country;⁴ that such is also the case when a man in one country incites an agent in another country to commit perjury;⁵ that he who on one side of a boundary shoots a person on the other side is amenable in the country where the blow is received;⁶ that he who in one State employs an innocent agent to obtain goods by false pretences in another State, is amenable in the latter State;⁷ that a

Agent's acts in such case imputable to principal.

¹ Wh. Con. of L. §§ 876, 910. The universality, as well as the humanity of this last point, are elucidated by Bluntschli, *Das Moderne Völkerrecht*, Nördlingen, 1868, §§ 394-404. See, to the same effect, Holtzendorff, *Leipzig*, 1870, p. 540.

² *Supra*, § 248; *infra*, § 1207. See Wh. Con. of L. §§ 877-921; Wh. Cr. Ev. § 112.

³ *Stillman v. White Rock Co.* 3 Wood. & M. 538. See *R. v. Burdett*, 4 B. & A. 175, 176; *Bulwer's case*, 7 Co. 2 b, 3 b; *Com. Dig. Action*, N. 3, 11.

⁴ *R. v. Johnson*, 7 East, 65; *Com. v. Blanding*, 3 Pick. 304.

⁵ *Com. v. Smith*, 11 Allen (Mass.), 243.

⁶ 1 Hale P. C. 475; *U. S. v. Davies*, 2 Sumn. 482, cited and approved in *State v. Wyckoff*, 2 Vroom, N. J. 68, and the same point taken in *Com. v. Macloon*, 101 Mass. 1.

⁷ *People v. Adams*, 3 Denio, 190; *aff. 1 Comstock*, 173, and authorities cited *infra*, § 280. S. P. held in *R. v. Garrett*, 6 Cox C. C. 260, *infra*, § 279, where Lord Campbell affirmed the principle, but ruled an acquittal on other grounds. "The rule," said Chief Justice Beasley, of New Jersey, in 1864 (*State v. Wyckoff*, 2 Vroom,

thief who sends goods by another person, not an accomplice in the theft, to a foreign State for sale, is indictable in the latter State;¹ that he who sells through agents, guilty or innocent, lottery tickets in another State, is amenable in the State of the sale, though he was absent from such State personally;² that he who gives poison in one jurisdiction which operates in another is responsible in the latter jurisdiction;³ and that so is a person who in one county advises another, by signals, when to commit a highway robbery in another county.⁴ In England we have the same principle affirmed by the highest judicial authority. Thus, in a case for obtaining money by false pre-

69), "appears to be firmly established, and upon very satisfactory grounds, that where the crime is committed by a person absent from the country in which the act is done, through the means of a merely material agency, or by a sentient agent who is innocent, in such cases the offender is punishable where the act is done. The law implies a constructive presence from the necessity of the case; otherwise the anomaly would exist of a crime but no responsible criminal." The Connecticut courts, it is ruled in that State, in 1867, will take cognizance of an offence committed in that State by the procurement of a resident of another State, who does not personally come here to commit the offence, whether committed by a guilty agent or not, and whether a misdemeanor or a felony. The doctrine that a resident of one State who procures a felony to be committed in another State, by a guilty agent, without being personally present to assist in the commission of the offence, cannot be punished in the State where the offence is committed, was declared to have never been recognized by the Connecticut courts, and to be deserving of signal repudiation. *State v. Grady*, 34 Conn. 119.
¹ *Conn. v. White*, 123 Mass. 430.
² *Com. v. Gillespie*, 7 Serg. & R. 469.

³ The overt act of homicide by administering poison within the meaning of the law, consists not simply in prescribing or furnishing the poison, but also in directing and causing it to be taken; so that if the poison be prescribed and furnished in one county to a person who carried it into another county, and there, under the directions given, takes and becomes poisoned, and dies of the poison, the administering is consummated, and the crime committed, if committed at all, in the county where the person is poisoned. *Robbins v. State*, 8 Oh. St. 131.

⁴ *State v. Hamilton*, 13 Nev. 386.
 In this case it was proved that there was a conspiracy between Lawrie and others to rob the treasure of Wells, Fargo & Co., on the road between Eureka and some point in Nye County; that L. was to ascertain when the treasure left Eureka, and signal his confederates by a fire on the top of a mountain in Eureka County, which could be seen by them in Nye County, thirty or forty miles distant; that the signals were given by him, and his confederates attacked the stage and attempted to rob the treasure. It was held that L. was a principal. The same rule would apply to telephone communications across a boundary.

tences in England, the offender being at the time in Russia, this absence was in itself held to be no ground for acquittal; and Lord Campbell, sustained by Baron Parke, declared, "that a person may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our courts;" Baron Parke saying, that "a person, though personally abroad, might commit a crime in England, and be afterwards punished here: as, for instance, if he, by a third party, sent poisoned food to one in England, meaning to kill him, he would be guilty of murder, if death ensued, although he could not be amenable to justice till he was personally within the jurisdiction."¹ "It was a monstrous thing," Sir R. Phillimore is reported as saying at a meeting of the Law Amendment Society, in 1868,² "that any technical rule of venue should prevent justice from being done in this country on a criminal for an offence which was perpetrated here, but the execution of which was concocted in another country." Hence we may hold that personal presence is not an essential condition of indictability.³

§ 280. Some doubt, however, has been expressed as to whether, when the agent who thus intra-territorially consummates the guilty act is personally responsible, the principal who extra-territorially plans it, is intra-territorially liable in cases of felony, he being absent from the jurisdiction at the time of the commission of the offence. That a foreign principal is so liable is expressly denied by the Supreme Court of New Jersey,⁴ in a case in which it was ruled that unless the agent was innocent, so as to be a mere tool, the party employing him could not be regarded as a principal; and that if such employing party was simply an accessory before the fact, and absent from the State, he could not, by the principles of the English common law, be tried in New Jersey. The same view has been maintained as to felonies, in New Hampshire,⁵

¹ R. v. Garrett, 6 Cox C. C. 260; S. P., R. v. Manley, 1 Cox C. C. 104; S. C., Dears. 232; and see R. v. Jones, R. v. Ball, 1 Cox C. C. 281.

² U. S. Dip. Cor. 1868, pt. ii. p. 147.

⁴ State v. Wyckoff, 2 Vroom, 65 (1864).

³ Com. v. White, 123 Mass. 430;

⁵ State v. Moore, 6 Foster, 448.

North Carolina,¹ and Arkansas,² though it is conceded that by statute the accessory may be made triable in the place of the overt act.³ It is to be noticed, however, that this view, growing from the distinction between an innocent and a guilty agent in case of felony, is purely technical, based on an arbitrary fiction of the old common law relating to felonies alone, and not touching the question of general jurisdiction. Thus, in treason and misdemeanors, in which all concerned are principals, and in which, therefore, the rule that an accessory can only be tried in the place where he is accessory, if there be such a rule, does not obtain, all parties concerned are liable to punishment in any country where an overt act is performed. This is expressly ruled as to treason;⁴ and in misdemeanors the result is demonstrable, as it is in those States in which all accessories before the fact are by statute principals. If, in such cases, the extra-territorial offender acts through an innocent agent, he is on all sides regarded as intra-territorially liable. If he acts through a guilty agent, he is indictable for conspiracy, when jurisdiction vests in any country in which an overt act is performed;⁵ or, on the same reasoning, he may be so indicted as principal in misdemeanor, or as inciter, or accessory before the fact, in felony, in those States in which the distinction between accessories before the fact and principals is retained.⁶ Even as to felonies, the rule that the absent accessory before the fact may be indicted in the country of the commission has been properly affirmed in Connecticut,⁷ and is good in all those States in which accessories are by statute principals. That it has been applied to principals in the second degree has been just seen.⁸

¹ *State v. Knight*, 1 Taylor, 65. See *Smith*, ex parte, 6 Bost. Law Rep. 57.

² *State v. Chapin*, 17 Ark. 561.

³ *Infra*, § 287.

⁴ *Ibid.*

⁵ *Infra*, §§ 287, 1397. See this distinction well stated in *State v. Chapin*, 17 Ark. 561. See also *R. v. Johnson*, 6 East R. 583; *Johns v. State*, 19 Ind. 421; *State v. Hamilton*, 13 Nev. 386.

⁶ *Com. v. Smith*, 11 Allen (Mass.), vol. 1.

243. See *R. v. Murdock*, 2 Den. C. C. 298.

⁷ *State v. Grady*, 34 Conn. 118. See *R. v. Brisac*, 4 East, 164; *Bennett & Heard's Lead. Cas.* 2d ed. ii. p. 151; *Bishop's C. L. i.* § 80. As to *Warren & Costello's case*, see *U. S. Diplomatic Correspondence*, 1868, pt. i. pp. 51, 129. For a report of these cases, and also for correspondence concerning the same, see same volume, pp. 841-848.

⁸ See *State v. Hamilton*, 13 Nev. 386.

It is conceded that to secure the trial of a subject in a foreign land, the offended sovereign must obtain possession of the person of such offender by process of extradition. This is elsewhere fully discussed.¹ To arrest such offender in a foreign sovereign's territory, either by force or stealth, is a violation of the law of nations. Yet though so, it is a violation of which the offended sovereign alone has a right to complain. The person so arrested cannot plead the unlawfulness of the arrest in bar.²

4. *Offences by Aliens in Country of Arrest.*

§ 281. By the modern Roman law, all residents are bound by the territorial law. "Whoever," says Berner, in his authoritative work on the territorial bounds of penal jurisdiction,³ "enters our territory, juridically binds himself to submit to the laws of this territory. This duty is the more imperative as the laws which exact

Aliens indictable in the country of the crime. Roman law.

obedience are the more stringent. It is absurd to suppose that this obedience diminishes or ceases in respect to those laws on which the very existence of the community is staked."⁴ And it is even held in Prussia that a foreigner who lingers in a country with which the sovereign of his allegiance is at war, may be tried for treason to the country of his residence, if he aids in any warlike designs against it.⁵

§ 282. "Local allegiance," says Blackstone, "is such as is due from an alien or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases the instant the stranger transfers himself from the kingdom to another."⁶ Indictments for political offences of all grades have been based on this form of allegiance.⁷ In Guinet's case, which was a prosecution in the United States

¹ Whart. Crim. Plead. & Prac. §§ 39 and Holtzendorff, Leipzig, 1870, p. 582.

² Kraus, ex parte, 1 B. & C. 258; Brewster v. State, 7 Vt. 118; Dow's case, 18 Penn. St. 37; Scott, ex parte, 9 B. & C. 446; 4 M. & R. 361. See fully Whart. on Cr. Plead. & Prac. § 27.

³ Berlin, 1853, p. 83. To the same effect is Heffter, Strafrecht, § 264,

and Holtzendorff, Leipzig, 1870, p. 582.

⁴ For the United States Alien Act, authorizing removal of alien enemies, see Brightly, i. p. 33; Rev. Stat. U. S. 1878, §§ 4067 *et seq.*

⁵ Preussisches St. G. B. § 70.

⁶ Comm. ii. 377.

⁷ See 27 Howell's St. Tr. 627; Peltier's case, 28 *Ibid.* 530, and cases cited *infra*, § 1805.

Circuit Court in Philadelphia in 1795, for fitting out in Philadelphia a French armed vessel, to cruise against England, the United States and England being then at peace, the point that the defendant, a Frenchman by birth, had entered into the service of the French republic, was made by the defence, but was treated by the court as without weight, and the defendant was convicted.¹ In the trial of the Fenian conspirators in England and Ireland in 1868, several of the defendants set up alienage and citizenship in the United States as a defence, but in vain. Mr. Adams, speaking of this in a letter to Mr. Seward, of May 2, 1868,² says: "The only question he," one of the defendants, "raises, is that of citizenship; but even that relates rather to the form of trial, as, on the merits, even his being admitted to be an alien would not shield him from the consequence of acts dangerous to the peace of the realm." The same view was taken by Mr. Buchanan, when Secretary of State.³ Such, also, is the tenor of a speech by Lord Lyndhurst in the House of Lords, in March, 1853.⁴ Nor can such an alien divest himself of the penal incidents of his acts against the government which he attacks, as those incidents are defined by the *lex delicti commissi*. Of this we have, in 1870, an English illustration. An alien was indicted for high treason, in compassing to depose the Queen, and in levying war against the Queen. The material overt acts of compassing to depose the Queen were: (1.) Conspiring at Dublin, to raise rebellion and levy war within the realm; and (2.) levying war within the realm at various places. There was evidence that he was a member of the directing body of a treasonable conspiracy having for its object the overthrow of the Queen's government, and the establishment of a republic in Ireland. There was also evidence that he had planned an attack upon the castle of Chester, in England, for the purpose of seizing arms there, and conveying them to Ireland, with the view of

¹ Wharton's St. Tr. 93; U. S. v. Wiltsberger, 5 Wheaton, 97; Wh. St. Tr. 185. The Act of 31 July, 1861, punishing seditious conspiracy, applies to "persons within any State or Territory of the United States," embracing all residents.

² Diplomatic Cor. U. S. 1868, pt. i.

p. 192; R. v. McCafferty, 10 Cox C. C. 603.

³ See Cockburn on Nationality, London, 1869, p. 82, for other authorities to this effect.

⁴ 124 Hansard's Parl. Deb. 1046, cited Wh. Con. of L. § 904.

raising an insurrection there. Evidence was also given that the directing body had, in February, 1867, given orders for a rising in Ireland. On the 23d of February, 1867, he was arrested while attempting to land in Dublin. On the 5th of March, 1867, he being in custody, an insurrectionary movement, the result of the commands of the directing body of the conspiracy, broke out in several places in Ireland, and various acts of war were committed. It was held that these acts of war were admissible against him on the indictment in England.¹

Foreign ambassadors and their retinues, it should be added, are not indictable for crimes committed in the country to which they are officially deputed. The only remedy is to send them home.²

§ 282 *a*. An Indian, who is not, under the Federal Constitution, the member of an independent community, relieved as such from state jurisdiction, is indictable in a state court for an offence committed in such State, a violation of laws of the State, in the same way as would any other foreigner residing in the State.³ Whether he is so indictable for an offence committed by him within the territory in which his tribe, under the Federal Constitution and treaties, is sovereign, is a question not within our present limits to discuss.⁴ The federal government, it is asserted, under the constitutional authority to "regulate commerce . . . with the Indian tribes," may suppress the sale of liquor to Indian tribes, whether within or without the boundaries of a State.⁵

§ 283. Where a person bearing arms commits illegal acts within our territorial limits, by command of his own sovereign or pretended sovereign, then our quarrel is with the sovereign and not with the subject, pro-

¹ *R. v. McCafferty*, 1 Ir. R. C. L. 363; 10 Cox C. C. 603.

² 1 Kent Com. 39; U. S. v. Lafontaine, 4 Cranch C. C. 173; *Resp. v. De Longchamps*, 1 Dall. 111.

³ *Worcester v. Georgia*, 6 Pet. 518; U. S. v. Holliday, 3 Wall. 407; U. S. v. Cisna, 1 McLean, 254; U. S. v. Sacco-da-cut, 1 Abb. U. S. C. C. 377; U. S. v. Stahl, 1 Woolworth C. C. 192; *State v. Duxtater*, S. C. Wis. 1879; 20 Alb. L. J. 356; *State v. Tachanatah*,

64 N. C. 614; *State v. Foreman*, 8 Yerg. 256; *State v. Tassels*, Dudley, 229; *Caldwell v. State*, 1 St. & P. 327; *Clay v. State*, 4 Kans. 49; *Reed v. State*, 16 Ark. 499; *People v. Antonio*, 27 Cal. 404.

⁴ Whart. *Conf. of Laws*, § 7; *Walker on Indian Quest.* Pamp. 1874; N. Am. Rev. Ap. 1873; *Inter. Rev.* vols. 1 & 2.

⁵ U. S. *Shaw-mux*, 2 *Sawyer*. 118.

vided we recognize such sovereign as a belligerent. In time of war this is clear; it being conceded that we then can treat such offender, if captured in the illegal act, only as a prisoner of war. In time of peace, the better opinion is that the same rule prevails. If our laws be in this way infringed, we must seek redress from the invading sovereign, and not from the subject who acts as the latter's subaltern.¹ But this only applies to cases where the subject is an officer or functionary of the foreign sovereign, or when the foreign sovereign adopts his act.² On the same reasoning, when, as in the case of our late civil war, insurgents are recognized as belligerents, then such insurgents, if in arms, are not punishable in the civil courts for acts done when on military duty, but are responsible solely to military law, according to the rules of war.³

5. *Offences by Aliens abroad.*

§ 284. As we have already seen,⁴ a principal organizing abroad a crime which is executed within our territory is indictable in our courts for the crime. We will presently see that by statute aliens forging our government securities abroad, or committing perjury before our consuls, are made indictable in our courts. We may therefore hold that offences against our rights may be indictable though extra-territorially designed.⁵

Extra-territorial offences against our rights may be intra-territorially indictable.

¹ The *Emulous*, 1 Gallis. 563.

² *Infra*, § 310; Wh. Con. of L. § 911; The *Emulous*, 1 Gall. 563; Com. v. Blodgett, 12 Met. 56; *People v. McLeod*, 1 Hill N. Y. 377; 25 Wend. 483, where the principle was denied by the New York Supreme Court, and asserted by the federal government. See review in 4 Bost. Law Rep. 169; and 1 Am. Law Mag. 348, and compare John Quincy Adams's Diary, *in loco*, 6 Webster's Works, 244. For review of debate in Senate on this case, see 18 Alb. L. J. 506 *et seq.* Compare opinion U. S. Attorney General in the *Modoc* case, June, 1873. And see *Phillips v. Eyre*, L. R. 6 Q. B. 1, 24; 1 Op. Atty. Gen. 81.

³ Wh. Con. of L. § 909; 1 Hale,

433; 3 Inst. 50; *Coleman v. State*, 97 U. S. 509; *Com. v. Holland*, 1 Duvall, 182; *Hammond v. State*, 3 Cold. (Tenn.) 129; though see U. S. v. Greathouse, 2 Abbott U. S. 364; *infra*, §§ 310, 1801.

⁴ *Supra*, § 278.

⁵ In my work on *Conflict of Laws*, I used expressions in this relation which I now desire to modify. The several theories of criminal jurisdiction may be classified as follows:—

I. SUBJECTIVE, or those based on the conditions of the offender.

1. *Universality of jurisdiction* which assumes that every State has jurisdiction of all crimes against either itself or other States by all persons at all places. This theory has few advo-

§ 285. Jurisdiction over aliens abroad is expressly claimed by the United States, in cases of perjury and forgery before its consular officers; nor, as has been seen, can there be serious doubt that an alien who, when abroad, plans violations of the laws of a foreign State, is amenable to the laws of such State, should he be arrested on its soil after the commission of an overt act. Of course

Jurisdiction claimed in cases of forgery and perjury before consular officers.

cates in England or the United States. It has, however, the high authority of Taney, C. J., who said in *Holmes v. Jennison*, 14 Peters, 540, 568, 569, that the States of the Union "may, if they think proper, in order to deter offenders from other countries from coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction."

2. *Personal jurisdiction* which assumes that a State has jurisdiction over all crimes committed by its subjects, no matter what may be their residence at the time of the offence, or the sovereignty whose rights they invade. This theory has little support in our jurisprudence. It is otherwise in England. In the case of *Tivnan (Tirnan)*, 5 B. & S. 645, 679, Chief Justice Cockburn says: "An offence may be cognizable, triable, and justiciable in two places, — *e. g.* a murder by a British subject in a foreign country. A British subject who commits a murder in the United States of America may be tried and punished here by our municipal law, which is made to extend to its citizens in every part of the world." Cited by Blatchford, J., *Stubbs' case*, 12 Blatch. 124.

3. *Territorial jurisdiction* which assumes that each State has cognizance of all offences when the offender at the time of the offence was on its territory; but that it has jurisdiction of no other offences. This has been

the prevalent English and American theory.

II. *OBJECTIVE*, which assumes that each State has jurisdiction of all offences which assail its rights, or the rights of its subjects, no matter where the offender was at the time of the commission of the offence. This view, which appears to be the one best calculated to reconcile our adjudications on the vexed question before us, I have discussed at some length in the *Southern Law Review* for December, 1878 (vol. iv. p. 676). From this article I condense the following: —

The *real* theory of jurisdiction, as it is called by its advocates, rests, as has been seen, on the *objective*, rather than on the *subjective*, side of crime. Jurisdiction is acquired, not because the criminal was, at the time of the crime within the territory of the offended sovereign, nor because he was at the time a subject of such sovereign, but because his offence was against the rights of that sovereign or of his subjects. The real theory is, therefore, valuable as an adjunct to the territorial theory. We punish all who offend on our own soil because our duty is to attach to crime committed within our borders its retribution. But, in addition to this, we must punish, when we obtain control over the person of the offender, offences committed abroad, by either subject or foreigner, against our own rights. But the term 'our own rights,' in this sense, is susceptible of a double

it would be a defence to him that he committed such acts in obedience to his own sovereign, on whom the responsibility then shifts.¹

meaning. It may mean the sum of all the possible objects of crime found within our territory; or it may mean the sum of all the possible objects of crime *belonging to the State or any of its subjects*. The first, therefore, confines the real theory to attacks upon objects existing within our territorial bounds. The second expands this theory so as to include attacks upon our citizens and their property abroad. Or, to illustrate this distinction: by the first of these theories — the ‘territorial-real,’ as it might be called — the execution of a murderer of a subject on a savage island would not be justified; by the second — the ‘personal-real’ — it would. A foreigner, to take another illustration, who forges abroad American coin, by the first theory, is liable only in case the false coin circulates in this country; while by the second theory he is liable for the circulation of such coin abroad.

Two objections, however, may be made to the real theory of jurisdiction just stated: —

The first is that it renders foreigners liable for disobedience to a law with which they are unfamiliar. But if this objection is valid, it would relieve foreigners intra-territorially as well as extra-territorially. If a foreigner can set up the defence of ignorance of our laws abroad, he can set up the defence of ignorance of our laws on our own shores. The foreigner who, when arriving in one of our cities, passes counterfeit United States coin, is not likely to be any more familiar with our statutes than he who executes the forgery abroad. But in point of fact no such ignorance can be set up. The foreigner who

forges our securities abroad knows forgery to be a crime as well as does the most expert counterfeiter who has never left our shores. Neither the domestic nor the foreign counterfeiter is familiar with the letter of our statutes; and if ignorance of the letter excuses, it would excuse the most veteran home malefactor. In other words, the presumption of knowledge of the unlawfulness of crimes *mala in se* is not limited by state boundaries. The unlawfulness of such crimes is assumed wherever civilization exists.

Another and more serious objection is that the real theory assails the prerogatives of foreign sovereignties.

To this it may be replied that the objection proves too much. If a foreign sovereign has exclusive jurisdiction over his own subjects, then we cannot, under any circumstances, punish the subjects of a foreign sovereign. But this no one, even among the sturdiest advocates of the personal theory, pretends. It is conceded on all sides that the moment a foreigner sets foot on our shores, we hold him liable to our penal system in all its details. Nor is this all. There is no civilized State that has not passed statutes making it a criminal offence, punishable in its courts, for foreigners, even in their own country, to forge its securities, or to make false and fraudulent oaths before its consuls. We do not, it is true, attempt to arrest them in their own land, unless as a preliminary to a demand for extradition; we are restrained from making unconditional arrests by the countervailing principle of the inviolability of the soil of foreign States. But when such offenders come volun-

¹ *Supra*, § 283; *Inf.* § 310; Whart. *Conf.* of L. §§ 871-7.

§ 286. Is the punishment to be assigned to an alien, for political offences committed abroad, to be the same as would be inflicted by the offended sovereign for similar offences by his own subjects? This subject is hereafter

Punishment in such cases.

tarily, or involuntarily, within our borders, we try them as justly subject to our laws, on the ground that they have criminally assailed our rights. Nor is this all. Among the numerous cases of piracy which have been adjudicated in our courts, where is the case in which the defence of foreign allegiance was ever set up? What counsel would have the audacity to claim that because a pirate was the subject of a foreign prince, therefore he could not be tried for his piracy in the courts of the United States?

What, however, are our own distinctive rulings as to the important question which has been just discussed? At the outset, in answering this question, we are arrested by the sixth amendment to the Constitution of the United States: '*In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the assistance of counsel for his defence.*'

Does this clause control state prosecutions? Does it preclude any prosecution of an offender except in the State and district *where he was* when the offence was committed? What does '*where the offence was committed*' mean?

Waiving the first question, as to whether crimes cognizable by the States are subject to the limitation just stated, we are obliged to give a decided negative to the second ques-

tion, and to maintain that the place where the crime takes effect, and not the place where the offender at the time stood, is the place of the commission of the crime. The history of the federal government, in its several departments, abounds with cases in which persons were put on their trial in districts in which they were not present at the time of the commission of the offence. We must, in fact, take the amendment before us in connection with the second section of the third article of the Constitution, which provides that criminal trials 'shall be held in the State where the said crimes shall have been committed; *but when not committed in any State, the trial may be at such place or places as the Congress may by law have directed.*' That the place of the commission of the crime is not necessarily the place where the offender stood at the time when the crime was committed, in the opinion of those concerned in the early construction of the Constitution, is further illustrated by the fact that Congress, in execution of the power given by the Constitution to 'define and punish piracies and felonies committed on the high seas, and offences against the law of nations,' proceeded, in one of its earliest sessions, to provide for the punishment on land of offences committed at sea. Few questions, in fact, claimed earlier and more conspicuous attention from the executive than those which concerned the arrest and punishment at home of offences against our sovereignty, or against the law of nations, abroad. And for the purpose of providing a specific place of trial in such

discussed, but it may be here mentioned that it is argued with great justice, by Bar, an eminent German jurist, that the pun-

cases, it was prescribed by statute that 'the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district in which the offender is apprehended, or into which he may be first brought.' That this limitation, however, refers exclusively to the federal government and to federal sovereignty, is indicated, not merely by the considerations we have already noticed, but by the exclusive use of the word 'district,' and the avoidance of the word 'state,' in the statute.

But it is not only of cases in which the offender was, at the time of the offence, on the high seas that we have thus claimed jurisdiction. By an act of Congress passed June 22, 1860, as is noticed in the text, we have invested with criminal jurisdiction our consuls and commercial agents 'at islands or in countries not inhabited by any civilized people, or recognized by any treaty with the United States.' By the prior Act of August 11, 1848, consuls in China and Turkey were charged with power to 'arraign and try,' in pursuance of treaty stipulations, 'all citizens of the United States charged with offences against law,' 'which shall be committed in the dominions of China' 'and Turkey.'

A still more remarkable assertion of jurisdiction over offences in which the offender, at the time of the commission of the offence, is resident abroad, is to be found in the statute already noticed, passed during the administration of Mr. John Adams. Dr. George Logan, of Philadelphia, afterwards a senator of the United States from Pennsylvania, inspired by philanthropic sentiments, which, if chimerical, were at least honest and earnest,

started in 1798 on a self-constituted mission to France. Dr. Logan was a democrat, as well as a Quaker; and he united the peace-loving tastes of his religious sect with the political liberalism of his party. He thought he would be able, by personal interviews with leading French politicians, to avert the war which he conceived to be impending between France and the United States. Had it not been for his political attachments, his mission might have been regarded with the indifferent cynicism which marked the attitude of the British government to the various Quaker deputations which from time to time have visited European sovereigns in the interests of peace. But the federal administration, then justly incensed at the reckless disrespect with which it had been treated by the French negotiators, and suspicious of anything that savored of French cosmopolitan philanthropy, took alarm at Dr. Logan's mission, and a statute was hurried through to stop his negotiations. This statute, passed on January 30, 1799, made it a high misdemeanor, subject to fine and imprisonment, for any 'citizen of the United States, whether he be actually resident or abiding within the United States or in any foreign country,' to 'directly or indirectly,' 'without the permission or authority of the government of the United States,' 'commence or carry on any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States.' This act still re-

ishment a sovereign can thus inflict can be only that which he would impose upon offences of the same grade committed by his

mains unrepealed; and it was several times invoked by Mr. Seward, during the late civil war, as giving to the home government jurisdiction in cases of political offences committed by citizens of the United States when resident abroad. And it is strong proof that, in the contemplation of statesmen who were virtually contemporaneous expounders of the Constitution, the clause in the constitutional amendment before us, requiring trials to be in the 'State and district wherein the crime shall have been committed,' was not understood to require that at the time of the commission of the crime the offender should have been corporeally present in such district. It is the place of the commission of the offence (in other words, where the crime takes effect), and not that of the immediate residence of the offender, that the Constitution contemplates.

That at common law this principle holds good is illustrated by the numerous cases which hold that corporeal presence at a crime is not necessary to convict an accessory before the fact, or even the principal in the second degree. Nor can we by any other mode of construction explain the jurisdiction already mentioned as assumed by us in cases of offences against our sovereignty committed by false swearing before our consuls abroad, and forgery of our securities abroad. The crime takes effect in this country though the perpetrator was at the time in another land. The same reasoning applies to the jurisdiction assumed in most of our States over homicide where the death was within the boundary, though the offender at the time stood outside of the boundary. Statutory, if not common

law, jurisdiction is in like manner claimed over larcenies and embezzlements effected intra-territorially by an agent at the time extra-territorially resident. And it is now settled that he who organizes abroad an offence consummated within our borders is responsible to us though he may never have trod our soil. Thus, he who abroad employs an agent to obtain by false pretences goods in one of our States is responsible to such State for obtaining the goods by false pretences; *People v. Adams*, 3 Denio, 190 (affirmed 1 Comst. 173); *S. P., R. v. Garrett*, 6 Cox C. C. 260; see *State v. Grady*, 34 Conn. 119; and he who abroad incites an agent to commit perjury in one of our States is liable to indictment in such State for the perjury. *Commonwealth v. Smith*, 11 Allen, 243. It is true that in some cases we have intimations that this jurisdiction is only to be exercised where the agent is ignorant of the character of the offence he is employed to perpetrate, or at least is innocent of any guilty purpose as to such perpetration. *State v. Wyckoff*, 2 Vroom, 65. But this does not in any way touch the question before us, which is, whether a person who at the time of the concoction and perpetration of an offence was not present in the State where it was committed is penally amenable to such State. And there can be no question that the rulings before us — whose authority is undisputed, and which will be, in all probability, followed in similar cases hereafter arising in England and the United States — establish such amenability. See *supra*, § 278.

We have, therefore, in our Constitution, our statutes, and our judicial decisions, repeated affirmations of the

own subjects against a foreign sovereignty. For there is a great difference in the degree of guilt between treason by a subject, and invasion of neutrality by an attack on the government of a foreign State.¹

principle, that where an offence takes effect within our borders, or is directed against our laws, then we have jurisdiction to punish it, irrespective of the residence of the offender at the time of consummation. We find ourselves, therefore, adopting what has been described in prior pages as the *objective* theory of jurisdiction. The place of the commission of an offence, in other words, is the place in which the offence operates. It makes no matter where the offender is at the time when he aims the shot, or organizes the cheat, or sets on foot the conspiracy. The *effect* is all that the law can take cognizance of. *Cogitationis poenam nemo patitur*. A man who on our soil conceives a plan for a fraud to be executed in a foreign State is not liable to us. For thought no man can be punished. Acts alone are cognizable by the law. And these acts, when criminal, are the crimes which alone we can punish; and the place of their consummation is the place which has jurisdiction of the offence, although of the *attempt* other courts may have jurisdiction. Where the offender was at the time has nothing to do with the question of jurisdiction. It has a good deal to do with the question of arrest. If he is in a foreign land at the time, and there remains, we may have a difficulty in arresting him; but this difficulty exists in cases where the offender, after the offence, flies from justice. But, with

regard to the principle of jurisdiction, we must hold that where the offence was consummated, there was the law outraged, there was the injury inflicted, there was sovereignty assailed by an overt, appreciable act, and there resides jurisdiction over the offence.

The analogies of private international law, on its civil side, are strong to the same effect. What State has jurisdiction over a contract? In other words, to adopt Savigny's metaphor, in what State has a contract its *seat*? Not the State, it is now universally agreed, in which the contract was signed, unless for other reasons than that of the mere locality of signing. The place of signing is a mere matter of accident, which does not enter into the essence of the engagement. The place, on the other hand, in view of which a contract is made, is the place of performance; and the conditions of the place of performance — not those of the place of signing — the parties have in mind when the contract is framed. Hence, as has been settled by several adjudications, when a contract is signed in New York to deliver in Maine, for sale, articles the sale of which in Maine is illegal, then the contract itself is illegal; while, on the other hand, the same contract, if signed in Maine, would be legal if the place of its performance is in New York. So is it with respect to marriage. The laws that affect marital rights are not those

¹ This latter point is decided in conformity with the text by Henke, i. § 90, and Heffter, § 26, note 3. To the same effect is the Roman law, L. 4. D. ad. leg. Jul. Maj. 48. 4, which

seems to declare that the *crimen majestatis*, in its high sense, could only be committed by a subject against his own sovereign.

§ 287. As has been seen, accessories, in treason and in misdemeanors, are principals.¹ The old rule was that the accessory is to be tried at the place where his guilty act took place; though now, by statutes in most of the United States, he may be tried in the place having jurisdiction of the principal act,² and by more recent

Accessories
and co-con-
spirators
liable in
place of
overt act.

of the place where the marriage is solemnized, but those of the place of performance — *i. e.* those of the marital domicile. The same rule runs through the whole civil side of the law; and the reason is one of principle, which applies to criminal jurisprudence as well as to civil. Where a party doing a thing may happen to be when it is done is a matter indifferent. Where the thing is to be done, on the other hand, is vital. It is to that place that the actor's intention is directed. It is to that place his force is turned. It is to that place his hand is stretched. The length of the weapon he uses is of no consequence in the eye of either law or ethics. It may or may not extend over the boundary which separates two sovereign States. In either case he touches, by physical agencies, the thing injured, as much as if he grasp it in the palm of his hand. And it is in the place where the injury is wrought that the sphere of another's rights is invaded, public security disturbed, and public law outraged.

To the United States these considerations are peculiarly important. On our southwest boundary lies Mexico, with whom, if we have a treaty for

extradition, it is a treaty of very recent adoption, and of capricious application; while the state of municipal law in Mexico is such that it is hopeless to look to Mexican courts to punish offences concocted in Mexico for execution in our own land. Even if we should ask for justice in such cases, the answer would be: 'Take care of yourselves. The crime was to be done on your territory; it was, therefore, a crime on your soil; how can we punish a man for something done in another State?' Even should this pretext fail, corruption, or national prejudice, or common interest, would succeed in rendering abortive any prosecution that might be instituted. In the mean time, if we announce the principle that Mexico alone has jurisdiction in such cases, what would become of us? The Mexican side of our boundary would be the undisturbed abode of hordes of depredators, who would make our country a desert for many miles deep. Parties of armed marauders could come down in a swoop, pillage, ravish, and murder in every village or farm-house, as far as swift horses could travel, and then return over the line unmolested, and there, in their security, laugh insolently at

¹ *Supra*, §§ 223-4.

² See Wendell's *Blackstone*, iv. p. 305; *Com. v. Pettes*, 114 Mass. 307. Under the 2 & 3 Ed. 6, an accessory after the fact, it is said, is triable in the county in which he was accessory, but not in that where the principal offence was committed. 1 Hale P. C.

623; *Baron v. People*, 1 Parker C. R. 246; *Tully v. Com.* 13 Bush, 142; though see 1 East P. C. 361, intimating that the trial may be in the place of vicinage, or in that of the principal crime. And to that effect see *State v. Grady*, 34 Conn. 118.

statutes, making all accessaries before the fact principals, the accessory before the fact, or instigator, is triable in the place of

at the cries of their victims for vengeance. The plea of necessity was considered by England sufficient to justify the destroying the *Caroline*, an insurgent steamer, in a port of the State of New York; and we did not, at the time, hesitate to admit that if the case had not been one in which redress could have been obtained by application to our own courts, the necessity set up would have been a justification of the act. But if so, there can be no question of the application of the same plea of necessity to Mexico, so that, under its protection, we could cross the boundary line, arrest the criminals, and try them in the place of the consummation of their crime within our borders.

Another interesting application of the same principle may be drawn from our relations to Indian tribes. With several of these tribes we have executed treaties conceding to them sovereignty over certain tracts of land. Within this sovereignty, crimes perpetrated by Indians upon Indians are tried by Indian authorities, in conformity to Indian laws. But no one has ever claimed that, even within his own territory, an Indian can assail the rights of United States citizens without making himself liable to United States laws. *Supra*, § 282 *a*.

I have thus attempted to show the inadequacy of the personal and of the territorial theories as limits of criminal jurisdiction. Of course, I do not mean to say that the State has not a claim to the obedience of its subjects, wherever they may be; all that I here argue is that the State can prosecute others than its subjects when they assail its rights. Nor do I dispute the right of the State to exercise penal discipline over all abiding within its

borders; all that I claim is that the right of the State to exercise such discipline is not limited to those who were corporeally within its borders at the time of the commission of any offence for which it is incumbent on it to exact retribution. What I say is that the right of the State to exact such retribution, whenever its rights have been invaded, is not limited by the corporeal presence of the invader at the time of the invasion. And that this is the true view the following summary may be adduced to show:—

It is the duty of the State to protect, not merely its territory, but its rights. These rights are:—

1. Its political integrity.
2. The life, safety, and property of its subjects.

When these rights are assailed on our own soil by offenders who either remain at the time of the offence on foreign soil, or return to such soil when the offence is committed, we may exercise our jurisdiction over the crime in two ways. We may say to the foreign State within whose boundaries the offenders lurk, 'Execute justice for us in this case. Be our agent in trying, in your own courts, these offenders.' If such an appeal would be fruitless, then we have one of two remaining remedies. We may resort to a demand for extradition; or, in a case of necessity, where redress can in no other way be had, we can enter the State where the offenders are harbored, destroy their engines of destruction, and arrest the offenders themselves, with a view to their trial in our own courts.

We may even go a step further, and apply the same reasoning to wrongs inflicted on our citizens in foreign lands. To each of these citizens we

perpetration. In conspiracies, by the common law, each conspirator is responsible in any place where any overt act by any of his

owe protection, no matter where he may be. He pays us, in fact, for this protection. Taxes, it is said, form the price paid by the subject for the protection given to him by his sovereign; and these taxes we exact from our citizens resident abroad. When we have an income tax, that income tax we assess on them during their temporary non-residence; and no matter how long they may have remained absent, they find, when they return, that their county and state taxes have been running on against them while they are away, and that these taxes they have to pay. Their *status* when they are abroad is settled by the law of their domicile; what this law says they are, — married or single, legitimate or illegitimate, — that they must continue to be wherever they are. When they die, their estate is remitted to the courts of their domicile, to be distributed according to its laws. It would be a strange thing if they should thus be enveloped by their domicile with duties, but should not be enveloped by it with rights. It would be strange if, when travelling lawfully abroad, in connection, for instance, with that very commerce which by such multitudinous statutes it regulates and validates, their relation to the State should be wholly one-sided, consisting entirely of their duty to it, and not at all its duty to them. It would be strange if their citizenship should emerge whenever the State calls upon them for aid, and should disappear whenever they call upon the State for protection. But this anomaly does not exist. Whenever the State has rights which may be assailed, then the State has rights to defend; and the rights of the citizen are the rights of the State of which he is a constituent part. Even if we waive the question of duty based upon constructive contract, we must remember that the commonwealth is but the aggregation of its citizens, and that when the rights of one of these are invaded, then the rights of the aggregate State are invaded. We stand therefore, in this relation, on a higher, instead of a lower, ground than is occupied by those who hold that the relation of the citizen to the State is merely that of the subject to the prince. With us the citizens make the State; the State with us is not a king, nor a sentiment, but an aggregation of citizens, living together under a constitutional government, to which government they cede the duty of punishing invasions of their individual rights. We have, therefore, to rest this jurisdiction on the duty, not merely of the sovereign to protect the subject who pays him for this protection, but of the commonwealth to protect the rights of which it is itself the aggregate. Hence, if an American citizen is murdered or plundered abroad, it is the duty of his country to exact redress and retribution. If the crime is committed in a civilized country, the exaction is by requisition on the sovereign within whose boundaries the offence was committed, and the requisition is either to deliver the offenders to us or to take upon himself their prosecution. If the crime is committed in a barbarous or semi-barbarous land, where a demand for extradition is not recognized, and where justice is not inflicted in accordance with civilized jurisprudence, then we have a right to execute justice ourselves, by seizing the offenders and trying them according to our laws, in all cases in which these laws embody crimes

co-conspirators is done.¹ It is so, also, according to the English common law, with treason.² "Taken most literally," it was said by Chief Justice Marshall, in Burr's case, "the words 'levying of war' are perhaps of the same import with the words raising or creating war; but as those who join after the commencement are equally the objects of punishment, there would be probably a general admission that the terms also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would be considered as coming within the term would be settled by a course of decisions; and it would be affirming boldly to say, that those only who actually constitute a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in

against men, irrespective of local limitations. Ignorance of law would, indeed, avail as a defence as to offences not *mala in se*. But as to offences *mala in se*, wherever the rights of a citizen are assailed, then it is the prerogative of this State to require redress.

For the distinction above given between Real and Personal jurisdiction I am indebted to Rohland's *International Strafrecht*, Leipzig, 1877. Compare Bar's treatise on *Privat International Recht*, and Schwarze's *Essay, Der Werkung's Kreis des Strafgesetzes*, in the second volume of Holtzendorff's *Strafrecht*, 1871. See also *Ham v. State*, 4 Tex. App. 645, in which the Supreme Court of Texas held that a statute of Texas providing that persons forging land titles to lands in that State should be liable to indictment whether the offence should be committed in or out of the State, was constitutional, and the conviction of one who committed a forgery in Missouri sustainable thereunder. The Massachusetts Bill of Rights

prescribes that in "criminal prosecutions the verification of facts in the vicinity where they happen is one of the greatest securities of the life, liberty, and property of the citizen." This would seem to favor the *objective* rather than the *subjective* theory; in other words, the theory that the venue is the place of the act done, rather than the place where the agent was at the time of the act. See, as to this interpretation, *Com. v. Parker*, 2 Pick. 550; and see *R. v. Jones*, 1 Den. C. C. 551; *T. & M.* 270; *Com. v. Corlies*, 3 Brewst. 575; *Mooney v. State*, 8 Ala. 328; and cases cited *infra*, §§ 288, 1206.

In the United States we have acts of Congress expressly asserting jurisdiction over offences on the Indian territory and on Guano Islands. *Rev. Stat. U. S.* 1878, 2128, 2150, 5576.

¹ *Supra*, §§ 205-248, 279; *infra*, § 1397; *R. v. Ferguson*, 2 Stark. N. P. C. 489; *Com. v. White*, 123 Mass. 430; *Whart. Crim. Ev.* § 111.

² *Infra*, § 1793.

affirming that a particular act did, or did not, involve the person committing it in the guilt and in the fact of levying war. If, for example, an army should be actually raised for the avowed purpose of carrying on an open war against the United States, and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases who never saw the army, but who, knowing its object, and leaguering himself with the rebels, supplied that army with provisions; or by a recruiting officer, holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him." The same view was taken by the English and Irish courts in dealing with the Fenian prisoners in 1868.¹ But whatever may be the technical rule in this respect in particular States, it is clear that where the offence can be divided into successive stages, any participant may be prosecuted for his particular act in the place of such act.² This, in reference to homicides, is in several States affirmed by statute.³

§ 288. Conflicts of jurisdiction may be claimed when an offence is begun in one country to take effect in another. Supposing a libellous or forged writing be mailed in one place to be published in another, or an explosive package be expressed in one place to be opened in another, or a gun shot in one place and the shot takes effect in another,⁴ which is the place of the commission of the offence? Arguing by analogy from the law which makes the place of performance the seat of a contract,⁵ we would conclude that the place of consummation is the peculiar seat of the crime. So, in fact, under the common law, it has frequently been decided,⁶ though it is settled that a concurrent jurisdiction exists in the

¹ U. S. Diplom. Cor. 1868, pt. i. pp. 51, 193, 342; Wh. C. of L. § 878.

² Whart. Crim. Ev. §§ 111-12. *Infra*, §§ 292, 512.

³ *Ibid.*

⁴ See as to last point *U. S. v. Davis*, 2 Sumner, 482.

⁵ Wh. Con. of L. § 397. See *infra*, § 1621; Whart. Cr. Ev. § 113.

⁶ *Ibid.*; *supra*, § 280; *R. v. Girwood*, 1 Leach, 169; *R. v. Johnson*, 7 East, 65; *People v. Griffin*, 2 Barb. Sup. Ct. 427; *Com. v. Blanding*, 3 Pick. 804; *People v. Rathbun*, 21 Wend. 533; *Com. v. Gillespie*, 7 S. & R. 469. As to libel, see *Dana's case*, 7 Ben. 1.

place of the starting the offence.¹ The position that the place of reception, or the *situs* of the object of the crime, has jurisdiction, is strengthened by the accepted doctrine that an act designed in one State, and consummated in another, exposes the perpetrator to an action for damages only when the act is unlawful in the place of execution.² The same distinctions apply to obtaining goods by false pretences by letter.³ As has been already seen, attempts to commit crimes are cognizable in the place of the attempt,⁴ and such, also, is the case with conspiracies, where the conspiracy is the gist of the offence.⁵ But there can be no question that all parties concerned are also responsible at the place where the offence is consummated.⁶

Since, however, a crime may be organized in one country, advanced in a second, and executed in a third, it is necessary to conceive of the crime in question as broken up into several sections, committed in distinct jurisdictions, and severally cognizable in each. That such is the case is the opinion of several eminent jurists;⁷ and such would, no doubt (*e. g.* under indictments for treason or conspiracy, where every overt act would give the local court jurisdiction), under similar circumstances, be the practice of the English common law. And the same reasoning applies to all offences which are carried on in two or more jurisdictions. At the same time it must be kept in mind that an attempt to commit in a foreign State an act lawful in such

¹ *U. S. v. Worrall*, 2 Dall. 388; Whart. St. Tr. 189; *R. v. Burdett*, 4 B. & A. 95; *Perkins's case*, 2 Lewin, 150; 2 East P. C. 1120; 1 Campb. 215; 2 Campb. 506; *Wend. Blackst. iv. p. 305*. See *R. v. Jones*, 4 Cox C. C. 198; 1 Den. C. C. 551; *Johns v. State*, 19 Ind. 421; *State v. Chapin*, 17 Ark. 561. Compare Whart. Crim. Ev. § 113.

² Wh. Con. of L. §§ 482-488, 929.

³ *Intra*, § 1206; *R. v. Jones*, 1 Den. C. C. 551; *T. & M. 270*. As will presently be more fully seen, where a letter containing a fraudulent non-accounting of goods by an agent is re-

ceived by his employers in M. County, the latter county has jurisdiction of the offence. *R. v. Rogers*, 14 Cox C. C. 22; *L. R. 3 Q. B. D. 28*; cited fully *infra*, § 291. See *R. v. Treadgold*, 14 Cox C. C. 220.

⁴ *Supra*, § 195.

⁵ See *infra*, § 1397.

⁶ *Supra*, § 280.

⁷ Cited Wh. Con. of L. § 927; *P. Voet*, xi. c. i. note 8; *Ortolan*, No. 951; *Jul. Clarus*, *Sent. v. § fin. qu. 32*, note 9; *Pütter*, § 98; and see also reasoning of court in *Pearson v. McGowran*, 3 B. & C. 700; 5 D. & R. 616.

State, though unlawful in the place of the attempt, may not be punishable in the latter State.¹

The jurisdiction in cases of embezzlement is hereafter specially noticed.²

Whether when a *nuisance* is created in one jurisdiction and operates in another jurisdiction, the courts of the latter jurisdiction have cognizance of the offence, has been the subject of conflicting rulings. In New Hampshire, it is held that the venue may be laid in the place where the injurious effects are produced,³ but the contrary view has been maintained in New Jersey,⁴ and in Wisconsin.⁵ In Pennsylvania, jurisdiction in the county of the creation of the nuisance has been maintained, though the injurious effects were exclusively in another county.⁶

Bigamy in this relation is hereafter discussed.⁷

§ 289. It has been held that in such cases, in adjusting the sentence, the grade of the consummated offence will be taken into consideration, and a punishment adequate to the whole imposed, allowing for what may have been inflicted by other tribunals.⁸ But on this point there is some conflict. Foreign jurists have, and not without reason, held, that when an illegal transaction has been carried on in several territories, each territory can only punish for that segment of the crime committed within its own bounds.⁹ In the United States this is a question of growing importance, as will be elsewhere seen.¹⁰

§ 290. In England, by statute, wherever a felony or misdemeanor is begun in one county and completed in another, the venue may be laid in either county; and¹¹

¹ See Wh. Con. of L. § 482-489, 925. To this effect are decisions rendered in 1856 by the Supreme Court at Berlin. See Bar, § 142, note 3 a; and see *infra*, § 1621; Whart. Crim. Ev. § 113.

² *Infra*, § 1040.

³ *State v. Lord*, 16 N. H. 357.

⁴ *State v. Babcock*, 1 Vroom, 29.

⁵ *Eldred*, in re, 46 Wis. 530; 19 Alb. L. J. 392.

⁶ *Com. v. Lyons*, 1 Penn. L. J. Rep. 497.

⁷ *Infra*, § 1685.

⁸ Wh. Con. of L. § 920. See particularly, as to concurrent jurisdictions, Whart. Plead. & Prac. §§ 441 *et seq.*

⁹ *Ibid.*, citing Carpzov, *Prac. iii. qu.* 110, n. 23; Pütter, p. 203; Holtzendorf, 1870, p. 548. As to Massachusetts, see special statute.

¹⁰ *Infra*, § 293; Whart. Crim. Pl. & Pr. §§ 441, 453.

¹¹ 7 Geo. 4, c. 64, § 13; 1 Vict. c. 86, § 37.

offences committed when travelling, may be laid in any county through which the passenger, carriage, or vessel passes. Embezzlement or larceny can, therefore, in England be tried in any county into which the spoils of the offence are brought.¹ And similar statutes exist in most of the United States.

§ 291. As will be hereafter more fully seen, when goods are stolen in one country and brought by the thief into another country, the latter country by the English common law has no jurisdiction.² In the United States, however, it has been ruled to be within the constitutional province of each State to pass statutes giving the place of arrest, in which the goods are so brought, jurisdiction.³ And as between the several United States, this jurisdiction has been in Maine, Massachusetts, Connecticut, North Carolina, Illinois, Michigan, Maryland, Kentucky, Mississippi, Missouri, Iowa, Oregon, and Nevada, ruled to exist at common law.⁴ In other States, such jurisdiction is held not to exist without a statute;⁵

In larceny thief is liable wherever goods are brought.

¹ See *infra*, § 1040.

² *Butler's case*, 13 Co. 55; 3 Inst. 113; *R. v. Proves*, 1 Moody C. C. 349; *R. v. Debraid*, 11 Cox C. C. 207. See *infra*, § 930; and see *Whart. Crim. Ev.* § 111. In an English case decided in 1875, it was the prisoner's duty as country traveller to collect moneys and remit them at once to his employers. On the 18th April he received money in county Y.; on the 19th and 20th he wrote to his employers from Y., not mentioning that he had received the money; on the 21st April he wrote to them again from Y., thereby intending them to believe that he had not received the money. The letters were addressed to and received by his employers in county M., and written and posted in county Y. It was held that the prisoner must be tried in county M. for the offence of embezzling the money. *R. v. Rogers*, L. R. 3 Q. B. D. 28; 14 Cox C. C. 22. See *Com. v. Uprichard*, 3 Gray, 434.

Hemmaker v. State, 12 Mo. 453; *State v. Williams*, 35 Mo. 229; *Cummings v. State*, 1 Har. & Johns. 340; *McFarland v. State*, 4 Kans. 68; *State v. Levy*, 3 Stew. 123; *La Vault v. State*, 40 Ala. 44.

⁴ *State v. Underwood*, 49 Me. 181; *Com. v. Andrews*, 2 Mass. 14; *Com. v. Holder*, 9 Gray, 7; *State v. Brown*, 1 Haywood, 100; *Cummings v. State*, 1 Har. & J. 340; *Ferrill v. Com.* 1 Duvall, 153; *State v. Ellis*, 3 Conn. 186; *Watson v. State*, 36 Miss. 593; *State v. Williams*, 35 Mo. 229; *People v. Williams*, 24 Mich. 156; *Meyers v. People*, 26 Ill. 173; *State v. Bennet*, 14 Iowa, 479; *State v. Johnson*, 2 Oregon, 115; *State v. Newman*, 9 Nev. 48. See *infra*, § 930. As to Ohio, see *Hamilton v. State*, 11 Ohio, 435; *Stanley v. State*, 24 Ohio St. 166.

⁵ *People v. Gardner*, 2 Johns. 477; *People v. Schenck*, 2 Johns. 479; *State v. Le Blanche*, 2 Vroom, 82; *Simmons v. Com.* 5 Bin. 619; *State v. Rennels*, 14 La. An. 278.

and a statute conferring the jurisdiction has been held to be constitutional.¹ By several courts it has even been held that when the goods are stolen in Canada and brought into a State, the state courts have jurisdiction,² but this view is rejected in Massachusetts and Ohio,³ as well as in those States which hold that at common law there is no liability for a larceny in a sister State.⁴

§ 292. Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt at the common law, whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county; but by the 2 & 3 Edw. 6, c. 24, s. 2, it was enacted that the trial should be in the county where the death happened. By the statute of 8 & 9 Geo. 4, the English jurisdiction of persons dying in England from wounds received abroad is assumed. This statute, however, has been held not to apply to the case of a foreigner dying in England from injuries inflicted by another foreigner on a foreign vessel on the high seas.⁵ In this country it has been held that without a special statute the jurisdiction does not exist in the federal courts,⁶ nor in the courts of the particular States.⁷ An act of Congress conferring the jurisdiction has been adopted.⁸ In Michigan, an analogous statute was held in 1860 to be constitutional, and a prosecution sustained in a case where the blow was struck on a river in Canada and the death occurred in Mich-

¹ *Simmons v. Com.* 5 Bin. 619; *Simpson v. State*, 4 Humph. 461; *Beal v. State*, 15 Ind. 378; *State v. Butler*, 67 Mo. 59.

² *Infra*, § 930; *State v. Bartlett*, 11 Vt. 650; *S. P.*, *State v. Underwood*, 49 Me. 181; *State v. Williams*, 35 Mo. 229.

³ *Com. v. Uprichard*, 3 Gray, 440; *Com. v. White*, 123 Mass. 433; *Stanley v. State*, 24 Ohio St. 166.

⁴ *Simpson v. State*, 4 Humph. 456; *State v. Brown*, 1 Hayw. 100; *Beal v. State*, 15 Ind. 378; *People v. Longbridge*, 1 Neb. 11.

⁵ *R. v. Lewis*, Dears. & Bell, 182; S. C., 7 Cox C. C. 277. See Co. Lit. 74 b; 3 Inst. 48; 1 Hale, 426, 500; 2 Hale P. C. 20, 163. See Whart. Crim. Ev. § 110.

⁶ *U. S. v. McGill*, 4 Dall. 427; S. C., 1 Wash. C. C. 468; *U. S. v. Armstrong*, 2 Curt. C. C. 446.

⁷ *State v. Carter*, 27 N. J. L. (3 Dutch.) 499; *Com. v. Linton*, 2 Va. Cas. 205. See *Turner v. State*, 28 Miss. 684; *Riggs v. State*, 26 Miss. 51.

⁸ *U. S. St.* 1825, c. 65; 1857, c. 116. See *Rev. Stat.* 1042-1047.

igan.¹ In New Jersey, in 1859, in a case where the constitutional power to pass such a statute did not on the record arise, it was declared that there is no common law jurisdiction to this effect, that the New Jersey statutes did not cover the case of manslaughter, and that an indictment charging a felonious assault and battery in New York, and that the party injured came into and died in New Jersey, charged no crime in New Jersey.² In the same State, in 1878, it was held that where a mortal blow is given within the jurisdiction of that State, and the death of the victim occurs within the jurisdiction of another State, the courts of New Jersey have cognizance of the crime by force of the statute to that effect, which was held constitutional.³ In Massachusetts, the constitutional question was elaborately discussed by the Supreme Court, in 1869, upon the following facts: The defendants, one a citizen of Maine, and the other a British subject, were convicted in the County of Suffolk of the manslaughter of a man who died within the county of injuries inflicted by them on board a British merchant ship on the high seas. The Massachusetts statute, under which the defendants were convicted, provided, that "if a mortal wound be given, or other violence or injury inflicted, or poison is administered, on the high seas, or on land either within or without the limits of the State, by means of which death ensues in any county thereof, such offence may be prosecuted in the county where the death happened." It was held by the Supreme Court that there is nothing in the Constitution or laws of the United States, the law of nations, or the Constitution of the commonwealth, to restrain the legislature from enacting such a statute; and consequently there being no other ground for reversal, the conviction was sustained.⁴

7. *Offences committed against two Sovereignties.*

§ 293. Where a particular offence as an entirety is cognizable by two sovereigns, the first sovereign that takes possession of the defendant, and undertakes the prosecution

The first
prosecut-

¹ Tyler v. People, 8 Mich. 326.

² State v. Carter, 3 Dutcher, 500.

³ Hunter v. State, 40 N. J. L. 495.

⁴ Com. v. Macloon, 101 Mass. 1. In Walls v. State, 32 Ark. 565, it was

held that the legislature has no constitutional power to appoint a venue for bigamy in any other than the county of the bigamous marriage. See infra, § 1685.

ing the offence absorbs it. of the offence, absorbs the case, as a general rule, which action, if *bond fide* and complete, is a bar to the action of the other sovereign.¹ But as to offences partly against one and partly against another sovereign, if the defendant is convicted and sentenced under one sovereign, the better opinion is that this is to be taken into account in adjusting the sentence under the other sovereign.²

¹ Whart. Cr. Pl. & Prac. §§ 441, 453. In *Coleman v. State*, 97 U. S. 309, it was held that a prior conviction by a United States Military Court in Tennessee, in 1865, of a soldier in the federal army, of murder, with a sentence that he should be hung, which sentence, however, was never executed, divested the state court of jurisdiction. Of a subsequent prosecution in the state court, Field, J., giving the opinion of the Supreme Court of the United States, thus speaks: "The judgment and conviction in the criminal court should have been set aside and the indictment quashed for want of jurisdiction. Their effect was to defeat an act done under the authority of the United States, by a tribunal of officers appointed under the law enacted for the government and regulation of the army in time of war, and whilst that army was in a hostile and conquered State. The judgment of that tribunal at the time it was rendered, as well as the person of the defendant, were beyond the control of the State of Tennessee. The authority of the United States was then sovereign, and their jurisdiction exclusive. Nothing which has

since occurred has diminished that authority or impaired the efficacy of that judgment. In thus holding, we do not call in question the correctness of the general doctrine asserted by the Supreme Court of Tennessee, that the same act may, in some instances, be an offence against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee. But here there is no case presented for the application of the doctrine. The laws of Tennessee with regard to offences and their punishment, which were allowed to remain in force during its military occupation, did not apply to the defendant, as he was at the time a soldier in the army of the United States, and subject to the articles of war."

² Whart. Cr. Pl. & Prac. §§ 441, 453. *Supra*, § 289.

BOOK II.

CRIMES.

PART I.—OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE.

I. DEFINITIONS.

Murder is killing with malice aforethought, § 303.

Manslaughter is non-malicious killing, § 304.

Involuntary manslaughter is negligent killing, § 305.

Excusable homicide is either non-negligent, non-malicious killing, or killing in self-defence, § 306.

Justifiable homicide is homicide in discharge of a duty, § 307.

In verdict there is no distinction between excusable and justifiable homicide, § 308.

II. CERTAIN REQUISITES OF HOMICIDE IN GENERAL.

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Death must be imputable to defendant's act, § 309 a.

The homicide must not have been in legitimate public war, § 310.

There must be proof of *corpus delicti*, § 311.

Death must have been within a year and a day, § 312.

Malice is to be inferred from circumstances, § 313.

When there is deliberate, unlawful killing, malice is inferred, § 314.

If intent be only to inflict a slight offence, killing is but manslaughter, § 315.

Killing when intending to produce miscarriage is murder, § 316.

When wrong person has been killed by mistake, it has been ruled that offence is the same as if intended person had been killed, § 317.

Objections to this view, § 318.

Malice to a class covers malice to an individual, § 319.

By older writers killing with intent to commit collateral felony is murder, § 320.

This conclusion is incompatible with reason, § 321.

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Unintentional homicide incidental to an unlawful act is manslaughter, § 323.

So in respect to assaults, § 324.

So in respect to miscarriages, § 325.

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So as to illicit intercourse, § 327.

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 So of jailers and other guardians, § 361.
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- Lawful arrest unlawfully executed imposes responsibility, § 408.
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Husband in hot blood killing adulterer, guilty of manslaughter, § 459.

Same principle to be extended in

cases of punishment, when in hot blood, of attacks on the chastity of persons under the rightful protection of defendant, § 480.

Killing to redress a public wrong is murder, § 461.

A bare trespass on property not an adequate provocation in cases of intentional killing, § 462.

Exercise of a legal right no just provocation, § 463.

Spring-guns illegal when placed on spots where innocent trespassers may wander, § 464.

For master of house knowingly to kill visitor is murder, § 465.

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Manslaughter to kill master of house expelling defendant with unnecessary violence, § 468.

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A blow is sufficient provocation when parties are equal, § 470.

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Cool and deliberate use of disparity to kill is murder, § 473.

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Where mortal blow was given after deceased was helpless, offence is murder, § 475.

And so where attack was sought by person killing, § 476.

Question of continuance of old grudge is for jury, § 477.

Malicious killing in another's quarrel is murder, but killing in hot blood is manslaughter, § 478.

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 - Analogy from cases of interference in others' conflicts, § 490.
 - On principle, the test is the defendant's honest belief, § 491.
 - But although the defendant believes he is in danger of life, he is guilty of manslaughter if this belief is imputable to his negligence, § 492.
 - Apparent attack, to be an excuse, must have actually begun, and must be violent, § 493.
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 - Right cannot usually be exercised when there is an opportunity to secure offender's arrest, § 496.
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 - Risk of killing another to be, in extreme cases, preferred to certain death, § 509.
6. *Necessity*, § 510.
 - Defence only good when danger is immediate, and when the life of the defendant can only be saved by the sacrifice of the deceased, § 510.
 - Self-preservation in shipwreck, § 511.

XIV. INDICTMENT.

- Venue must aver jurisdiction, § 512.
- Averment of relationship between deceased and defendant when such is necessary, § 513.
- When variance as to intent to kill is fatal, § 514.
- "In the peace of God," &c., is not a necessary averment, § 515.
- Deceased must have been living at time of blow, § 516.
- "Feloniously" and "of malice aforethought" are necessary at common law, § 517.
- Allegation of assault necessary in violent homicides, § 518.
- At common law general character of instrument of death must be correctly given, § 519.
- Variance in this respect is fatal, § 520.
- When death is alleged to have been by compulsion, circumstances must be averred, § 521.
- Acts of agent or associate may be

averred as acts of principal, § 522.
 Variance in description of poison not fatal, § 523.
Scienter requisite in poisoning, § 524.
 Unknown instrument need not be averred, § 525.
 When counts are inconsistent, verdict should be taken on good counts, § 526.
 Value of instrument need not be proved, § 527.
 Allegation of hand of defendant need not be made, § 528.
 Averment of time need not be repeated, § 529.
 Word "struck" is essential when there has been a blow, § 530.
 But not necessary in cases of poisoning, § 531.
 General description of place of wound is sufficient, § 532.
 Term "wound" to be used in a popular sense, § 533.
 Exactness no longer necessary in description of wound, § 534.
 When two mortal wounds are

averred, either may be proved, § 535.
 Death must be averred, § 536.
 Must have been within a year and a day, § 537.
 Place of death must be averred, § 538.
 Omission of "malice aforethought" and "murder" reduces offence to manslaughter, § 539.
 Varying counts may be joined, § 540.

XV. VERDICT.

Conviction or acquittal of manslaughter acquits of murder, § 541.
 Jury may convict of minor degree, § 542.
 Verdict must specify degree, § 543.
 At common law can be no conviction of assault on indictment for murder, § 544.
 In excusable homicide verdict is not guilty, § 545.
 May be accessory to murder in second degree, § 546.
 When requisite verdict must designate punishment, § 547.

§ 302. HOMICIDE, at common law is divided into the following heads:—

- I. Murder.
- II. Manslaughter.
- III. Excusable Homicide.
- IV. Justifiable Homicide.

I. DEFINITIONS.

§ 303. Murder, as defined at common law, is where a person of sound memory and discretion unlawfully kills any human being, in the peace of the sovereign, with malice prepense or aforethought, either express or implied.¹ So far, however, as this definition is distinctive it is inconclusive. Murder is distinguished from other kinds of killing by the condition of malice; but malice is a term which requires, as has been already seen, peculiar exposition and limitation.² Nor

¹ 3 Inst. 47, 51; 2 Ld. Raymond, Com. 198; Lewis C. L. 394. As to 1487; 1 Hale, 425; 1 Hawk. c. 31, malice, see supra, § 106.
 ss. 3, 8; Kel. 127; Fost. 256; 4 Blac. ² Supra, §§ 106 et seq.

do the words "prepnese" or "aforethought" relieve the definition from ambiguity. What is "prepnese" or "aforethought"? Can the mental processes by which conclusions are reached be measured by the flow of time? Does not intention itself logically include prior thought? Under these circumstances we must hold that the definition just given, authoritative as it is, does not exhaustively describe the offence of murder. And we must reach, also, a second conclusion: if the sagacity of our jurists working on this important topic for so long a series of years has been unable to construct a terse, satisfactory definition of murder, this is because such a definition cannot, from the nature of the thing to be defined, be constructed. In order, therefore, to understand what murder is, we must study the subject in the concrete. When each particular case is presented to the jury, terms can readily be found, in aid of the common law or statutory definition, to reach the merits of such case. But a definition which is large enough to cover all cases in advance must be necessarily so general that each of its leading terms requires a new definition to make it exact.¹

§ 304. Manslaughter is the unlawful and felonious killing of another, without any malice either express or implied.² Volun-

¹ See Whart. on Homicide, § 2, and notes; and see *Firty v. State*, 3 Bax. 858.

According to Sir J. Stephen, "Malice aforethought means any one or more of the following states of minds preceding or coexisting with the act or omission by which death is caused, and it may exist where that act is unpremeditated.

"(a.) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

"(b.) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

"(c.) An intent to commit any felony whatever.

"(d.) An intent to oppose by force any officer of justice on his way to, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed.

"The expression 'officer of justice' in this clause includes every person who has a legal right to do any of the acts mentioned, whether he is an officer or a private person." Dig. C. L. art. 223.

² 1 Bl. Com. 194; 1 Hale, 449; 1 Hawk. c. 30, ss. 2, 3.

statute, there can be no conviction of involuntary manslaughter on an indictment for voluntary manslaughter.¹

§ 306. *Excusable homicide* is of two kinds: 1st. Where a man doing a *lawful* act, without any intention of hurt, by accident kills another; as, for instance, where a man is hunting in a park, and unintentionally kills a person concealed. This is called homicide *per infortuniam*, or by misadventure. 2d. *Se defendendo*, or in self-defence, which exists where one is suddenly assaulted, and in the defence of his person, where immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills the assailant. By the older text writers this species of homicide is sometimes called chance medley or *chaud medley*, words of nearly the same import. As will in another chapter be explained more fully, the same right of self-defence is extended to the relations of master and servant, parent and child, and husband and wife; and to those cases where homicide is unavoidably committed in the defence of the possession of one's dwelling-house against a trespasser, who, having entered, cannot be put out otherwise than by force; and where no more force is used and no other instrument or mode is employed than is necessary and proper for that purpose. Under the same general head of excusable homicide may also be enumerated that class of cases where two persons are reduced to the alternative, that one or the other or both must perish; as where two shipwrecked per-

Excusable homicide is either non-negligent, non-malicious killing, or homicide in self-defence.

by force; such as murder, robbery, house-breaking in the night-time, rape, mayhem, or any other act of felony against the person.¹ But in such cases the attempt must be not merely suspected but apparent, and the danger must be apparently imminent, and the opposing force or resistance necessary to avert the danger or defeat the attempt.²

§ 308. The distinction, in result, between justifiable and excusable homicide is now practically abandoned. In former times, in the latter case, as the law presumed that the slayer was not wholly free from blame, he was punished, at least by forfeiture of goods. But in this country such a rule is not known ever to have been recognized; it having been the uniform practice here, as it now is in England, where the grade does not reach manslaughter, for the jury, under the direction of the court, to acquit of the homicide.³

In verdict there is no distinction between excusable and justifiable homicide.

II. CERTAIN REQUISITES OF HOMICIDE IN GENERAL.

§ 309. It is essential in all cases to show that the deceased was living at the time when the alleged mortal blow was struck.⁴ Thus where it was doubtful, in a case where a mother was charged with throwing her child overboard, whether it was living or dead at the time, it was held that it rested on the government to show it was living at the time, it appearing that the mother was laboring under puerperal fever, and the idea of malice being thereby excluded.⁵ The presumption that a person proved to have been alive at a particular time is still so, holds until it is rebutted by the lapse of time, or other satisfactory proof.⁶ Hence it follows that in cases of infanticide it must be shown that the child was born alive.⁷ And for this purpose proof of an independent circulation on the part of the child is necessary.⁸

¹ United States v. Wiltberger, 3 Wash. C. C. 515; and see State v. Rutherford, 1 Hawks, 78, 457; State v. Roane, 2 Dev. 58.

² 4 Bl. Comm. 182; 1 Russ. on Crimes, 657-660. Infra, § 484.

³ See infra, § 545.

⁴ See supra, § 155; infra, § 516; and see Whart. on Crim. Ev. § 327.

As to assaults on a dead body supposed to be alive, see supra, § 128.

⁵ U. S. v. Hewson, 7 Boston Law Reporter, 361, per Story, J.

⁶ Com. v. Harman, 4 Barr, 269;

Whart. on Crim. Ev. §§ 324, 810.

⁷ See Whart. on Crim. Ev. § 327.

⁸ State v. Winthrop, 43 Iowa, 519. See infra, § 445.

§ 309 *a*. As has been already fully illustrated, the death must be traced to the blow charged to the defendant.¹

Death must be imputable to defendant's act.

§ 310. The words, "in the peace of God and the said Commonwealth, then and there being," as used in the indictment, and in the definition of murder, mean merely that it is not murder to kill an alien enemy in time of war;² at the same time it must be remembered that killing even an alien enemy, unless such killing occur in the actual exercise of war, is murder.³

The homicide must not have been in legitimate public war.

The plea of an Indian war with the United States cannot avail as an excuse for murder committed by "friendly" Indians, of "Indians at war," and in a part of the country not involved in hostilities.⁴

But homicide by any person forming part of a belligerent army, recognized as such, is not murder when committed in due course of war.⁵ In such case the rule *respondet superior* applies.⁶

¹ *Supra*, §§ 153 *et seq.*, 159; and see *infra*, § 340.

² Whart. Conf. of Laws, § 911; 3 Inst. 50; 1 Hale, 433. *Supra*, § 271; *infra*, § 575.

³ 1 Hale, 433; 3 Inst. 50; *State v. Gut*, 13 Minn. 341.

⁴ *Jim v. Territory*, 1 Wash. Ter. 76; and see proceedings in the *Mодоc's* case, June, 1873. In *Penns. v. Robertson*, Addis. 246, the defendant, who was charged with killing an Indian, was permitted to set up, as showing that he had apparent ground for self-defence, that the Indian belonged to a hostile tribe. Whether a subject of a foreign State is indictable for hostile acts directed by his sovereign is elsewhere considered. *Supra*, §§ 94, 283.

⁵ *Supra*, § 283; *Smith v. Brazelton*, 1 Heiskill, 44; *Gunter v. Patton*, 2 Heiskill, 261; *Sequestration cases*, 30 Texas, 700; and other cases cited in an interesting review of this topic in *Southern Law Rev. Ap.* 1873, 537. vol. 1.

⁶ *Supra*, § 283.

The right to kill in war is limited to combatants in contending armies. None but a recognized soldier can exercise it, and only against recognized soldiers in arms. It is therefore homicide for a soldier to kill a citizen unarmed, or even a disarmed enemy; and on the other hand, it is homicide for a private citizen to kill a soldier belonging to a hostile army. But when a nation is roused to guerilla resistance to an invader, and when the public passion is in continuous excitement, the offence may be but manslaughter. Whether or no a State can call forth its citizens as individuals to resist an invasion or rebellion, so as to justify such citizens in killing, otherwise than in open battle, members of the hostile army, is a question that will be decided one way if it comes up before the military tribunals of the army thus assailed, and another way if it comes up before a jury of the country that invokes this private warfare. On gen-

§ 311. The *corpus delicti*, in all cases of homicide, must be proved as an essential condition of conviction. To the *corpus delicti*, as is elsewhere seen, it is requisite: 1st, that the deceased should be shown to have died from the effect of a wound; 2dly, that it should appear that this wound was unlawfully inflicted. The evidence on these points will be discussed in another volume.¹

There must be proof of *corpus delicti*.

§ 312. By the English common law the death must have occurred within a year and a day from the date of the injury received;² and hence, an indictment which does not aver the death to have occurred within this limit is fatally defective.³

The death must have been within a year and a day from the injury.

§ 313. The old distinction between express and implied malice cannot be logically maintained.⁴ There is no case of malicious homicide in which the malice is not inferred from the circumstances of the case; no case in which it is demonstrated as express. We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent, more or less satisfactorily, from his acts.⁵

Malice to be inferred from circumstances.

Malice in this sense may be considered under the following heads:—

1. Intent to kill.
2. Intent to do bodily harm.

§ 314. Where there is a deliberate intent to kill, unless it be

eral principles, it has been argued, such killing is felonious homicide, though as committed in hot blood, not murder unless it were the cover for the wreaking of private revenge. But the better opinion, as is shown by Holtzendorff, is, that however a State may violate the law of nations by calling all its subjects to join in destroying an invader by private as well as by public warfare, yet as the subject is bound to obey its sovereign, and as the home law overrules, intra-territorially, the law of nations, such command is an absolute defence before the home tribunals, unless personal malice be shown. Holtz. Straf. iii. 423.

¹ Whart. on Cr. Ev. §§ 324-25.
² 3 Inst. 53. Infra, § 537.
³ State v. Orrell, 1 Dev. 139; State v. Mayfield, 66 Mo. 125; People v. Aro, 6 Cal. 207; People v. Kelley, 6 Cal. 210. See Whart. on Hom. § 13 for notes.

As to causal relations see supra, §§ 153, 157-58.

⁴ Supra, § 113. As to what malice is see supra, §§ 106 *et seq.*

⁵ See, for a full discussion of this question, Whart. on Crim. Ev. § 734; and as to inference to be drawn from other crimes, Whart. Crim. Ev. § 30; and see Meyers v. Com. 88 Penn. St. 181.

in the discharge of a duty imposed by the public authorities, or in self-defence, or in necessity, and killing follows, the offence is murder at common law. And as will hereafter be more fully seen, an intermediate provocation just prior to the offence forms no defence.¹ The reason of this is obvious. If all that was necessary for a man to do to relieve himself from the guilt of murder were such provocation, there would rarely be a case of homicide without such provocation being intentionally provoked.²

When there is deliberate, unlawful killing malice is inferred.

The mode of proving malice, as is elsewhere more fully seen,³ is that of the ordinary inductive syllogism: from certain facts, malice is to be inferred; here these facts exist; hence here malice is to be inferred.

§ 315. At common law, the intent to do "enormous" or "severe" bodily harm, followed up by homicide, constitutes murder; though, as will be seen hereafter, such an offence falls in those States where this distinction exists, under the head of murder in the second degree. Homicides of this character are numerous; and it is easy to suppose of homicide in a duel that may be so ranked, *e. g.* where the intention was to *maim*, not to *kill*. The distinction in a case of this kind is often slight; and where a statutory line is to be followed, it has been held that when the damage intended was such as would probably result in death, it is murder in the first degree, even though death may have been but incidental to the offender's purpose.⁴ In all cases of such outrageous hurt as to make the death a natural consequence, we have a right to infer such an intent;⁵ but it is otherwise when the hurt was less serious, and the presumption of an intent to kill less violent. Independently of the statutes, it has been said that though A. intend only to severely *beat* B. in anger, from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for its consequences. He beat B. with an intention of doing him great bodily harm, and is therefore answerable for all the harm he did.⁶

If intent be only to inflict a slight hurt, offence is but manslaughter.

¹ *Infra*, § 476.

² *Mason's case*, *Fost.* 132; *East P. C. c. 5, s. 53.*

³ *Whart. on Cr. Ev.* § 734.

⁴ *Com. v. Green*, 1 *Ashm.* 289.

⁵ See *Wellar v. People*, 30 *Mich.* 16.

⁶ *Fost.* 259. See *supra*, §§ 108-122.

So if a large stone be thrown at one with a deliberate intent to seriously hurt, though not to kill him, and by accident it kill him, this is murder.¹ But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in such cases. If the intent be merely to inflict a slight chastisement, and death arises from some peculiarity in the deceased's constitution (*e. g.* inflammation from a scratch), then the offence is but manslaughter; and so where the injury is only mischievously inflicted, with no intention seriously to hurt.²

§ 316. Under this head we may class attempts to produce mischief, resulting in the death of the mother. Killing of this character, when incidental to great bodily harm to the mother, or death to the child, has been held murder at common law.³ It is otherwise, as will hereafter be seen, when there was no intent to do a severe injury, or where the result is attributed merely to negligence.⁴

§ 317. Where A. aims at B. with a malicious intent to kill B., but by the same blow, unintentionally strikes and kills C., this has been held by several authoritative courts to be murder,⁵ though if A.'s aim at B. was without

Killing when intending to produce mischief is murder.

When wrong person is killed by mis-

¹ 1 Hale, 491.

² *Infra*, § 323.

In Vermont, in a case showing peculiar depravity of guilt, where a man, in order to have unlawful sexual intercourse with a girl, used artificial means, with her consent, to make such connection practicable, as a result of which the girl died, the killing was held but manslaughter. *State v. Center*, 35 Vt. 378. This case, supposing the girl was old and intelligent enough to consent, may be sustained on the ground of *Volenti non fit injuria*. See *supra*, § 141. But not otherwise. *R. v. Cox*, R. & R. C. C. 362; 1 *Leach*, 71. For to constitute grievous bodily harm, it is not necessary that the injury should be either permanent or dangerous; if it is such as seriously to interfere with comfort

or health, the allegation is sustained. *R. v. Ashman*, 1 F. & F. 88.

³ *Smith v. State*, 33 Me. 48; *Com. v. Jackson*, 15 Gray, 187; *Chauncey, ex parte*, 2 *Ashmead*, 227; *State v. Moore*, 25 Iowa, 128. See *R. v. Gaylor*, D. & B. C. C. 288; 7 *Cox C. C.* 253; and see *infra*, § 390.

⁴ *Infra*, §§ 325, 390.

⁵ *Supra*, §§ 107-111, 121, 128; 1 *Hale*, 379, 439, 466; *Dyer*, 128; *Kel.* 111, 112, 117; *Pult. de Pace*, 124 b; *Post.* 261; *R. v. Plummer*, 12 *Mod.* 627; *R. v. Holt*, 7 C. & P. 519; 1 *Hawk. c.* 31, 542; *State v. Cooper*, 1 *Green N. J.* 381; *Com. v. Dougherty*, 7 *Smith's Laws, Penn.* 696; *Callahan v. State*, 21 *Ohio St.* 306; *Wareham v. State*, 25 *Ohio St.* 601; *State v. Benton*, 2 *Dev. & Bat.* 196; *State v. Fulkerson*, 1 *Phil. (N. C.) L.*

malice, the offence would have been but manslaughter.¹ Thus A. gives poison to B., intending to poison her, and B., ignorant of it, gives it to a child, who eats it and dies; this is said to be murder in A., but no offence in B.; and this, though A. who was present at the time endeavored to dissuade B. from giving it to the child.² So where A., a policeman, is lawfully endeavoring to arrest B., and B. shoots at the policeman, and accidentally kills C., this has been held to be murder in B.³ The same rule has been applied, as will be hereafter seen, to cases of killing in riots. A rioter intends to kill an enemy, but kills a friend. The killing in such case, according to some authorities, is to be treated as of the same grade as it would have been if the person killed was the one whom the defendant intended to kill. Even where the intent was to inflict only serious bodily harm, this rule has been enforced.⁴ Under the present usual statutory provisions, such offence in this view would be murder in the second degree.⁵

§ 318. The decisions just given may be too firmly settled to be shaken; but it is not to be denied that in principle they are beset by serious difficulties. The reason given

take, it has been ruled that offence is same as if intended party has been killed.

Objections to this view.

as the prisoner was upon an unlawful design, if he had in pursuance thereof discharged the fusee against any of the king's officers that came to resist him, in the prosecution of that design, intending to kill such officer, and by accident had killed one of his own accomplices, it would have been murder in him; the reason being that if a man out of malice to A. shoot at him, but miss him and kill B., it is no less a murder than if he had killed the person intended. 12 Mod. 627; Kelyng, 111; Lord Raym. 1581; 9 St. Tr. 112. See also Higgins's case, Dyer, 128; Pl. 60, 474; Cromp. 101; 9 Co. 81; Agnes Gore's case; Williams's case, cited in the R. v. Mawgridge, Kelyng, 131, 132; 9 St. Tr. 61; supra, § 120; infra, § 346.

¹ Hale, 230; R. v. Saunders, 2 Plowden Com. 474; R. v. Jarvis, 2 M. & R. 40; State v. Fulkerson, Phillips N. C. 233. Supra, § 120; infra, § 346.

In Plummer's case, where Plummer and seven others opposed the king's officers in the act of seizing wool, one of the prisoners shot off a fusee and killed one of his own party. The court held, in giving judgment upon a special verdict, that

² Angell v. State, 36 Tex. 542.

³ State v. Smith, 2 Strobb. 77.

⁴ See infra, §§ 375 et seq.

murder, and there is no way, so it is argued, on this hypothesis, of preventing an attempt to kill from coalescing with any collateral accidental homicide which may occur through the instrumentality put in motion to carry out the intent. Yet it is not only possible that in the mean time the defendant may have repented and abandoned his intent, but the law, until the intent is consummated, always assumes such a repentance and abandonment as possible, and hence assigns a lighter punishment to the attempt. Supposing the actual homicide to be a mere accident, to which no blame is imputable, we thus use this accident, which occurs to an object wholly collateral, to change an attempt into a murder. The defendant is convicted of killing C. with malice to C. of which he was not guilty, and is not prosecuted for that of which he was guilty, the attempt on B.

Such are some of the points which are raised in reply to the doctrine that in cases of aberration, as they are called, the killing of one person is to be tacked to the intent to kill another, so as to form one complete murder. Were the question still open we might hold it to be the true view that so far as concerns B., the person whom A. intends to kill, but does not actually kill, A. is guilty only of an attempt to kill. What A.'s offence is as to C., who is not seen by A., but who accidentally interposes, and receives a fatal wound, depends upon whether the shooting was of such a character (*e. g.* from the place of firing being one in which persons are accustomed to pass) as implies either malice or negligence in A.¹ If killing C. was within the range of the instrument A. set in motion in order to effectuate his evil intent, the case is murder; if not, but the killing arose from the negligent use of the instrument by A., the case is manslaughter. That the intent to kill B. and the actual killing of C. cannot be lumped so as to make one offence, when the death of one does not ensue, as a natural consequence, from the attack on the other, is illustrated by the fact that supposing B. to have been killed, and the shot to have pierced him and then killed C., then the killing of B. and C. are distinct offences, to be separately tried.² We may

¹ See *supra*, §§ 107, 121, 128.

² *R. v. Champneys*, 2 M. & R. 26; *State v. Standifer*, 5 Porter, 523. See also cases cited Whart. on Cr. Ev. *State v. Benham*, 7 Connect. 414; § 587; Whart. Crim. Plead. & Prac. *People v. Warren*, 1 Parker C. R. § 468. *Vaughan v. Com.* 2 Va. Ca. 273;

maliciously putting an obstruction on a railway track.¹ And upon the same principle, if a man, knowing that people are passing along the street, maliciously throw a stone likely to kill, or shoot over a house or wall with intent to do serious harm, and one is thereby slain, it is murder on account of previous malice, though not directed against any particular individual; it is no excuse that the party was bent upon mischief generally.²

Where, however, the injury is inflicted negligently, without such recklessness as implies malice, as in negligently letting a piece of timber fall from a roof,³ or in negligently driving in the public streets,⁴ or in negligently driving a locomotive engine;⁵ then the offence is but manslaughter.

But when act is negligent offence is but manslaughter.

§ 320. So far as the intent to commit a collateral felony concerns the homicide of one person where the intent was to slay another, the subject has been already discussed; and so far, also, as concerns homicide committed in the perpetration of arson, rape, robbery, or burglary, it will be discussed under the head of statutory homicide.⁶ Independently of these points, it is declared by the old English text writers, as a general rule, that if the act on which death ensues be *malum in se*, it will be murder or manslaughter, according to the circumstances; if done in prosecution of a felonious intent, but death ensued against or beside the intent of the party, it will be murder; but, on the other hand, if the intent went no further than to commit a bare trespass, it will be manslaughter. The illustration usually given is that where A. shoots

By older writers killing with intent to commit collateral felony is murder.

"In this case Lord Chief Justice Cockburn said: 'If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to take life, yet if it were such that life was necessarily endangered by it—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it,' that was murder. Times Report, April 28, 1868. It is singular that this case is noticed in Cox's Reports only for the sake of a point about evi-

dence not the least worth reporting. See 11 Cox, 146.'"

¹ Presley v. State, 59 Ala. 98.

² 1 Hale, 475; 3 Inst. 57; 1 East P. C. 231; Boles v. State, 9 Sm. & M. 284.

³ R. v. Hull, Kel. 40; R. v. Rigmar-don, 1 Lewin, 180. Infra, § 351.

⁴ R. v. Timmins, 7 C. & P. 499; R. v. Grout, 6 C. & P. 629; R. v. Dallo-way, 2 Cox C. C. 509. Infra, § 353.

⁵ See infra, § 348.

⁶ Infra, § 384.

that the killing of the owner of the fowl was purely accidental, and that so far from it being intended, it was an act against the offender's will. If so, a jury will revolt at conviction; and the testimony of the judges examined by the English Homicide Amendment Committee shows that rather than permit such a conviction, judges who persist in holding the old rule "contrive" to find for the jury some collateral excuse for acquittal.

§ 322. Wherever the question is still open, the true course, when a homicide negligently takes place in the attempt to commit a felony, is to indict the defendant for an attempt to commit the felony, in one indictment, and for manslaughter in another indictment. Two offences have been committed by him. He must be indicted for them separately. A part of one cannot be broken off and joined to a part broken off from the other, so as to make a new offence. No such new offence can be constituted; for intending to do one thing and then doing another cannot make up one intentional crime. But the negligent homicide, which is manslaughter, may be properly prosecuted in one indictment, and the attempt to commit the felony in another. To join these in one indictment is not permissible; and *a fortiori* it is not permissible to join pieces of the two so as to make up one offence.¹

Proper course is to indict for attempt and for manslaughter.

§ 323. None of the difficulties which beset the last topic attend that which we are now about to notice. Manslaughter necessarily excludes the hypothesis of deliberate malicious killing, and includes all cases where killing takes place in execution of an unlawful design, not involving such deliberate malicious intent to kill.

Unintentional homicide incident to an unlawful act is manslaughter.

We may, therefore, properly hold that where a homicide is unintentionally committed when in the performance of an unlawful act, the offence is manslaughter. Under this head the following cases may be noticed:—

§ 324. Death unintentionally happening from a mere assault is manslaughter. Thus, where the defendant violently struck A.'s horse, which started and killed B., the defendant was held liable for the manslaughter of B.²

So in respect to assaults.

¹ See on this topic *supra*, §§ 109–11. ² 1 Hale, 475; 1 Hawk. c. 29, s. 11; c. 31, s. 41.

So where the defendant, having the right to the possession of a gun, which gun he knew to be loaded, carelessly attempted to snatch it from the hands of the deceased, and during the process the gun was discharged and killed the deceased, this was held manslaughter, and rightfully, for to seize carelessly a dangerous weapon from another is an unlawful act.¹

§ 325. Supposing a miscarriage be attempted in a way not to inflict serious injury on the mother, and the mother dies from negligence in the operation, there being no intent to kill, or to inflict serious injury, and no likelihood of such result, the offence, on the reasoning above given, is but manslaughter.² It is otherwise when the intent is to seriously injure the mother, or the act is likely seriously to injure her. In this case her killing is murder.³

So in respect to miscarriages.

§ 326. Homicide in riots, when there is no intent to kill, or to inflict serious bodily harm, is in like manner manslaughter.⁴

§ 327. The same rule applied where a man, in order to have sexual intercourse with a girl, used artificial means, with her consent, to make such intercourse practicable, in consequence of which she died.⁵

So as to illicit sexual intercourse.

§ 328. It has also been held that whoever, in attempting to commit suicide, unintentionally kills another, is guilty of manslaughter.⁶

So as to suicide.

¹ R. v. Archer, 1 F. & F. 351.

² Yundt v. People, 65 Ill. 372. See Willey v. State, 46 Ind. 363; People v. Olmstead, 30 Mich. 431; State v. Glass, 5 Oreg. 73. As to Massachusetts statute see Com. v. Brown, 121 Mass. 69; Com. v. Blair, 123 Mass. 242; S. C., 126 Mass. 40.

³ See infra, §§ 316, 450.

⁴ See infra, § 395.

⁵ State v. Center, 35 Vt. 378. See supra, § 315-16.

⁶ Commonwealth v. Mink, 123 Mass. 422.

"Suicide," said Gray, C. J., "being unlawful and criminal as *malum in se*, any attempt to commit it is likewise

unlawful and criminal. Every one has the same right and duty to interpose and save a life from being so unlawfully and criminally taken, that he would have to defeat an attempt unlawfully to take the life of a third person. Fairfax, J., in 22 E. 4, 45, pl. 10; Marler v. Ayliff, Cro. Jac. 134; 2 Rol. Ab. 559; 1 Hawk. c. 60, § 23. And it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his death, is guilty of criminal homicide, and, at the least, of manslaughter." See infra, § 453.

III. NEGLIGENT HOMICIDE.

§ 329. We have already seen¹ that an omission is not the basis of penal action unless it constitutes a defect in the discharge of a responsibility specially imposed. And the converse is true, that when a lawful duty is imposed upon a party, then an omission on his part in the discharge of such duty, when acting injuriously on the party to whom the duty is owed, is an indictable offence.²

Omission in discharge of a lawful duty indictable.

§ 330. As, in conformity with the definition just stated, the responsibility must be one especially assumed by the defendant, the omission to perform acts of mercy, even though death to another result from such omission, is not within the rule.³ One man, for instance, may see another starving, and may be able, without the least inconvenience to himself, to bring food to the sufferer, and thus save the latter's life; but the omission to do this is not indictable, unless there be a special responsibility to this effect imposed on the defendant. Thus it has even been ruled that where the defendant permits an idiot brother, residing in his house, to die from want of food, the defendant, on this evidence alone, is not penally responsible, he not having undertaken the special support of the deceased;⁴ and the same reasoning has been applied to a mother who neglects to supply the wants of a lunatic illegitimate child.⁵ But the law would be otherwise if it should appear that the defendant, no matter what was his relation to the deceased, had so secluded the deceased that he could be relieved by no one else.⁶

Omission to perform acts of mercy not indictable.

Sir J. Stephen states the rule as follows: "Every person under a legal duty, whether by contract or by law, or by the act of

¹ *Supra*, § 130.

² See this discussed in Whart. on *Hom.* § 73, in notes. For negligence generally see *supra*, §§ 125, 130. Compare *U. S. v. Knowles*, 4 Sawyer, 517; *Chrystal v. Com.* 9 Bush, 669, and cases in following sections.

An omission to discharge a duty as to drainage may be indictable. *R. v. Wharton*, 12 Mod. 510.

³ *Supra*, § 132. See *Connaughtry*

v. State, 1 Wis. 159; *Burrell v. State*, 18 Tex. 713.

⁴ *R. v. Smith*, 2 C. & P. 449. It is otherwise if the control be exclusive. *R. v. Porter*, L. & C. 394; 9 Cox C. 449. *Supra*, §§ 152-169. See also *State v. Preslar*, 3 Jones N. C. 421.

⁵ *R. v. Pelham*, 8 Q. B. 959.

⁶ *R. v. Smith*, L. & C. 607; 10 Cox C. 82. *Supra*, §§ 152-169; *infra*, §§ 447, 1563.

It was held that no legal duty was cast upon the mother to procure a midwife, and therefore that she could not be convicted of the manslaughter of her daughter.¹

It should be remembered that when food is wilfully withheld from a helpless person, under the defendant's special charge, with the intention to kill, the offence is murder.² And the same rule applies where a child is unjustifiably exposed to the weather.³

§ 332. A husband is responsible for his wife's death caused by her want of necessaries; though to support such an in- ^{Husband}dictment it should appear that the wife was in such a ^{and wife.} helpless state as to be unable to appeal elsewhere for aid, and that the death was the natural and likely consequence of the husband's withdrawal of aid.⁴

§ 333. The keeper of an asylum or prison, who undertakes, to the exclusion of others, to take care of a pauper, ^{Keepers,} or lunatic, or prisoner, is penally responsible for the ^{jailers, &c.} death of such pauper, lunatic, or prisoner naturally resulting from the defendant's reckless neglect.⁵ And a person who accepts the guardianship of another is bound adequately to discharge such guardianship,⁶ and is indictable for death caused by his reckless neglect.⁷

§ 334. In cases, however, where the party charged is unable to supply the necessary succor, he ceases to be responsible. ^{Incapacity} But this responsibility is not divested, in coun- ^{a defence.} tries where poor-houses exist, by poverty; for in such cases the person owing the duty is bound to report the case to the public

¹ *R. v. Shepherd*, 9 Cox C. C. 129; *L. & C.* 147. *Infra*, § 359.

² *R. v. Conde*, 10 Cox C. C. 547; *R. v. Bubb*, 4 Cox C. C. 455. *Infra*, §§ 359-1563-67.

³ *Infra*, § 1562. As to neglect of child by mother in birth, see *infra*, § 445.

⁴ *Infra*, §§ 358, 1563; *R. v. Plummer*, 1 C. & K. 600; *State v. Preslar*, 3 Jones Law (N. C.), 421.

⁵ *Infra*, §§ 333, 1585. See *R. v. Huggins*, 2 Stra. 882; 2 Ld. Ray. 1574; *R. v. Treeve*, 2 East P. C. 821;

R. v. Barrett, 2 C. & K. 343; *R. v. Porter*, L. & C. 394; 9 Cox C. C. 449; *R. v. Pelham*, 8 Q. B. 959; 1 W. & S. Med. J. § 242.

⁶ See *R. v. Bubb*, 4 Cox C. C. 455; *R. v. Hook*, 4 Cox, 455.

⁷ *R. v. Nicholls*, 13 Cox C. C. 75.

⁸ *R. v. Hogan*, 5 Eng. L. & E. 553; 2 Den. C. C. 277; 5 Cox C. C. 255; *Saunders's case*, 7 C. & P. 277; *R. v. Phillpot*, 20 Eng. L. & E. 591; 6 Cox C. C. 140; *R. v. Vann*, 8 Eng. L. & E. 596; 2 Den. C. C. 325. See *infra*, §§ 359 *et seq.*

of a vessel omit to keep a proper lookout;¹ where a pilot omits to make himself properly understood by a foreign helmsman;² where the officer in charge omits to ventilate a mine;³ where a railway tender omits to give the proper signal;⁴ where an iron-founder, instead of recasting a piece that had burst fills up the crevice with lead;⁵ where a mechanic, employed for the purpose in a colliery, omits to plank up a shaft;⁶ where a switch-tender omits properly to turn a switch;⁷ and where a conductor of a street car, whose duty it is to look out and to stop the car if it is likely to do damage, neglects to keep a proper lookout.⁸ And the same liability attaches to the omission of the captain of a vessel to stop or lower boats so as to save the life of a seaman falling from a ship.⁹ But, as has been seen, *the duty of the defendant which he thus fails to discharge must be one to which he is specifically subject.*¹⁰ A stranger, who sees that unless a railway switch is turned or the car stopped an accident may ensue, is not indictable for not turning the switch or stopping the car.¹¹

§ 338. The test as to giving warning of danger is, is such notice part of an express duty with which the defendant is specifically charged? If so he is responsible for injury which is the regular and natural result of his omission; but if not so bound he is not so responsible.¹² A man

So of persons employed to give notice of danger.

a machine at rest does not *per se* confer responsibility. *Hilton's case*, 2 Lewin, 214.

¹ *R. v. Lowe*, 4 Cox C. C. 449; 3 C. & K. 123; *R. v. Spence*, 1 Cox C. C. 352; correcting *R. v. Allen*, 7 C. & P. 153; and *R. v. Green*, *Ibid.* 156.

² *R. v. Spence*, 1 Cox C. C. 352.

³ *R. v. Haines*, 2 C. & K. 368. *Infra*, § 360.

⁴ *R. v. Pargeter*, 3 Cox C. C. 191.

⁵ *R. v. Carr*, 8 C. & P. 163. *Infra*, § 359.

⁶ *R. v. Hughes*, 7 Cox C. C. 301.

State v. O'Brien, 8 Vroom, 169.

⁷ *See R. v. Pardenton*, 6 Cox C. C. 247. *Infra*, § 369.

⁸ *Com. v. Metr. R. R.* 107 Mass. 286. See also as to negligence of R.

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R. subalterns, *R. v. Ledger*, 2 F. & F. 857; *R. v. Trainer*, 4 F. & F. 105; *R. v. Smith*, 11 Cox C. C. 210; *R. v. Birchall*, 4 F. & F. 1087; *R. v. Gray*, 4 F. & F. 1098.

⁹ *U. S. v. Knowles*, 4 Sawyer, 517.

¹⁰ *R. v. Gray*, 4 F. & F. 1098; *R. v. Barrett*, 2 C. & K. 343.

¹¹ See Whart. on Homicide, § 80.

¹² *R. v. Smith*, 11 Cox C. C. 210. It is the duty of A. to put up air headings in a colliery where they are required. It is the duty of B. to give A. notice where an air heading is required. But A. has means, apart from B.'s report, of knowing whether such air headings are required or not. A. omits to put up an air heading. B. omits to give A. notice that one is

man came to town in a chaise, and before he got out of it fired his pistols in the street, which by accident killed a woman, the offence was ruled manslaughter, the act being likely to produce death, and manifestly improper,¹ and we may hold generally that it is manslaughter in the common law if one negligently discharge a gun in a public place or street, and kill one whom he does not see.² Where the shooting is malicious the offence is murder.³ Of course if the discharge was in performance of any legal duty the law is otherwise.⁴

308; *State v. Vance*, 17 Iowa, 138; *State v. Hardie*, 47 Iowa, 647. See supra, §§ 161, 166. In *State v. Hardie*, 47 Iowa, 647, a revolver was fired playfully for the object of frightening a lady. The revolver turned out to be loaded, and she was killed. This was held manslaughter.

¹ *Burton's case*, 1 Stra. 481. See also *State v. Vance*, 17 Iowa, 138.

² Supra, § 161; *R. v. Campbell*, 11 Cox C. C. 323; *R. v. Jones*, 12 Cox C. C. 628; *People v. Fuller*, 2 Parker C. R. (N. Y.) 16; *Sparks v. Com.* 3 Bush, 111; *State v. Vance*, 17 Iowa, 138. See *R. v. Hutchinson*, 9 Cox C. C. 555; *R. v. Archer*, 1 F. & F. 351, — a case of unlawful snatching of a loaded gun, when it accidentally went off. *Whart. on Neg.* §§ 92, 836, 853. See *Haack v. Fearing*, 5 Robertson, 528.

³ See supra, § 319; *Gallihier v. Com.* 2 Duvall (Ky.) 163.

⁴ *R. v. Hutchinson*, supra.

Where deer had entered a corn-field, and were beating down the corn, the owner went with his servant to watch at night with a gun, and charged him to fire when he heard anything rush into the standing corn; and upon the owner rushing into the corn in another part of the field, the servant fired and killed him. In the first passage wherein Lord Hale mentions this case, he seems to think that it amounted to manslaughter, for want

of due diligence and care in the servant in shooting upon such a token as might befall a man as well as a deer; however, he says, it was a question of great difficulty. But in a subsequent part of his work, as is noticed by Mr. East, the learned author relating the same case, which had been determined by himself at Peterborough, says, that he had ruled it only to be misadventure; for the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. But it seemed to him that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter; because of the want of due caution in the servant to shoot before he discovered his mark. So in the case above cited, where a gentleman on alighting from a chaise fired his pistols in the street, which, by accident, killed a woman, it was ruled manslaughter; for the act was likely to breed danger, and manifestly improper. 1 Hale, 475; *Burton's case*, 1 Str. 481.

Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent; and, therefore, if a bystander be killed by the shot, such killing will be manslaughter. *Fost.* 258.

It has, however, been held that a person who unlawfully keeps powder

§ 345. Whoever negligently exposes poison in such a way that as an ordinary consequence it produces death is guilty of manslaughter; ¹ though as has been already seen, his penal responsibility ceases if the poison was taken through the negligence of the deceased, or of that of an independent responsible third person. ²

Negligent exposure of poison indictable.

§ 346. It is also settled that he who administers poison negligently to another, causing death, is guilty of manslaughter; and it is sufficient to establish negligence in this respect that he ought to have known the pernicious character of the drug he administered. *Cui facile est scire, ei detrimento esse debet ignorantia sua.* ³ This principle has been frequently recognized in our criminal jurisprudence. ⁴ Thus, it is manslaughter in a nurse to produce the death of a child by negligently administering to it laudanum with the intention of quieting it; ⁵ and for an apothecary negligently to label "laudanum" as "paregoric," thereby causing death. ⁶ To make a person liable, however, for the consequences of communicating poison, or other deleterious matter, he must either be cognizant of its dangerous properties, or be in a position in which he ought to be so cognizant. ⁷

So of negligent administration of poison.

§ 347. When an overdose of intoxicating liquors is negligently administered, producing death in the recipient, the person administering is guilty of manslaughter. ⁸

So as to intoxicating liquors.

§ 348. Those conducting or driving a locomotive engine are bound to show in their calling the diligence that good and prudent officers in such departments are accus-

Officers of railroads liable for

in his house is not responsible for mischief caused by negligent meddling with it by his servants. *R. v. Bennett*, Bell C. C. 1; 8 Cox C. C. 74.

¹ See supra, §§ 133, 161, 166; 1 Hale, 431; *R. v. Chamberlain*, 10 Cox C. C. 486. When a man lays poison to kill rats, and another man takes it and it kills him, if the poison was laid in such a manner and place as to be mistaken for food, it is manslaughter; if otherwise, misadventure only. 1 Hale, 431. See *R. v. Michael*, 9 C. & P. 356; 2 M. C. C. 120, where it is held murder to maliciously admin-

ister poison through an unconscious agent.

² See supra, §§ 152-169.

³ See Whart. on Neg. §§ 91, 440, 441, 853, and supra, §§ 107, 111, 128, 317; infra, § 369.

⁴ *Tessymond's case*, 1 Lew. 169.

⁵ *Ann v. State*, 11 Humph. 159.

⁶ *Tessymond's case*, 1 Lew. 169.

See supra, §§ 107, 111, 128, 317.

⁷ Infra, § 524.

⁸ *R. v. Martin*, 3 C. & P. 211; *R. v. Packard*, 1 C. & M. 236. See fully Whart. on Hom. § 93.

tomed to exercise. If, from lack of such diligence, death ensues either to a passenger in the train or a traveller on the road, the officer guilty of the neglect is liable for manslaughter.¹ In carrying out this principle, where the switch-tender of a railroad was indicted in New Jersey for manslaughter in neglecting properly to move a switch whereby loss of life ensued, it was held not necessary to prove that the neglect was wilful or of purpose, and that the question whether due care was shown was for the jury.²

§ 349. When a collision occurs on a railroad, and death is caused, the person responsible, by the English rule, is the man actually in charge of the engine, and whose negligence caused the accident at the time of the collision;³ and he is responsible if he leave the engine in charge of an incompetent person.⁴ But it has been ruled in England, that unless the law imposes a duty on the owners of a railroad to watch the crossing, they are not responsible for injuries which might have been avoided by having a guard at the crossing. Thus, the private servant of the owner of a tramway, crossing a public road, was intrusted to watch it; while he was absent from his duty an accident happened, and a person was killed. The private act did not require the owner to watch the tramway. It was held that there was no duty between the owner and the public, and therefore his servant was not guilty of negligence, so as to make him guilty of manslaughter.⁵ But it is otherwise when a railway tender, undertaking to act as such, to the exclusion of others, neglects to give the proper signal.⁶

¹ See topic discussed at large in Whart. on Neg. §§ 645, 798.

² State v. O'Brien, 3 Vroom, 169. In the Hudson County (New Jersey) Court of Quarter Sessions, on Tuesday, January 12, 1875, John S. McClelland, a telegraph operator, was convicted of negligence in giving a wrong signal to the conductor of an approaching train, in consequence of which a collision and death ensued. See N. Y. Times, Jan. 13, 1875.

³ R. v. Birchall, 4 F. & F. 1087. When there is malice, it is murder.

See Gallier v. Com. 2 Duvall (Ky.), 163.

⁴ R. v. Lowe, 4 Cox C. C. 449.

⁵ R. v. Smith, 11 Cox C. C. 210.

⁶ Supra, §§ 125, 130 *et seq.*

On an indictment in England against an engine driver, and a fireman of a railway train, for the manslaughter of persons killed while travelling in a preceding train, by the prisoners' train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed

thoroughfare by which a person passing is struck and killed. Of this a pointed illustration is given in a case tried in the Old Bailey, in 1664. The defendant was employed upon a building, thirty feet from the highway, and threw down a piece of timber, having first cried out to stand clear. The timber fell upon a person who happened to go out of the way to pass underneath, and killed him. It was held misadventure only, though it was said that if the house had been on a constant thoroughfare, it would have been manslaughter, supposing the warning given to have been imperfect.¹

Killing by negligently dropping articles man-slaughter.

On the same view a merchant, who was raising a cask of wine to a third story, over a crowded street, and who let the cask slip, whereby two women were killed, was guilty of manslaughter, as, under the circumstances, the method taken of raising the cask was not sufficiently guarded and no due notice was given.²

§ 352. By the Act of Congress of July 7, 1838, § 12, it was provided that "every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties the life or lives of any person or persons on board such vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any Circuit Court of the United States, shall be sentenced to confinement at hard labor for a period not more than ten years." Under this act it has been held that there must be a causal connection between the negligence and the injury, and that the former must appear to be the proximate cause of the latter.³ *Intent*, in accordance with the principles already stated, does not enter into the issue; it is enough if the defendant, being an officer charged with the particular duty, neglected such duty.⁴ A part owner, assuming the

Liability of steamboat officers for negligence.

¹ *R. v. Hull*, Kel. 40.
² *R. v. Rigmardon*, 1 Lewin, 180.
³ *U. S. v. Collyer*, Appendix Wh. on *Hom.*; and see also *U. S. v. Warner*, 4 McLean, 463; *U. S. v. Taylor*, 5 McLean, 242; *S. P., R. v. Green*, 9 C. & P. 156. "By negligence or inattention in the management of steamboats is undoubtedly meant the omission or commission of any act which

may naturally lead to the consequences made criminal; and it is no matter what may be the degree of misconduct, whether it is slight or serious, if the proof satisfy that the setting fire to the boat was the necessary or most probable cause of it." *Ingersoll, J.*, in *U. S. v. Collyer*, citing charge in *U. S. v. Farnham*, MSS.

⁴ *U. S. v. Warner*, 4 McLean, 463.

§ 355. The care to be exercised is that which careful drivers are accustomed to use.¹ Hence, a driver who fails to exercise such care and thereby injures another is personally responsible.² As a rule, care is to be proportioned to danger. To drive rapidly on an open country highway, where the danger of collision is slight, is not negligence. On the other hand, rapid driving in a thronged street invokes a peculiar degree of caution.³

Care to be that usual to prudent drivers.

mins, 7 C. & P. 499; R. v. Swindall, 2 Carr. & Kir. 229; 2 Cox C. C. 273.

¹ Wh. on Neg. §§ 31-46. Compare R. v. Huggins, 2 Stra. 882; 2 Ld. Ray. 1574; 1 Hale P. C. 486.

² R. v. Murray, 5 Cox C. C. 509; R. v. Grout, 6 C. & P. 629; Pitts v. Gaines, 1 Str. 635; 2 Ld. Ray. 1402; Hall v. Pickard, 3 Camp. 184; Barnes v. Hurd, 11 Mass. 57. Supra, §§ 133 *et seq.* A foot-passenger in England is not excluded from the use of the carriage way, though there be a foot-path, and hence the killing of him by a carriage is manslaughter in the owner, if reasonable care was not used. Thus a tradesman was walking on a road, about two feet from the foot-path, after dark, but there were lamps at certain distances along the line of road, when the prisoner drove in a cart drawn by one horse, at the rate of from eight to ten miles an hour, according to some witnesses, and from six to seven miles an hour, according to other witnesses; the prisoner sat on some sacks, laid on the bottom of the cart, and he was near-sighted. Other persons, who were walking along the same road, had with considerable difficulty got out of the way of the prisoner's cart. Bolland, B., told the jury that the question was whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way as not to put in jeopardy the limbs

and lives of his majesty's subjects. If they thought he had conducted himself properly, they would say he was not guilty; but if they thought that he acted carelessly and negligently, they would pronounce him guilty of manslaughter. R. v. Grout, 6 C. & P. 629.

³ R. v. Swindall, *ut supra*; Com. v. Metrop. R. R. 107 Mass. 236; Whart. on Homicide, § 111, where the authorities are given at large.

A. was driving a cart with four horses in the highway at Whitechapel, and he being in the cart, and the horses upon a trot, they threw down a woman, who was going the same way, with a burden upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder, Lovel, held this to be only misadventure. But by Holt, C. J., if it had been in a street where people usually pass, it had been manslaughter. 1 East P. C. 263. But upon this case Mr. East remarked: "It must be taken for granted, from this note of the case, that the accident happened in a highway, where people did not usually pass; for otherwise the circumstance of the driver's being in the cart and going so much faster than is usual for carriages of that construction, savored much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person who could not get out of the

§ 356. When two drivers were negligently racing with their respective carts on a public road, and one of the carts killed a traveller on the road, both drivers were held responsible for manslaughter.¹ And this rule holds good in respect to all cases where an injury is produced to an innocent third person by a collision between two parties who are both negligent.²

§ 357. He who lets loose a dangerous animal is responsible for death caused by such animal, provided he either knew of the animal's dangerous tendencies,³ or was in such a position that he should have known of such tendencies.⁴ If the mischief was undesigned by the defendant, the offence is manslaughter; if designed, murder.⁵

§ 358. The doing an act, or imperfect performance of a duty towards a person who is helpless, which naturally and ordinarily leads to the death of such person, is mur-

way in time. And indeed such conduct, in a driver of such heavy carriages, might, under most circumstances, be thought to betoken a want of due care, if any, though but few persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it required; but whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it which persons in similar situations are accustomed to do." 1 East P. C. 263.

Carter must stand at horse's head.
— A carter, who is supposed not to have the means of controlling his horse when standing in the cart, is bound to keep at his horse's head or side, and if in consequence of his neglect in this respect death follows, he is guilty of manslaughter. Upon an indictment for manslaughter, the evidence was that the prisoner, being employed to drive a cart, sat in the inside instead of attending at the

horse's head, and while he was sitting there the cart went over a child, who was gathering up flowers on the road. Bayley, B., held that the prisoner, by being in the cart instead of at the horse's head or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter. Knight's case, 1 Lew. 168. Cf. Repsher v. Wattson, 1 Phila. 24; 7 Penn. St. 365.

¹ R. v. Swindall, 2 C. & K. 229; 2 Cox C. C. 141. Supra, § 353.

² Colegrove v. N. Y. & N. H. R. R. 20 N. Y. 492; aff. S. C. 6 Duer, 382; Lockhardt v. Lichtenhaler, 46 Penn. St. 151; Barrett v. The Third Ave. R. R. Co. 45 N. Y. 628; Thoroughgood v. Bryan, 8 C. B. 115; Catlin v. Hills, 8 C. B. 123; R. v. Haines, 2 C. & K. 368. For further distinctions see Whart. on Neg. (2d ed.) § 395; Armstrong v. R. R. L. R. 10 Exch. 477.

³ R. v. Dant, L. & C. 567; 10 Cox C. C. 102.

⁴ Supra, § 207, Wh. on Neg. § 904.

⁵ See fully Whart. on Hom. § 125.

der if death or grievous bodily harm is intended; and manslaughter if the cause is negligence.¹

§ 359. So far as concerns the neglect of a mother to attend to a bastard child after birth, statutes exist in which the common law offence is absorbed. Independently of these statutes, it may be generally stated that for a parent, having special charge of an infant child, to so culpably neglect it that death ensues as a consequence of such neglect, is manslaughter if death or grievous bodily harm were not intended; and murder if there was an intent to inflict death or grievous bodily harm.² To constitute murder there must be means to relieve, and wilfulness in withholding relief.³ If the parent has not the means for the child's nurture, his duty is to apply to the public authorities for relief; and failure to do so is itself culpable neglect, wherever there are public authorities capable of affording such relief.⁴ Hence, as we have seen, it is not necessary to aver in the indictment possession of means by the parent.⁵

When a child grows to sufficient age to be capable of applying for aid himself, and is at full liberty so to do, then the

negligent act is manslaughter.

Death of child by parent's neglect is manslaughter.

¹ *R. v. Walters*, C. & M. 164; *R. v. Smith, L. & C.* 607; 10 *Cox C. C.* 82. See *supra*, § 156; *U. S. v. Knowles*, 4 *Sawyer*, 517. Sir J. Stephen (*Dig. C. L. art. 223*) thus states the point in *Walters' case*: A., recently delivered of a child, lays it naked by the side of the road, and wholly conceals its birth. It dies of cold. This is murder or manslaughter, according as A. had or had not reasonable ground for believing that the child would be preserved. On this he comments as follows:—

"This case appears to me to illustrate the true doctrine on the subject better than the old and often quoted case of the woman who left her child in a place where it was struck by a kite and killed. The point of that case I take to be that the striking by a kite was an occurrence sufficiently likely to impose upon the mother the duty of guarding against it. Kites

having been almost exterminated in England, their habits are forgotten. But to lay a child on the ground in Calcutta would be to expose it to almost certain and speedy death from kites and other birds of prey. I have myself been struck by a kite which had just struck at one of my children."

² *Supra*, §§ 156, 331, 374; *infra*, §§ 1563-8; *R. v. Chandler*, *Dears*, C. C. 453; *R. v. Mabbett*, 5 *Cox C. C.* 339; *R. v. Bubb*, 4 *Cox C. C.* 455; *R. v. Conde*, 10 *Cox C. C.* 547; *R. v. Ryland*, L. R. 1 C. C. 99; 10 *Cox C. C.* 569. See, however, *R. v. Knights*, 2 *F. & F.* 46.

³ *R. v. Saunders*, 7 C. & P. 277.

⁴ *Supra*, § 335; *R. v. Mabbett*, 5 *Cox C. C.* 339; *R. v. Bubb*, 4 *Cox C. C.* 455.

⁵ *R. v. Ryland*, L. R. 1 C. C. 99; 10 *Cox C. C.* 569.

parent's neglect to supply his wants is not the subject of indictment.¹ Nor can the parent's conscientious errors of judgment in matters of medical treatment be at common law punished.²

Much doubt exists as to the legal obligation of a father to support an illegitimate child, though as to the fact of the moral duty there can be no question.³ Puffendorf tells us⁴ that "maintenance is due not only to legitimate children, but even to incestuous issue." But be this as it may, it is clear that when a party assumes the guardianship of a child, whether as putative or step parent, he becomes responsible for mismanagement or neglect.⁵

A married woman, however, cannot be convicted of the murder of her illegitimate child, three years old, by withholding from it proper food, unless it be shown that her husband supplied her with food to give the child, and that she wilfully withheld it.⁶

To place a helpless infant child in such a position that it cannot live is murder if the intent be to kill; and manslaughter if the desertion be negligent.⁷

So as to master and apprentice and master and servant. § 360. The same general principles are applicable to prosecutions against masters for neglect of their servants and apprentices, resulting in death.⁸

So of jailers and other guardians. § 361. Whoever assumes the special charge of a helpless person is indictable for manslaughter if he cause the death of such person by withholding the necessa-

¹ *Supra*, § 335; *R. v. Shepherd*, 9 Cox C. C. 123; L. & C. 147.

² *Supra*, § 336.

³ *Nichole v. Allen*, 3 C. & P. 36.

⁴ *Book 4*, c. 11, s. 6.

⁵ *Stone v. Carr*, 3 Esp. 1; *Cooper v. Martin*, 4 East, 77; *Williams v. Hutchinson*, 3 Comst. 312; *Sharp v. Cropsey*, 11 Barb. 224; *Murdock v. Murdock*, 7 Cal. 511; *Gillett v. Camp*, 27 Mo. 541; *Hussey v. Roundtree*, *Busbee Law (N. C.)*, 110; *Lantz v. Frey*, 14 Penn. St. 201; *Davis v. Goodenow*, 27 Vt. 715; *Brush v. Blanchard*, 18 Ill. 46; *Schouler Dom. Rel.* 378.

⁶ *R. v. Saunders*, 7 C. & P. 277.

⁷ *R. v. Walters*, C. & M. 164; *B.*

v. Ridley, 2 Camp. 640, 653; *R. v. Waters*, T. & M. 57; 1 Den. C. C. 356; 2 C. & K. 864; *R. v. Philpott*, *Dears. C. C.* 179; 6 Cox C. C. 140. *Supra*, §§ 156, 331, 335, 358.

⁸ *Self's case*, 1 East P. C. 226; 1 Leach C. C. 187; *R. v. Squire*, 1 Russ. on Cr. 491; *R. v. Ridley*, 2 Camp. 650; *Anon.* 5 Cox C. C. 279; *Sellan v. Norman*, 4 C. & P. 80; *R. v. Smith*, 8 C. & P. 153; *R. v. Smith*, L. & C. 607; 10 Cox C. C. 82; *R. v. Porter*, L. & C. 394; *R. v. Davies*, 1 Russ. on Cr. 491; *R. v. Crumpton*, 1 C. & M. 597. See these cases detailed in *Whart. on Hom.* §§ 137-8. *Comp. supra*, § 335; *infra*, § 1585.

ries of life.¹ This rule undoubtedly applies to jailers and almshouse keepers, and persons undertaking the voluntary charge of lunatics.² It has been correctly extended in England to a person who undertakes the special nursing and care of another, who is sick or otherwise helpless.³

But it is necessary that the guardianship should be special.⁴ And, as has been already seen,⁵ a brother, omitting to supply his idiot brother with food, is not, in default of proof of such obligation, indictable for the omission.⁶ It is otherwise if the control be exclusive and absolute.⁷

§ 362. One who professes to be a physician, and is called in as such, is bound to apply to his patient the care and skill which good physicians of his particular school are accustomed to apply under similar circumstances.⁸ If he does not possess the skill or apply the care usual among good practitioners of his school under the circumstances, and his patient dies in consequence of his neglect, then he is chargeable with manslaughter.⁹

Physician
liable for
lack of
ordinary
diligence
and skill.

The burden is on the prosecution to prove negligence.¹⁰

§ 363. If the patient, by refusing to adopt the remedies of the physician, frustrates the latter's endeavors, or if he aggravates the case by his misconduct, he cannot charge to the physician the consequences due distinctively to himself.¹¹

Not re-
sponsible if
patient was
direct
cause of
injury.

¹ *Supra*, § 333; *infra*, § 1585.

² *R. v. Porter*, L. & C. 394; 9 Cox C. C. 449; *R. v. Treeve*, 2 East P. C. 821; *R. v. Warren*, R. & R. C. C. 48 n; *R. v. Booth*, R. & R. C. C. 47 n, and other cases cited *supra*, § 333.

³ *R. v. Marriott*, 8 C. & P. 425.

⁴ *R. v. Pelham*, 8 Q. B. 959.

⁵ *Supra*, § 331; *infra*, §§ 1563 *et seq.*

⁶ *R. v. Smith*, 2 C. & P. 449.

⁷ *R. v. Porter*, L. & C. 394; 9 Cox C. C. 449; *R. v. Edwards*, 3 C. & P. 611. *Supra*, §§ 330-1.

⁸ Whart. on Neg. § 730. See as to question of causal relation, *supra*, § 157.

⁹ *R. v. Spiller*, 5 Car. & P. 333; *R. v. Senior*, 1 Moo. C. C. 346; *R. v. Williamson*, 3 C. & P. 635; Webb's case, 1 M. & R. 405; *R. v. Long*, 4

C. & P. 398; *R. v. Whitehead*, 3 C. & K. 202. See *R. v. Chamberlain*, 10 Cox C. C. 486; *R. v. Spencer*, 10 Cox C. C. 525; *R. v. Markuss*, 4 F. & F. 356; *R. v. Macleod*, 12 Cox C. C. 534; *State v. Hildreth*, 9 Ired. 440; *Mattheson's case*, 1 Swinton, 593; 2 Wh. & St. Med. J. § 1058. For cases at large see Whart. on Hom. §§ 143-4.

¹⁰ *R. v. Bull*, 2 F. & F. 201; *R. v. Spencer*, 10 Cox C. C. 525. See *Brown v. State*, 38 Tex. 482, that reasonable doubt must acquit.

¹¹ *Supra*, §§ 162-3; *McCandless v. McWha*, 22 Penn. St. 261; S. C., 25 Penn. St. 95. See the qualifications in *Hibbard v. Thompson*, 109 Mass. 286; *Brown v. State*, 38 Tex. 482. Compare *supra*, § 157.

§ 364. It was once said in England, that if a physician or surgeon give his patient a potion or plaster, intending to do him good, and, contrary to the expectation of such physician or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure.¹ It was also held that if the medicine were administered or the operation performed by a person not a *regular* physician or surgeon, the killing would be manslaughter at the least.² But the English and the American law now is, that the want of a degree (unless there be a special statute on the subject) adds nothing to the grade of the offence if there be a *bona fide* and honest attempt by the defendant to do his best.³

§ 365. It is obvious that the position just taken depends upon the honesty and *bona fides* of the practitioner. Where he is pursuing a plan of bold imposture, the case is otherwise, and the defendant is liable for injuries produced by his ignorance, and this whether he be with or without a degree.⁴

§ 366. Proof of the use or administration of dangerous agencies by an incompetent person is evidence from which culpable negligence can be inferred.⁵

§ 367. It matters not whether the medical man is deal-

¹ 4 Black. Com. 197; 1 Hale, 429.

² Brit. c. 5; 4 Inst. 251; R. v. Simpson, Willcock's L. Med. Prof. Append. 227.

³ R. v. Van Butchell, 3 C. & P. 629; R. v. Williamson, 3 C. & P. 635; R. v. Spiller, 5 C. & P. 333, coram Boland, B., and Bosanquet, J. See also Lamphier v. Philpot, 8 C. & P. 475, where Tindal, C. J., said: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have

higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable, and competent degree of skill." See R. v. Simpson 1 Lew. C. C. 172; R. v. Ferguson, 1 Lew. C. C. 181. To the same effect is Com. v. Thompson, 6 Mass. 134.

⁴ R. v. Long, 4 C. & P. 398; R. v. Long, 4 C. & P. 423; Com. v. Thompson, 6 Mass. 134, cited at large in Whart. on Hom. §§ 148 *et seq.*

⁵ R. v. Crick, 1 F. & F. 519; R. v. Crook, 1 F. & F. 521; R. v. Markus, 4 F. & F. 356; R. v. Chamberlain, 10 Cox C. C. 486.

Where the prisoner, a person ignorant and rash, was charged with manslaughter upon an indictment which alleged that he undertook, as a man midwife, the care and charge of B.

ing with a patient as a feed physician or as a volunteer friend. Thus in a case tried before Denham, J., in 1874, the defendant, a physician, was charged with negligently killing his wife by an overdose of muriate of morphine. Judge Denman correctly charged the jury "that it made no difference whether a medical man was dealing with a patient, or, as a volunteer, dealing with a friend, or with his wife." . . . "If the drug was administered without want of skill and intending to do for the best,—doing nothing, in fact, that a skilful man might not do,—then if the jury merely thought it was some error of judgment which anybody might have committed, the prisoner should be acquitted."¹

Gratuitousness does not affect case.

§ 368. An apothecary's apprentice who is guilty of negligence in delivering medicine, when death ensues in consequence, is guilty of manslaughter.² But if the mistake be made under such circumstances as would perplex an ordinarily prudent man, there should be, it seems, an acquittal.³

Apothecaries and chemists liable on same principles.

§ 369. It has been already stated that in the use of dangerous instruments care must be applied in proportion to danger.⁴ This principle applies both to manufacturers, by whom defective material is used or defective workman-

By persons running machinery care must

K., and to do everything needful for her during and after the time of her delivery, and that after B. K. was delivered he neglected to take proper care of and to render her proper assistance, by means whereof she died; Tindal, C. J., said to the jury: "You are to say whether, in the execution of that duty which the prisoner had undertaken to perform, he is proved to have shown such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of; and that the death of the person named in the indictment was caused thereby." Ferguson's case, 1 Lew. 181. If this be the case stated in Long's Cases, the prisoner was a blacksmith, drunk, and wholly ignorant of the law.

rant of the proper steps to be taken; no evidence is stated in Lewin. See 1 Russ. on Cr. 503, 504; and see also R. v. Webb, 1 M. & R. 405; 2 Lew. 196; R. v. Spilling, 2 M. & Rob. 107.

¹ R. v. Macleod, 12 Cox C. C. 534. The question how far the physician's liability is affected by the patient's misconduct, or by concurrent diseases, is discussed supra, §§ 153-169.

² Tessymond's case, 1 Lew. 169. Supra, § 346. For an indictment against a druggist for manslaughter, through negligently compounding a prescription, see State v. Smith, 66 Mo. 92.

³ R. v. Noakes, 4 F. & F. 920. Supra, § 346.

⁴ Supra, § 337.

be exercised in proportion to danger.

ship applied, and to workmen who are guilty of negligence in their application of such powers to practical use.¹

The jury will be directed, however, to acquit, if the care usual with good workmen under similar circumstances was shown.²

§ 370. For a person charged specially with dangerous machinery to desert without notice, and leave an incompetent substitute in his place, makes him liable for death caused by the incompetency of such substitute.³ But a person so leaving machinery is not liable for injuries caused by the interposition of an independent responsible agent.⁴

¹ R. v. Carr, 8 C. & P. 163.

² Rigardon's case, 1 Lew. 180; Fenton's case, 1 Lew. 179.

An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding; and that in consequence of the scaffolding being so broken, a corf, in which the deceased was descending the mine, struck against a beam, on which the scaffolding had been supported, and by such striking the corf was overturned, and the deceased precipitated into the mine and killed. It was proved that scaffolding was usually found in the mines in the neighborhood, for the purpose of supporting the corves, and enabling the workmen to get out and work the mines; that the stones were of a size and weight sufficient to knock away the scaffolding, and that if the beam only was left, the probable consequence would be that the corf striking against it would upset, and occasion death or injury. Tindal, C. J., said: "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circum-

stances which show an intent to kill, or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death." Fenton's case, 1 Lew. 179.

The deceased was with others employed in walling the inside of a shaft. The defendant was engaged to put a stage over the mouth of the shaft, but from his omission to perform this duty the deceased was killed. The defendant was held on this evidence to be rightfully convicted of manslaughter. R. v. Hughes, D. & B. C. C. 248; 7 Cox C. C. 301. See supra, § 337.

Homicide from negligent omission to ventilate a mine is in like manner manslaughter. R. v. Haines, 2 C. & K. 368.

³ R. v. Lowe, 3 C. & K. 123; 4 Cox C. C. 449.

⁴ R. v. Hilton, 2 Lewin C. C. 214.

IV. KILLING IN ATHLETIC SPORTS.

§ 371. On the same principle that parties engaged in a duel are guilty of murder if death ensue, persons engaged in prize-fighting with the same result are guilty of manslaughter. The difference between the cases is simply that of *intent*. In the first instance, there is an intent to take life; in the second, an intent merely to do an unlawful act not amounting to felony. But if, in prize-fighting, a party goes out with an original intent to do grievous bodily harm to his antagonist and slays him, the offence is murder at common law, or murder in the second degree under the American statutes. And so if he goes with the intention to *kill*, no matter what may have been the *motive*, the offence is murder. If, however, the guilty intent arises in hot blood, in the excitement of the struggle, and without the intervention of cooling time, the offence is but manslaughter; and under ordinary circumstances, all persons encouraging a prize-fight in which death ensues are accessaries to manslaughter.¹

Prize-fighters liable for manslaughter in case of non-malicious killing of antagonist.

§ 372. When death occurs as an incidental consequence of an unlawful sport, it is manslaughter in all concerned in promoting the act which immediately caused the death. This principle has been applied in England to all present encouraging not only boxing matches, but other sports of a similar kind, which are exhibited for lucre, on the ground that they tend to encourage idleness by drawing together a number of disorderly people, and hence involve a criminal responsibility.² In such cases the intention of the parties is not

And so of participants in unlawful sports.

¹ R. v. Murphy, 8 C. & P. 103; R. v. Young, 8 C. & P. 844; and see §§ 232, 451. As to liability for assault in such cases see *infra*, § 636.

² Fost. 260. In R. v. Young, 10 Cox C. C. 371, it was held by Bramwell, B., at the Central Criminal Court, that there is nothing unlawful in a sparring exhibition unless the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. Therefore, except in the latter case,

death caused by an injury received during a sparring match does not amount to manslaughter. On the other hand, even in an innocent game, killing consequent on an attempt to seriously hurt, or on negligence in use of undue strength, is manslaughter. R. v. Bradshaw, 14 Cox C. C. 83.

In R. v. Orton, 39 L. T. (N. S.) 293; 14 Cox C. C. 226, the evidence was that a number of persons assembled in a room, entrance money being paid, to witness a fight between

evidence was that Sir John Chichester made a pass at his servant with a sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard; and the thrust not being effectually broken, the servant was killed by the point of the sword.¹ This was adjudged manslaughter: and Mr. J. Foster thinks, in conformity with Lord Hale, that it was rightly so adjudged, on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm.² But, notwithstanding these high authorities, it may now be questioned whether, in this case, the application of the principle is as correct as the principle itself. If the practising of this kind in fencing — which was the sport in which Sir John Chichester was engaged — is lawful, it would seem that the bursting of the sword through the chape of the scabbard was mere misadventure. The design of the scabbard is to render the sword harmless, and a man who carries his sword about his person assuredly gives the best evidence in his power of his confidence in the sufficiency of the guard. If it is lawful to carry such a weapon, it assuredly is lawful to use it when properly guarded from mischief. The whole question, therefore, turns on the point, whether the particular exercise in which Sir John Chichester was engaged was one likely to disengage the sword from the scabbard.

§ 373 a. But where the death occurs not as incident to a game whose risks all the participants know in advance, but as the result of a practical joke which was a surprise on the deceased, then, though there was no malice, the defendant is responsible for manslaughter, when the death is imputable to physical agencies put in motion by himself. In accordance with this view it has been held manslaughter to cause death by ducking another;³ by building a fire round a drunken man in order to frighten him, he afterwards rolling into the fire, which was not placed so near as to endanger him if he had laid still;⁴ by shooting with a gun, though for the mere

In practical jokes responsibility attaches.

¹ 1 Hale, 472.

² 1 Hale, 473; Fost. 260.

³ 1 East P. C. 236.

⁴ R. v. Errington, 2 Lew. 217.

MURDER IN THE FIRST DEGREE.

	ENUMERATED INSTANCES.	GENERAL DEFINITION.
<i>Maine</i> . . .	Murder "in perpetrating or attempting to perpetrate any crime punishable with death, or imprisonment in the state prison for life, or for an unlimited term of years."	Murder with "express malice aforethought."
<i>New Hampshire</i>	Murder by "poison, starving, torture," or "in the perpetration or attempt at the perpetration of arson, rape, robbery, or burglary."	Murder by "deliberate and premeditated killing."
<i>Massachusetts</i> .	Murder "in the commission of or in an attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty."	Murder "committed with deliberately premeditated malice aforethought."
<i>New York</i> . . .	Murder "when perpetrated without any design to effect death by a person engaged in the commission of any felony."	Murder "first, when perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. Second, when perpetrated by an act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." "Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, shall be murder in the second degree when perpetrated intentionally, but without deliberation and premeditation." ¹
<i>Pennsylvania</i> .	Murder "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary."	Murder perpetrated "by any other kind of wilful, deliberate, and premeditated killing."
<i>Connecticut</i> .	Ibid.	Ibid.
<i>New Jersey</i> .	Ibid.	Ibid.
<i>Michigan</i> . .	Ibid.	Ibid.
<i>Missouri</i> . . .	Murder "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or any other felony."	Ibid.
<i>Virginia</i> . . .	Murder by "poison, by lying in wait, imprisonment, starving, or by wilful, deliberate, and premeditated killing, or other cruel treatment or torture," or in "the commission of or attempt to commit any arson, rape, robbery, or burglary."	Ibid.
<i>Tennessee</i> . .	Murder committed "by means of poison, or by lying in wait," or "in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or larceny."	Murder perpetrated "by any (other) kind of wilful, deliberate, malicious, and premeditated killing."

¹ Act of May 29, 1873.

The earliest of these statutes was that of Pennsylvania, attributed to the first Mr. William Rawle and to Mr. William Bradford, jurists as distinguished for their humanity as for their legal capacity. As the Pennsylvania statute has been reproduced in a majority of the States in the Union, it forms the basis of most of the adjudications which have been given under this head.

§ 377. The general definition of the Pennsylvania and cognate statutes does not touch the common law distinction between murder and manslaughter; it simply divides murder into two classes: murder with a specific, deliberate intent to take life being murder in the first degree; murder without such an intent to take life being murder in the second degree. The statutes, it has been held, in requiring murder in the first degree to be deliberate, do not change the common law doctrine in that respect with regard to murder; the existence of deliberation being necessary to both degrees. The distinctive peculiarity attached by the statutes to murder in the first degree, however, is that it must necessarily be accompanied with a premeditated intention to take life. The "*killing*" must be "*premeditated.*" Wherever, then, in cases of deliberate homicide, there is a specific intention to take life, the offence, if consummated, is murder in the first degree; if there is *not* a specific intention to take life, it is murder in the second degree.¹

Pennsylvania and cognate statutes leave distinction between murder and manslaughter untouched, making specific intent to take life the general feature of murder in the first degree.

¹ Resp. v. Bob, 4 Dallas, 146; Penn. v. Honeyman, Addison, 148; Penn. v. Lewis, Addison, 283; Com. v. Green, 1 Ashmead, 289; Com. v. Murray, 2 Ashmead, 41; Com. v. Daley, App. Whar. Hom.; Com. v. Hare, Ibid.; Com. v. Gable, 7 Serg. & R. 428; Kelly v. Com. 1 Grant, 484; Com. v. Drum, 58 Penn. St. 9; Com. v. Dougherty, 1 Browne, App. p. 18; Com. v. Crause, 4 Clark (Phil.), 500; State v. Spencer, 1 Zabriskie, 196; Bennett v. Com. 8 Leigh, 745; Slaughter v. Com. 11 Leigh, 618; Com. v. King, 2 Va. Cas. 78, in note; Whiteford v. Com. 6 Randolph, 721; Burgess's case, 2 Va. Cas. 483; Com. v. Jones, 1 Leigh, 610; Dale v. State, 10 Yerger, 551; Mitchell v. State, 5 Yerger, 340; State v. Anderson, 2 Tenn. R. 6; Dains v. State, 2 Humph. 439; Anthony v. State, 1 Meigs, 265; Swan v. State, 4 Humph. 136; Clark v. State, 8 Humph. 671; Riley v. State, 9 Humph. 646; Bratton v. State, 10 Humph. 103; Warren v. State, 4 Cold. 130; State v. Shultz, 25 Miss. 128; People v. Potter, 5 Mich. 1; People v. Barry, 31 Cal. 357; People v. Josephs, 7 Cal. 129; People v. Haun, 44 Cal. 96; People v. Doyle, 48 Cal. 85; Milton v. State, 6

§ 378. The doubt which arises from the term "wilful" has already been noticed. Can an *unintended* act be said to be wilful, and if so, can the homicide of one party when another was intended be such? It has been

Neb. 136; *Palmore v. State*, 29 Ark. 248.

See particularly remarks of King, P. J., in *Com. v. Daley*, Whart. on Hom. App., afterwards adopted by Rogers, J., in the Supreme Court, in *Com. v. Sherry*, *Ibid.* Appendix.

A criticism on the conclusion in the text may be found in *Atkinson v. State*, 20 Texas, 522, where, under a similar statute, it was held that to constitute murder in the first degree, some degree of prior deliberation must be shown. This subject has been already discussed in its general bearings. See *supra*, §§ 106-122.

As to Alabama, see *Fields v. State*, 52 Ala. 348; *Simpson v. State*, 59 Ala. 1. The distinction between the Alabama and the Pennsylvania statutes is given in *Mitchell v. State*, 60 Ala. 26.

In Missouri, which follows in the main the Pennsylvania precedents, the rule given in the text is qualified by the insertion, after "arson, rape, robbery, or burglary," in the statute, of the words, "or any other felony." The infliction of great bodily harm on another, though such injury does not amount to mayhem, being regarded a felony in Missouri, it was at first held that a murder committed incidentally to the infliction of such injury is murder in the first degree, though in Pennsylvania, from the lack of a specific intent to take life, it would be murder in the second degree. Thus in *State v. Jennings*, 18 Mo. 438, the court below charged the jury that if they "believed from the evidence that it was not the intention of those concerned in lynching Willard to kill him,

but that they did intend to do him great bodily harm, and that in so doing death ensued, such killing is murder in the first degree, by the statute of this State." The Supreme Court on this point say: "The sixth instruction is correct under the statute of this State. Homicide (*sic.* 'murder' is the statutory term), committed in the attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree. The thirty-eighth section makes the person by whose act or procurement great bodily harm has been received by another guilty of what is by our law called a felony." To the same effect is *State v. Nueslin*, 25 Mo. 111. See *State v. Joeckel*, 44 Mo. 234.

In *State v. Green*, 66 Mo. 631, it was held that under the statute the intent to inflict great bodily harm upon the defendant, such act, if consummated, being a felony in Missouri, made homicide murder in the first degree, although such homicide was not "wilful, deliberate, or premeditated."

In *State v. Wieners*, 66 Mo. 13; *aff.* in *State v. Green*, *Ibid.* 647, it is said that "such a killing," *i. e.* one in the attempt to perpetrate any felony, "was murder, although not specifically intended, for the law attaches the intent to commit the other felony to the homicide."

These rulings have been reviewed in a series of thoughtful articles in the *Central Law Journal* for 1878. If the Missouri Supreme Court, as the words quoted in *State v. Jennings* may indicate, hold that a homicide in perpetration of a felony, or by poisoning or

seen that on this point there exists some conflict of authority. Keeping in view the severity which the construction of a penal statute requires, and recollecting that the term as used in this case was meant to be restrictive, the better view seems to be, that in order to bring a homicide within the act, it must have been specifically *willed* by the perpetrator. It is difficult to see how, if an unintended homicide be within the terms of the act, any other kind of homicide with a collateral felonious intent can be excluded.¹

§ 379. That species of homicide, which is the result of justly provoked passion, falls at common law under the head of manslaughter, and of course is out of the question here. But there are many cases of murder at common law which are *in*deliberate. Putting aside homicides perpetrated in pursuance of a collateral felonious intent, which have already been considered, we have those cases where the intellect is so confused by drink or stimulants, or by undue and yet not homicidal passion, as to be incapable of deliberation. These cases are all murder at common law, but it is plain that they want the essential features of deliberation to make them murder

rape, would be murder under the statute, when it would not be murder at common law, this position cannot be reconciled with the words of the statute, or the rulings of other courts. *Infra*, §§ 382-84. If, on the other hand, what is meant is that a *murder at common law*, perpetrated incidentally to another felony, need not be wilful or premeditated or deliberate, the question is open to doubt. See *infra*, § 384, and *Souther v. Com.* 7 Grat. 673. The question here depends on the statute. "Other kind of wilful, deliberate, and premeditated killing" may seem to indicate that all killing, under the statute, in order to be murder in the first degree, must be "wilful, deliberate, and premeditated." But the statute, if closely read, does not sustain this view. The words are, "Every murder which shall be committed by means of poison, or by lying in wait,

or by any other kind of wilful, deliberate, or premeditated killing; or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be murder in the first degree." The terms "wilful," &c., do not qualify the enumerated cases with which the section closes.

In *Shock v. State*, 68 Mo. 352, it was said by the court: "We are of the opinion that the words 'other felony' used in the first section refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offence distinct from homicide. *Whart. on Hom.* §§ 55, 56, 57, 58, 62."

¹ See *Felton v. U. S.* 96 U. S. 699.

under the statutes before us. Under these statutes the deliberative intent must be "to take life."¹

§ 380. It has been said that a positive previous intent to take life must be shown;² but this opinion has since been recalled by the court that delivered it,³ and is opposed to the weight of authority elsewhere. And it has also been said that when the fact of death alone is proved, the presumption is that it is murder in the second degree, it being incumbent on the prosecution to rebut this by something, however slight, from which premeditation can be inferred.⁴ But be this as it may — and when analyzed the position varies very little from that of the crown writers on murder, who draw the presumption of malice aforethought, not from the fact of death, but from the nature of the wound, instrument, &c. — there is a general concurrence of authority on the general meaning of *premeditation*. It involves a prior intention to do the act in question.⁵ It is not necessary that this intention should have been conceived for any particular period of time.⁶ It is as much pre-

¹ *State v. Mitchell*, 64 Mo. 191; *Nye v. People*, 35 Mich. 16. As to N. Y. statute see *People v. Batting*, 49 How. Pr. 392.

² *Mitchell v. State*, 5 Yerger, 340.

³ *State v. Andrews*, 2 Tenn. 6; *Dale v. State*, 10 Yerg. 551. *Supra*, §§ 116-7.

⁴ *Hill's case*, 2 Grat. 594; *State v. Turner*, *Wright*, 30. See *infra*, § 392; *supra*, §§ 116-17.

Sir J. Stephen (Dig. art. 218) says: "A man who wantonly, or on a slight cause, intentionally and violently kills another, shows by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred instantly conceived and executed, which is at least as bad, if not worse. This, in the strict sense of the words, is malice aforethought. As *Hobbes* well observes: 'It is malice forethought, though not long forethought.' *Dialogue of the Common Laws, Works*, vi. 85. And it is not by law necessary that it should be long. If a slight provocation does not reduce

murder to manslaughter, *a fortiori* the total absence of all provocation, and the mere rapidity with which the execution of a cruel and wicked design follows on its conception, cannot have that effect." To this it may be added that we can be on the guard against malice which exhibits itself in prior overt acts, but not against that which is concealed.

⁵ *State v. Wieners*, 66 Mo. 13.

⁶ *Supra*, § 117; *Keenan v. Com.* 44 Penn. St. (8 *Wright*) 55; *Warren v. Com.* 36 Penn. St. (1 *Wright*) 45; *Kilpatrick v. Com.* 31 Penn. St. 198; *Green v. Com.* 83 Penn. St. 75; *Donnelly v. State*, 2 *Dutch*. (N. J.) 463; *Whiteford v. Com.* 6 *Rand. Va.* 721; *Miller v. State*, 54 *Ala.* 155; *McKenzie v. State*, 26 *Ark.* 384; *State v. Dunn*, 18 *Mo.* 419; *State v. Jennings*, 18 *Mo.* 435; *State v. Hays*, 23 *Mo.* 287; *State v. Holmes*, 54 *Mo.* 158; *State v. Mitchell*, 64 *Mo.* 191; *People v. Cotta*, 49 *Cal.* 166. In *Indiana*, the statute is construed to require that an inten-

may be inferred. a man intelligently and maliciously makes use of a weapon likely to take life;¹ where he declares his intentions to be deadly; where he makes preparations for the concealing of the body; where, before the death, he lays a train of circumstances which may be calculated to break the surprise, or baffle the curiosity which would probably be occasioned by it; where, in any way, evidence arises which shows a harbored design against the life of another;² where the act is part of a conspiracy to destroy persons of a particular class;³ where the facts indicate peculiar cruelty;⁴ such evidence, when standing by itself, entitles us to hold, as a presumption of fact, that the intention to take life was deliberate.⁵ The same view was taken where the defendant loaded a pistol, took aim at, and shot the deceased;⁶ where he deliberately procured a butcher's knife and sharpened it for the avowed purpose of killing the deceased;⁷ where he concealed a dirk in his breast, stating, shortly before the attack, that he knew where the seat of life was;⁸ where he thrust a handspike deeply into the forehead of the deceased.⁹

seq.; and see *supra*, §§ 313, 314; *Green v. Com.* 83 Penn. St. 75; *Lanahan v. Com.* 84 Penn. St. 80.

¹ *Kilpatrick v. Com.* 31 Penn. St. 198.

² *Campbell v. Com.* 84 Penn. St. 187.

³ *Ibid.*; *Carroll v. Com.* 84 Penn. St. 107; *Kehoe v. Com.* 85 Penn. St. 127.

⁴ *State v. Mahly*, 68 Mo. 315.

⁵ *Resp. v. Mulatto Bob*, 4 Dal. 145; *Com. v. Williams*, 2 Ashmead, 69. See *State v. Spencer*, 1 Zab. 196.

⁶ *Com. v. Smith*, 7 Smith's Laws, 696.

⁷ *Com. v. O'Hara*, 7 Smith's Laws, App. 594. See *Green v. Com.* 83 Penn. St. 75; *Lanahan v. Com.* 84 Penn. St. 80; *Com. v. Burgess*, 2 Va. Cases, 484; *Whart. Crim. Ev.* §§ 734-764.

"Without adopting all the language of Chief Justice McKean in that case (*Com. v. O'Hara*), I may use that of Judge Strong in *Cathcart v. The Com-*

monwealth, 1 Wright, 112. 'If the killing was not accidental, then malice and a design to kill were to be presumed from the use of a deadly weapon; for the law adopts the common, rational belief that a man intends the usual, immediate, and natural consequences of his voluntary act. Human reason will not tolerate the denial that a man who intentionally, not accidentally, fires a musket ball through the body of his wife, and thus inflicts a mortal wound, has a heart fatally bent on mischief, and intends to kill.'" *Agnew, C. J., McCue v. Com.* 78 Penn. St. 185; *S. P., Quigley v. Com.* 84 Penn. St. 18. But see *Whart. Cr. Ev.* §§ 734-764.

⁸ *Bennett's case*, 8 Leigh, 749.

⁹ *Swan v. State*, 4 Humph. 139; and see generally *Whart. Crim. Ev.* §§ 764 *et seq.*; *U. S. v. Cornell*, 2 Mason, 94; *Com. v. Whiteford*, 6 Randolph, 721; *Woodside v. State*, 2 Howard (Miss.), 656; *State v. Toohy*, 2 Rice's Digest, 104.

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statute), not necessarily murder in the first degree.

can be murder either in the first or second degree; and we have first to inquire, in determining the grade of any particular homicide under the statutes, whether it is murder at common law. If it is not, then such homicide cannot be murder in the second degree under the statutes, although it is a homicide committed in perpetration of one of the specified felonies.¹

§ 385. The same observation applies to the agency of poison. A homicide by poison is not necessarily murder at common law.² If it is not, it is not murder in the first degree.³ At the same time, where the evidence shows that the death was effected by intentional and malicious poisoning, it is the duty of the court to tell the jury that the offence is murder in the first degree.⁴

So also as to lying in wait. A man may lie in wait for another merely to commit a trespass; and if so, in case of an accidental killing, the offence being only manslaughter at common law is

¹ *State v. Dowd*, 19 Conn. 388; *Com. v. Hanlon*, 8 Brewst. 461; *S. C.*, 8 Phil. R. 401; *Chauncy, ex parte*, 2 Ashm. 227. See *Com. v. Jones*, 1 Leigh, 610, and comments in *Whart. on Hom.* § 184. As to Missouri, see *Shock v. State*, 68 Mo. 352; *Supra*, § 377.

In *People v. Vasquez*, 49 Cal. 560, it was held that where several are engaged in the commission of a robbery, and one of the associates does not intend to take life, and prohibits the others from taking life, yet he is guilty of murder in the first degree if one of them take life in furtherance of the plan to rob. See also *Singleton v. State*, 1 Tex. Ap. 501.

As to what is extreme atrocity and cruelty, under Massachusetts statute, see *Com. v. Devlin*, 126 Mass. 253.

In Virginia, where "wilful and excessive whipping" is among the enumerated instances, a verdict of murder in the first degree was sustained against a master for whipping a slave to death, though it was maintained

that the intent was to do only bodily harm. It should be observed, however, that in the Virginia act the term "other" is omitted before the phrase "*kind of wilful, &c., killing*," so that to some degree the bearing of the latter definition on the enumerated instances is weakened. *Souther v. State*, 7 Grat. 678.

A homicide, to be murder in the first degree under this clause, must be one emanating from the felony; not one to which the felony was collateral. *Pliemling v. State*, 46 Wis. 516.

² See *supra*, § 346.

³ *State v. Dowd*, 19 Conn. 388; *Chauncy, ex parte*, 2 Ashmead, 227, 391. See *Rhodes v. Com.* 15 Penn. St. 396; *Lane v. Com.* 59 Penn. St. 371; *Com. v. Jones*, 1 Leigh, 610; *Souther v. Com.* 7 Grat. 678. When poison is administered in order to excite sexual passion, and death ensues, this is not death through intended poisoning so as to be murder in the first degree. *Infra*, § 610; *Bechtelheimer v. State*, 54 Ind. 128.

⁴ *Shaffner v. Com.* 72 Penn. St. 60.

only manslaughter under our statutes. But if an intentional homicide by lying in wait be proved, then such homicide is ordinarily murder in the first degree.

§ 386. Where A., intending to commit a felony, the execution of which is not enumerated in the statutes as contributing to the definition of murder in the first degree, unintentionally kills B., the offence is manslaughter. A., for instance, shoots a tame fowl, and in so doing unintentionally and accidentally kills B. Is A. guilty in this of murder in the second degree under our statutes? No doubt we have several *obiter dicta* of our judges answering this question in the affirmative, though no case exists in which the point has been directly affirmed. But if we are to hold, as we may justly do, that such an offence is only manslaughter at common law, then it is only manslaughter under our statutes.¹

Homicide incidental to unenumerated felony is manslaughter.

§ 387. An "attempt" to commit one of the enumerated felonies, under the statutes, must consist of a substantive indictable offence. The word "attempt," as thus used in the statutes, must be construed strictly, as describing such an attempt as is indictable. Hence it is not sufficient, in order to bring the case under the statutes, that the homicide should have been committed while in preparing to commit the felony in question; ² nor is it enough that the offence consists in mere solicitation; or in purpose without distinctive overt act.³ "An attempt to commit a rape, in which killing occurs, is necessarily an overt act, indicating the intent and purpose of the assault, of which clear proof, sufficient to place the case beyond reasonable doubt, should be given. A mere intention to commit the offence is nothing, unless accompanied by acts directed towards its accomplishment. The killing, to constitute the crime of murder, without the specific intent to take life, must be already shown by the prosecution to have occurred in the performance of such acts as should establish the independent substantive crime."⁴

Under the statutes, "attempt" must be a substantive offence.

§ 388. Murder in the second degree includes all cases of common law murder where the intention was not to

Murder in the second degree in-

¹ See this point examined supra, §§ 320 et seq.

² See supra, § 180.

³ Supra, § 179.

⁴ Thompson, C. J., *Kelly v. Com.*
1 Grant, 486.

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cludes all common law murders in which the intention is not to take life, including cases in which the mind is in such a state as to be incapable of specific intent.

Murder in drunkenness is murder in the second degree.

take life, of which murder, when the intent was only to do great bodily hurt, may be taken as a leading illustration.¹ There may, also, be cases where death ensues during a riotous affray, under circumstances which would constitute murder at common law, but which, in consequence of the want of a specific intent to take life being shown, amount but to murder in the second degree.²

§ 389. When the defendant is in such a state of drunkenness as to be incapable of forming a specific intent to take life, then the offence, if murder at common law, is murder in the second degree under the statutes.³ "Implied malice is sufficient at common law to make the offence murder, and under our statute to make it murder in the second degree; but to constitute murder in the first degree actual malice must be proved. Upon this question the state of the prisoner's mind is material. In behalf of the defence, insanity, intoxication, or any other fact which tends to prove that the prisoner was incapable of deliberation, was competent evidence for the jury to weigh. Intoxication is admissible in such cases, not as an excuse for crime, but as tending to show that the less and not the greater offence was in fact committed."⁴

§ 390. As has been already noticed, if a pregnant woman be killed in an attempt to produce abortion in her, and it appears

¹ *Com. v. Dougherty*, 7 Smith's Laws (Penn.), 698; *Whiteford v. Com.* 6 Rand. (Va.) 721; *State v. Decklotts*, 19 Iowa, 447. See *Washington v. State*, 53 Ala. 29; *Caldwell v. State*, 41 Tex. 86.

² *Com. v. Hare*, 4 Penn. Law Jour. 257; and see *Com. v. Sherry*, App. Wharton on Hom.; *Com. v. Neills*, 2 Brewst. 553. *Supra*, §§ 47, 118.

³ See cases cited *supra*, §§ 47, 52.

⁴ *Carpenter, J.*, *State v. Johnson*, 40 Conn. 136; *Com. v. Jones*, 1 Leigh, 610; *Com. v. Haggarty*, Lewis C. L. 403; *Pirtle v. State*, 9 Humph. 664.

"Except in the case of murder, which happens in consequence of act-

ual or attempted arson, rape, robbery, or burglary," says Judge Lewis, of the Supreme Court of Pennsylvania, "a deliberate intention to kill is the essential feature of murder in the first degree. When this ingredient is absent; where the mind, from intoxication or any other cause, is deprived of its power to form a design, with deliberation and premeditation, the offence is stripped of the malignant features required by the statute to place it on the list of capital crimes; and neither courts nor juries can lawfully dispense with what the act of assembly requires." Lewis C. L. 405. And see *Haile v. State*, 11 Humph. 154.

that the design of the operator was not to take the life of the mother, the offence has been held murder in the second degree.¹ And on the principles already expressed, this may be defended in all cases where the intent was to do the mother serious bodily harm. Where there is no such intent, the proper course is to indict separately for the manslaughter of the mother, and for the perpetration of the abortion.

Killing a woman in an attempt to produce abortion, murder in the second degree.

§ 391. Aside from murder in the commission of enumerated felonies, the rule is that where the deliberate intention is to take life, and death ensues, it is murder in the first degree; where it is to do serious bodily harm, and death ensues, it is murder in the second degree; while the common law definition of manslaughter remains unaltered. This distinction, however, cannot always be preserved. In those jurisdictions where the juries are entitled to take control of the law, it of course gives way to other tests more agreeable to the prejudices of the particular case. And even where the court assumes its proper province, and where it lays down the law with precision and fulness, a jury is apt to seize upon murder in the second degree as a compromise, when they think murder has been committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties. In such cases courts are not disposed to disturb verdicts, but permit them to stand, though technically incorrect.²

Murder in second degree a compromise courts are unwilling to disturb.

§ 392. The character of the presumption to be drawn in cases of malicious killing is elsewhere independently discussed.³ It is scarcely necessary here to repeat that such a presumption is an inference of fact to be drawn from all the circumstances of the particular case. If a killing be shown with a deadly weapon, intentionally, deliberately, and unjustifiably used, then the inference, as we have just seen, is that of an intent to take life, and the case is murder in the first degree. The burden, however, of proving this is on the

In cases of doubt presumption is for murder in second degree.

¹ *Supra*, §§ 316, 325; *infra*, § 450; *Ostrander*, 30 Mo. 18; *State v. Mew-Com. v. Jackson*, 15 Gray, 187; *herter*, 46 Iowa, 88. See, however, *Chauncy*, *ex parte*, 2 Ashm. 227; *Clem v. State*, 42 Ind. 420; *Pliemling v. State*, 46 Wis. 516.

² *Whart. on Hom.* § 193; *Slaughter v. Com.* 11 Leigh, 683; *State v.*

³ See *Whart. Crim. Ev.* §§ 784, 764.

prosecution.¹ Stripping the case of these incidents, however, and supposing that simply a malicious killing be proved, then the inference is of murder in the second degree.²

§ 393. Under the statutes, a common law indictment for murder is sufficient to sustain a verdict of guilty of murder either in the first or the second degree. It being held, as has already been seen fully, that the line separating murder from manslaughter is in no way changed by our statutes; and it being further seen that murder in the second degree is simply murder at common law with certain aggravating features discharged, it follows that on a common law indictment for murder a verdict of murder either in the first or in the second degree can be sustained. So, indeed, have our courts, in many instances, ruled.³ The same principle has been

Common law indictment for murder sustains either degree.

¹ Murray v. Com. 79 Penn. St. 311; Kehoe v. Com. 85 Penn. St. 127.

² Supra, § 118; Whart. on Cr. Ev. §§ 334, 721; Com. v. Drum, 58 Penn. St. 9; O'Mara v. Com. 75 Penn. St. 424; Brown v. Com. 76 Penn. St. 319; Laros v. Com. 84 Penn. St. 230; State v. Walters, 45 Iowa, 389; Hill v. Com. 2 Grat. 594; Mitchell v. State, 5 Yerg. 340; Witt v. State, 6 Cold. 5; Davis v. State, 10 Ga. 101; State v. Holme, 54 Mo. 153; State v. Evans, 65 Mo. 574; State v. Gassert, 65 Mo. 352; State v. Winge, 66 Mo. 181; State v. Testerman, 68 Mo. 408; Hamby v. State, 36 Tex. 523; Preuit v. People, 5 Nev. 377; Milton v. State, 6 Neb. 136.

In a Texas case it is said: "When a homicide has been proven, that fact alone authorizes the presumption of malice, and unexplained would warrant a verdict for murder in the second degree. But express and premeditated malice can never be presumed; it is evidenced by former grudges, previous threats, lying in wait, or some concerted scheme to kill, or do some bodily harm, as poisoning, starving, torturing, or the attempted perpetration of rape, robbery,

or burglary, and these evidences of express malice, or some one of them, must be proven as directly as the homicide, before the jury are authorized in finding a verdict for murder in the first degree.

"The distinction between murder in the first and second degrees has been so often discussed by this court that we deem it necessary here only to refer to a few cases deciding this question: McCay v. The State, 25 Texas, 33; Maria v. The State, 28 Texas, 698; Ake v. The State, 30 Texas, 473; Lindsay v. The State, and Williams v. The State, decided at this term." Ogden, J., Hamby v. State, 36 Texas, 523

³ State v. Verrill, 54 Me. 408; State v. Pike, 49 N. H. 399; Green v. Com. 12 Allen, 155; Fitzgerald v. People, 37 N. Y. 413; Kennedy v. People, 39 N. Y. 245; Com. v. White, 6 Binney, 183; Com. v. Flannagan, 7 Watts & S. 415; McCue v. Com. 78 Penn. St. 185; Com. v. Miller, 1 Va. Cas. 310; Com. v. Gibson, 2 Va. Cas. 70; Com. v. Wicks, 2 Va. Cas. 387; Livingston's case, 14 Grat. 592; State v. Lessing, 16 Minn. 75; Hines v. State, 8 Humph. 597; Mitchell v. State, 5 Yerg. 340; Poole v. State, 2 Bax-

recognized in cases where murder is committed in the attempt to commit arson, rape, robbery, &c., in which cases the specific intent need not be alleged.¹ These rulings were first made in Pennsylvania, a State which was the earliest to legislate on this subject; and it needs but a glance at the statutes and their history to see that the interpretation then given to them by the courts is correct. The object of the statutes in Pennsylvania, and in the States that adopted the same legislation, was to provide that when a defendant's mind is not capable of a specific design to take life, then he is not to be capitally punished.² In subsequent Pennsylvania statutes, it was provided that when the defendant's mind is disturbed to the further extent of being actually insane, then the jury is to acquit of the felony, but find the insanity, upon which the defendant is to be imprisoned as a dangerous lunatic. Analogous statutes have been adopted throughout the United States. Now it is no more reasonable to require a "specific intention to take life" to be specially averred to meet the first class of statutes, than it is to require "sanity" to be specially averred to meet the second class of statutes.³ The legal scope of murder, as a generic term, is unchanged by either of the statutes. All that the statutes say is that when the jury find that the murder was committed in certain conditions of

ter, 238; *People v. Lloyd*, 9 Cal. 54; *People v. Bonilla*, 38 Cal. 699; *State v. Millain*, 3 Nev. 409; *State v. Thompson*, 12 Nev. 140; *Gehrke v. State*, 13 Tex. 568; *White v. State*, 16 Tex. 206; *Wall v. State*, 18 Tex. 682; *Henrie v. State*, 41 Tex. 573; *Evans v. State*, 6 Tex. Ap. 513; *McAdams v. State*, 25 Ark. 405; *Leschi v. Territory*, 1 Wash. Ter. 23. See *State v. Cleveland*, 58 Me. 564; *Hogan v. State*, 30 Wis. 437; *Davis v. State*, 39 Md. 355. In Missouri, however, it is held necessary to specify the murder to have been wilful and deliberate, and to state the circumstances making it such. *Bower v. State*, 5 Mo. 364; *State v. Jones*, 20 Mo. 58. As to California, see *People v. Wallace*, 9 Cal. 30; *People v. Lloyd*, *Ibid.*

54; *People v. Steventon*, *Ibid.* 273; *People v. Dolan*, *Ibid.* 576; *People v. Murray*, 10 Cal. 309; *People v. Choisier*, *Ibid.* 310; *People v. Urias*, 12 Cal. 325. As to Iowa, rejecting the views of the text, see *State v. McCormick*, 27 Iowa R. 402; *State v. Watkins*, *Ibid.* 415. In Indiana, murder in first degree must be averred to have been done "purposely." *Snyder v. State*, 59 Ind. 105.

¹ *Com. v. Flannagan*, 7 Watts & Serg. 415.

² See *supra*, § 376; and particularly 1 Whart. & St. Med. J. §§ 181, 214, 227.

³ This has been even held when the statute makes a "sound mind" a constituent of murder. *Fahnestock v. State*, 23 Ind. 231.

mind, then the punishment shall not be death, but imprisonment. We cannot reject this reasoning without holding that in all cases where a jury are, by statute or otherwise, authorized to find a diminished responsibility, the indictment must specially negative the facts implying such diminished responsibility. But this is absurd; and we must therefore fall back on the position established above, that an indictment for murder at common law is sufficient in case of murder in the first degree.

By the same reasoning, it has been held in Pennsylvania not necessary to aver "against the statute" in the conclusion, the offence being at common law and only the punishment statutory.¹

§ 394. Under an indictment for murder at common law, there may be, as has just been incidentally noticed, a conviction of either murder in the first or of murder in the second degree, as well as a conviction of manslaughter.² Hence, under such an indictment, if there be a conviction for manslaughter, or of murder in the second degree, the more correct course is to find "not guilty of murder, but guilty of manslaughter," or "of murder in the second degree."³ In

¹ *Com. v. White*, 6 Bin. 183. In Maine, under the Act of 1865, c. 339, it is necessary only to charge that the defendant "feloniously, wilfully, and of his malice aforethought," did kill the deceased. *State v. Verrill*, 54 Me. 408. As to New Hampshire, see *State v. Pike*, 49 N. H. 399 (*Smith, J.* 1869).

In summing up the adjudications on this point, we may say that in Massachusetts, New York, Virginia, Indiana, Wisconsin, Arkansas, Texas, Nevada, Minnesota, California, and Washington Territory, as well as in Pennsylvania, Maine, and New Hampshire, which have been specially cited above, an indictment for murder at common law will sustain a verdict of murder in the first degree.

In Iowa, it has been held by the Supreme Court error to put the defendant on trial for murder in the first degree, on an indictment charging

murder in the second degree, though the conviction was only for murder in the second degree. See *State v. McNally*, 32 Iowa, 581; *State v. McCormick*, 27 Iowa, 402. As to Missouri, see *State v. Phillips*, 24 Mo. 475.

In Kansas, the indictment to constitute murder in the first degree must charge that the assault and the killing were with the deliberate and premeditated intention of killing the deceased. *State v. Brown*, 21 Kans. 38.

In Connecticut, a statute was passed in 1870 declaring that in all indictments of murder the degree shall be charged. This, however, does not touch indictments found prior to its passage, in which it is not necessary to allege the degree. *State v. Smith*, 38 Conn. 397.

² See *Com. v. Herty*, 109 Mass. 348; *Keefe v. People*, 40 N. Y. 348; *Davis v. State*, 39 Md. 355.

³ See *infra*, § 541.

exclude the great mass of those cases of general riot, which were formerly included within the term. It has already been noticed that during the necessities of civil war in England, each government for the time in power, acting on the principle that self-preservation is the duty of all governments, followed its predecessors in pushing the law of treason to its extremest verge, both as regards principle and temper. But in more recent days, when the crown no longer feels it to be a contest for life between it and the state prisoner at the bar, the old policy has been relaxed, and "levying war," in the definition of treason, is shorn of the constructive element, and restricted, as the term suggests, to the actual making of war against the State. The same amelioration of judicial construction has taken place, also, in our own country. In the earlier treason cases in Pennsylvania, those of Roberts and Carlisle, which were tried in revolutionary times, the early English precedents were cited with approbation and applied with rigor. In Fries's trial, which took place during the administration of John Adams, when the government was scarcely settled, the same general views were expressed which obtained in England during the civil wars, and a local opposition to the execution of the window tax was construed to be a "levying war" against the government of the United States. But in Hanway's case, the Circuit Court of the United States, sitting in Philadelphia in 1851, after noticing the fact that the better opinion in England now is that the term "levying war" should be confined to insurrections and rebellions for the purpose of "overturning the government by force and arms," went on to say that a combination on the part of certain citizens, in a particular neighborhood, to aid fugitive slaves in resisting their capture, even though such resistance results in murder and robbery, is not treason.¹

§ 396. Individuals who, though not specifically parties to the killing, are present and consenting to the assemblage by whom it is perpetrated, are principals when killing is in pursuance of common design. "When divers persons," says Hawkins, "resolve generally to resist all opposers in the commission of a breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays,

¹ U. S. v. Hanway, 2 Wall. Jr. 139.

and in so doing happen to kill a man, they are all guilty of murder, for they must at their peril abide the event of their actions who unlawfully engage in such bold disturbances of the public peace, in opposition to, and defiance of, the justice of the nation."¹

§ 397. It should be observed, however, that while the parties are responsible for collateral acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals. Thus ^{But not in collateral crimes.} if one of the party, on his own hook, turn aside to commit a felony foreign to the original design, his companions do not participate in his guilt.² It must be remembered that to make out the *corpus delicti* in such cases it is essential to show that the party charged struck, either actually or constructively, the fatal blow, and consented to the common design. Thus it has been correctly held in England that when two or more, one of whom has received a provocation (as a blow) which would reduce homicide to manslaughter, are all charged with murder, and it cannot be proved which of them inflicted the fatal blow, neither of them can be convicted of murder, without a proof of a common design to inflict the homicidal act; nor of manslaughter, without proof of a common design to inflict unlawful violence.³

§ 398. Where a sudden popular movement is got up for the purpose of redressing some supposed grievance, the ^{Presence without intent to kill involves manslaughter.} temper of those concerned is aroused by the outrage they believe themselves to have suffered, and in this view a homicide committed by one of the parties so affected would be but manslaughter. We must, however, remember that the common law treats at least as manslaughter all killing when in performance of an unlawful act, and the "unlawful act" in this case is the riotous assemblage, of which all

¹ 1 Hawk. P. C. c. 31, s. 51; Staundf. 17; 1 Hale, 439 *et seq.*; 4 Black. Com. 200; 1 East P. C. c. 55, s. 33, p. 257; R. v. Archer, 1 F. & F. 351; U. S. v. Ross, 1 Gallis. 624; Ruloff v. People, 45 N. Y. 213; Huling v. State, 17 Oh. St. 583; Washington v. State, 36 Ga. 222; Brennan v. People, 15 Ill. 511; State v. Simmons, 6 Jones (Law) N. C. 21.

² Supra, §§ 214-220; R. v. Skeet, 4 F. & F. 931; R. v. Hawk, 3 C. & P. 394; R. v. Collison, 4 C. & P. 565; R. v. Warner, 5 C. & P. 525; R. v. Price, 8 Cox C. C. 96; R. v. Manning, 2 C. & K. 837; U. S. v. Gibert, 2 Sumn. 19.

³ R. v. Turner, 4 F. & F. 339.

present, passive or active, are component parts.¹ It should be added that a rioter is not responsible for an accidental homicide caused by an officer engaged in suppressing the riot;² nor for a death caused by a stranger independently interfering for his own ends.³

§ 399. When the object is to inflict capital punishment by what is called lynch-law, all who consent to the design are responsible for the overt act.⁴ It is not necessary to say that under our laws this is murder in the first degree when not executed in hot blood. Of all species of homicide it is among those that most strikingly combine the two distinctive features of that type, — namely, deliberation and a specific intent to take life.

§ 399 a. Even though the original assailants in a riotous homicide are guilty of murder, a person who in hot blood rushes in to aid them is responsible only for manslaughter for a killing which takes place after he joins them.⁵ Whether a particular party in such a homicide is guilty of murder, supposing hot blood to have been proved, depends upon whether there has been cooling time.⁶ A person who is secure from further personal aggression has no right to return armed to the scene of conflict, and voluntarily engage in a new conflict with the aggressor. If he do, and slay his assailant, the offence will be murder or manslaughter, according to the particular circumstances.⁷ Where the whole proceeding is infected with a continuous public excitement, and where the return to the conflict is so immediate and so associated in sentiment as to form part of the same transaction with the original assault, the law applies the

¹ See supra, §§ 213 *et seq.*; *R. v. Murphy*, 6 C. & P. 103; *R. v. Collinson*, 4 C. & P. 565; *R. v. Jackson*, 7 Cox C. C. 357; *R. v. Skeet*, 4 F. & F. 931; *Patten v. People*, 18 Mich. 314; *People v. Knapp*, 26 Mich. 112; *Sloan v. State*, 9 Ind. 565; *Brennan v. People*, 15 Ill. 511; *State v. Jenkins*, 14 Rich. S. C. 213.

² *Com. v. Campbell*, 7 Allen, 541.

³ *R. v. Murphy*, 6 C. & P. 103. See supra, §§ 214, 220.

⁴ *State v. Wilson*, 38 Conn. 126. *Infra*, §§ 461, 487.

⁵ *Supra*, §§ 115, 397. *Thompson v. State*, 25 Ala. 41; *Frank v. State*, 27 Ala. 38.

⁶ See *infra*, §§ 455 *et seq.*, where this point is discussed in its general relations.

⁷ *Infra*, §§ 478-482; and see supra, § 114.

the judgment be to be hanged, and the officer behead the party, this is said to be murder;¹ and if there be no jurisdiction in the court by whom the warrant is issued, the offence is murder, even though the officers charged honestly believed in the validity of the warrant, though it is otherwise when the warrant is irregular from some merely formal defect.²

§ 402. As a general principle, officers of the law, when their authority to arrest or imprison is resisted, will be justified in opposing force to force even if death should be the consequence;³ yet they ought not to come to extremities upon every slight interruption, without a reasonable necessity.⁴ If they should kill where no resistance is made, it will be murder; and the same rule will exist if they should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled.⁵

52, 211; 4 Bl. Com. 179. See supra, §§ 94, 307; infra, § 508.

¹ 1 Hale, 433, 454, 466, 501; 2 Hale, 411; 3 Inst. 52; 4 Black. Com. 179.

² Sir J. Stephen (Dig. C. L. art. 197) gives the following illustrations of the rule in the text:—

“(1.) A. sits under a commission of jail delivery. The officer forgets to adjourn the court at the end of the first day’s sitting. This determines the commission. On the following day A. sits again, sentences a felon to death, who is duly executed by B. Neither A. nor B. is guilty of murder or manslaughter, though the proceedings are irregular. Per Lord Hale, 1 Hale, P. C. 499.

“(2.) A., a lieutenant or other having commission of martial authority in time of peace, causes B. to be hanged by C., by color of martial law. This is murder in both A. and C. Coke, 3d Inst. 52; 1 Hale P. C. 499, 500. The whole subject of martial law underwent full discussion in connection with the execution of Mr.

Gordon by a court martial in Jamaica in 1865. An elaborate history of the case has been published by Mr. Finlason, and the charge to the grand jury, delivered at the Central Criminal Court by the Lord Chief Justice of England, has been published in a separate form. I know not whether the charge to the grand jury of Middlesex, delivered by Lord (then Mr. Justice) Blackburn, has been published or not. Much information on the subject will be found in Forsyth’s Cases and Opinions on Constitutional Law, pp. 484–563. Mr. Forsyth prints, *inter alia*, an opinion given by the late Mr. Edward James, Q. C., and myself, in 1866; see pp. 551–563; and see Phillips v. Eyre, L. R. 6 Q. B. 11.”

³ Compare Inf. § 411; R. v. Dudson, 2 Den. C. C. 35; U. S. v. Rice, 1 Hughes, 560; Wolff v. State, 18 Ohio St. 298; State v. Garrett, Winston N. C. 144; State v. Anderson, 1 Hill S. C. 327; Clements v. State, 50 Ala. 117.

⁴ 1 East P. C. 297.

⁵ 1 Hale, 481; Fost. 291.

The cases under this head may classed as follows : —

1. Civil.
2. Criminal.

1. *Civil*

§ 403. In civil suits, if the party against whom the process has issued fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer, not being able to overtake him, make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it has been said that it will amount to murder.¹ But this is an extreme case, for the same authorities inform us that if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence;² and if there be resistance, and an affray ensue, during which the party sought to be arrested is slain, the offence will be but manslaughter.³

Officer intentionally killing a person flying from civil arrest chargeable with murder.

If a party liable to a civil arrest put in jeopardy the lives of those seeking lawfully to arrest him, his homicide will be excusable.⁴

2. *Criminal.*

§ 404. Unless it be in cases of riots, it is not lawful for an officer to kill a party accused of misdemeanor if he fly from the arrest, though he cannot otherwise be overtaken. Under such circumstances (the deceased only being charged with a misdemeanor) killing him intentionally is murder; but the offence will amount only to manslaughter if it appear that death was not intended.⁵

And so in pursuit of criminal charged with misdemeanor.

Where resistance is made, yet if the officer kill the party after the resistance is over, and the necessity has ceased, the crime will at least be manslaughter.⁶

¹ 1 Hale, 481; Fost. 291. *Infra*, § 416.

² R. v. Tranter, 1 Stra. 499.

³ Fost. 293, 294.

⁴ State v. Anderson, 1 Hill S. C. 327.

⁵ 1 East P. C. 302; R. v. Smith, 4 Black. Com. 201, note. See State v. Oliver, 2 Houst. (Del.) 585. *Infra*, § 429.

⁶ 1 East P. C. 525. See Clements v. State, 50 Ala. 117.

§ 405. An honest and non-negligent belief that a felony is about to be perpetrated will extenuate, so it has been declared, a homicide committed in prevention of it, though the person interposing be but a private citizen,¹ but not a homicide committed in pursuit, unless special authority be given, or the pursuit be conducted according to law.² So far as concerns officers, where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit if he cannot otherwise be overtaken. But the slayer in such cases, especially if he be a mere pursuer, must not only show that a felony was actually committed, but that he avowed his object, and that the felon refused to submit, and that the killing was necessary to make the arrest.³ Such is the old law; but in States where the distinction between felonies and misdemeanors is done away with, the cases resting on this distinction are no longer authoritative. The reasonable rule is that where a man flies from arrest, the charge being a mere trespass or an offence equivalent to a trespass, to kill him in prevention of an escape is at least manslaughter. It is otherwise supposing the arrest be duly authorized and notice duly given, where the offence is of high grade, assailing life or public safety.

§ 406. When a felony, or offence of high grade in States where the distinction as to felonies is abolished, has been committed and the offender is in duress, the officer is bound to make every exertion to prevent an escape; and if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable.⁴ This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it;

¹ *Infra*, §§ 426-429, 440, 488, 497, 537; *Pond v. People*, 8 Mich. 150; *Oliver v. State*, 17 Ala. 487; *Dill v. State*, 25 Ala. 15; 1 East P. C. 259. See *Whart. Cr. Pl. & Prac.* § 8.

² *State v. Rutherford*, 1 Hawks, 457; *Selfridge's Trial*, 160; *R. v. Haworth*, 1 Mood. C. C. 207; *R. v. Williams*, *Ibid.* 387; *R. v. Longden*, R. & R. 228.

³ *R. v. Hagan*, 8 C. & P. 167; *U. S.*

v. Travers, 2 Wheel. C. C. 510; *State v. Roane*, 2 Dev. 58; *Whart. Crim. Pl. & Prac.* §§ 8, 9, 13.

⁴ *Fost.* 321. See *R. v. Huggins*, 2 Stra. 882; 2 *Ld. Ray.* 1574; *R. v. Treeve*, 2 East P. C. 821; *R. v. Barrett*, 2 C. & K. 343; *R. v. Porter*, L. & C. 394; 9 *Cox C. C.* 449; *R. v. Pelham*, 8 Q. B. 959. See *Wharton Cr. Plead. & Prac.* §§ 1-17.

ing it, in the prosecution of his purpose causes the death of another person, guilty of murder.¹ And as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter. In all cases, the officer should proceed with due caution; and although it is not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor unless upon a reasonable necessity, in order to execute his duty.²

§ 409. An officer who makes an arrest out of his proper district, or without any warrant or authority, and purposely kills the party for not submitting to such illegal arrest, will, generally speaking, be guilty of murder in all cases where an indifferent person, acting in the like manner, without any such pretence, would be guilty to that extent.³ The offence is manslaughter if the arrest is without malice.⁴

§ 410. As has already been observed, in the case of private persons using their endeavors to bring felons to justice, caution must be used to ascertain that a felony has actually been committed, and that it has been committed by the party arrested or pursued upon suspicion; since, if the suspicion be not supported by the fact, the person endeavoring to arrest or imprison, and killing the party in the prosecution of such purpose, will be guilty of manslaughter.⁵

§ 411. The distinctions just announced apply to military and naval officers killing without authority. Unless there be such authority, killing by a military or naval officer is at least manslaughter.⁶ And a subaltern cannot defend himself, if he act maliciously, by his superior's commands.⁷

¹ See supra, § 139.

² 1 East P. C. 297; 1 Hale, 481, 488, 494; 2 Hale, 84; Caffé's case, 1 Vent. 216; State v. Roberts, 52 N. H. 492; State v. Hull, 34 Conn. 132. Supra, § 139.

³ 1 East P. C. 312. Infra, § 432; Whart. Crim. Plead. & Pract. §§ 1-17.

⁴ R. v. Carey, 14 Cox C. C. 214.

⁵ Fost. 818. Infra, §§ 431, 497.

⁶ Infra, § 431; Clode's Military Law, 167. See R. v. Vaughan, 9 B.

& S. 329; Roscoe's Cr. Ev. 7th ed. 767; Warder v. Bailey, 4 Taunt. 77; R. v. Thomas, 1 Russ. on Cr. 614. See, as to the killing of Midshipman Spencer for mutiny, Letters by Mr. Sumner in the second volume of Sumner's Life.

⁷ Ibid. See U. S. v. Jones, 3 Wash. C. C. 209; Com. v. Blodgett, 12 Met. 57. Compare cases cited supra, §§ 401 et seq.

§ 412. Although an officer must not kill for an escape where the party is in custody for a misdemeanor, yet if the party assault the officer with such violence that he has reasonable ground for believing his life to be in peril, he may justify killing the party.¹ The case is then one of homicide in self-defence.

Officer when in danger of life may kill person charged with misdemeanor attempting to escape.

IX. HOMICIDE OF OFFICERS OF JUSTICE AND OTHERS AIDING THEM. 72

§ 413. When a party who having authority to arrest or imprison uses the proper means on a proper occasion for such a purpose, and in so doing is assaulted and killed, it will be murder in all concerned if the intent be to kill or inflict grievous bodily hurt.² And it has been decided that if in any quarrel, sudden or premeditated, a justice of the peace, constable, or watchman, or even a private person be slain in endeavoring to keep the peace and suppress the affray, he who kills him will be guilty of murder.³ But in such case the person slain must have given notice of the purpose for which he came, by officially commanding the parties to keep the peace, or by otherwise showing that it was not his intention to take part in the quarrel, but to appease it;⁴ unless, indeed, he were an officer within his proper district, and known, or generally acknowledged, to bear the office he had assumed.⁵ Thus if A., B., and C. be in a tumult together, and D., the constable, come to appease the affray, and A., knowing him to be the constable, kill him, and B. and C., not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C.⁶

Intentional killing of arresting officer is murder.

§ 414. If an innocent person be indicted for a felony, and an attempt be made to arrest him for it, without warrant, and he resist and kill the party attempting to arrest him; if the party attempting the arrest were a constable, it is said in England that the killing is murder;⁷ if a

But manslaughter when arrest is illegal.

¹ State v. Anderson, 1 Hill S. C. 327. *Infra*, § 454; and see Forster's case, 1 Lew. 187; cited Whart. on Hom. § 220.

² Whart. on Hom. § 225; *Fost.* 270-271; 1 Hale, 494; 2 Hale, 117-8; U. S. v. Travers, 2 Wheeler's C. C. 495; State v. Green, 66 Mo. 631; Angell v. State, 36 Tex. 542. See Com. v. Drew, 4 Mass. 391.

³ 1 Hawk. P. C. c. 31, ss. 48, 54.

⁴ *Fost.* 272. *Infra*, § 418.

⁵ 1 Hawk. P. C. c. 31, ss. 49, 50.

⁶ 1 Hale, 438. See 1 Hale, 446; 1 Russ. on Cr. 535. *Supra*, §§ 219, 236.

⁷ 1 Hawk. c. 28, s. 12; 2 Hale, 84,

private person, manslaughter; ¹ the reason given being that the constable has authority, by law, to arrest in such case, but a private person has not.² The same rule is applied in all the cases where a person is arrested, or attempted to be arrested, upon a reasonable suspicion of felony.³ But if an arrest, under color of legal authority, be illegally attempted, the better opinion now is that the killing of the person arresting, not in malice, but in resisting the arrest, is but manslaughter.⁴ And where A. unlawfully attempts to arrest B., B. is justified in resisting; and if A. so presses B. as to make it necessary for him to choose between submission and killing A., then the killing A. is not even manslaughter.⁵ So if A.'s assault on B. has mixed in it a felonious intent, then B., if necessary to avert the danger, may take A.'s life.⁶ In other cases, where the intent of B. was not to kill or inflict serious bodily harm, then the offence is but manslaughter, though the arrest was legal,⁷ while under a statute such case may be murder.⁸ And a malicious and deliberate killing of an officer is murder, to which it is no defence that the officer was at the time endeavoring to arrest, on defective or void procedure, the defendant or his friends.⁹

87, 91; and see *R. v. Ford*, R. & R. 329; *Drennan v. People*, 10 Mich. 169.

¹ See 2 Hale, 83, 92.

² See, as to arrest, Whart. Crim. Plead. & Prac. §§ 1-17.

³ See *Samuel v. Payne*, 1 Doug. 359.

⁴ *Tooley's case*, 2 Ld. Raym. 1296; *R. v. Phelps*, 1 C. & M. 180; S. C., 2 Mood. C. C. 240; *R. v. Patience*, 7 C. & P. 775; *R. v. Thompson*, 1 Moody C. C. 80; *Com. v. Carey*, 12 Cush. 246; *Com. v. Drew*, 4 Mass. 391; *Tackett v. State*, 4 Yerg. 392; *Galvin v. State*, 6 Cold. 291; *Noles v. State*, 26 Ala. 31; *Roberts v. State*, 14 Mo. 146; *State v. Oliver*, 2 Houst. 585; *Rafferty v. People*, 69 Ill. 111; S. C., 72 Ill. 37; *State v. Belk*, 76 N. C. 10. See *Tiner v. State*, 44 Tex. 128.

⁵ *Infra*, §§ 646-8; *State v. Oliver*, 2 Houston, 585; *State v. Tiner*, 44

Tex. 128; *State v. Anderson*, 1 Hill S. C. 327. See Whart. Crim. Plead. & Prac. §§ 5 *et seq.*

⁶ *Supra*, § 412.

⁷ *R. v. Porter*, 12 Cox C. C. 444; 1 Green's C. R. 155.

⁸ *State v. Green*, 66 Mo. 631.

⁹ *Rafferty v. People*, 72 Ill. 73.

We have an elaborate discussion of the topic in the text in the argument of counsel and the opinion of Blackburn and Mellor, JJ., in *R. v. Allen*, reported in the appendix to Steph. Dig. C. L. From the opinion of Blackburn, J., which is concurred in by Mellor, J., and as to which he consulted the other judges, we take the following:—

“When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection around him, and, consequently, if he is killed in the ex-

§ 415. As has already been incidentally noticed, constables, policemen, and other peace officers, as stated by Sir W. Russell, while in the execution of their offices, are under the peculiar protection of the law, — a protection founded in wisdom and equity, and in every principle of political policy; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of public justice.¹ This rule is not confined to the instant the officer is upon the spot and at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *eundo, morando, et redeundo*.² If known to be a peace officer, about to repair to a scene of public disorder in the exercise of his duties, it is murder to kill him in order to prevent him from discharging his duties; and it is also murder to kill him after he leaves the spot in retreat or otherwise.³

Constable and policeman have authority to arrest when public order is threatened.

A policeman or other officer appointed by the municipal authority for the preservation of order and the prevention of crime is entitled to the same protection which we have just stated to belong to a constable.³

§ 416. As a general rule, in civil cases, though an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity in cases of reason-

able, in the execution of his duty, it is, in general, murder, even though there be such circumstances of hot blood and want of premeditation as would, in an ordinary case, reduce the crime to manslaughter. But where the warrant, under which the officer is acting, is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and, consequently, the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable

provocation." If, however, the crime was committed intentionally, during deliberate attempt to rescue, the irregularity of the warrant does not constitute any defence.

¹ Russ. or Cr. 535 *et seq.*; R. v. Gardner, 1 Mood. C. C. 390. On the general question may be consulted *People v. Pool*, 27 Cal. 572.

² R. v. Thompson, 1 Mood. C. C. 78. *Supra*, § 407; *infra*, § 430.

³ R. v. Hems, 7 C. & P. 312 — Williams, J.; R. v. Hagan, 8 C. & P. 167 — Bolland, B., and Coltman, J. See R. v. Porter, 12 Cox C. C. 444.

able necessity; yet, if the party against whom the process has issued fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody, in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means.¹

Bailliff's powers limited to arrest.

§ 417. As is stated by Sir William Russell,² the party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant; and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law; and therefore if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter.³

Officer executing process must be within jurisdiction.

§ 418. Where a party is apprehended in the commission of a felony, or on fresh pursuit, notice of the crime is not necessary, because he must know the reason why he is apprehended.⁴ So far as concerns riots and affrays, it is ordinarily considered enough for an officer of justice who is present at a riot or affray within his district, in order to keep the peace, to produce his staff of office, or any other known ensign of authority, in the daytime, when it can be seen; and if resistance be made after this notification, and he or any of his assistants be killed, this has been held to be murder in every one who joined in such resistance.⁵

Notice may be inferred from facts.

§ 419. If the defendant, being placed in a position in which his life is imperilled, slay an officer of whose official character

¹ 1 Hale, 481; Fost. 279; State v. Moore, 39 Conn. 244. Supra, § 402.

² 1 Russ. on Cr. 532-592; 1 Hale, 457-9; 1 East P. C. c. 5, s. 80, pp. 312, 314.

³ 1 Russ. on Cr. 4th ed. 614; R. v. Chapman, 12 Cox C. C. 4; R. v. Lockley, 4 F. & F. 155; R. v. Mead, 2 Stark. 205; Rafferty v. People, 69 Ill. 111. See Whart. Plead. & Prac. §§ 5 et seq.; infra, § 648.

⁴ Whart. Crim. Plead. & Prac. § 8;

R. v. Payne, 1 M. C. C. R. 378. See R. v. Fraser, R. & M. C. C. R. 419; R. v. Davis, 7 C. & P. 785—Parke, B.; R. v. Taylor, 7 C. & P. 266—Vaughan, J.; R. v. Howarth, 1 M. C. C. R. 207; 1 Russ. on Cr. 603; R. v. Woolmer, 1 M. C. C. R. 334; 1 Russ. on Cr. 598; Wolf v. State, 19 Ohio St. 248.

⁵ Fost. 311; 1 Hale, 315, 583. Infra, § 1555; Whart. Crim. Plead. & Prac. § 16.

It has also been held that a warrant omitting to state an offence is illegal.¹

§ 423. As has already been noticed, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer, for every man is bound to submit himself to the regular course of justice;² and therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it.³

Falsity of charge no alleviation.

§ 424. At common law, if a warrant commanding the arrest of an individual in the name of the State have no seal, it is void. If an officer attempt to arrest the party named upon such authority, he proceeds at his peril, and is a wrong-doer; and if he be killed in the attempt by the party, the slayer is guilty of manslaughter and not murder.⁴

Warrant without seal void.

§ 425. Where, however, a warrant is merely informal, but not illegal, its informality will be no palliation for the killing of the officer intrusted with its execution.⁵

Informality not amounting to illegality.

§ 426. It is not necessary that a warrant be shown to the party to be arrested, provided its substance be mentioned.⁶ Indeed, as is elsewhere stated,⁷ if reading the warrant to the defendant is a prerequisite to an arrest,

Warrant need not be shown.

defendant's name as John Doe or Richard Roe, whose other name is to complainant unknown, is held void. See Whart. Crim. Plead. & Prac. § 5. R. v. Hood, 1 Mood. C. C. 281.

¹ Money v. Leach, 1 W. Bl. 555; Nisbett, ex parte, 8 Jurist, 1071; Caudle v. Seymour, 1 Q. B. 889.

² 1 East P. C. c. 5, s. 8, p. 310.

³ Curtis's case, Fost. 135; and see Fost. 312.

⁴ Stockley's case, 1 East P. C. c. 5, s. 58. See Housin v. Barrow, 6 T. R. 122, and cases there cited; Stevenson's case, 19 St. Tr. 846; R. v. Harris, 1 Russ. on Cr. 621.

R. v. Ford, R. & R. 329; R. v.

Allen, 17 L. T. N. S. 222. And see Sandford v. Nichols, 13 Mass. 210; Com. v. Martin, 98 Mass. 4; Boyd v. State, 17 Ga. 194. Under English statute, see R. v. Roberts, 4 Cox C. C. 145. Omission to state in assault that an assault had been committed is fatal. Caudle v. Seymour, 1 Q. B. 889. See, as to other informalities, Jones v. Johnson, 5 Exch. 862; S. C., 7 Exch. 452; R. v. Downey, 7 Q. B. 281; State v. Oliver, 2 Houst. 585.

⁶ 2 Hawk. P. C. c. 13, s. 28; though see State v. Garrett, 1 Wins. N. C. 144; Gen. Stat. Mass. c. 158, § 1.

⁷ Whart. Crim. Plead. & Prac. § 7.

threatened, and there is a probability of its execution, then the officer may arrest without warrant.¹

§ 430. Where there is a reasonable suspicion that a felony has been committed, and a charge has been made against a particular defendant connecting him with it, killing in cool blood the officer who arrests the defendant will be murder, though he has no warrant, and though the charge does not in terms express all the particulars necessary to constitute the felony.²

Whatever would amount to probable cause in an action for malicious prosecution is reasonable suspicion to justify an arrest.³

§ 431. Military and naval officers, when acting without authority, are to be treated as private citizens, and are responsible as such.⁴ Hence, where an officer of a British ship of war, in the year 1769, attempted without a special warrant to impress several seamen in a Massachusetts merchant vessel, and was killed in the attempt, it was held but manslaughter, the deceased acting without authority.⁵

§ 432. As has already been generally observed, every one coming to the aid of the officers of justice, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself.⁶ One aiding a policeman in conveying a person suspected of felony to the station-house is entitled to the same protection *eundo, morando, et redeundo* as the policeman. The deceased having been required

Plead. & Prac. §§ 1-10; Galliard v. Laxton, 2 B. & S. 363; R. v. Walker, Dears. C. C. 358. Roscoe's Cr. Ev. (ed. of 1874) declares this the "better opinion." See to same effect R. v. Marsden, L. R. 1 C. C. R. 131; R. v. Chapman, 12 Cox C. C. 4; State v. Oliver, 2 Houst. 585; Tiner v. State, 44 Tex. 128.

¹ R. v. Light, D. & B. C. C. 332; Baynes v. Brewster, 11 L. J. M. C. 5.

² Supra, § 427; R. v. Ford, R. & R. 329; R. v. Thompson, 1 Mood. C. C. 80.

³ Supra, § 411. See Whart. Crim. Plead. & Prac. §§ 1-10; R. v. Dadson, T. & M. 389; 2 Den. C. C. 35.

⁴ Supra, § 411.

⁵ Case of the crew of the Pitt Packet, 4 Boston Law Reporter, 369.

⁶ 1 Hale, 462, 463; Post. 309; Brooks v. Com. 61 Pa. St. 352; Galvin v. State, 6 Cold. (Tenn.) 233. In such case the private persons so assisting are under the officer's commands. R. v. Patience, 7 C. & P. 775; People v. Moore, 2 Douglass (Mich.) 1. And the officer may have special private assistants. Coyles v. Hurten, 10 Johns. 85. See State v. Alford, 80 N. C. 445; Whart. Crim. Plead. & Prac. §§ 8, 10 *et seq.*

by a policeman to aid him in taking a man, whom he had apprehended on suspicion of stealing potatoes, to the station-house, did so for some time, and then was going away, when he was attacked and beaten to death, and it was objected that he was not at the time aiding the policeman; Coltman, J., said, "He is entitled to protection *eundo, morando, et redeundo*." 1

§ 433. The same sanction is, with certain restrictions herein-after stated, extended to the cases of private persons interposing to prevent mischief from an affray, or using their endeavors to apprehend felons, or those who have given a dangerous wound, and to bring them to justice; such persons being likewise in the discharge of a duty required of them by the law. The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice.² And it is murder for the defendant to kill one whom he knows to be pursuing him for a felony of which he is the perpetrator.³

So as to private persons lawfully arresting independently of officer.

§ 434. But while it is clear that a private person is not only justified but obliged to do his best to bring felons to justice, as well as to prevent felony,⁴ a party interfering on this principle should be clear, first, that a felony has actually been committed, or that an actual attempt to commit a felony is being made by the party arrested.⁵ In the former case it must appear that the fel-

Pursuer must show that felony was committed and that the person flying was guilty.

¹ R. v. Phelps, 1 C. & M. 480; R. v. Porter, 12 Cox C. C. 444; State v. Oliver, 2 Houst. 585.
² Post. 309; Jackson's case, 1 East P. C. 298; Brooks v. Com. 61 Penn. St. 352. See, however, supra, §§ 410, 432; infra, § 497.
³ Ibid.; Holly v. Mix, 3 Wend. 350; Reuck v. McGregor, 3 Vroom (N. J.), 70; Com. v. Deacon, 8 S. & R. 48; State v. Roane, 2 Dev. 58. See Galvin v. State, 6 Cold (Tenn.) 283.
⁴ Ex parte Kraus, 1 B. & C. 261; 1 Russ. on Cr. 535. See more fully

Com. v. Daily, Com. v. Hare, Appendix Whart. Hom.; Dill v. State, 25 Ala. 15. Infra, §§ 1542-1555.
⁵ 2 Inst. 52, 172; Post. 318; Samuel v. Payne, Dougl. 359; and in Cox v. Winan, Cro. Jac. 150, it was holden that, without a fact, suspicion is no cause of arrest; and 8 Ed. 4, 3; 5 Hen. 7, 5; 7 Hen. 4, 35, are cited. To same effect see Burns v. Erben, 40 N. Y. 463; Hawley v. Butler, 54 Barb. 490. See supra, § 410; infra, § 497; Whart. Crim. Plead. & Prac. § 13.

ony was committed by the person intended to be pursued or arrested ; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavoring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter if he should kill ; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter : the one not having used due diligence to be apprised of the truth of the fact ; the other not having submitted and rendered himself to justice.¹

Private person may interfere to prevent crime. § 435. Where a felony is in the process of commission, a private person is authorized to interfere and arrest without a warrant.²

Indictment found, good cause of arrest by private persons. § 436. An indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon ; but it is said that if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out ; otherwise they will be guilty of manslaughter.³

Railway officers may arrest passengers guilty of misconduct. § 437. A railway officer has a right to put out of the cars, in a careful way, so as not unnecessarily to hurt, a person who is disorderly in the cars, or who refuses to obey the rules of the company.⁴ But if the railway officer exact conditions which are unjust or illegal, then he is liable for any injury he or his assistants may inflict. And so if his mode of arrest or detention be unnecessarily severe.⁵ The same principles govern the rights of the assailed party in resisting the assault.

Arrest for breach of peace illegal without *corpus delicti*. § 438. To sustain an arrest for a breach of the peace an actual breach of the peace at the time of the arrest must be proved.⁶

¹ 1 Hale, 490; Post. 318. See State v. Rutherford, 1 Hawks, 457.

² Infra, § 495; R. v. Hunt, Ry. & M. 93; R. v. Price, 8 C. & P. 282.

⁴ Infra, § 623. See Wharton on Negligence, § 646, and cases there cited.

³ Dalt. c. 170, s. 5; 1 East P. C. c. 5, s. 68, p. 301.

⁵ "There is this distinction between a private individual and a constable:

⁶ R. v. Mann, 6 Cox C. C. 461.
⁶ R. v. Bright, 4 C. & P. 387.

as to civil suits, the defendant in his own house is privileged from arrest.

Private persons interfering to quell riots should give notice of their purpose.

§ 440. Private persons interfering in riots, for the furtherance of public justice, should expressly avow their intention, or their killing will be but manslaughter.¹ If there be a malicious intention to kill, however, the case is murder.²

Must be reasonable grounds to justify arrest of vagrants.

§ 441. To justify the arrest of street-walkers and vagrants, there must be reasonable ground of suspicion. The present and more humane opinion in this respect is, that the taking up of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer.³

v. Fidler, 2 S. & R. 263; State v. Oliver, 2 Houst. 585.

Specifications of notice, however, may be waived by the house-owner not asking for them. *Com. v. Reynolds*, 120 Mass. 190.

Where a party arrested escapes into his own house, the officer may, without notice, break the outer door, if the pursuit be immediate, and the defendant's conduct such as to imply a waiver of notice. *Allen v. Martin*, 10 Wend. 300; *Com. v. McGahey*, 11 Gray, 194.

Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced after the notification, demand, and refusal, which have been mentioned. *Fost.* 320; 1 *Hale*, 459. And see 2 *Hawk. P. C. c. 14*, s. 7, where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person. And see *De Gondouin v. Lewis*, 10 A. & E. 120.

¹ *Fost.* 310, 311; *U. S. v. Travers*, 2 *Wheeler's C. C.* 510; 1 *East P. C. c. 5*, s. 58, p. 510. See *supra*, §§ 418, *et seq.*; *infra*, § 494.

² *State v. Ferguson*, 2 *Hill S. C. R.* 619. See *R. v. Bourne*, 5 *C. & P.* 120.

³ *Tooley's case*, 2 *Lord Raym.* 1296. It is said that watchmen and beaules have authority, at common law, to arrest and detain in prison, for examination, persons walking in the streets at night, whom there is ground to suspect of felony, although there is no proof of felony having been committed. *Lawrence v. Hedger*, 3 *Taunt.* 14. And it has been said by *Hawkins* and others that every private person may, by the common law, arrest any suspicious night-walker, and detain him till he give a good account of himself; 2 *Hawk. P. C. c. 13*, s. 6; *c. 12*, s. 20; and it has been held that a person may be indicted for being a common night-walker, as for a misdemeanor. 2 *Hawk. P. C. c. 12*, s. 20; *Poph.* 208; *State v. Maxey*, 1 *McMull.* 503. But this prerogative is liable to great abuse, and should be kept within strict bounds. See article in 20 *Alb.*

in the same position as B. to those who knew the officer was acting in an official capacity.¹

Persons interfering to release prisoners cannot take advantage of the informality of the warrant.²

X. INFANTICIDE.

§ 445. To kill a child in its mother's womb is no murder; but if the child be born alive, and die after birth through the potion or bruises received in the womb, it is murder in the person who administered or gave them.³ Where, also, a blow is maliciously given to a child while in the act of being born, as, for instance, upon the head as soon as the head appears, and before the child has breathed, it will be murder if the child is afterwards born alive, and dies thereof.⁴ If the child has been killed by the mother wilfully and of malice aforethought while it is alive, and has an independent circulation of its own, this is murder, although the child be still attached to its mother by the umbilical cord,⁵ supposing it does not derive its power of existence from its connection with its mother.⁶ But it must be proved that the child has actually been born into the world in a living state; and the fact of its having breathed, as will be in a moment seen, is not a conclusive proof thereof.⁷ It has also been held that if a person intend-

When death occurs before child has independent circulation, offence not homicide; otherwise, when the child is born alive and dies after birth from injuries prior to birth.

¹ State v. Zeibart, 40 Iowa, 169.

² R. v. Allen, 17 L. T. N. S. 222. See infra, §§ 1672 *et seq.*

³ 3 Inst. 50; R. v. Poulton, 5 C. & P. 329; R. v. Wright, 9 C. & P. 754; Evans v. People, 49 N. Y. 86.

⁴ R. v. Senior, 1 Mood. C. C. 346; 3 Inst. 50; 1 Hawk. P. C. c. 31, s. 16; 4 Bl. Com. 198; supra, § 331; 1 East P. C. c. 5, s. 14, p. 228; *contra*, 1 Hale, 432; and Staundf. 21. But the reasons on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established.

⁵ R. v. Trilloe, 1 Car. & Mars. 650; Evans v. People, 49 N. Y. 86; Com. v. Donahue, 8 Phila. R. 623. See infra, § 446.

⁶ R. v. Handley, 13 Cox C. C. 79.

⁷ R. v. Sellis, 1 Mood. C. C. 850; S. C., 7 C. & P. 850. *Infra*, § 446. It is ruled, however, if a child be actually wholly produced alive, it is not necessary that it should have breathed to make it the subject of murder. Upon an indictment for the murder of a child, where it appeared that the dead body of the child was found in a river, and it was proved by two surgeons that it had never breathed, Park, J. A. J., said: "A child must be actually wholly in the

ing to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder if the misconduct was meant to kill; and the mere existence of a possibility that something might have been done to prevent the death would not render it the less murder.¹ If the misconduct was merely reckless, without an intent to kill, the offence is manslaughter.²

§ 446. Whether the child was born alive is a question of fact to be determined by all the circumstances of the case. Birth is a question of fact. Thus where the evidence went to prove that the child was dropped from the mother when she was at a privy, and was smothered in the soil, it was held a question to be determined in the first place by the jury whether the child was alive at the birth.³

§ 447. A principle of much importance bearing on this question, and one that has been more fully discussed in a previous chapter in its general relations, is, that if a person do or omit any act towards another who is helpless, which act or omission in usual natural sequence leads to the death of that other, the crime amounts to murder if the act or omission be intentional; but if the circumstances are such that the person would not or could not have been aware that the result would be death, that would reduce the crime to manslaughter, provided the death was occasioned by an unlawful act, but not such an act as showed a malicious mind.⁴ Killing of child by negligent exposure is manslaughter.

world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive, and yet do not breathe for some time after their birth." *R. v. Brain*, 6 C. & P. 349. See also *R. v. West*, 2 C. & K. 784. Compare *R. v. Crutchley*, 7 C.

& P. 814; *R. v. Reeves*, 9 C. & P. 25; *R. v. Enoch*, 5 C. & P. 539; *R. v. Wright*, 9 C. & P. 754; *R. v. Poulton*, 5 C. & P. 329, cited at large in *Whart. on Hom.* § 446.

¹ *R. v. West*, 2 C. & K. 784.

² *R. v. Handley*, 13 Cox C. C. 79.

³ *R. v. Middleship*, 5 Cox C. C. 275.

⁴ *R. v. Walters*, C. & M. 164; 2

XI. SUICIDE.

§ 448. Whoever is present, actually or constructively, encouraging the violent and illegal death of another, is responsible for such death, even though it was voluntarily submitted to by the deceased.¹ Thus, if two persons encourage each other to commit suicide jointly, and one succeeds and the other fails in the attempt upon himself, he is a principal in the murder of the other.² Nor is it necessary to prove that the deceased would not have killed himself without the defendant's coöperation; nor does it make any difference that the deceased was at the time under sentence of death.³

§ 449. As at common law the principal must be convicted before a conviction of the accessory, there can be at common law no conviction of an accessory before the fact to suicide, because the suicide is beyond the process of the courts.⁴ But by statutes in England and several of the United States, the advising another to commit suicide is made a substantive indictable offence.⁵

§ 450. A woman desires to miscarry of a child with which she is pregnant, and assents to an operation for that purpose; and dies from the operation. Her assent, as we have already seen, is no defence to an indictment against the person performing the operation.⁶ If the intent was to kill or grievously injure her, the offence is murder; it is manslaughter if the intent was only to produce the miscarriage, the agency not being one from which death or great injury would be likely to result.⁷ But suppose the opera-

Lew. 220; *R. v. Middleship*, 5 Cox C. C. 275. See fully supra, §§ 56, 331, 359; infra, §§ 1563 *et seq.*

¹ *R. v. Sawyer*, 1 Russ. Cr. & M. 670; *R. v. Dyson*, Russ. & Ry. C. C. 528.

² Supra, § 216; *R. v. Dyson*, Russ. & Ry. C. C. R. 528; *R. v. Allison*, 8 C. & P. 410; *R. v. Sawyer*, 1 Russ. Cr. & M. 670; *Blackburn v. State*, 23 Oh. St. 165.

³ *Com. v. Bowen*, 13 Mass. 359; 2 Wheel. C. C. 321; Pamph. Tr. 1816.

See comments in *Com. v. Dennis*, 105 Mass. 162; *Com. v. Mink*, 123 Mass. 422; and see supra, §§ 216, 326.

⁴ *R. v. Leddington*, 9 C. & P. 79; *R. v. Russell*, 1 M. C. C. 356; *R. v. Fretwell*, 1 Mood. C. C. 356.

⁵ See supra, § 142; infra, § 451. As to Ohio, see *Blackburn v. State*, 23 Oh. St. 165.

⁶ See supra, §§ 325, 390.

⁷ *R. v. Gaylor*, D. & B. C. C. 288; 7 Cox C. C. 288.

tion be one which is essential to the preservation of the mother's life? In this case the fact of such necessity is, as will be presently shown in fuller detail, a defence, should the operation terminate fatally.

§ 451. That consent in such cases is no bar is an axiom acknowledged by all schools of jurisprudence, and rests on the maxim, *Jus publicum privatorum voluntate mutari nequit*.¹ Of this we may recur to an illustration given in Pennsylvania in 1826, in which it was held that an agreement not to bring a writ of error in a criminal case of high degree does not preclude the defendant from bringing such writ. "What consideration," said Chief Justice Tilghman, in words that may be here repeated as touching the immediate point before us, "can a man have received, adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement, yet the principle is, in both cases, the same."²

§ 452. It has just been seen that the consent of the deceased is no defence to an indictment for murder; for no one can by consent validate the taking of his own life. But suppose A. is assailed by a fatal disease from which the only escape is a dangerous surgical operation; and that this operation is skilfully performed by B. at A.'s request, but that A. dies under the knife?³ On this point, Lord Macaulay, in his Report on the Indian Penal Code, says: "It is often the wisest thing a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labor under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will

Consent of deceased no bar to prosecution for homicide.

Killing another with his consent in order to avoid greater evil.

¹ See supra, §§ 142, 372.

² *Smith v. Com.* 14 S. & R. 69.

³ *Sir J. Stephen, Cr. L. art. 203,* takes the view given in the text, say-

ing, "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery assumes their truth."

restore him to health and vigor. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself likely to cause it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death." The same rule applies, as has been argued by Bar, an able German jurist, in cases where consent, on account of mental incapacity, cannot be given. Suppose a dangerous operation is required as the last hope of resuscitating an unconscious person. If the operation is performed with the skill usual to surgeons under such circumstances, this is a good defence if death ensue.¹

§ 453. Killing another, though unintentionally, when aiding in the effort to commit suicide, is at least manslaughter.²

Man-slaughter, &c.

Attempts, &c.

§ 454. At common law, as we have already seen, an attempt to commit suicide has been held to be a misdemeanor.³

XII. PROVOCATION AND HOT BLOOD.⁴

§ 455. To sustain provocation as a defence it must be shown that the defendant, at the time of the fatal blow, was "deprived of the power of self-control by the provocation which he had received; and, in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind."⁵

§ 455 a. It has been held that where the evidence shows an intent on the part of the defendant to kill, no words of reproach,

¹ See *infra*, §§ 509, 510.

² *Com. v. Mink*, 123 Mass. 422, cited *supra*, § 328.

³ *R. v. Doody*, 6 Cox C. C. 463; *R. v. Burgess, L. & C.* 258; 9 Cox C. C.

247; cited with approval in *Com. v. Mink, supra*. *Comp. supra*, § 175.

⁴ As to burden of proof as to provocation, see *Whar. on Cr. Ev.* § 334.

⁵ *Steph. Dig. C. L. art.* 225.

no matter how grievous soever, are provocation sufficient to free the party killing from the guilt of murder; nor are indecent provoking actions or gestures expressive of contempt or reproach without an assault upon the person.¹

Words of reproach no adequate provocation.

At the same time it must be remembered that an assault, too slight in itself to be a sufficient provocation, may become such by being coupled with insulting words.²

§ 456. The moment, however, the person of the defendant is touched with apparent insolence, then the provocation is one which, ordinarily speaking, reduces the offence to manslaughter.³ Thus it has been held that if A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall) take the wall of him, and thereupon A. kill B., this is murder; ⁴ but if B. had jostled A., this jostling, if made with such apparent insolence as to provoke a quarrel, and if hastily resented by A., in hot blood, reduces the grade to manslaughter.⁵

When the person is touched, then provocation reduces degree.

A fortiori, where an assault is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis*, occasioned by the provocation.)

¹ 1 Hale P. C. 456; Foster, 290; U. S. v. Wiltberger, 3 Wash. C. C. R. 515; U. S. v. Travers, per Story, J., 2 Wheeler's C. C. 504; Com. v. York, 9 Metcalf, 93; Green v. Com. 83 Penn. St. 75; State v. Tackett, 1 Hawks, 210; State v. Merrill, 2 Dever. 269; State v. Carter, 76 N. C. 20; Ray v. State, 15 Ga. 223; Jackson v. State, 45 Ga. 198; Malone v. State, 49 Ga. 210; Bird v. State, 55 Ga. 17; Taylor v. State, 48 Ala. 180; Rapp v. State, 14 B. Monroe, 614; State v. Starr, 38 Mo. 270; State v. Evans, 65 Mo. 574; Preston v. State, 25 Miss. 383; Williams v. State, 3 Heisk. 376; People v. Freeland, 6 Cal. 96; People v. Butler, 8 Cal. 435; People v. Tur-

ley, 50 Cal. 469; State v. Shippey, 10 Minn. 223; Martin v. People, 30 Wis. 216; Johnson v. State, 27 Texas, 758; State v. Anderson, 4 Nev. 265; State v. Crozier, 12 Nev. 300. See qualifications of this stated in R. v. Rothwell, 12 Cox C. C. 145.

² R. v. Sherwood, 1 C. & K. 556; R. v. Rothwell, *ut supra*; R. v. Smith, 4 F. & F. 1066; Hurd v. People, 25 Mich. 405; Nye v. People, 35 Mich. 16; State v. Keene, 50 Mo. 357; and see cases cited *infra*, §§ 468 *et seq.*

³ See Erwin v. State, 29 Oh. St. 186.

⁴ See State v. Smith, 77 N. C. 488.

⁵ 1 Hale, 455. *Infra*, § 472; Felix v. The State, 18 Ala. 720.

(And so it was considered that where A. was riding on the road and B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only manslaughter.¹)

§ 457. Though words of slighting, disdain, or contumely will not of themselves make such a provocation as to lessen the crime to manslaughter; yet it seems that if A. give indecent language to B., and B. thereupon strike A., but not mortally, and then A. strike B. again, and then B. kill A., this is but manslaughter. The stroke by A. was deemed a new provocation, and the conflict a sudden falling out; and the killing was therefore considered only manslaughter.²

Inter-
change
of blows
reduces
to man-
slaughter.

§ 458. A large class of cases occur in practice where slight provocations, as has been already incidentally noticed, have been considered as extenuating the guilt of homicide, upon the ground that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But, in cases of this kind, it must appear that the punishment was not urged with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life.³ Thus where it appeared that the prisoner, having employed her step-daughter, a child ten years old, to reel some yarn, and finding some of the skeins knotted threw at the child a *four-legged stool*, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and it was also shown that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered of great difficulty, and no opinion was ever delivered by the judges. The doubt appears to have been principally upon the question whether the instrument was such

A slighter
provoca-
tion exten-
uates when
intent is
only to
chastise.

¹ Kel. 135; 1 Hale, 455.

² 1 Hale, 455; R. v. Ayes, R. & R. 166; U. S. v. Mingo, 2 Curtis C. C. 1; Com. v. Biron, 4 Dall. 125; State v. Massage, 65 N. C. 480; State v. Abarr, 39 Iowa, 185. *Infra*, § 471.

³ Post. 291; 4 Black. Com. 200;

Com. v. Green, 1 Ashmead, 289; State v. Tackett, 1 Hawks, 210; State v. Roberts, *Ibid.* 349; Thompson v. State, 55 Ga. 87; R. v. Freeman, 1 Russ. on Cr. 518; R. v. Howlett, 7 C. & P. 274; Wigg's case, 1 Leach, 378.

as would probably, at the given distance, have occasioned death or great bodily harm.¹

§ 459. Whether a homicide committed by a man smarting under a sense of dishonor is murder or manslaughter depends upon the question whether the killing was in the first transport of passion or not. In the latter case the offence is murder; in the former, manslaughter. Thus, where a man finds another in the act of adultery

Husband
in hot
blood kill-
ing adul-
terer,
guilty of
man-
slaughter.

¹ Hazel's case, 1 Leach, 368; 1 East P. C. 236.

Where a man, who was sitting drinking in an alchouse, being called by a woman "a son of a whore," took up a broomstaff and threw it at her from a distance, and killed her, after conviction of murder, a pardon was advised; and the doubt appears to have arisen upon the ground, that the instrument was not such as could probably, at the given distance, have occasioned death or great bodily harm. 1 Hale, 455, 456. See *Felix v. State*, 18 Ala. 720.

A master having struck his servant, who was a lad, with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the size of the instrument he had made use of, have had any intention to take away the boy's life. *Turner's case*, Comb. 407; 1 Ld. Raym. 143; 2 Sid. 1498.

The keeper of a park, finding a boy stealing wood in his master's ground, tied him to a horse's tail and beat him, upon which the horse running away, the boy was killed. It was said, that if the chastisement had been more moderate, it had been but manslaughter; *Halloway's case*, Cro. Car. 131; 1 Hale, 434; 1 East P. C. c. 5, s. 22, p. 289; but on the evidence, the offence was murder, since death, through a process so cruel and dangerous, was

ground from which malice could be inferred. See *infra*, § 477.

Where A., finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him, it was holden to be manslaughter; but it must be understood that he beat him, not with a mischievous intention, but merely to chastise for the trespass, and to deter him from committing it again. *Fost. 291*; 1 Hale, 473.

The prisoner's son having fought with another boy and been beaten, ran home to his father all bloody, and the father presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died. The case was held to be manslaughter, on the ostensible ground of hot blood; but the authority is only supportable on the ground that the accident happened by a single stroke given in heat of blood, with a cudgel, not likely to destroy, and that death did not immediately ensue. *Rowley's case*, 1 Hale, 453; *Fost. 294, 295*. Yet such a palliation would not be allowed if the punishment was deliberately cruel. *Infra*, § 475. And hence in Virginia, where a man who had whipped a boy very severely was the next day killed by the boy's father, who fell on him and beat him violently, cruelly, and continuously with his fists, the killing was held murder. *Com. v. McWhirt*, 3 Grat. 594.

with his wife, and kills him or her¹ in the first transport of passion, he is only guilty of manslaughter, and that of a nature entitled to the lowest degree of punishment,² for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But it has been already shown that the killing of an adulterer deliberately, and upon revenge, would be murder.³ And evidence of the adultery is only admissible when the time of the husband's discovery of it is brought so near to the homicide as not to allow space for cooling.⁴ The same reason makes it murder for a man deliberately to kill his wife whom he has found in adultery, if the intent to take life be shown.⁵

¹ Pearson's case, 2 Lew. 216.

² Manning's case, 1 Vent. 212; Raym. 212; *People v. Horton*, 4 Mich. 83; *Com. v. Whitler*, 2 Brewst. 388; *Maher v. People*, 10 Mich. 212; *State v. John*, 8 Ired. 330; *State v. Samuel*, 3 Jones (N. C.) Law, 74; *State v. Neville*, 6 Jones (N. C.) Law, 433. See *People v. Cole*, Cent. Law J. July 30, 1874.

³ 1 Russell on Crimes, 525; *R. v. Fisher*, 3 Car. & P. 182; *State v. Holme*, 54 Mo. 153; *State v. Samuel*, 3 Jones (N. C.) Law, 74; *State v. Avery*, 64 N. C. 608; *State v. Neville*, 6 Jones (N. C.) 433; *State v. Harman*, 78 N. C. 515; *Sawyer v. State*, 35 Ind. 80.

⁴ See *Biggs v. State*, 29 Ga. 723. Comp. infra, § 496.

⁵ *Shufflen v. People*, 62 N. Y. 229.

It was therefore rightly held by the Supreme Court of Indiana, in 1871, that it is incompetent for the defendant to prove that for a long time he had been cognizant of the adulterous intercourse of his wife with the deceased. *Sawyer v. State*, 35 Ind. 80 (1871). "If," said the court, "he had been thus for a long time apprised of her guilt in that respect, there had been an abundance of time for the ebullition of passion which might

be supposed to arise on being first apprised of the fact, to subside. . . . It is sufficient to say that if the facts offered to be proven were established, they would in no way excuse or mitigate the offence." See also *State v. Samuel*, 3 Jones (N. C.), 74; *State v. John*, 8 Ired. 330. It is, however, admissible for the defendant to prove a conspiracy of late date to carry off his wife, which had only come to defendant's notice immediately before the homicide, the deceased being in the conspiracy. *Cheek v. State*, 35 Ind. 492. See *R. v. Kelly*, 2 Car. & K. 814; *State v. Holme*, 54 Mo. 153.

In a famous case tried in Philadelphia, in 1816, the facts were that the deceased, after being married for some years, left the country; and A., his wife, not hearing from him for two years, married the defendant, acting under a Pennsylvania statute, which provided that persons so marrying should not be indictable for adultery, although, as it was afterwards held, the second marriage was not in other respects valid. The deceased returned, after a lapse of a year from the second marriage, and found A. living with the defendant, upon which a quarrel arose, which was partially composed, but which ended in the defendant delib-

§ 460. A man cannot, indeed, thus avenge the adultery of his paramour,¹ for the connection is not merely unauthorized by law but in defiance of law. But where there is a legal right and natural duty to protect, there an assault on the chastity of the ward (using this term in its largest sense) will be a sufficient provocation to make hot blood thus caused an element which will reduce the grade to manslaughter. That this is the law when a father is incensed at an unnatural offence attempted on his son, and acts in hot blood, is conceded.² There is no sound reason why a similar allowance should not be made for a father's or a brother's indignation at a sexual outrage attempted on a daughter or a sister. To impose a severer rule would be a departure from the analogies of the law, and would bring the court in conflict, not only with the jury, who under such circumstances never would convict of murder, but with the common sense of the community. Supposing the injury to female chastity to be avenged in hot blood by a brother, a father, or other person having a right to protect the person injured, the offence is but manslaughter. But a brother cannot, after his sister has been apprehended in adultery, set up the provocation as a defence to an indictment against him for killing the paramour.³

Same principle to be extended to cases of punishment, when in hot blood, of attacks on the chastity of persons under the rightful protection of the defendant.

§ 461. Persons laboring under a sense of wrong, public or

erately shooting the deceased at the house of A. This was held murder in the first degree. *Com. v. Smith*, 7 *Smith's Law, App.*; 2 *Wheeler C. C.* 80.

maintaining his own rights in his own house, the malice necessary to constitute murder in the first degree was not imputable to him.

But the propriety of this ruling has since been gravely questioned, on the ground that Judge Rush, who presided, charged that no prior intention to kill was necessary to murder in the first degree. See comments of Ch. J. Agnew, in *Jones v. Com.* 75 *Penn. St.* 408. Another ground for exception is, that as the defendant acted under legal advice (mistaken though it was) that his marriage was valid, and that as he therefore, according to his own view, was at the time of the conflict

A husband suspecting his wife of an adulterous intercourse with A., employed B. to watch them. While so employed B. killed A. It was held, that testimony that A. had committed adultery with the wife was not relevant in the trial of B. for the murder of A., whatever might have been the law if the husband had killed him. *People v. Horton*, 4 *Mich.* 67.

¹ *Parker v. State*, 31 *Texas*, 132.

² *R. v. Fisher*, 8 *C. & P.* 182.

³ *Lynch v. Com.* 77 *Penn. St.* 205.

private, real or imaginary, must apply to the law for redress. If there is opportunity to apply for such redress, he who supposes himself aggrieved is guilty of a criminal offence if he undertakes to inflict violent punishment; and he is guilty of murder if he deliberately and coolly kills the person by whom he supposes himself aggrieved.¹ In the highest of all injuries, that of adultery, this, as we have just seen, is the law; and *a fortiori* must this rule be applied in cases of injuries less crushing. That such grievances exist, constitutes a defence that will not, as a bar to the indictment, be received by the court. Thus on an indictment against a convict for the homicide of his keeper, evidence was properly held, by the Supreme Court of Connecticut, in 1870, to be inadmissible for the purpose of showing that the food supplied by the deceased to the defendant was tainted and unwholesome.²

So a supposed public grievance will not excuse a riot undertaken for its removal; ³ though, as has been seen, the excitement and tumult produced by a movement of this class may be put in evidence for the purpose of showing such a confusion of mind as prevented the participants from entertaining a deliberate design to take life.⁴

§ 462. A bare trespass against the property of another, not his dwelling-house, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defence, and if he do, and with it kill the trespasser, it will be murder, and this, though killing were actually necessary to prevent the trespass.⁵ On the other hand, if the object of the violence is to drive off the trespasser, or even to chastise him, and no blows likely to produce grievous bodily harm are inflicted, the offence, if death ensue, is but manslaughter.⁶

¹ See supra, § 399.

² State v. Wilson, 38 Connect. 126. See, also, Territory v. Drennan, 1 Montana, 41.

³ Supra, §§ 397-399.

⁴ See supra, § 388.

⁵ R. v. Scully, 1 C. & P. 319; Langstaffe's case, 1 Lew. 162; Com. v. Drew, 4 Mass. 391; State v. Morgan,

³ Iredell, 186; M'Daniel v. State, 8 S. & M. 401; Hayes v. State, 58 Ga. 35; Oliver v. State, 17 Ala. 588; Simpson v. State, 59 Ala. 1; State v. Shippey, 10 Minn. 223. Supra, § 98; infra, § 473.

⁶ Post. 291; 1 Hale, 473; Hawk. c. 31, s. 34; Kel. 132; Halloway's case, Cro. Car. 131; 1 Hawk. c. 31, s. 42.

§ 463. It should be remembered that the mere exercise of a legal right, no matter how offensive, is no such provocation as lowers the grade of homicide.¹

Exercise of a legal right no just provocation.

§ 464. A land-owner has no right to plant in it spring-guns by which ordinary trespassers may be wounded, and if he does so, and death ensues, he is responsible for the consequences.² If such weapons are erected inconsiderately, the killing of a mere heedless trespasser on an open country is manslaughter; if the weapons are erected maliciously, the offence is murder.³ But if the weapons are erected at the door of a place where valuables are kept, and to which in the ordinary course of things none but a burglar would penetrate, then the killing is excusable.⁴

Spring-guns illegal when placed on spots where innocent trespassers may wander.

§ 465. The law as to defence of dwelling-house is discussed in future sections.⁵ In the present connection we may state the following propositions:—

1. For the master of a house to kill, in cool blood, a person seeking entrance into a house, is murder, unless the person killing, according to his own lights, honestly, and without negligence, believes that the person entering the house is attempting to perpetrate a felony, and that killing is the only way to prevent the felony; in which case there should be an acquittal.

For master of house knowingly to kill visitor is murder.

§ 466. 2. For the master of a house to kill, in hot blood, a

The defendant, having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died; being indicted for murder, the defendant was found guilty and executed. *R. v. Price*, 7 C. & P. 178.

¹ See *State v. Craton*, 6 Ired. 164; *State v. Lawry*, 4 Nev. 161; *R. v. Longden*, R. & R. C. C. 228.

² *Infra*, § 507; *State v. Moore*, 31 Conn. 479; *Barnes v. Ward*, 9 C. B. 392, 420; *In re Williams v. Groucott*, 4 B. & S. 149, 157; *Binks v. South*

Yorkshire R. C. 3 B. & S. 244; Hounsell v. Smyth, 7 C. B. N. S. 731; *Hardcastle v. South Yorkshire R. C.* 4 H. & N. 67; *Gray v. Combs*, 7 J. J. Marsh. 478; *Simpson v. State*, 59 Ala. 1. With *Barnes v. Ward*, *supra*, compare *Stone v. Jackson*, 16 C. B. 199; *Holmes v. North Eastern R. C. L. R.* 4 Ex. 254; *Indermaur v. Dames*, L. R. 1 C. P. 274; *R. R. v. Stout*, 17 Wall. 657; *Bird v. Holbrook*, 4 Bing. 628, cited 1 Q. B. 37; *Wooton v. Dawkins*, 2 C. B. N. S. 412. See also *Judgm., Mayor of Colchester v. Brooks*, 7 Q. B. 339.

³ *Simpson v. State*, 59 Ala. 1.

⁴ See *infra*, § 507.

⁵ See *infra*, §§ 506, 507.

§ 470.]

person forcing his way into the house, is manslaughter, unless the person killing, according to his own lights, honestly, and without negligence, believes that the person entering the house is seeking to perpetrate a felony, and that killing is the only way to prevent the felony; in which case there should be an acquittal.

When such killing is in hot blood it is manslaughter.

§ 467. 3. When a person in danger of his life takes refuge in his own house, then, the attack being unlawful, he is excused for taking his assailant's life; and he may assemble his friends for the same purpose, who stand, as to this defence, in the same position as himself.¹

When such killing is in self-defence it is excusable.

Man-slaughter to kill master of house expelling defendant with unnecessary violence.

§ 468. As a man has a right to order another to leave his house, but has no right to put him out by force until gentle means fail, if he attempt to use violence at the outset and is slain, it will be only manslaughter in the slayer, if there is no previous malice.²

§ 469. If A. stands with a weapon in the doorway of a room, wrongfully to prevent B. from leaving it and others from entering, and C., who has a right to the room, struggles with A. to get his weapon from him, upon which D., a comrade of A., stabs C., this is murder in D. if C. dies.³

Killing a person having a legal right to the use of a room is murder.

§ 470. Any assault, in general, made with violence or circumstances of indignity upon a man's person, by one not greatly his inferior in strength, if it be resented immediately by the death of the aggressor, and it appear that the party acted in the heat of blood upon that provocation, will reduce the crime to manslaughter.⁴

Where the parties are equal, a blow is sufficient provocation.

¹ As authority for these points see *infra*, §§ 506-7, and *Levett's case*, Cro. Car. 438; 1 Hale P. C. 43, 474, cited *supra*, § 38; *State v. Patterson*, 45 Vt. 308; *Com. v. Clarke*, 2 Met. 23; *State v. Ross*, 2 Dutcher, 226; *People v. Caryl*, 3 Parker C. R. 326; *Harrington v. People*, 45 Barb. 262; *Greschia v. People*, 53 Ill. 295; *Pond v. People*, 8 Mich. 150; *Patten v. People*, 18 Mich. 314; *State v. Martin*, 30 Wis. 216; *State v. Lazarus*, 1 Const. C. R. 34; *Lyon v. State*, 22 Ga. 397; *Carroll v. State*, 23 Ala. 28; *McCoy v. State*, 3 Eng. (Ark.) 451; *Hinton v. State*, 24 Tex. 454; *Terr. v. Drennan*, 1 Mont. 81. See also an article in *Albany Law J.* for October 14, 1874.

² *McCoy v. State*, 3 Eng. (Ark.) 451; *Hinton v. State*, 24 Tex. 454; *Lyon v. State*, 22 Ga. 399.

³ *R. v. Longden*, R. & R. C. C. 228.

⁴ *R. v. Thomas*, 7 C. & P. 817; R.

§ 471. In a sudden and equal quarrel, when both parties strike in the heat of blood, it is immaterial by whom the first blow is struck.¹ Thus, if A. uses provoking language or behavior towards B., and B. strikes him, upon which a combat ensues, in which A. is killed, this is held to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow.²

In sudden quarrels, immaterial who struck the first blow.

§ 472. An unintentional and trivial assault is no palliation.³ Thus in a case in South Carolina, where it was argued by the defendant's counsel that the passions of the defendant were excited by an unintended jostle of the prisoner or his wife by the deceased, the position was said to be equally unsupported by proof, and unavailing if true. "In a city like Charleston, where many persons are constantly passing until a late hour of the night, the accidental impinging of one upon another in the dark would not authorize such a murderous attack upon him. Such an act of itself would be a sure indication of a depraved and wicked heart, void of all social duty, and fatally bent on mischief."⁴ The assault must be of a character from which hot blood might be expected to ensue.⁵

But the assault must have been calculated to arouse the passions.

§ 473. Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow.⁶ Violent acts of resentment, bearing no proportion to the provocation or insult, particularly where there is a decided preponderance of strength on the

Deliberate and cruel use of superior strength implies malice.

v. Taylor, 2 Lew. C. C. 217; R. v. Snow, 1 Leach C. C. 151; R. v. Rankin, R. & R. C. C. 43; Allen v. State, 5 Yerger, 483. Supra, § 455, and cases hereafter cited.

¹ Supra, § 457.

² Fost. 295; 1 Hale, 456; R. v. Ayes, R. & R. 166.

³ R. v. Ayer, R. & R. 166.

⁴ State v. Tooky, 2 Rice's Digest, 104.

⁵ Nichols v. Com. 11 Bush, 575.

⁶ R. v. Lynch, 5 C. & P. 324.

part of the party killing, and where the punishment is deliberate and cruel, constitute murder, if death ensue from the attack.¹

¹ Keates's case, Comb. 408; R. v. Snow, 1 Leach, 151; 2 Lord Raym. 1498; R. v. Lynch, 5 C. & P. 324; Royley's case, 12 Rep. 87; S. C., 1 Hale, 453; R. v. Shaw, 6 C. & P. 372; R. v. Thomas, 7 C. & P. 817. See also Fost. 294; Cro. Jac. 296; Godb. 182; R. v. Willoughby, 1 East P. C. 288; McWhirt's case, 3 Grat. 594; State v. Craton, 6 Ired. 164; State v. Hildreth, 9 Ired. 429; State v. Hargett, 65 N. C. 669; State v. Christian, 66 Mo. 138, and authorities hereafter cited.

This distinction applies to the case already cited, where the keeper of a park, finding a boy stealing wood in his master's ground, tied him to a horse's tail and beat him, upon which the horse running away, the boy was killed; the case being held murder. *Supra*, § 462.

There being an affray in the street, one Stedman, a foot soldier, ran hastily towards the combatants. A woman, seeing him run in that manner, cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled; and Stedman, pursuing her, stabbed her in the back. It seemed to Holt, C. J., that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially; but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was ruled

clearly to be no more than manslaughter. The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the attack. Stedman's case, Fost. 292.

But even on this evidence, as it thus stands, the case has been very much doubted. Thus, in Pennsylvania, Gibson, C. J., said: "If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on a husband would bring the killing of her below murder. Under this view of the law I have always doubted Stedman's case." *Com. v. Mosler*, 4 Barr, 268.

Much doubt, also, has been expressed, as we have already seen, as to the following case: Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up-stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom; which, at the importunity of his servant, he laid down upon the table, saying: "He did not intend to hurt the officers; but he would not be ill-used." The officer who had been sent for the attorney's bill soon returned to his companion at the lodgings; and words of anger arising, Lutterel struck one of the officers on the face with a walking-cane, and drew a little blood. Whereupon both of them fell upon

§ 474. If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter.¹ But if a party, under color of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, and kills the other party with such weapon; or if at the beginning of the contest he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon; the killing in both these cases will be murder.²

Malice implied from concealed weapon.

§ 475. Where a party, after he has got the better of the other, holds him prostrate and defenceless, the reception of a prior blow will not reduce the grade to manslaughter. This proposition, in fact, is a corollary of that which makes a blow no mitigating provocation when there is a manifest disparity of strength between the parties. For even where no such disparity at first exists, the principle holds good when by the result of the conflict one party is disarmed, or becomes otherwise helpless.³

Where the mortal blow is deliberately given after the deceased is helpless, offence is murder.

§ 476. The plea of provocation will not avail where it appears

him: one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. And this is reported to have been holden manslaughter by reason of the first assault with a cane. *R. v. Tranter*, 1 Stra. 449. Supra, § 403. Mr. Justice Foster, viewing the case as thus reported, is surprised "that all these circumstances of aggravation — two to one, he helpless and on the ground, begging for mercy, stabbed in nine places, and then dispatched with a pistol — that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a

slight stroke with a cane." The case, however, is explained by the fact, heretofore noticed, that Lutterel was killed when resisting an arrest.

¹ *R. v. Anderson*, 1 Russ. Cr. 731; *R. v. Kessal*, 1 C. & P. 437; *Davis v. People*, 88 Ill. 350; *State v. Ramsay*, 5 Jones N. C. 195; *Judge v. State*, 58 Ala. 408; *Preston v. State*, 25 Miss. 383; *State v. Christian*, 66 Mo. 138; *State v. Alexander*, 66 Mo. 148.

² *R. v. Anderson*, 1 Russ. on Cr. 731; *R. v. Taylor*, 5 Burr. 2793; *R. v. Smith*, 8 C. & P. 160; *Macklin's case*, 2 Lew. 225.

³ *R. v. Shaw*, 6 C. & P. 372. As to burden of proof, see *Whart. on Cr. Ev.* § 334.

that the provocation was sought for and induced by the act of the party in order to afford him a pretence for wreaking his malice; and even where there may have been previous struggling or blows, such defence will not be sustained where there is evidence of prior malice.¹ And where a combatant enters into a contest dangerously armed and fights under an undue advantage, though mutual blows pass, it is not manslaughter, but murder, if he slays his adversary pursuant to a previously formed design, either general or special, to use his weapon in an emergency.² A party has in this way no right, even on the plea of self-defence, to execute private vengeance.³

Case is murder where the attack is sought by the party killing.

§ 477. It has been said that when the existence of deliberate malice in the slayer is once ascertained, its continuance, down to the perpetration of the meditated act, must be presumed, unless there is evidence to repel it; and that there must be some evidence to show that the wicked purpose had been abandoned.⁴ If by this we are to understand that the defendant is in such case to prove by witnesses that he had abandoned his old grudge, the position cannot be sustained. It is otherwise, however, if we understand the conclusion to be that the presumption (which is exclusively one of fact) of the continuance of the old grudge may be met and overcome by the presumption of its abandonment, which may be drawn from the lapse of time, from the circumstances of the encounter, and from

Question of continuance of old grudge one of fact.

¹ 1 Vent. 159; 1 Hale, 452; Oneby's case, 2 Ld. Raym. 1490; R. v. Smith, 8 C. & P. 160; R. v. Mason, 1 East P. C. 232; 1 Russ. on Cr. 521, 585; Stewart v. State, 1 Ohio St. 66; State v. Stoffer, 15 Ohio St. 47; Slaughter v. Com. 11 Leigh, 681; Vaidon v. Com. 12 Grat. 717; Bristow v. Com. 15 Grat. 634; Dock v. Com. 21 Grat. 909; State v. Neeley, 20 Iowa, 108; State v. Johnson, 1 Ired. 354; State v. Lane, 4 Ired. 113; State v. Tachanatah, 64 N. C. 614; State v. Ferguson, 2 Hill S. C. 619; Lyon v. State, 22 Ga. 399; State v. Green, 37 Mo. 466; State v. Linney, 52 Mo. 40; State v. Underwood, 57 Mo. 40; State v. Christian, 66 Mo. 138; Atkins v. State, 16 Ark. 568; State v. Rogers, 18 Kans. 78; People v. Stonecifer, 6 Cal. 405; McCoy v. State, 25 Tex. 33; Murray v. State, 36 Tex. 642. As to burden of proof, see Whart. on Crim. Ev. § 334.

² R. v. Thomas, 7 C. & P. 817; State v. Craton, 6 Ired. 164; Nettles, ex parte, Sup. Ct. Ala. 1878; St. Dig. C. L. art. 224 *et seq.*

³ Ibid. *Infra*, §§ 485, 496. For a laxer view see Wray, ex parte, 30 Miss. 673; Moore v. State, 36 Miss. 187.

⁴ *Supra*, §§ 114, 399; State v. Johnson, 1 Ired. 354; State v. Tilly, 3 Ired. 424.

the character of the parties.¹ Thus it has been properly held that if a person, upon meeting unexpectedly his adversary, who had intercepted him upon his lawful road and in his lawful pursuit, accepts the fight where he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the old grudge, but upon the insult given by stopping him on the way, and it will be manslaughter.² And after a reconciliation, the motive will be presumed to be the recent provocation, not the old grudge.³

On the other hand, if one seek another, and enter into a fight with him, with the purpose, under the pretence of fighting, to stab him; if a homicide ensue it will be murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat.⁴ Thus if A. from previous angry feelings, on meeting with B., strike him with a whip, with the view of inducing B. to draw a pistol, or, believing he will do so in resentment of the insult, and determines if he do so to shoot B. as soon as he draws, and B. does draw, and A. immediately shoots and kills B., this is murder.⁵ But if there has been a quarrel between A. and B. and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kills B., this is not murder; though if it appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, a conviction of murder will be sustained.⁶

¹ *Supra*, § 114. See Whart. on Crim. Ev. § 735; *Murray v. Com.* 79 Penn. St. 311; *State v. Savage*, 78 N. C. 520.

⁴ *State v. Marten*, 2 Ired. 101.

⁵ *Supra*, § 114; 1 Hale, 451; *Mason's case*, 1 Fost. 132.

² *Copeland v. State*, 7 Humph. 479. See *State v. Tachanatah*, 64 N. C. 614. As to grudge, see Whart. Crim. Ev. § 784; and see *Wellar v. People*, 30 Mich. 16. As to continuance of malice see *supra*, § 114.

³ *State v. Barnwell*, 80 N. C. 466.

⁶ *R. v. Smith*, 8 C. & P. 160; 1 Hale, 451; *State v. Lane*, 4 Ired. 113; *State v. Ferguson*, 2 Hill's S. C. R. 619; *State v. Harris*, 59 Mo. 550.

Where a sufficient provocation at the time to extenuate the homicide is proved, it is not competent for the prosecution, in order to show that the act of killing was not by reason of the immediate provocation, but of a preëxisting malice, to prove that a year before the prisoner declared his intention to kill two or three men, it being admitted that the deceased was not one of the men referred to. *State v. Barfield*, 7 Ired. 299.

the sergeant with a sword, and upon the trial the articles of war were not produced, nor any evidence given of the usage of the army, and so no authority in the sergeant appeared.¹)

§ 482. Cool and deliberate homicide in a duel is murder in the guilty party, and this, though the latter had received the provocation of a blow,² or had been threatened with dishonor.³ It is the deliberation which constitutes the grade of guilt. Thus if A. and B. meet deliberately to fight, and A. strike B., and pursue B. so closely that B., to protect his own life, kills A., this is murder in B.; because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done.⁴

If the agreement to fight be cool and deliberate, no subsequent hot blood will be a defence. Thus where B. challenged A., and A. refused to meet him, but in order to evade the law, A. told B. that he should go the next day to a certain town about his business, and accordingly B. met him in the road to the same town, and assaulted him, whereupon they fought, and

¹ Buckner's case, Styl. 467; Withers's case, 1 East P. C. 233; R. v. Curwan, 1 Moody C. C. 132; R. v. Wiloughby, 1 East P. C. 288.

² R. v. Young, 8 C. & P. 644; Smith v. State, 1 Yerger, 228; R. v. Cuddy, 1 Car. & Kir. 210; R. v. Selten, 11 Cox C. C. 674; State v. Underwood, 57 Mo. 40. Supra, § 215. As to duelling as a substantive offence see infra, §§ 1767 *et seq.*

³ 1 Hale, 452. Supra, § 101.

⁴ 1 Hale, 452, 480, who says: "Thus is Mr. Dalton, cap. 93, p. 241 (new ed. c. 145, p. 471), to be understood." But a *qu.* is added in 1 Hale, 452, whether, if B. had really and truly declined the fight, ran away as far as he could, and offered to yield, and yet A. refusing to decline it had attempted his death, and B. after this had killed A. in his own defence, it would excuse him from the guilt of murder; admitting clearly that if the running away were only a pretence to save his own life, and was really designed to draw

out A. to kill him, it would be murder. This *quære* of Lord Hale's is discussed in 1 East P. C. c. 5, s. 54, pp. 284 *et seq.*, and it is observed that Mr. J. Blackstone (4 Black. Com. 185) expressly puts the same case of a duel as Lord Hale, but without subjoining the same doubt; and that it was considered as settled law by the chief justice in Oneby's case. Lord Raym. 1489. Mr. East, after reasoning in favor of the extenuation of the duellist so declining to fight, proceeds thus: "Yet still it may be doubtful whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity in self-defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon in defiance of the law." 1 East P. C. c. 5, s. 54, p. 285.

for murder. they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence is not sufficient; but if they sustain the principals by their advice or presence, or if they go for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present, and assisting and encouraging at the moment when the pistol is fired, they are guilty of murder.¹

XIII. EXCUSE AND JUSTIFICATION.²1. *Repulsion of Felonious Assault.*

§ 484. *Vim vi repellere licet* is a cardinal doctrine of the Roman law. A crime is threatened; and it is my right to repel it, whether such crime be levelled at others or myself.³ But the offence threatened must be a *crime*. "Felony" has, in our law, been used to express the

¹ R. v. Young, 8 C. & P. 644. See R. v. Cuddy, 1 C. & K. 209.

In R. v. Young, 8 C. & P. 644, the prisoners were indicted for the murder of Charles Flower Mirfin, who was killed in a duel by a Mr. Elliott. Neither of the prisoners acted as a second on the occasion, but there was evidence to show that they and two other persons went to the ground in company with Mr. Elliott, and that they were present when the fatal shot was fired. Vaughan, B., told the jury, "When upon a previous arrangement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder; and the seconds also are equally guilty. The question then is, did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest?" After observing that neither prisoner had acted as a second, the learned judge continued: "If, however, either of

them sustained the principal by his advice or presence; or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do anything, yet if he was present and was assisting and encouraging at the moment when the pistol was fired, he will be guilty of the offence imputed by this indictment." The prisoners were found guilty. R. v. Young, 8 C. & P. 644; Roscoe's Cr. Ev. p. 754. As to responsibility of surgeons assisting at duels see Cullen v. Com. 24 Grat. 624.

² As to burden of proof see Whart. Crim. Ev. § 335.

³ Supra, §§ 98-101, 140. That this right exists to repel a felony is well established. 1 East P. C. 259, 271; U. S. v. Wiltberger, 3 Wash. C. C. 515; Dill v. State, 25 Ala. 15; Oliver v. State, 17 Ala. 15; Mattison v. State, 55 Ala. 224; Kingen v. State, 45 Ind. 518; Pond v. People, 8 Mich. 150; People v. Doe, 1 Mich. 451; People v. Campbell, 30 Cal. 312; Murphy v.

defendant cannot be set up by him as a defence. "A man has not," as is properly said by Breese, C. J.,¹ "the right to provoke a quarrel and take advantage of it, and then justify the homicide."² Self-defence may be resorted to in order to repel force, but not to inflict vengeance. "Non ad sumendam vindictam, sed ad propulsandam injuriam."³ "There is certainly no law to justify the proposition that a man may be the assailant and bring on an attack, and then claim exemption from the consequence of killing his adversary on the ground of self-defence. While a man may act safely on appearances, and is not bound to wait until a blow is received, yet he cannot be the aggressor and then shield himself on the assumption that he was defending himself."⁴

§ 486. But though the defendant may have thus provoked the conflict, yet if he withdraws from it in good faith, and clearly announces his desire for peace, then if he be pursued his rights of self-defence revive. Of course there must be a *real and bonâ fide* surrender and withdrawal on his part, for if there be not, then he will still continue to be regarded as the aggressor.⁵ But if A. really and evidently withdraws from the contest, and resorts to a place of security, and B., his antagonist, knowing that he is no longer in danger from A., nevertheless attacks A., then A.'s rights in self-defence revive.⁶

§ 486 a. In cases of personal conflict, it must appear, in order to establish excusable homicide in self-defence, that the party kill-

v. Com. 12 Grat. 717; Roach v. State, 34 Ga. 78; State v. Rogers, 18 Kans. 78. See State v. Stoffer, 15 Oh. St. 47; Hayden v. State, 4 Blackf. 547; People v. Stonecipher, 6 Cal. 407; Eiland v. State, 52 Ala. 322; Evans v. State, 44 Miss. 762; State v. Starr, 38 Mo. 270; State v. Linney, 52 Mo. 40; State v. Hays, 23 Mo. 287; State v. Hudson, 59 Mo. 135; White v. Maxey, 64 Mo. 552; Dawson v. State, 33 Tex. 491.

¹ Adams v. People, 47 Ill. 208.

² Stewart v. State, 1 Ohio St. 66. See also State v. Neely, 20 Iowa, 208; Roach v. State, 34 Ga. 78; State

v. Green, 37 Mo. 466. See other cases cited supra, § 476.

³ See supra, §§ 96, 97.

⁴ Wagner, J., State v. Linney, 52 Mo. 40; S. P., Williams v. State, 3 Heisk. 376.

⁵ See Hodges v. State, 15 Ga. 117; State v. Hill, 4 Dev. & B. 491; State v. Howell, 9 Ired. 485; State v. Smith, 10 Nev. 106. See supra, §§ 95-102.

⁶ Stoffer v. State, 15 Ohio St. 47; Vaidon v. Com. 12 Grat. 717; Hittner v. State, 19 Ind. 48; Evans v. State, 33 Ga. 4; Evans v. State, 44 Miss. 762; State v. Linney, 52 Mo. 40; People v. Stonecipher, 6 Cal. 407; State v. Conally, 3 Oregon, 69.

ing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him.¹ The last qualification is worthy of particular consideration. "Retreated to the wall" is sometimes given by the old text writers as the exclusive test; but even if we accept this test exclusively, we must remember that it is to be taken in a figurative sense, as indicating a retreat to the limits of personal safety. First, the word "wall" is sometimes used interchangeably with "ditch;" showing that what is meant is that when the assailed cannot further recede without exposing him to great peril (*e. g.* as in crossing a ditch), then he may turn and assume the aggressive. Secondly, "walls" and "ditches" are not always accessible; and to make them prerequisites to the initiation of those offensive acts which are the conditions of self-defence would be to declare that there should be no self-defence when there are no "ditches" or "walls." The true view is, that a "wall" is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to turn and attack the pursuer. And retreat need not be attempted when the attack is so fierce that the assailed, by retreating, will apparently expose himself to death.² Nor is retreat required from a party who at the time is standing on his rights.³

Retreat is necessary when practicable.

¹ Hale, 481, 483; Gilleland v. Iowa, 188; State v. Hill, 4 Dev. & State, 44 Tex. 356. Bat. 491; Oliver v. State, 17 Ala. 587.

² Supra, § 100; Fost. 273; 1 Hawk. c. 29, s. 14; R. v. Smith, 8 C. & P. 160; 4 Black. Com. 185; Runyan v. The assailed must retreat as far as the assault will permit. Dock v. Com. 21 Grat. 909; Evans v. State, 33 Ga. State, 57 Ind. 80; State v. Tweedy, 4; McPherson v. State, 22 Ga. 478.

³ Supra, § 99; Pfomer v. State, 4 his life, in such case it is agreed that the party thus attacked need not retreat in order to bring his case within the rule of necessity in self-defence; or if, in the assault, B. fall to the ground, whereby he could not fly, in such case if B. kill A. it is in self-defence upon chance-medley. 1 Hawk. c. 29, s. 14; 4 Black. Com. 185; 3 Inst. 56; State v. Dixon, 75 N. C. 275; Holloway v. Com. 11 Bush, 344.

The distinction between this kind of homicide and manslaughter is, that here the slayer could not otherwise escape although he would; in manslaughter, he would not escape if he could. Thus if A. assault B. so fiercely that going back would endanger

pose the ideal reasonable man would at the time of the conflict have believed that a gun aimed by the deceased was loaded, whereas in point of fact the defendant knew the gun was not loaded; would the defendant be justified in shooting down an assailant approaching with a gun the defendant knows to be unloaded, simply because the ideal reasonable man would suppose the gun to be loaded? No doubt that in such case no honest belief of the ideal reasonable man would be a defence to the defendant who knew that the belief was false, and that he was not really in danger of his life. And if the belief of the ideal reasonable man is not admissible to *acquit, a fortiori* is it inadmissible to *convict*.¹

¹ For a discussion of the authorities on this point see Whart. on Hom. § 495. And as to admissibility of evidence of deceased's bad character see Whart. Crim. Ev. § 69; and see *Adams v. People*, 47 Ill. 208; *Schnier v. People*, 23 Ill. 17; *State v. Swift*, 14 La. An. 827; *Gladden v. State*, 12 Fla. 562; *R. v. Smith*, 8 C. & P. 160; *R. v. Forster*, 1 Lewin C. C. 187. As to admissibility of evidence of threats of deceased see Whart. Crim. Ev. § 75.

Other cases exist in which a standard outside of the defendant is apparently set up, but in which the view actually taken is that the standard is to be the defendant's own consciousness; but that, as is elsewhere shown, if his error of fact is attributable to his own negligence, and if his apprehension of danger springs from this error in fact, then he is guilty of negligent homicide, that is of manslaughter.¹ That this is correct, see *infra*, § 492.

The penal codes of many of the

¹ *Morris v. Platt*, 32 Conn. 75; *Shorter v. People*, 2 Const. 193; *People v. Austin*, 1 Parker C. R. 154; *Creek v. State*, 24 Ind. 151, and cases cited in Whart. on Hom. § 500.

² 2 R. S. 660, § 3, sub. 2, declared by *Bronson, J.*, *Shorter v. People*, 2 Const. 193, to be only declaratory of the common law.

States leave the question open. The "fear," it is declared, in language substantially the same, though with incidental variations, must be the "fear of a reasonable person," or must be a "reasonable fear," and the killing must have been "under the influence of these fears," and "not in revenge." So it is presented by statute, though in language exhibiting much diversity, in New York,² California,³ Arkansas, Illinois, Georgia, Kansas,⁴ Mississippi,⁵ and Minnesota.⁶ But in no statute do we find a determination of the question whether this "reasonableness" is to be tested by the defendant's lights, or those of an ideal reasonable man. Undoubtedly, courts have read the statutes so as to include the latter view.⁷ But this is not a necessary implication of the statutes, which leave it open to determine in what way the term "reasonable" is to be defined.

The leading maxim on this point is one which Mr. Broom, in his *Legal*

³ *People v. Hurley*, 8 Cal. 390; *People v. Williams*, 32 Cal. 280.

⁴ Gen. Stat. 1868, p. 319.

⁵ *Dyson v. State*, 26 Miss. 362.

⁶ Stat. 1867, p. 598. I am indebted for these citations to *Hor. & Thomp. Cas. P.* 268.

⁷ See cases cited to § 488.

§ 490. As showing that it is the defendant's stand-point that is the test, we may appeal to a class of cases already noticed, where A. interferes to protect B., whom A. conceives to be unjustly and unfairly attacked by C. Now it does not matter whether A.'s impressions were

Analogy from cases of interference in the conflicts of others.

Maxims, tells us Lord Erskine relied on as of controlling importance, and which is adopted in a well known opinion of Baron Parke :¹ "The rule of law founded in justice and reason is, that *Actus non facit reum, nisi mens sit rea*; the guilt of the accused must depend upon the circumstances as they appear to him." To the same effect may be cited the following expressions of Garrow, J., in a much earlier case :² "Here the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man who was only a trespasser, he would be guilty of manslaughter."

This test has been maintained, with only slight occasional and probably inadvertent departures, by the Pennsylvania courts. It was uniformly applied in all homicide cases by Judge King, a great master of criminal law.³

Following Judge King's lead, we find Judge Brewster, afterwards presiding in the same court, declaring⁴ that "The attack must have been such as in the belief of the prisoner rendered it necessary to defend himself, even to the taking of the life of the deceased."

To the same effect may be cited an opinion of the late Chief Justice

Thompson, of Pennsylvania, speaking for the whole supreme bench of that State.⁵

In Massachusetts, if we are to judge from cases in which evidence of the deceased's ferocity and brutality is declared inadmissible, the view here defended is rejected; yet we must not forget that in Selfridge's case, which has always been held law in Massachusetts, evidence was received of the defendant's debility and of his expectation of being attacked by "some bully;" and Judge Parker expressly told the jury that these were among the chief points for them to consider in determining whether the danger to the defendant was apparent. And the present tendency of the Massachusetts Supreme Court is to return, though with the reservation that the impression must be reasonable, to the subjective tests established in Selfridge's case. Thus under the statutes authorizing the defendant to be examined in his own behalf, when the defendant has introduced evidence tending to show that, at the time he struck the blow, he had reasonable cause to apprehend an attack upon and serious bodily harm to himself from the man he killed, he is now allowed to testify that at that time he did in fact apprehend such an attack.⁶ Judge Thurman, in a capital case

¹ R. v. Thurborn, 1 Den. C. C. 388-9.

² R. v. Scully, 1 C. & P. 319.

³ This view runs through the charges of this great jurist in the homicide cases growing out of the riots of 1844-5, as given in prior pages. It was accepted by him, as a matter of unquestioned law, in Flavel's case, cited in Wharton's Crim. Law, 7th ed. § 1027.

⁴ Com. v. Carey, 2 Brewster, 401.

⁵ Logue v. Com. 38 Penn. St. 265. See also Com. v. Seibert, quoted at large in Whart. on Hom. § 507.

⁶ Com. v. Woodward, 102 Mass. 155. For the rule in Michigan see Pond v. State, 8 Mich. 150.

right or wrong. If they were honest, and not negligently adopted, then A.'s offence is not higher than manslaughter.¹

in Ohio, in 1852 (*Stewart v. State*, 1 Oh. St. 66), says: "Whether a person assaulted is or is not bound to quit the combat, if he can safely do so, before taking life, it will not be denied that in order to justify the homicide, he must, at least, have reasonably apprehended the loss of his own life, or great bodily harm, to prevent which, and under a real, or at least supposed necessity, the fatal blow must be given." But "reasonably" by what standard, and "supposed" by whom? That the defendant was the person thus taken as a standard appears from a succeeding passage, in which Judge Thurman, when inquiring whether there was such a *bonâ fide* supposition by the defendant, says, "We find no evidence tending to prove that Stewart (the defendant), when he saw Dotey (the deceased), was in danger of loss of life or limb, or of great bodily harm, or that he apprehended such danger." It is clear, therefore, that "reasonably" is used by Judge Thurman in antithesis to "negligently." If the defendant "reasonably," *i. e.* in due exercise of his reason, believed himself in danger, this is a defence.

In New York, the opinion of Judge Bronson in Shorter's case, as already cited, has been frequently referred to, in succeeding trials, as properly expounding the law. At the same time, in Lamb's case, in 1866, the judge trying the case charged the jury as follows: "A man is not bound, if his life is in imminent peril or danger, to wait until he receives a fatal wound, or has some great bodily injury inflicted on him. If he think his life is in imminent peril, he has a right to act

upon that thought and take life; but if he does it, it is at the risk of a jury saying, when all the facts are developed before them, whether he was justified in forming that opinion or not. If you are satisfied from the evidence that the circumstances did not warrant the conclusion that he arrived at, and that he took life, it is no justification, and you have a right to convict. It is not his impressions alone, but the question is, whether those impressions at the time he formed them were correct. If they were correct, it is a protection; if they were incorrect, then it affords him no immunity or protection." This is certainly very loosely put; and we can only reconcile the last statement with the first three by supposing that "correct," in the last sense, is to be understood as "correct according to the defendant's own opportunities of judging." But however this may be, we learn, on examining the opinions of the appellate judges, that the charge was, in the opinion of Davies, C. J., Smith, J., and Morgan, J., not erroneous, when taken as a whole; and that Smith, J., and Morgan, J., were of opinion that there were no facts proved to which a charge on the law of self-defence was applicable, and hence that it was not, if erroneous, calculated to prejudice the defendant. *People v. Lamb*, 2 Abb. Pr. N. S. 148; 2 Keyes, 360; S. C., 54 Barb. 342. See *Temple v. People*, 4 Lans. 119.

As cases adopting the subjective test see *Grainger v. State*, 5 Yerger, 459; *State v. Rippey*, 2 Head, 217; *State v. Williams*, 3 Heisk. 376; *Teal v. State*, 22 Ga. 75; *State v. Sloan*, 47 Mo. 604; *State v. Bryant*, 55 Mo. 75;

¹ Fost. 262; 1 Hawk. c. 31, § 44; and see supra, §§ 395 *et seq.*



to his individual character. An abstract and universal standard is here impracticable. The defendant should be held guiltless (of malicious homicide) if he only defended himself to the extent to which, according to his honest convictions as affected by his particular individuality, defence under the circumstances appeared to be necessary."¹

¹ As illustrations of this important principle the following cases may be here cited: To larceny a felonious intent is necessary; a person who takes another's goods honestly, though erroneously believing them to be his own, is not guilty of larceny. See *R. v. Reed*, 1 C. & M. 306; *Merry v. Green*, 7 M. & W. 623; *Com. v. Weld*, Thacher's C. C. 157.

A specific punishment is assigned to assaulting an officer: A, an officer, is assaulted by B., who is honestly and innocently ignorant that A. is an officer; B. is not liable for assaulting an officer, though chargeable with assaulting a private person. *Com. v. Logue*, 38 Penn. St. 265; *Yates v. People*, 32 N. Y. 509. See *U. S. v. Ortega*, 4 Wash. C. C. 531; *U. S. v. Liddle*, 2 Wash. C. C. 205. See *supra*, §§ 87, 419; *infra*, § 649.

A cruiser, under the innocent and honest belief that a merchant vessel is a pirate, captures the merchant vessel; this is not piracy in the cruiser. *The Mariana Flora*, 11 Wheat. 11. See *Crow v. Wright*, Bray. 118.

So is it in cases of drunkenness. Drunkenness is itself negligence, and if a drunken man without prior malice kills another, it is manslaughter. But unless there be such prior malice, such killing is not murder, because the drunken man, supposing his mind to be stupefied by drink, is incapable of a specific intent to take life. *Keenan v. Com.* 44 Penn. St. 55; *State v. Garvey*, 11 Minn. 154; *Jones v. State*, 25 Ga. 595; *Shannahan v. Com.* 8 Bush, 463; and other cases cited *supra*, § 51.

In the same line may be noticed cases in which, under the influence of public excitement, the mind becomes so disturbed as to be incapable of a specific intent. During the Philadelphia riots of 1844 several cases of this character were brought before the courts. In such a whirlwind of terror and fanaticism as then swept over the Irish residents of Philadelphia, dividing them into two hostile camps, it was not strange that men of weak minds should lose their balance, and, maddened by fear, with their powers of discrimination paralyzed or frenzied, should use wildly and mischievously any dangerous instruments they might seize. Were such men to be held guilty, under the old common law rule, of murder, if it appeared that by them, or by those with whom they acted, others were killed? Neither Judge King, who tried the cases on their first presentation, nor Judge Rogers, of the Supreme Court, to which body one of the cases was subsequently removed, so thought. These clear-headed judges held that the defendant could not be convicted of murder in the first degree, unless a specific intent to kill could be proved; and that this intent could not be supposed to have been harbored by men who were so overcome by excitement as to be incapable of knowing what they were about. Hence the convictions were for murder in the second degree or manslaughter.

Whether threats uttered before a fatal collision, not communicated to the defendant, are admissible, is dis-

§ 492. A man who deals with deadly weapons is bound to act considerately; and if he kill another person by his negligent use of such weapons, such killing, as is elsewhere fully shown, is manslaughter.¹

But though defendant believes he is in danger of life, he is guilty of manslaughter if this belief is imputable to his negligence.

That this view underlies the English common law on this point a scrutiny of the preceding cases will demonstrate. In Levett's case, for instance, which is the crucial case in this branch of the law, we find a man, who, suddenly aroused from sleep, under information wholly false, kills another whom he supposes to be a burglar, acquitted on the ground that in the circumstances he acted under an innocent error of fact. But Foster² tells us that "possibly it (the case in question) might have better been ruled manslaughter at common law, *due circumspection not having been used.*" Judge Bronson, in commenting on this passage,³ says, "He," (Foster) "calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder." In other words, when a man kills another in an honest error of fact, murder is out of the question. The only issue is, was this error negligent or non-negligent? If negligent, the killing is manslaughter. If non-negligent, excusable homicide.

cused in another volume. Whart. Crim. Ev. § 757. It is clear, however, that the very courts which hold the defendants, on the question of intent, to the strictest accountability, have been the most reluctant to admit evidence of the deceased having threatened the defendant, unless it could be proved that those threats were known to the defendant. But why should proof of threats when known to the defendant be received? Simply because when known to the defendant they go to explain his motive when the question of self-defence comes up. They are therefore admitted; and when admitted are deemed of peculiar weight, because they tend to show that danger was imminent to the defendant's apprehension.

Another illustration may be drawn

from the rulings with regard to the character of the deceased. As is elsewhere seen, the better opinion is that it is competent for the defendant, in cases of self-defence, to show that the deceased was a person of great physical strength, and of brutal and lawless character. No doubt this is admissible on general grounds, for the purpose of showing the deceased's attitude. But it is eminently proper, for the purpose of proving that the defendant, according to his lights, had reason to believe that the attack on him endangered his life. See Whart. Crim. Ev. § 757. For a discussion of this topic in its general relations see supra, § 102.

¹ See supra, § 343.

² Crown Law, p. 299. See this case discussed supra, § 38.

³ Shorter's case, 2 Const. 193.

§ 500. We have already seen¹ how far trespass is a palliation. We may here repeat that it is murder for A. to deliberately kill B. for merely trespassing on A.'s property.² When the act is the unduly violent assertion of a claim to property, the result is the same. Where A., having a right to the possession of a gun which was in the hands of the deceased, and which he knew to be loaded, attempted to take it away by force, and in the struggle which ensued the gun went off accidentally and caused the death of the deceased; it was held, that as the death was caused by the discharge of the gun, which was the result of the unlawful act of A., he was guilty of manslaughter; while if the shooting had been intentional, the offence would have been murder.³ The principle is that if such killing take place in the passion and heat of blood, the killing is manslaughter, but under no circumstances can it be less.⁴

§ 501. The owner of property has a right to use as much force as is necessary to prevent its forcible illegal removal, or his exclusion from its use.⁵ But to kill a mere trespasser, not attempting the removing of the property or any felony, is at least manslaughter; and if the killing

Trespass
no excuse
for killing
trespasser.

Owner
may resist
to death
violent re-
moval of
property,

274; 1 Hale P. C. 488; and see Pond v. People, 8 Mich. 150.

¹ Supra, § 462.

² R. v. Archer, 1 F. & F. 351; Com. v. Drew, 4 Mass. 391; People v. Cole, 4 Parker C. R. 35; People v. Horton, 4 Mich. 67; State v. Vance, 17 Iowa, 138; State v. Kennedy, 20 Iowa, 569; State v. Shippey, 10 Minn. 223; State v. Lambeth, 23 Miss. 322; State v. Morgan, 3 Ired. 186; State v. McDonald, 4 Jones Law (N. C.), 19; State v. Brandon, 8 Jones (N. C.), 463; Oliver v. State, 17 Ala. 588; Carroll v. State, 23 Ala. 28; Noles v. State, 26 Ala. 31; Harrison v. State, 24 Ala. 67; Keener v. State, 18 Georgia, 194; Monroe v. State, 5 Georgia, 95.

³ R. v. Archer, 1 F. & F. 351.

⁴ Supra, § 462; and see Claxton v. State, 2 Humph. 181.

⁵ See Com. v. Kennard, 8 Pick. 133;

Com. v. Power, 7 Met. (Mass.) 596; Johnson v. Patterson, 14 Conn. 1; People v. Hubbard, 24 Wend. 369; Curtis v. Hubbard, 1 Hill, 336; S. C., 4 Hill, 434; People v. Payne, 8 Cal. 341. It is true that we have cases intimating that only a dwelling-house can be defended by taking the assailant's life. State v. Zellers, 2 Halst. 220; Kunkle v. State, 32 Ind. 220; Carroll v. State, 23 Ala. 28; Roberts v. State, 14 Mo. 138. But this is true only so far as concerns the old common law right of making houses "castles" or fortifications. A dwelling-house has prerogatives of this class belonging to no other property. But this must not be so construed as to abridge the right to defend all other valuable rights to the utmost. See supra, § 100.

or attack upon his rights; but not attack on honor.

be not in hot blood, is murder.¹ The question is mainly, is an essential right of the party forcibly assailed? If so, he is entitled, in absence of adequate legal remedy, to use such force as is necessary to repel the attack.² But he is not entitled to use such force for the defence of honor.³

3. *Protection of Dwelling-house.*

§ 502. When a person is attacked in his own house he need retreat no farther. Here he stands at bay, and may turn on and kill his assailant if this be apparently necessary to save his own life; nor is he bound to escape from his house, in order to avoid his assailant. In this sense, and in this sense alone, are we to understand the maxim that "Every man's house is his castle." An assailed person, so we may paraphrase the maxim, is not bound to retreat out of his house, to avoid violence, even though a retreat may be safely made.⁴ But he is not entitled, either in the one case or the other, to kill his assailant unless he honestly and non-negligently believes that he is in danger of his life from the assault.

§ 503. A felonious attack on a house or its inmates may be resisted by taking life. This may be when burglars threaten an entrance,⁵ or when there is apparent ground to believe that a felonious assault is to be made on any of the inmates of the house. In the first case there can be no question that a person who, according to his lights, *bonâ fide* believes that a burglar is breaking into the house, can take the life of such burglar, if this be apparently the only way of preventing the offence; and the *bonâ fide* belief is a defence, if not negligently adopted, even though an innocent person be killed. And the same rule applies to a felonious attack on any of the inmates of the house.⁶

¹ U. S. v. Williams, 2 Cranch C. C. 439; Com. v. Drew, 4 Mass. 391; State v. McDonald, 4 Jones (Law) 19; State v. Morgan, 3 Ired. 186; Priester v. Augley, 5 Rich. (Law) 44; State v. Vance, 17 Iowa, 144.

² See Pond v. People, 8 Mich. 150; Roach v. People, 77 Ill. 25. Supra, §§ 98-100, 484.

³ Supra, § 101.

⁴ Supra, § 98; 1 Hale P. C. 486; 3 Greenl. Ev. § 117; Pond v. People, 8 Mich. 150; Carroll v. State, 28 Ala. 28; Haynes v. State, 17 Ga. 483 Com. v. Smith, as discussed in Jones v. Com. 75 Penn. St. 403.

⁵ See supra, § 495.

⁶ See supra, §§ 489 et seq.

§ 504. But this right is only one of *prevention*. It cannot be extended so as to excuse the killing of persons not actually breaking into or violently threatening a house.¹ Nor is killing justifiable for the prevention of a trespass or non-felonious entrance.²

But this does not excuse killing of mere trespassers.

¹ Patten v. People, 18 Mich. 314; R. v. Meade, 1 Lew. 184.

² R. v. Meade, 1 Lew. 184; R. v. Bull, 9 C. & P. 22; Patten v. People, 18 Mich. 314; People v. Walsh, 43 Cal. 447; Carroll v. State, 23 Ala. 28. See comments in Whart. on Hom. §§ 543-4.

In Patten v. People, 18 Mich. 314, a riotous approach was made towards the defendant's house, where his mother was living in bad health. It was ruled that if, from the defendant's knowledge of his mother's peculiar physical condition, he had reason to believe that her life was endangered by the riotous proceedings, and if the rioters were informed of her condition, or if all reasonable or practicable efforts had been made to notify them of the fact, it was sufficient to excuse his conduct toward them to the same extent as though the danger to her life had resulted from an actual attack upon her person, or as though he was in the like danger from an attack upon himself; and he was justified in using the same means of protection in the one case as in the other. See Whart. on Hom. § 545; and see supra, § 98.

Still more indulgently, so far as concerns the right of a person apparently defending his own house, was the law interpreted by the Supreme Court of New York in 1838. The evidence was that the deceased and two companions sought to gain admittance into a house of ill-fame by violence, and against the will of the keeper thereof, who ran out and struck the deceased with a door bar, from which death en-

sued; and this being proved, it was held by Nelson, C. J., and Cowen, J. (Bronson, J., dissenting), that testimony that threats had been made a week before by a party of rioters, who had broken into the house and abused the inmates, that they would return some other night and break in again, might be received and submitted to the consideration of the jury under the instruction of the court; although it was intimated that for the rejection of such evidence, where it was not shown that the deceased was one of the party who made the threats, a new trial would not be granted. People v. Rector, 19 Wend. 569. Meade's case was cited by Cowen, J., who said, "there" (in Meade's case) "the death was occasioned by firing a loaded pistol. The case at bar presents the same circumstance of alarm one step more remote, the assailant not being identified with the previous rioters. That, *per se*, however, would not so absolutely remove apprehension that the killing could not be referred to it. The jury might have laid no stress upon the circumstance; but I think it should have been received, because we cannot say they would not. The lightness of a relevant circumstance is no argument for withholding it from the jury."

In Vermont, in 1873, the doctrine of Meade's case was affirmed, it being expressly declared that the use of deadly weapons is permissible to avert an impending apparent felonious assault on the defendant or his household. State v. Patterson, 45 Vt. 308; 1 Green's C. R. 490. See supra, § 98.

§ 505. When there is resistance to a felonious attempt (*e. g.* burglary or arson, or felonious assault on the person), the question of the ownership or of the purposes of the building does not arise. If such a felony is apparently attempted, and if it cannot be apparently prevented except by taking the life of the assailant, then any person interested is justified in taking such life.¹ Hence, not only the owner of the house, but his friends, neighbors, and *a fortiori* his servants and guests, may arm themselves for this purpose.²

We must remember that there are two distinct aspects in which the relation of the "house" to the topic before us comes up. The first is that of defence of property, which has been already noticed. The second is that of self-defence; and it would seem to be clear that not only is an attacked person excused from further retreat when he is in his own house,³ but that he has the same excuse when he is pursued into any building out of which he cannot escape without exposing himself to serious bodily harm when escaping. The difference between the two cases is this: that when in his own house he is not bound to escape, even though he could do so conveniently; but that if in the house of another it is his duty, if he can conveniently and safely escape, to do so, and is not excused, if he can make such escape, in taking his assailant's life. But wherever his property is situate, he is entitled to use violent means to repel from it a violent attack.⁴

In California, in 1872, *People v. Walsh*, 43 Cal. 447, the same point was affirmed.

¹ *Supra*, § 494.

² *Cooper's case*, Cro. Car. 544; *Semayne's case*, 5 Co. 92; *R. v. Tooley*, 11 Mod. 242; *Com. v. Drew*, 4 Mass. 391; *Curtis v. Hubbard*, 4 Hill N. Y. 437; *Temple v. People*, 4 Lansing, 119; *McPherson v. State*, 22 Ga. 478; *Pond v. People*, 8 Mich. 150; *De Forrest v. State*, 21 Ind. 23; *People v. Walsh*, 43 Cal. 447.

³ See *supra*, § 502.

⁴ *Com. v. Daley*, 4 Penn. L. J. 145.

In an English case, where the prisoner was a lodger at a house to which

there was a backway, of which the prisoner was ignorant, it being the first night he had lodged at the house, and some persons split open the door of the house in order to get the prisoner out and ill-treat him; *Bayley, J.*, is reported to have said: "If the prisoner had known of the backway, it would have been his duty to have gone out backwards, in order to avoid the conflict." *R. v. Dakin*, 1 Lew. 166. But the true view is, that the protection of the house extends to each and every individual dwelling in it; and it has been held that a lodger might justify killing a person endeavoring to break into the house where he

§ 515. It is not necessary to allege that the party killed was "in the peace of God and of our lord the king," &c., though such words are commonly inserted, for they are not of substance, and perhaps the truth may be that the party was at the time actually breaking the peace.¹ The omission of the words is no ground for arrest of judgment.²

§ 516. As has been already seen,³ it is essential in all cases to show that the deceased was living at the time when the alleged mortal blow was struck.

§ 517. It is necessary to state that the act by which the death was occasioned was done feloniously, and especially that it was done of *malice aforethought*,⁴ which, as we have already seen, is the great characteristic of the crime of murder; and it must also be stated that the prisoner *murdered* the deceased. If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner *murdered*, &c., or *killed* or *slew* the deceased, the conviction can only be for manslaughter.⁵

§ 518. Where the killing is alleged to have been caused by a battery, it is necessary to allege an assault.⁶ In indictments for neglect, however, where no violence is alleged, the "assault" may be omitted.⁷ But the term "assault" does not vitiate the indictment, though it

"In the peace of God," &c., not a necessary averment.

Deceased must have been living at time of blow.

"Feloniously" and "malice aforethought" necessary at common law.

Allegation of "assault" necessary in violent homicides.

¹ 2 Hawk. P. C. c. 25, s. 73; 2 Hale, 186; 1 Hale, 433. Supra, § 310.

² Com. v. Murphy, 11 Cush. 472.

See R. v. Sawyer, R. & R. 294.

³ Supra, § 309.

⁴ 2 Hale, 186, 187; Bradley v. Banks, Yelv. 205; Com. v. Gibson, 2 Va. Cas. 70; Sarah v. State, 28 Miss. 268; Edwards v. State, 25 Ark. 444; Witt v. State, 6 Cold. (Tenn.) 5. In Massachusetts the terms may be omitted as to the assault, if given afterwards as to the killing. Com. v. Chapman, 11 Cush. 422. See also R. v. Nicholson, 1 East P. C. 346; Maille v. Com. 9 Leigh, 661. In Iowa, the indictment, under the statute, must aver both assault and killing to be wilful,

and premeditated. State v. Knouse, 39 Iowa, 118. In Wisconsin, under statute, "malice aforethought" need not be here used. State v. Duvall, 26 Wis. 415. In Louisiana, "wilfully" and "feloniously" are necessary to murder. State v. Thomas 29 La. An. 601. See State v. Harris, 27 La. An. 572. In Texas, "malice aforethought" is enough. Henrie v. State, 41 Tex. 573. See Wh. Cr. Plead. & Prac. § 269.

⁵ Infra, § 539; Wh. Prec. 7, 8; though see Anderson v. State, 5 Pike, 444. As to "strike" see § 530.

⁶ Lester v. State, 9 Mo. 666; Reed v. State, 8 Ind. 200.

⁷ R. v. Plummer, 1 C. & K. 600;

Where several are charged as principals, one as principal in the first degree and the others as present, aiding and abetting, it is not material which of them be charged as principal in the first degree, as having given the mortal blow, for the mortal injury done by any one of those present is, in legal consideration, the injury of each and every one of them.¹ It is otherwise when there is a local statute assigning distinct penalties to the degrees.² But an averment that the defendant was principal cannot, at common law, be supported by proof that he was accessory before the fact.³ An accessory before the fact, under the statutes making such principals, may be indicted as principal.⁴

§ 523. It may be generally stated that when one kind of poison is averred and another proved, the variance is not fatal.⁵

§ 524. A special *scienter* in cases of poisoning is proper,⁶ though in Pennsylvania, at a time when granting an *allocatur* for review was at the discretion of the court, the omission of the *scienter* (the indictment containing the averment "knowingly") was held, after conviction, not ground for an *allocatur*.⁷ In Massachusetts it is not necessary to aver in poisoning a specific intent to kill when there are other allegations from which the *scienter* is inferrible.⁸

averred to be acts of principal.

Variance in description of poison not fatal.

Scienter requisite in poisoning.

¹ *Supra*, § 221; *Foster*, 551; 1 *East* P. C. 350; *R. v. Culkin*, 5 C. & P. 121; *R. v. O'Brien*, 1 Den. C. C. 9; 2 *Car. & Kir.* 115; *Com. v. Chapman*, 11 *Cush. (Mass.)* 422; *State v. Mairs*, 1 *Coxe*, 453; *State v. Fley*, 2 *Brev.* 338; *State v. Jenkins*, 14 *Rich. (S. C.)* L. 215; *Brister v. State*, 26 *Ala.* 107; *People v. Cotta*, 49 *Cal.* 166; *Whart. Cr. Ev.* § 102.

² *Supra*, § 221.

³ *R. v. Soares*, R. & R. 25; *R. v. Fallon*, 9 *Cox C. C.* 242; *State v. Wyckoff*, 2 *Vroom*, 65; *Hughes v. State*, 12 *Ala.* 458; *Josephine v. State*, 89 *Miss.* 613. See *supra*, § 208.

⁴ *Cathcart v. Com.* 37 *Penn. St.* 108; *Campbell v. Com.* 84 *Penn. St.* 187; *Baxter v. People*, 3 *Gilman*, 368; *Dempsey v. People*, 47 *Ill.* 323;

Yoe v. People, 49 *Ill.* 410; *State v. Zeibart*, 40 *Iowa*, 169; *Jordan v. State*, 56 *Ga.* 92. See *supra*, § 238.

⁵ 2 *Hale* P. C. 485; *R. v. Tye*, R. & R. 345; *R. v. Culkin*, 5 C. & P. 121; *R. v. Waters*, 7 C. & P. 250; *R. v. Grounsell*, *Ibid.* 788; *R. v. Martin*, 5 C. & P. 128. And see *R. v. Hickman*, 1 *Mood. C. C.* 34; *R. v. O'Brien*, 2 C. & K. 115; *R. v. Warman*, *Ibid.* 195; *Carter v. State*, 2 *Carter*, *Ind.* 617; *State v. Vawter*, 7 *Blackf.* 592. As to ambiguous description of poison see *R. v. Clark*, 2 B. & B. 473.

⁶ *State v. Yarborough*, 77 *N. C.* 524. See forms in *Whart. Prec.* 125 *et seq.*

⁷ *Com. v. Earle*, 1 *Whart. R.* 525.

⁸ *Com. v. Hersey*, 2 *Allen*, 173. In *Fairlee v. People*, 11 *Ill.* 1, it

the indictment allege that the defendant did strike and thrust, proof of a striking which produced contused wounds only will maintain the indictment.¹

“Firing” is not a sufficiently exact mode of averring “shooting;”² nor is “striking.”³

“Strike” not necessary when poison or other modes of death, not involving wounds, are used.

General description of place of wound sufficient.

§ 531. Where the nature of the injury does not admit of the averment of a stroke, it is enough if the special instruments themselves are correctly enumerated.⁴

§ 532. In the old practice it was held that the indictment must show in what part of the body the wound was inflicted, though it was said that if the wound be stated to be on the right side, and be proven to be on the left, the variance is not fatal.⁵ It is now, however, generally conceded that “upon the body” is a sufficient averment of location,⁶ though if the description be inconsistent, this may be bad on demurrer.⁷

§ 533. The term “wound” has had two distinct interpretations given to it: the *first*, under the ordinary common law indictments for homicide; the *second*, under the English and American statutes, making “wounding” specifically indictable.

When the term “wound” is used in an indictment for homicide (*i. e.* in the clause, giving unto the deceased *one mortal wound, &c.*), the term is used in a popular sense, and is understood to include bruises,⁸ &c.

Where, however, the indictment is under a statute making “wounding” specifically indictable, the construction

¹ Arch. C. P. 10th ed. 486. See *supra*, § 520. As to averment of throwing stones see *R. v. Dale*, 1 R. & M. C. C. 5; and see *White v. Com.* 6 Bin. 179, 183; *Turns v. Com.* 6 Met. (Mass.) 224.

² *Shepherd v. State*, 54 Ind. 25.

³ *Guedel v. People*, 43 Ill. 226.

⁴ *R. v. Webb*, 2 Lew. 196; S. C., 1 M. & Rob. 405; *R. v. Tye*, R. & R. 345.

⁵ 2 Hale, 186; Archb. C. P. 384; *Dias v. State*, 7 Blackf. 20; *Nelson v. State*, 1 Tex. Ap. 41.

⁶ *Sanchez v. People*, 8 E. P. Smith, 147; *Whelchell v. State*, 23 Ind. 89; *Thompson v. State*, 36 Tex. 326. See *People v. Davis*, 56 N. Y. 95; *State v. Draper*, 65 Mo. 338. Even when a part of the body is described, this is to be taken in a popular and not scientific sense. *R. v. Edwards*, 6 C. & P. 401.

⁷ *Dias v. State*, 7 Blackf. 20.

⁸ *R. v. Warman*, 2 C. & K. 195; 1 Den. C. C. 185; *State v. Leonard*, 22 Mo. (1 Jones) 449.

demeanor of involuntary manslaughter.¹ And on an indictment for murder in the second degree there can be a conviction of manslaughter.²

Joint defendants may be convicted of different degrees.³

§ 543. In New York, on an indictment for murder at common law, a verdict of guilty, without specifying the degree, is a verdict of guilty of murder in the first degree.⁴ But as a general rule, established in many States by statute (*e. g.* Maine, Massachusetts, Pennsylvania, Ohio, and California), in others as a common law principle, the degree must be designated.⁵ In Missouri it is only necessary, by statute, to

¹ *Com. v. Gable*, 7 S. & R. 423; *Walters v. Com.* 44 Penn. St. 135; but see *Whart. Crim. Plead. & Prac.* § 261; and *Hunter v. Com.* 79 Penn. St. 503; *Bruner v. State*, 58 Ind. 159. In Kentucky, there can be such a conviction. *Buckner v. Com.* 14 Bush, 60.

Under murder, in Kentucky, defendant cannot be convicted of willfully striking. *Conner v. Com.* 13 Bush, 714.

² *State v. Smith*, 53 Mo. 139.

³ *Whart. Crim. Plead. & Prac.* § 755; *Mickey v. Com.* 9 Bush, 593. *Supra*, § 236.

⁴ *Kennedy v. People*, 39 N. Y. 245.

⁵ *State v. Verrill*, 54 Me. 408; *State v. Cleveland*, 58 Me. 564; *Com. v. Herty*, 109 Mass. 348; *State v. Dowd*, 19 Conn. 388; *Ford v. State*, 12 Md. 514; *State v. Oliver*, 2 Houston, 585; *State v. Town, Wright*, 75; *Dick v. State*, 3 Oh. St. 88; *Parks v. State*, *Ibid.* 101 (in Ohio, however, the indictment must be special under statute, as there are no common law crimes); *Fouts v. State*, 8 Oh. St. 98; *Hagan v. State*, 10 Oh. St. 459; *State v. Moran*, 7 Clarke (Iowa), 236; *State v. Redman*, 17 Iowa, 329; *Tulley v. People*, 6 Mich. 273; *Hogan v. State*, 30 Wis. 437; *State v. Reddick*, 7 Kans. 143; *State v. Huber*, 8 Kans.

447 (by statute); *McPherson v. State*, 9 Yerg. 279; *Johnson v. State*, 17 Ala. 618; *Hall v. State*, 40 Ala. 698; *Robertson v. State*, 42 Ala. 509 (by statute); *Levison v. State*, 54 Ala. 520 (a case of poisoning); *McGee v. State*, 8 Mo. 495; *State v. Upton*, 20 Mo. 397; *People v. Campbell*, 40 Cal. 129; *Isbell v. State*, 31 Tex. 138; *State v. Rover*, 10 Nev. 388. As to Georgia, see *McGuffie v. State*, 17 Ga. 497; *Washington v. State*, 36 Ga. 222.

In Massachusetts, in a celebrated case which has been the subject of much discussion, in 1865-6, it was held that a plea of "guilty of murder in the first degree," to the ordinary indictment for murder, was, at common law, a plea of guilty of murder in the first degree, and that on this a capital sentence could be imposed. *Green v. Com.* 12 Allen, 155.

In Missouri only the minor degrees need be specially found. *State v. Brannon*, 45 Mo. 329.

See, further, as to verdicts, *State v. Potter*, 16 Kans. 30; *State v. Bowen*, 16 Kans. 475.

In Pennsylvania, on an indictment for murder by poisoning, a verdict of guilty in manner and form as indicted is a verdict of guilty of murder in the first degree. *Com. v. Earle*, 1 Whart. 525. But if the indictment is one

CHAPTER II.

RAPE.

DEFINITION.

Intent to use force necessary, § 550.

I. DEFENDANT'S CAPACITY TO COMMIT OFFENCE.

Under fourteen, boy presumed to be incapable of offence, § 551.

Impotency a defence, § 552.

Husband may be indicted as accessory, § 553.

All aiders may be principals in second degree, § 553 a.

II. IN WHAT CARNAL KNOWLEDGE CONSISTS.

Penetration must be proved, but not emission, § 554.

III. IN WHAT WANT OF WILL CONSISTS.

"Against her will" is equivalent to "without her consent," § 556.

Acquiescence through fear is not consent, § 557.

Nor is acquiescence of infant, § 558.

Nor is acquiescence through fraud, § 559.

Nor acquiescence through mental disorder, § 560.

Nor acquiescence of married woman under mistake, § 561.

Nor acquiescence obtained by artificial stupefaction, § 562.

How far fraud is equivalent to force, § 563.

Prior unchastity of prosecutrix no defence, § 564.

IV. PARTY AGGRIEVED AS A WITNESS.

Testimony of prosecutrix should be corroborated, § 565.

She may be corroborated by her own prior statements, § 566.

Such evidence to be confined to corroboration, § 567.

Prosecutrix may be impeached by proof of bad character for chastity, and in some States by proof of prior immoral acts, § 568.

V. PLEADING.

Two defendants may be joined as principals, § 569.

Rape may be joined with assault, § 570.

Allegation of assault is unnecessary, § 571.

Age need not be averred, § 572.

"Ravish," and "forcibly and against the will," are essential, § 573.

Sex need not be averred, § 574.

Defendant may be convicted of minor offence, § 575.

VI. ASSAULT WITH INTENT TO RAVISH.

Assault may be sustained when rape is not consummated, § 576.

Force to be inferred from circumstances, § 576 a.

Assent bars prosecution if knowingly given by person capable of assenting, § 577.

DEFINITION.

§ 550. RAPE is the act of having carnal knowledge of a woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm.¹ How far, if such permission is given, the fact that it was obtained by fraud, or through the woman's ignorance, affects the case, is hereafter discussed.² "Forcibly" is frequently

¹ Steph. Dig. Cr. L. c. xxix.

² Infra, § 559.

CHAPTER IV.

MAYHEM.¹

Mayhem is inflicting wound diminishing capacity for self-defence, § 581. | Intent to be inferred from facts, § 582. | Offence is felony, § 583.

§ 581. **MAYHEM**, at common law, says Mr. East, is such a bodily hurt as renders a man less able in fighting to defend himself or annoy his adversary; but if the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem.² Upon this distinction, the cutting off, disabling, or weakening the man's hand, or finger, or striking out an eye, or fore-tooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his ear or nose are not such at common law. By statutes, however, in England and in the United States, the offence has been extended, so as to cover all malicious disabling injuries to the person.³

- ¹ For indictments in mayhem see Wh. Prec. as follows:—
- (192.) Indictment on Coventry Act, 22 & 23 Car. 2, c. 1, for felony by slitting a nose, and against the aider and abettor.
- (193.) Mayhem by slitting the nose, under the Rev. Stat. Massachusetts, ch. 125, § 10.
- (194.) Mayhem by cutting out one of the testicles, under the Pennsylvania statute.
- (195.) Against principal in first and second degree for mayhem, in biting off an ear, under the statute of Alabama.
- (196.) Biting off an ear, under Rev. Stat. N. C. 84, c. 84.
- (197.) Maliciously breaking prosecutor's arm with intent to maim him, under the Alabama statute.
- ² 1 East P. C. 393. See *R. v. Hagan*, 8 C. & P. 167.
- ³ 1 East P. C. 393; Co. Litt. 126, 288; 3 Inst. 62, 118; Staundf. 38 b; 1 Hawk. c. 44, ss. 1, 2; 2 Hawk. c. 23, s. 16; 3 Blac. Com. 121; 4 Blac. Com. 205; *State v. Danforth*, 3 Conn. 112; *Foster v. People*, 50 N. Y. 598; *Godfrey v. People*, 63 N. Y. 207; *Scott v. Com.* 6 S. & R. 224; *Rifle-maker v. State*, 25 Oh. St. 395; *Com. v. Hawkins*, 11 Bush, 603; *State v. Vowels*, 4 Oreg. 324; *State v. Brown*, 60 Mo. 141; *Esckridge v. State*, 25 Ala. 30. The distinction between

CHAPTER VI.

ABORTION.

Producing an abortion is an offence at common law, § 592.

Woman a witness for the prosecution, § 593.

Consent no defence, § 594.

Otherwise as to necessity, § 595.

Non-pregnancy no defence to indictment for attempt, § 596.

Indictment must be special, § 597.

§ 592. **THERE** is no doubt that at common law the destruction of an infant unborn is a misdemeanor, and at an early period it seems to have been deemed homicide.¹

If the child dies subsequently to birth from wounds received in the womb, it is clearly homicide,² even though the child is still attached to the mother by the umbilical cord.³ Destruction of the infant after quickening is agreed on all sides to be an offence at common law; though whether it is so before the infant has quickened has been doubted at common law.⁴ In determining this question we must remember that the civil rights of an infant in *ventre sa mere* are equally respected at every period of gestation; and it is clear that no matter at how early a stage, he may be appointed executor;⁵ is capable of taking as legatee,⁶ or under a marriage settlement;⁷ may take specifically

¹ 1 Russ. on Cr. 671; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; 1 Hale, 434; 1 East P. C. 90; 3 Chitty C. L. 798. See W. & S. Med. Jur. tit. Abortion; and Ellwell's Med. Jur. § 243, &c. For statutory cases see Com. v. Wood, 11 Gray, 86; Com. v. Brown, 14 Gray, 419; Com. v. Jackson, 15 Gray, 187; People v. Lohman, 2 Barbour, 216; S. C., 1 Comst. 379; People v. Stockham, 1 Parker C. R. 424; Moody v. State, 22 Ohio St. 110; Wilson v. State, 22 Ohio R. 319; Robinson v. State, 8 Ohio St. 132.

² R. v. Senior, 1 Mood. C. C. 346; 3 Inst. 50. See supra, § 445.

³ R. v. Trilloe, 2 Moody C. C. 260.

⁴ Com. v. Bangs, 9 Mass. 387; Com. v. Jackson, 15 Gray, 187; 2 W. & S. Med. Jur. § 84; Guy's Med. Juris. tit. Abortion; 1 Beck, 172, 192; Lewis C. L. 10. See 1 Russ. on Crim. 661; 1 Vesey, 86; 3 Coke's Inst. 50; 1 Hawk. c. 13, s. 16; Bracton, l. 3, c. 21.

⁵ Bac. Ab. tit. Infants.

⁶ 2 Vernon, 710.

⁷ Swift v. Duffield, 5 S. & R. 38; Doe v. Clark, 2 H. Bl. 399; 2 Ves. Jr.

under a general devise as a "child;"¹ and may obtain an injunction to stay waste.² That the destruction of an infant before quickening is a misdemeanor at common law, has been held in Pennsylvania.³ A contrary view, at common law has been expressed in Massachusetts,⁴ in New Jersey,⁵ and in Iowa,⁶

673; *Thellusson v. Woodford*, 4 Vesey, Jr. 340.

¹ *Fearne*, 429.

² *Vernon*, 710.

³ *Com. v. Demain*, &c. 6 Penn. Law Jour. 29; *Brightly*, 441; *Mills v. Com.* 13 Penn. St. (1 Harris) 631; *Lewis C. L.* 13.

⁴ *Com. v. Bangs*, 9 Mass. 387; *Com. v. Parker*, 9 Met. 263. Otherwise by statute, see *Com. v. Wood*, 11 Gray, 85; *Com. v. Jackson*, 15 Gray, 187.

⁵ *State v. Cooper*, 2 Zabriskie, 57.

⁶ *Abrams v. Foshee*, 3 Clarke, 274; and see *Hatfield v. Gano*, 15 Iowa, 177; *Evans v. People*, 49 N. Y. 386. For a discussion of the term "miscarriage" see *Smith v. State*, 33 Me. 48. For a notice of medical authorities see 7th edition of this work, §§ 1223 *et seq.*

The weight of medical authority is that quickening is a mere circumstance in the physiological history of the fetus, which indicates neither the commencement of a new stage of existence, nor an advance from one stage to another; that it is uncertain in its periods, sometimes coming at three months, sometimes at five, sometimes not at all; and that it is dependent so entirely upon foreign influences as even to make it a very incorrect index, and one on which no practitioner can depend, of the progress of pregnancy. See *R. v. Wycherly*, 8 C. & P. 265. There is as much vitality, in a physical point of view, on one side of quickening as on the other; and in a social and moral point of view, the infant is as much

entitled to protection, and society is as likely to be injured by its destruction, a week before it quickens as a week afterwards. But if the common law, in making feticide penal, had in view the great mischief which would result from even its qualified toleration, — *e. g.* the removal of the chief restraint upon illicit intercourse, and the shock which would thereby be sustained by the institution of marriage and its incidents, — we can have no authority now for withdrawing any epoch in gestation from the operation of the principle. Certainly the restraints upon illicit intercourse are equally removed — the inducements to marriage are equally diminished — the delicacy of the woman is as effectually destroyed — no matter what may be the period chosen for the operation. Acting under these views, the legislatures of Massachusetts and New Jersey, in order to fill up the supposed gap, passed acts making ante-quickening feticide individually penal. If, however, as has been argued, no such gap exists, it will be worth while for the courts of those States which have not legislated on the subject to consider how far an exploded notion in physics is to be allowed to suspend the operation of a settled doctrine of the common law.

It is remarkable that both in Massachusetts and New Jersey a leading English case on this point was not referred to, where, in an investigation before a jury of matrons, Gurney, B., said, after taking medical counsel, "Quick with child, is having conceived; with quick child is when the

§ 593. The woman on whom the abortion has been performed is a competent witness against the defendant, even though she be regarded as an accomplice.¹ But in cases of force or undue influence the law regards her

child is quickened." *R. v. Wycherly*, 8 C. & P. 265. This view disposes of all the common law authorities against the indictability of the offence.

In New York, where one statute makes it a misdemeanor to administer drugs, &c., to a pregnant female, with intent to produce a miscarriage; and another statute declares it manslaughter to use the same means with intent to destroy the child, in case the death of such child should be thereby produced; an indictment charging all the facts necessary to constitute manslaughter under the latter statute, except the intent to destroy the child, and alleging only an intent to produce miscarriage, is fatally defective as an indictment for manslaughter, but is good as an indictment for a misdemeanor. *Lohman v. People*, 1 Comst. 379; *People v. Lohman*, 2 Barb. 216. See *People v. Stockham*, 1 Parker C. R. 424. A conviction for a misdemeanor, for administering drugs to a pregnant woman with intent to produce miscarriage, would, it seems, be a bar to a subsequent indictment for manslaughter for administering the same drugs to the same female, with intent to destroy the child, by which means the death of the child was produced. *Ibid.*

If the mother dies in consequence of the operation, the offence is murder or manslaughter. If the intent was to kill or to do grievous bodily harm, the offence is murder. If otherwise, it is manslaughter. See *supra*, § 325.

By the Pennsylvania Act of May 31, 1781, any person who counsels, advises, or directs a woman "to kill the child she goes with, and after she is delivered of such a child she kills it, is to be deemed accessory to such murder." Purdon, 9th ed. 531.

Under 1 Vict. c. 85, it is immaterial whether or not the woman was pregnant at the time. *R. v. Goodhall*, 1 Den. C. C. 187. For forms of indictments in abortion see *Whar. Prec.*, as follows:—

- (204.) Production of abortion at common law. First count. By assault and thrusting an instrument in the prosecutor's womb, she being "big, quick, and pregnant."
- (205.) Second count, averring prosecutrix to be "big and pregnant."
- (206.) Third count, merely averring pregnancy in same.
- (207.) Assault on a woman with quick child, so that the child was brought forth dead. (At common law.)
- (208.) Against A., the principal, for producing an abortion by using an instrument on the person of a third party, and B., an accessory before the fact, under the English statute.
- (209.) Administering a potion at common law with intent to produce abortion.
- (210.) Producing abortion in New York, 2 R. S. 550, 551, § 9, 2d ed.
- (211.) Administering medicine under the Indiana statute, with intent to produce abortion.
- (212.) Attempt to procure abortion by

¹ *Whar. Crim. Ev.* § 440; *Com. v. Briggs*, 9 R. I. 361; *People v. Josse-lyn*, 39 Cal. 393.
Wood, 11 Gray, 86. See *State v.*

CHAPTER VIII.

ASSAULTS.

I. ASSAULTS GENERALLY.

1. *Incidents of Prosecution.*

An assault is an apparent violent attempt to do hurt to another, § 603.

There must be some movement towards physical violence, § 604.

Frustration no defence, § 605.

Apparent ability to hurt sufficient, § 606.

Conditional threat of force may be an assault, § 607.

Assault on a mass of people is assault on the individuals, § 608.

Assault may be inferred from facts, § 609.

Administering poison may be an assault, § 610.

Violence provocative of a breach of the peace may be an assault, § 611.

And so of injurious physical attempts on persons ignorant of act, § 612.

Wrongful abuses of authority may be assaults, § 613.

Apparent effect must be injurious, § 614.

No defence that act was secret, § 615.

All concerned are principals, § 616.

Any tactical application of force is a battery, § 617.

2. *Defence.*

Pendency of civil prosecution no defence, § 618.

Nor are words of provocation, § 619. Otherwise as to misadventure and *casus*, § 620.

Attacks on property may be forcibly repelled, § 621.

Intruders may be expelled from depot, § 622.

Passenger disobeying rules may be expelled from car, § 623.

Persons refusing to leave may be expelled from house, § 624.

Inn-keeper has this right as to visitors, § 625.

And so has person controlling cemetery, § 626.

Agent may eject trespassers, § 627.

Prior assault a defence, § 628.

Defence of relative is in like manner justifiable, § 629.

Exercise of legal right is no sufficient provocation, § 630.

Parents have right of proper correction, § 631.

And so have school-masters, § 632.

Husband at common law may coerce wife, § 633.

So of master as to servant, and so as to officer of justice, § 634.

Alms and poor-house keepers may restrain inmate, § 635.

Assent a defence, § 636.

3. *Indictment and Verdict.*

Enough to aver assault, § 637.

All concerned are principals, § 638.

When double blow is given both parties struck may be joined, § 639.

Battery may be discharged as surplusage, § 640.

II. ASSAULTS WITH FELONIOUS INTENT.

Intent to kill essential to indictments for assaults with intent to murder, § 641.

Defendant may be convicted of assault, § 641 *a*.

There must be apparent ability to consummate attempt, § 642.

Touching not necessary to offence, § 643.

In indictment particularity of specification is not required, § 644.

§ 611. Threats of great bodily harm, accompanied by acts showing a formed intention of putting them into execution, if intended to put the person threatened in fear of their execution, and if they have that effect and are calculated to produce that effect upon a person of ordinary firmness, constitute a breach of the public peace punishable by indictment.¹ And detaining another by threats in a particular place may be an assault,² though it is not so when a mere passive resistance is offered without any threats or other indications of intended violence.³

§ 612. It is no defence that the attack was made upon an unconscious person, or upon one ignorant of the nature of the act. Thus, to expose an unconscious child is an assault.⁴ The same rule applies where the party assaulted does not know what the act is. Thus one decoying a female under ten years of age, and detected standing before her in a state of indecent exposure, is properly convicted of an assault with an attempt to commit a rape, though there is no evidence of his actually touching her.⁵ And even non-resistance is no defence to an indictment for an assault with intent to take indecent liberties, when the defendant is a school-master and the person assailed a female pupil.⁶

Where a medical practitioner had sexual connection with a female patient of the age of fourteen years, who had for some time been receiving medical treatment from him, it was held that he was guilty of an assault, the jury having found that she was ignorant of the nature of the defendant's act, and made no resistance, solely from a *bona fide* belief that the defendant was (as he represented) treating her medically, with a view to her

¹ State v. Benedict, 11 Verm. 236; State v. Baker, 65 N. C. 332. *Supra*, § 197; *infra*, § 1553.

² Long v. Rogers, *supra*; Smith v. State, 7 Humph. 43; Bloomer v. State, 3 Sneed, 66; Bird v. Jones, 7 Q. B. 742.

³ Inness v. Wylie, 1 C. & K. 257; People v. Lee, 1 Wheeler C. C. 364.

⁴ R. v. March, 1 C. & K. 496. See *supra*, § 359.

⁵ Hays v. People, 1 Hill, 351. See R. v. Lock, L. R. 2 C. C. R. 10, and cases cited *supra*, §§ 558-9, 576.

⁶ R. v. Nichol, R. & R. 130; R. v. McGavaran, 6 Cox C. C. 64. See *supra*, § 576; *infra*, § 636. As to general defence of assent see *supra*, § 141. As to special relations, *infra*, § 636.

proof that the prosecutor struck the first blow will not justify an enormous battery.¹

It is not the defendant's mere notion that he is about to be attacked that justifies; but there must be circumstances leading the defendant, according to his lights, to expect an attack.²

If the defendant prove an assault merely, as, for instance, that the prosecutor lifted up a cane or staff, and offered to strike him, this is sufficient to justify the defendant's striking the prosecutor; for a party seriously threatened need not, in such a case, stay till the other has actually struck him.³

Nor is a party in such case precluded from self-defence if it appears that he could have previously invoked the interposition of the public authorities for his protection.⁴

§ 629. A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master, whenever this is necessary to avert a blow.⁵

It is otherwise, however, when the object of interference is merely to take part in a fight.⁶

§ 630. Generally, the exercise of a legal right is not a provocation that excuses an assault.⁷

§ 631. It is admissible for the defendant to show that the battery was merely the correcting of a child by its parent;⁸ but if the parent chastising the child exceed the bounds of moderation and inflict cruel, merciless, or unnecessary punishment, he is subject to indictment.⁹

¹ State v. Quinn, 3 Brevard, 515; Cotton v. State, 4 Texas, 260; Floyd v. State, 36 Geo. 91. See Com. v. Ford, 5 Gray (Mass.), 475; Allen v. State, 52 Ala. 391. Supra, § 619.

² Supra, § 491. See Whart. on Crim. Ev. §§ 69 *et seq.*; State v. Lull, 48 Vt. 581; State v. Bryson, 1 Winston (N. C.), No. 2, 86.

³ Bull. N. P. 18; 2 Ro. Abr. 547, l. 37. See supra, §§ 455 *et seq.*

⁴ Evers v. People, 6 Thomp. & C. 156; 3 Hun, 716. Supra, § 97 a.

⁵ 2 Ro. Abr. 546 (D.); 1 Hawk.

c. 60, ss. 23, 24. Supra, §§ 97 *et seq.*, 494.

⁶ State v. Johnson, 75 N. C. 174; Waddell v. State, 1 Tex. Ap. 720.

⁷ State v. Lawry, 4 Nev. 161.

⁸ Com. Dig. Pleader, 3 M. 19; 1 Hawk. c. 60, s. 23; c. 62, s. 2; and see 2 B. & P. 224; Reeve's Dom. Rel. 288; 1 Kent Com. 204. See supra, § 359; infra, § 1563. As to guardian and ward see Stanfield v. State, 43 Tex. 167.

⁹ Com. v. Coffey, 121 Mass. 66; Com. v. Blaker, 1 Brewst. 311; Neal

nant cruelty. Nor is this view modified by the fact that the two are at the time living apart.¹ But the better opinion is that while a husband has no right to inflict corporal punishment on his wife, he may defend himself against her, and restrain her from acts of violence towards himself or others.²

§ 634. A master, it is said, may chastise his apprentice moderately;³ though a master, not standing *in loco parentis*, cannot chastise a servant.⁴ The master of a vessel, unless restrained by statute, has the same power under the same checks.⁵ Where an officer of justice is charged with assault and battery, it is a good defence that the offence was committed in the discharge of his official duties.⁶ No greater force, however, can be used,⁷ nor any further duress imposed,⁸ than is necessary to effect the immediate object. So a man may justify laying his hands upon another to prevent his fighting, or committing a breach of the peace;⁹ or to prevent him from rescuing goods taken in execution;¹⁰ or the like.¹¹ A coroner,¹² and a magistrate upon a preliminary inquiry,¹³ may justify a forcible exclusion of a person from the justice room, even though he be the attorney of the party accused; but if the inquiry be final and of a judicial nature all persons have a right to be present.¹⁴

§ 635. Persons having charge of poor and alms-houses have the right to restrain by force, if necessary to the preservation of order, those under their charge. But where the keeper of a town alms-house seized and chained to the floor a pauper, who was at the time quietly reading, it

¹ *State v. Black*, 1 Wins. (N. C.) & Prac. §§ 1-20. As to homicide in such cases see supra, §§ 333, 374.
 Law, No. 1, 266. See Wh. Con. of L. § 166.

² *Com. v. McAfee*, 108 Mass. 458; 445; *Rusberry v. State*, 1 Tex. Ap. 664; *Skidmore v. State*, 43 Tex. 93.
People v. Winters, 2 Parker C. R. (N. Y.) 10; *State v. Buckley*, 2 Harring. 552; *State v. Mabrey*, 64 N. C. 592; *State v. Oliver*, 70 N. C. 60.

³ *R. v. Keller*, 2 Show. 289.

⁴ See *Penns. v. Kerr*, Add. 324; *Com. v. Conrow*, 2 Barr, 402; *Com. v. Baird*, 1 Ashm. 267; *Davis v. State*, 6 Tex. Ap. 133; 2 Kent Com. 261.

⁵ Supra, § 374; infra, §§ 1871-85.

⁶ 2 Ro. Abr. 546 a; Whart. Plead.

⁷ *Harrison v. Hodgson*, 10 B. & C. 445; *Rusberry v. State*, 1 Tex. Ap. 664; *Skidmore v. State*, 43 Tex. 93.

⁸ *State v. Parker*, 75 N. C. 249.

⁹ *Com. Dig. Pleader*, 3 M. 16.

¹⁰ 3 Lev. 113.

¹¹ See 1 Mod. 168; 2 Ro. Abr. 546.

¹² *Garnett v. Ferrand*, 6 B. & C. 611.

¹³ *Cox v. Coleridge*, 1 B. & C. 37.

¹⁴ *Daubney v. Cooper*, 10 B. & C. 237.

that actually done is no defence.¹ Thus consent on a woman's part is no defence to an indictment for a sexual assault when the consent was simply given to medical treatment;² and consent to take certain food is no defence to an indictment for taking such food when infected by poison.³ It has been even held that consent on a woman's part to illicit intercourse is no defence to an indictment for an assault in communicating to her a venereal disease;⁴ or to excessive force in the act.⁵

3. *Indictment and Verdict.*

§ 637. It is enough if the indictment charge an assault of the defendant on the prosecutor.⁶ It is not necessary that the word "unlawfully" should be used in the indictment;⁷ nor is "wilfully" or "maliciously" essential;⁸ nor is it necessary to allege that the assault and battery were committed in public, or to the terror of the citizens of the Commonwealth.⁹

§ 638. As has been seen, all concerned, whether as inciters, aiders, or agents, are principals, and may be charged jointly with the assault.¹⁰

Hence indecent fondling of a child without consent is an assault. *Ridout v. State*, 6 Tex. Ap. 249.

¹ *Supra*, § 141.

² *R. v. Case*, 4 Cox C. C. 220; *R. v. Flattery*, 13 Cox C. C. 388; *Don Moran v. People*, 25 Mich. 356. *Supra*, §§ 559, 612.

³ *Com. v. Stratton*, 114 Mass. 303.

⁴ *R. v. Bennett*, 4 F. & F. 1105; *R. v. Sinclair*, 13 Cox C. C. 28; though see *Hegerty v. Shine*, 12 Irish L. T. R. 100, cited in 18 Alb. L. J. 202; 14 Cox C. C. 124, 142.

⁵ *Richie v. State*, 58 Ind. 355.

⁶ *State v. Trulock*, 46 Ind. 289; *Martin v. State*, 40 Tex. 19.

⁷ *Whart. on Cr. Plead. & Pr.* § 269; *State v. Bray*, 1 Mo. 126; *Bloomer v. State*, 3 Sneed (Tenn.), 66. See *State v. Munco*, 12 La. An. 625; *State v. Hays*, 41 Tex. 526.

⁸ *Ibid.*; *U. S. v. Lunt, Sprague*, 311.

⁹ *Com. v. Simmons*, 6 J. J. Marshall, 615.

¹⁰ *Supra*, § 616. See *State v. Dalton*, 27 Mo. 13.

An indictment which avers that the defendant "in and upon the body of I. S., deceased, in the peace of the Commonwealth then and there being, did make an assault, and him the said I. S. did strike divers grievous and dangerous blows, upon the head of him the said I. S., whereby the said I. S. was cruelly and dangerously beaten and wounded and his life greatly endangered," sufficiently shows that the assault was upon a living person. *Com. v. Ford*, 5 Gray (Mass.), 475. See *R. v. Mulroy*, 3 *Craw. & Dix.*, 318.

An indictment against a medical

II. ASSAULTS WITH FELONIOUS INTENT.¹

§ 641. In an indictment for an assault with intent to murder, the intent is the essence of the offence. Unless the offence would have been murder, either in the first or second degree, had death ensued from the stroke, the

Intent to kill essential to indictment

- (231.) Assault with beating and wounding on the high seas.
- (232.) Assault on high seas, by binding the prosecutor and forcing an iron bolt down his throat.
- (233.) Stabbing with intent to wound, under Ohio statute, p. 49, § 6.
- (234.) Shooting with intent to wound, under Ohio statute, p. 49, § 6.
- (235.) Assault on high seas with dangerous weapon.
- (236.) Another form for same.
- (237.) Same in a foreign port, the weapon being a Spanish knife.
- (238.) Second count, same as first, charging the instrument differently.
- (239.) Third count — Assault with intent to kill.
- (240.) Assault and false imprisonment at common law.
- (241.) Assault and false imprisonment, with the obtaining of five dollars.
- (242.) Assault with intent to murder at common law.
- (243.) Another form for same.
- (244.) Assault with intent to drown.
- (245.) Assault with intent to murder, under the New York Revised Statute.
- (246.) Second count — With intent to maim.
- (247.) Assault with intent to commit a felony generally.
- (248.) Felonious assault, under the Massachusetts statute.
- (249.) Assault with intent to murder in South Carolina.
- (250.) Felonious assault with intent to rob, being armed. Rev. Stats. of Massachusetts, c. 125, § 14.
- (251.) Assault with intent to rob, against two.
- (252.) Another form for same.
- (253.) Assault with intent to ravish.
- (254.) Same, under Revised Statutes of Massachusetts, c. 125, § 19.
- (255.) Assault with intent to commit rape, under Ohio statute, p. 48, § 4.
- (256.) Another form for assault with intent to ravish.
- (257.) Same against two.
- (258.) Same against a person of color, in North Carolina, under the statute.
- (259.) Indecent assault.
- (260.) Indecent assault with intent to have an improper connection.
- (261.) Indecent assault by stripping.
- (262.) Assault with intent to commit rape. Attempting to abuse a female under ten years of age, under Ohio statute, p. 48, § 4.
- (263.) Assault with intent to steal.
¹ For decisions on statutes see U. S. v. Small, 2 Curtis C. C. 241; U. S. v. Gallagher, 2 Paine C. C. 447; Com. v. Barlow, 4 Mass. 439; Com. v. Newell, 7 Mass. 244; Com. v. Squire, 1 Met. 258; Com. v. Chapman, 7 Bost. Law Rep. 155; Com. v. Cunningham, 13 Mass. 245; Com. v. Goddard, 13 Mass. 455; People v. Shaw, 1 Parker C. R. 61; People v. O'Leary, Ibid. 187; Stewart v. State, 5 Ohio, 242; Sharp v. State, 19 Ohio, 379; Bowles v. State, 7 Ohio, 599; Wilson v. State, 18 Ohio, 145; Smith v. State, 12 Ohio St. 511.

§ 642. Where the ability to commit a felonious attack is both apparently and really wanting, the offence is not complete.¹ This position was pushed to an extreme in an early Indiana case, where a man was indicted for shooting at another with intent to murder. On trial it appeared that the gun contained in it nothing but powder and cotton wad (though the man shooting believed it contained a bullet), and the man shot at was forty feet distant; and it was held that he was not guilty as charged.² This ruling, however, was afterwards reconsidered by the court that advanced it,³ and the true view is undoubtedly that, assuming the necessary intent to exist, it is enough if the act be apparently adapted to accomplish the particular thing intended.⁴

Must be apparent ability to consummate attempt.

Touching not necessary to offence.

In indictment, particularity of specification is not required.

§ 643. An assault with intent to kill may be committed without actual striking or wounding.⁵

§ 644. In an indictment for an assault with intent to commit an offence, the same particularity is not necessary as is required in an indictment for the commission of the offence itself. It is true that in indictments for attempts it is requisite to set forth the mode of attempt.⁶ But an assault (herein differing from an attempt) is *per se* indictable; and hence it is not necessary to go into details as to the mode.⁷ Thus an indictment for an assault with intent to steal or to rob, without stating the goods or money intended to be stolen, is good.⁸ In an indictment for an assault with intent to murder, at common law, or where the statute

Clark v. State, 12 Ga. 350; State v. Stedman, 7 Port. 495; Gardenhier v. State, 6 Tex. 348; Dickerson v. Com. 2 Bush (Ky.), 1; State v. Bowling, 10 Humph. 52; McBride v. State, 2 Eng. 374; People v. McDonald, 9 Mich. 150; State v. Vadnais, 21 Minn. 382. *Supra*, § 27. And see fully Whart. Cr. Plead. & Prac. § 247.

¹ See *supra*, §§ 183-4, 606.

² State v. Swails, 8 Ind. 524. See *supra*, §§ 182-3.

³ Kunkle v. State, 32 Ind. 220. But see subsequent statute requiring real

danger. McCulley v. State, 62 Ind. 428.

⁴ Mullen v. State, 45 Ala. 43. *Supra*, §§ 606-8; and see *supra*, §§ 183, 184, for authorities at large.

⁵ State v. M'Clure, 25 Mo. (4 Jones) 338; Stockton v. State, 25 Tex. 772.

⁶ *Supra*, § 192.

⁷ See Whart. Cr. Plead. & Prac. § 159.

⁸ Com. v. M'Donald, 5 Cush. 365; Com. v. Rogers, 5 S. & R. 463; Dickerson v. Com. 2 Bush (Ky.), 1; Taylor v. Com. 3 *Ibid.* 508.

does not specify the instrument; it is not necessary to state the instrument or means made use of by the assailant to effectuate the murderous intent.¹ The means of effecting the criminal intent, or the circumstances evincing of the design with which the act was done, are considered matters of evidence to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment.² It is sufficient, unless the statute impose special conditions, if the use of a deadly weapon be averred, and the intent be specifically stated.³

¹ *U. S. v. Herbert*, 5 Cranch C. C. R. 87; *State v. Daley*, 41 Vt. 564; *State v. Dent*, 3 Gill & J. 8; *Rice v. People*, 15 Mich. 9; *Kilkelly v. State*, 43 Wis. 604; *State v. Franklin*, 36 Tex. 155; *Wall v. State*, 23 Ind. 150; *State v. Hubbs*, 58 Ind. 415; *State v. Chandler*, 24 Mo. 371; *State v. Seward*, 42 Mo. 206. But see *Trexler v. State*, 19 Ala. 21; *People v. Jacobs*, 29 Cal. 579. Compare *Whart. Cr. Pl. & Pr.* § 158, 159.

² *Ibid.*; *Williams v. State*, 47 Ind. 568; *Harrison v. State*, 2 Cold. (Tenn.) 232; *Martin v. State*, 40 Tex. 19; *Bittick v. State*, 40 Tex. 117; *Meredith v. State*, 40 Tex. 480; *State v. Rigg*, 10 Nev. 284. But see *contra*, *Wood v. State*, 50 Ala. 144; *State v. Johnson*, 11 Tex. 22; *State v. Jordan*, 19 Mo. 213. See *Ash v. State*, 56 Ga. 533; *Mayfield v. State*, 44 Tex. 59.

³ *State v. Davis*, 26 Tex. 201; *People v. English*, 30 Cal. 214; *People v. Congleton*, 44 Cal. 92; *State v. Garvey*, 11 Minn. 154. See *Whart. Cr. Pl. & Pr.* § 159.

An indictment which charges the accused with "an assault and battery with a deadly weapon, with intent to commit manslaughter," cannot be construed to be an indictment for an assault with intent to kill, which is understood, and has been held to be an intent to commit murder. *Bradley v. State*, 10 S. & M. 618.

An indictment for an assault with a deadly weapon, *e. g.* a pistol, need not aver that the pistol was loaded. *Allen v. People*, 82 Ill. 610.

In an indictment for assault with intent to kill, the person intended to be killed must be named or designated. A charge "with intent, in so striking and beating him, the said J. W., with the club, &c., feloniously, &c., to kill and murder, against," &c., is bad for uncertainty, *J. W.* being only named as the person assaulted. *State v. Patrick*, 3 Wis. 812.

Where, in a case in Maine, the first two counts charged an assault, in different forms, with intent to murder; and the last two charged an assault with intent to kill; it was held, that they all charged but one substantive offence, and the verdict might be, guilty of an assault simply, or of an assault with intent to kill, or of one with intent to murder. *State v. Phinney*, 42 Me. 384.

In some jurisdictions the indictment must charge that the proposed act was done feloniously, with malice aforethought; it is not sufficient that this allegation is made in the first part of the indictment, where the assault is charged. See *Wh. Cr. Pl. & Pr.* § 260; *State v. Howell*, Ga. Decis. part i. 158; *State v. Wilson*, 7 Ind. 516; but see *U. S. v. Gallagher*, 2 Paine C. C. 447.

The object must be stated to be fe-

§ 645. Whatever provocation or mitigation would be a defence to an indictment for homicide is a defence to an indictment for an assault with intent to kill. If there is an aggression — a going out of the line of defence for the purpose of attack — self-defence ceases.¹ It is necessary that the danger should have been personal, imminent, and immediate; though, when the assault with intent to kill is necessary, according to the defendant's lights, to prevent the commission of one of the higher felonies, it is justifiable. Yet this violent action is not permissible in order to prevent such larcenies or trespasses as are not made with force.²

An assault with intent to commit a felony is, at common law, considered a misdemeanor only; and at common law can only be punished as such.³

The subject of assault with intent to ravish has been already distinctively considered.⁴

Wherever aggravation can be discharged as surplusage, the defendant may be convicted of the minor offence.⁵

§ 645 a. Shooting with intent to kill is in many jurisdictions a statutory offence, and is regulated by the rules we have already noticed as applying to assaults. An interesting question arises, however, when the person shot is not the person whom the defendant intended to shoot. Under a statute which makes it simply indictable to

Indictment for shooting with intent to kill must conform to statute.

lonious, *e. g.* feloniously to kill, &c. Whart. Crim. Plead. & Prac. § 260.

“Malice aforethought” is an essential averment in such an indictment. *State v. Fee*, 19 Wis. 562; *State v. Wilson*, 7 Ind. 516; *Milan v. State*, 24 Ark. 346. See *supra*, § 517; Whart. Plead. & Prac. § 258.

It is, however, otherwise with an assault with intent to kill. *State v. Newberry*, 26 Iowa, 467. “Feloniously” is essential in an assault to commit a rape. *Mears v. Com.* 2 Grant, 385.

Whether it is necessary in other assaults with felonious intent is elsewhere considered. Whart. Cr. Plead. & Prac. § 260.

It is not necessary that the term

“unlawfully” should be used. *State v. Williams*, 3 Foster (N. H.) 321; Whart. Plead. & Prac. § 269.

¹ See *State v. Boyden*, 13 Ired. 505. *Supra*, §§ 95 *et seq.*

² *Supra*, § 484. See *State v. Morgan*, 3 Ired. 186; *Field v. State*, 50 Ind. 15; *Harris v. State*, 53 Ga. 640; *Brown v. State*, 55 Ga. 169; *Curry v. State*, 4 Neb. 545; *Williams v. State*, 43 Tex. 382.

³ *State v. Scott*, 24 Vt. 127; *Stout v. Com.* 11 S. & R. 179; though see *Curtis v. People*, 1 Breeze, 199; *State v. Boyden*, 13 Ired. 505.

⁴ *Supra*, § 576.

⁵ *Supra*, § 644; Whart. Cr. Plead. & Prac. §§ 249, 251, 261, 742.

servedly recognized.¹ If there be no jurisdiction in the officer, then issues the terse command, “*Vim vi repellere licet.*” When an officer transcends his powers, obedience to him may become even an offence. “*Extra territoriam ius dicenti impune non paretur. Idem est, si supra iurisdictionem suam velit jus dicere.*”² With sharp emphasis does the same law summon the citizen to resist acts of oppression and extortion attempted by government officials: “*Sancimus licere universis, obicere manus his, qui ad capienda bona alicuius venerint, qui succubuerint legibus; ut etiam si officiales ausi fuerint, a tenore datae legis desistere, ipsis privatis resistentibus a facienda iniuria arceantur.*”³ If government agents attempt to extort illegal taxes, the party on whom the attempt is made had what is quaintly called the “*Jus eum propulsandi.*”⁴ Even to the remotest provinces is this right reserved. “*Contra nostra praecepta si quis vetito et temerario ausu exactionem audebit — licebit provinciali, temeritatem legitime repellere.*”⁵ Nor was it from any popular impulse that the

the United States in the service of a writ of arrest.

- (886.) Refusal to aid a constable in the service of a *capias ad respondendum*, issued by a justice of the peace.
- (887.) Assault, with intention to obstruct the apprehension of a party charged with an offence.
- (888.) Assault on a deputy jailer in the execution of his office.
- (889.) Resisting a sheriff in execution of his office. First count, assault on sheriff at common law.
- (890.) Second count. The same under statute, specially setting out the execution which the sheriff was serving, &c.
- (891.) Assault on police officer of the city of Boston.
- (892.) Assaulting a person specially deputized by a justice of the peace to serve a warrant.
- (893.) Assaulting peace or revenue officers in the execution of their duties.

(894.) Resisting an officer of the customs in the discharge of his duty.

By the federal Act of April 9, 1866 (Civil Rights Act), penalties are attached to the violating the provisions of that act, and for obstructing officers, &c., in their duties, &c. St. 1866, 27, 28. There is nothing, however, in this statute to prevent the arrest of a federal officer, though in execution of his duties, on a state warrant for felony (U. S. v. Kirby, 7 Wall. 482) or misdemeanor. Penny v. Walker, 64 Me. 430.

¹ L. 12. 4. Cod. si a non competente iudice. (7. 48.) L. 170. D. de reg. iur.

² L. 20. D.

³ L. 5. Cod. de iure fisci (10. 1).

⁴ L. 4. Cod. de discussoribus.

⁵ L. 5. Cod. de executor. et exact.

See, for a summary of these and other statutes, Berner's Lehrbuch, § 211, who shows that even the canon law, which accepted the *jure divino* claims of government in their highest sense, took the same view: “*Auch das Ka-*

English common law writers argued from another stand-point. The theory of due and symmetrical official gradation, which so much fascinated the jurists of Rome, had no charms for those of England at the time the English common law took shape. To them feudalism was the true governmental model, and in feudalism the mesne lord, or the lord of the manor, or the lord of the manor's bailiff, was as absolute as the lord paramount. Undoubtedly the mesne lord was responsible to the lord paramount if the lord paramount was strong enough to exact such responsibility. But the vassal was bound to implicit obedience to the lord whom he immediately served, or to any representative that lord might depute. To this principle of feudalism may we trace that line of early English decisions which hold, that when officers of justice transcend their powers the remedy is not resistance but submission, and subsequent appeal to the law for redress. No doubt this view has been, in recent years, as we have just seen, much modified. But it may still be a question whether a sound and free jurisprudence does not recommend modifications still more liberal, and a still closer approximation to the principles of the jurists of Rome.

§ 648. But even by the English common law it is settled that, to constitute the offence of resisting an officer, it must be shown that the process is legal.¹ The officer must at the time be engaged in executing his duties, and the defendant must be notified thereof;² and unless there be notification or knowledge to this effect, the killing of

To justify arrest process must be legal and must be notified.

¹ *Supra*, § 414; *Com. v. Newton*, 123 Mass. 420; *People v. Muldoon*, 2 Parker C. R. (N. Y.) 13; *Com. v. Bryant*, 9 Phila. 595; *State v. Zeibart*, 40 Iowa, 169; *Barbour's Cr. Treatise*, 82; *Roscoe's Cr. Evid.* 625, 656. See *State v. Cassady*, 52 N. H. 500; *Com. v. Tobin*, 108 Mass. 426; *State v. Moore*, 39 Conn. 244.

In *Com. v. Tobin* (108 Mass. 426: 1871) the defendant was indicted for assaulting an officer in the discharge of his duty. It appeared that the defendant was arrested for a breach of the peace. It did not appear that

any complaint was subsequently made against him. The defendant requested a ruling that the failure to complain against and prosecute him for the offence for which he was arrested made the officer a trespasser, and the defendant had a right to resist him. This was affirmed by the Supreme Court. See fully *supra*, §§ 402-444; and *Whart. Crim. Plead. & Pr.* §§ 1-17.

² 1 Hale, 470. *Infra*, § 650; *supra*, §§ 402-444; *Whart. Crim. Plead. & Prac.* §§ 1-11; *Codd v. Cabe*, 13 Cox C. C. 202.

the officer in resisting the arrest will not be murder. Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning in order to arrest him, but not telling his business or using words of arrest, and the party not knowing that the other was an officer, in the first surprise snatched down a sword which hung in his room and killed the bailiff, this was ruled to be only manslaughter.¹

An officer making an arrest by virtue of a warrant, however, is not bound to exhibit his warrant and read it to the prisoner before securing him, if he resists.² And there is a current of authority to the effect that the legality of an officer's appointment cannot be tested by a forcible resistance to his acts.³ This

¹ 1 Hale, 470. *Supra*, §§ 402-444.

² *Com. v. Cooley*, 6 Gray, Mass. 354. See *Johnson v. State*, 30 Ga. 426; *Whart. Crim. Plead. & Prac.* § 1-11.

With regard, says Mr. East, to such ministers of justice as, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary that the parties concerned should have some notice of the intent with which they interpose; otherwise the persons engaged may, in the heat and bustle of an affray, imagine that they come to take a part in it. But in these cases a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer in any other manner declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged to bear the office he assumes; or if, in order to keep the peace, he produce his staff of office, or any other known ensign of authority, the law will presume that the party killing had due notice of his intent, especially if it be in the daytime. In the night, indeed, when such ensigns of authority cannot be distinguished, some further notifica-

tion is necessary; and commanding the peace, or using words of the like import notifying his business, will be sufficient. These kinds of notification, by implication of law, hold also in cases where such officers, having warrants directed to them as such to execute, are resisted in the attempt. See *supra*, §§ 402-444; *Whart. Crim. Plead. & Prac.* §§ 1-11. But even when the officer is properly authorized, this protection does not shelter him in case of any irregularity in his procedure. Thus where the defendant was indicted for assaulting a constable in the execution of his office, it appearing that the prosecutor had an execution issued by a magistrate against the goods of a Mrs. Craig, who lived as tenant in the house of the defendant; and that when the constable attempted to remove the goods, the defendant resisted the removal of them until his rent was paid, and that resistance was the assault complained of; it was held, that the defendant was justified in resisting the removal of the goods until his rent was paid, using no more force than was necessary. *State v. Dunn*, 1 *Rice's Digest*, 49.

³ See *Pearce v. Whale*, 5 B. & C. 38; *R. v. Gordon*, 1 *Leach*, 516; *R.*

may be sound law when the defendant, by his conduct, or by the issue presented by him, admits that the party resisted holds the office in question. But the rule ought not to be extended to cases where the object is to test the right of the party resisted to hold the office.¹

§ 649. If the defendant, indicted for resisting an officer, can prove that he was ignorant that the party resisted was an officer, this is a defence to the indictment for resistance;² but not to that for an assault, if undue violence was used. So persons interfering in an arrest by an officer under criminal process, not knowing that he is an officer and acting in the discharge of his duty, but interfering with the intention of quelling a fight, if they use more force than is necessary for that purpose, are liable to an indictment for an assault.³ On the other hand, a defendant who aggressively assaults an officer in ignorance of the latter's official rank is said to be liable, from the fact that he voluntarily perpetrates an unlawful act, to conviction for the aggravated offence.⁴ But this exception is to be jealously limited. It is against the policy of the State to clothe its servants with official immunities, except when engaged in official acts. The immunity belongs not to the individual but to the office; and if the immunity is to be vindicated, the office must be proclaimed. To punish resistance to a secret officer as

v. Newton, 1 C. & K. 469; *Jones v. Stevens*, 11 Price, 235; *U. S. v. Wood*, 2 Gall. 361; *Com. v. Dugan*, 12 Met. 233; *Com. v. Cooley*, 6 Gray, 354; *People v. Hopson*, 1 Denio, 574. 265; *State v. Belk*, 76 N. C. 10; *Johnson v. State*, 26 Tex. 117. See *Com. v. Kirby*, 2 Cush. 577, and cases supra, §§ 419, 491.

That the indictment must aver such knowledge see *State v. Maloney*, S. C. R. I. 1879, citing *Com. v. Kirby*, 2 Cush. 577; *Com. v. Cooley*, 6 Gray, 354; *State v. Downer*, 8 Vt. 424, 429; *Kernan v. State*, 11 Ind. 471; *United States v. Tinklepaugh*, 3 Blatchf. 425; *United States v. Keen*, 5 Mason, 453; *Com. v. Israel*, 4 Leigh, 675; *State v. Hilton*, 26 Mo. 199. Supra, §§ 87-8.

¹ See *Smith v. Taylor*, 1 New Rep. 196; 11 Mod. 308; 4 M. & S. 548; 1 Ad. & El. 695; *R. v. Curvan*, 1 Mood. C. C. 132; *Com. v. Carey*, 12 Cush. 246; *People v. Gulick*, Hill & Denio, 229; *McQuoid v. People*, 3 Gilman, 76; *Cantrill v. People*, *Ibid.* 356.

In *Com. v. Sheriff*, 3 Brewst. 343, it was held that remonstrance was not resistance. And see *Whart. on Crim. Plead. & Prac.* § 5, and *infra*, § 1617.

² *Supra*, § 87; *R. v. Ricketts*, 3 Camp. 68; *Yates v. People*, 32 N. Y. 509; *People v. Muldoon*, 2 Parker C. R. 13; *Logue v. Com.* 38 Penn. St.

³ *Com. v. Cooley*, 6 Gray, 350.
⁴ *U. S. v. Liddle*, 2 Wash. C. C. 531; *U. S. v. Ortega*, 4 Wash. C. C. 531; *U. S. v. Benner*, Baldwin, 234. *Supra*, § 87.

a crime turns first the officer into a spy, and then the spy into a despot.¹

It should at the same time be remembered that though an officer attempting to execute process be unauthorized, and therefore a trespasser, yet he is not bound to submit to unreasonable and unnecessary violence, and may defend himself against the same without being guilty of an assault.² Nor is a blow necessary to constitute the offence.³ There must, however, be some actual overt act of obstruction.⁴

§ 650. An indictment for resisting an officer while attempting to serve a lawful process need not describe particularly the nature of the process, or the mode of the resistance.⁵ But the indictment must set forth that such process was legal, or so describe it as to show it to be so; and if issued from a court of limited jurisdiction, it must appear that the court, in issuing it, acted within the sphere of their authority.⁶ It is not enough to say that the defendant "resisted" the officer; for this is a mere conclusion of law.⁷

Indictment need not set forth process in detail.

¹ It is no defence to an indictment for forcibly obstructing an officer of the customs in the discharge of his duties, that the object of the defendant was personal chastisement, and not to obstruct or impede the officer in the discharge of his duties, if he knew the officer to be so engaged. *U. S. v. Keen*, 5 Mason, 453.

² *People v. Gulick, Hill & Denio* (N. Y.), 229.

³ *Roddy v. Finnegan*, 43 Md. 490; *Woodworth v. State*, 26 Ohio St. 196. Under Wisconsin statute see *State v. Welch*, 37 Wis. 196. Under Texas statute see *Hill v. State*, 43 Tex. 329.

⁴ *Com. v. Sheriff*, 3 Brewst. 343. In *U. S. v. Lukins*, 3 Wash. C. C. 335, [it was said *obiter* that refusal to obey an officer is indictable resistance. This is disapproved in *State v. Welch*, 37 Wis. 196, as without authority and reason.

⁵ *McQuoid v. People*, 3 Gilm. 76.

⁶ *U. S. v. Stowell*, 2 Curtis C. C. 153; *State v. Scammon*, 2 Fost. N.

H. 44; *State v. Beason*, 40 N. H. 367; *Cantrill v. People*, 3 Gilm. 356; *Bowers v. People*, 17 Ill. 373; *State v. Hailey*, 2 Strohh. 73; *Slicker v. State*, 8 Eng. (13 Ark.) 397. See *State v. Henderson*, 15 Mo. 486; *State v. Burt*, 25 Vt. 373. And see *contra*, *State v. Belk*, 76 N. C. 94.

⁷ *Lamberton v. State*, 11 Ohio, 282; though see *U. S. v. Batchelder*, 2 Gallis. 15; *State v. Hooker*, 17 Vt. 658.

An indictment for assaulting and obstructing an officer in the discharge of his duties as such averred that the defendant made an assault upon the officer, and, while the latter was in the due and lawful execution of his office, did "unlawfully, knowingly, and designedly hinder and oppose him," &c.; this was held to be a sufficient allegation that the defendant knew that the person assaulted was an officer. *Com. v. Kirby*, 2 Cushing, 577-8.

Municipal and police officers under same sanction.

§ 651. Municipal and police are, equally with state officers, under the protection and subject to the limitations of this branch of the law.¹

And so of officers charged with process.

§ 652. Officers charged with process are eminently under the protection of the law, and to forcibly resist them is therefore not only an indictable offence,² but, if amounting to an obstruction of process, is a contempt of court, summarily punishable as such. If a party assists in resisting a criminal arrest, he may become thereby an accessory after the act, by endeavoring, if the case be one of felony, to shelter the accused.³

Officers entitled to call in aid.

§ 652 a. The converse of what has just been stated is true in regard to the duty imposed upon citizens to aid officers when in the lawful discharge of their duties. As is noticed more fully in another work,⁴ "This duty of the citizen is absolute. . . . His obligation to come to the aid of the sheriff (or other officer) is just as imperative as that imposed on the latter to see that the community suffer no harm from licentiousness."⁵

¹ Johnson v. State, 30 Ga. 426.

425; McQuoid v. People, 3 Gilm. 76;

² See supra, § 414; Whart. Crim. Plead. & Prac. §§ 1-5.

Slicker v. State, 13 Ark. 397.

³ Supra, § 241; 4 Bl. Com. (Wend. ed.) 129-30; Dalt. 530, 1; 1 Hale, 619; 2 Hawk. c. 29, s. 26; R. v. Marsden, L. R. 1 C. C. 131; 11 Cox C. C. 90; U. S. v. Tinklepaugh, 3 Blatch.

⁴ Whart. Plead. & Prac. § 17, note.

⁵ King, J., cited bid.; and see infra, § 1584; R. v. Brown, C. & M. 314; Res. v. Montgomery, 1 Yeates, 419; Comfort v. Com. 5 Whart. 437; Anon. 1 Haz. U. S. Reg. 263; State v. Littlejohn, 1 Bay, 316.

PART II.
OFFENCES AGAINST PROPERTY.

CHAPTER IX.

FORGERY.

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I. DEFINITION.

§ 653. FORGERY at common law is defined by Sir Wm. Blackstone as the fraudulent making or alteration of a writing to the prejudice of another's rights,¹ and by Mr. East as the false making or altering, *malo animo*, of any written instrument for the purposes of fraud and deceit.²

According to Sir J. Stephen,³ "every one commits a misdemeanor who forges any document by which any other person may be injured, or utters any such document knowing it to be forged, with intent to defraud, whether he effects his purpose or not."⁴

¹ 4 Blac. Com. 247. As to intent to defraud see *infra*, § 717.

² See 2 Russ. on Cr. 6th Am. ed. 317, &c., for a full examination of the English cases; and see also 2 East P. C. 852; *State v. Kimball*, 50 Me. 411; *Com. v. Chandler, Thacher's C. C.* 187; *Penn. v. McKee*, Add. 33; *Van Horne v. State*, 5 Pike, 349.

³ Dig. C. L. art. 366.

⁴ Of this he gives the following illustrations:—

An order from a magistrate to a jailer to discharge a prisoner as upon bail being given. *R. v. Harris*, R. & M. 393.

A certificate of character to induce the Trinity House to enable a seaman to act as master. *R. v. Toshack*, 1 Den. C. C. 592. *Infra*, § 687.

Testimonials whereby the offender

In 1865, in a remarkable case which will be hereafter criticised,¹ Cockburn, C. J., declared that forgery, "by universal acceptance, is understood to mean" "the making or altering a writing so as to make the alteration purport to be the *act of some other person*, which it is not." But this definition was soon found too scant, and afterwards, in 1869, we hear it announced on a crown case reserved, by Kelly, C. B., with the concurrence of all his associates, that the offence consists in the fraudulent making of an instrument, in words purporting to be what they are not, to the prejudice of another's rights.²

By Blackburn, J., in the same case, the following definition from Comyn is adopted: "Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of another." This definition comes nearer than the two previous towards satisfying the cases which will appear hereafter. As, however, it is too limited in its description of the instrument of forgery ("deed" or "writing"), the following definition is now proposed:—

FORGERY IS THE FRAUDULENT FALSIFYING OF AN INSTRUMENT TO ANOTHER'S PREJUDICE.

Forgery is the fraudulent falsifying of an instrument to another's prejudice.

The offence is consummated by the false making of the instrument, with intent to defraud, without any uttering.³

§ 654. By the common law, forgery is a misdemeanor.

Is a misdemeanor at common law.

By statutes passed in England and the United States, various kinds of forgery are made felonies. Whether in particular cases the statute has absorbed the offence is a matter of special statutory construction. It may be generally stated that unless the statute, in its terms, undertakes to be

obtained an appointment as a police constable. *R. v. Moah*, D. & B. 550.

The like with intent to obtain the office of a parish schoolmaster. *R. v. Sharman*, Dear. C. C. 285.

A certificate that a liberated convict was gaining his living honestly, to obtain an allowance. *R. v. Mitchell*, 2 F. & F. 44.

¹ Windsor, in re, 6 B. & S. 522; 10 Cox C. C. 118; the latter report being the fullest; and see *infra*, § 667.

² *R. v. Ritson*, L. R. 1 C. C. 200. *Infra*, § 663.

³ *R. v. Crocker*, 2 Leach, 987; *R. & R. 97*; *Com. v. Ladd*, 15 Mass. 526; *Com. v. Chandler*, Thacher's Crim. C. 187.

Party signing his name when such name is another's may be guilty of forgery.

§ 657. *When a person writes his own name, though it be on a false affirmation of procuration from another, this is not forgery,*¹ unless, as will presently be seen, the name written is used in such a way as to throw the onus of the obligation on another person bearing the same name. But if the name signed is common to two persons, one of whom signs it, or causes it to be signed² in such a

Leigh & C. 168; R. v. Moody, 9 Cox, 166; Leigh & C. 173; R. v. Dodd, 18 L. T. (N. S.) 89. These are cases of forgery by the treasurers of voluntary societies to defraud their associates; but the reasoning applies to all partnerships.

¹ R. v. White, 2 C. & K. 413; 1 Den. C. C. 208. *Infra*, § 669.

² So in a case where an innocent person was induced to sign his name as accepting a bill, and the defendant introduced a false address, it was held forgery. R. v. Blenkinsop, 2 C. & K. 531; S. C., 1 Den. C. C. 276; R. v. Mitchell, 1 Den. C. C. 282. *Infra*, §§ 670, 713.

Sir J. Stephen (Dig. C. L. art. 356) gives the following analysis of cases of "making false documents" under the English statute:—

"To make a false document is—

"(a.) To make a document purporting to be what in fact it is not;¹

"(b.) To alter a document, without authority, in such a manner that if the alteration had been authorized it would have altered the effect of the document;²

"(c.) To introduce into a document, without authority, whilst it is being drawn up, matter which, if it had been authorized, would have altered the effect of the document;³

"(d.) To sign a document

"(i.) In the name of any person

¹ R. v. Hart, R. & M. 486.

² See, to this effect, *State v. Maxwell*, 47 Iowa, 454.

without his authority, whether such name is or is not the same as that of the person signing;

"(ii.) In the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing;⁴

"(iii.) In a name represented as being the name of a different person from that of the person signing it, and intended to be mistaken for the name of that person;

"(iv.) In a name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.

"But it is not making a false document—

"To procure the execution of a document by fraud;

"To omit from a document being drawn up matter which would have altered its effect if introduced, and which might have been introduced, unless the matter omitted qualifies the matter inserted;

"To sign a document in the name of a person personated by the person who signs it, provided that the effect of the instrument does not depend upon his identity with that person.

"It is not essential to the making of

³ R. v. Griffiths, D. & B. 584.

⁴ *Infra*, § 670.

of non-existent person. lently use the name of a fictitious firm.¹ If, however, the fictitious name be one which the defendant had been accustomed to employ, and under which he had done business, a conviction cannot be sustained.²

It is forgery at common law to forge the name of an imaginary child as representative of a childless person.³ So, also, is it indictable, on the same reasoning, to forge the name of a non-existing corporation, when the object is to defraud another person.⁴ This principle is of much use in cases where a corporation alleged to be defrauded is incorrectly described, or when the bank is extinct, or is prohibited from issuing the notes in question.⁵ In such case it is sufficient to aver as the party defrauded the person on whom it is attempted to pass the forged note.⁶

§ 661. Where the drawer of a paid check on a bank, after it was returned to him, altered his signature so as to give the appearance of forgery, in order to defraud the bank and criminate the payee, this has been held in England not to be forgery.⁷ But as an action, supposing the altered signature to be what it purported to be after alteration, would lie against the bank in favor of the alterer, this decision cannot be sustained.⁸

The test is, could such an action *primâ facie* lie on such fraudulently altered paper, by means of such alterations, against the person intended to be defrauded? If it could not, the offence,

Whiley, 2 Leach, 983; R. & R. 90; R. v. Francis, R. & R. 209; and see R. v. Webb, 3 B. & B. 228; R. v. Watts, R. & R. 436; State v. Hayden, 15 N. H. 355; Com. v. Costello, 119 Mass. 214; Sasser v. State, 13 Ohio, 453; State v. Givens, 5 Ala. 747; Henderson v. State, 14 Texas, 503. As to intent see R. v. Bontien, R. & R. 260; R. v. Peacock, *Ibid.* 273. See *infra*, § 698.

¹ R. v. Rogers, 8 C. & P. 629; R. v. Ashby, 2 F. & F. 560; *contra*, Com. v. Baldwin, 11 Gray, 197, — a case which it is hard to sustain except on the hypothesis either that the firm name was not assumed by the defend-

ant fraudulently, or that it was not a probable instrument of fraud.

² R. v. Bontien, R. & R. 260; R. v. Aickles, 1 Leach C. C. 438; 2 East P. C. 968.

³ R. v. Lewis, 2 East P. C. 957.

⁴ *Infra*, §§ 698, 716; U. S. v. Mitchell, Baldwin C. C. 367; White v. Com. 4 Binn. 418; Buckland v. Com. 8 Leigh, 732.

⁵ *Infra*, § 698.

⁶ *Infra*, § 744.

⁷ Brittain v. Bank of London, 3 F. & F. 465; 11 W. R. 569.

⁸ See 2 Russ. Cr. & Mis. 719. *Infra*, § 695.

that it was impossible to distinguish the case from those in which deeds made in false names were held to be forgeries. To fabricate a deed with a false date issuing from a prior deceased grantor, with intent to cut out a subsequent grantee, would be clearly forgery; why not a falsely antedated deed emanating from the forger himself? Now the position that executing a deed in a fictitious name is forgery is too well and too justly settled to be shaken; and as in the case before us the material point in the deed is *date* and not *name*, we may accept as authoritative the decision on which we here comment. The deed is a forgery, because it is a fictitious deed, emanating from a person who in the eye of the law is dead as to the particular property, but who falsely claims to be alive as to such property, and capable of disposing of it.¹

§ 664. Is the entry of a false item in a pass-book forgery? As illustrating this, we may take pass-books with gro-
Forgery to make false entry in pass-book. cers or other tradesmen, the book being kept by the customer, and the vendor entering, from time to time, sales; or, as another instance, a banker's pass-book, in which the banker enters from time to time cash received or paid out by him. Is it forgery for either party falsely and fraudulently to make or alter entries in such books, to the prejudice of the other party? Now such books are the joint property of the two parties; and each acts as the agent of the other in making entries. Hence if one makes an entry, contrary to the instructions either express or implied of the other, this is equivalent to an agent fraudulently filling up a blank intrusted to him with a wrong sum, which, as will presently be more fully seen, is forgery.² *A fortiori* is this the case when either party fraudulently alters a prior entry.³

¹ As analogous cases, see *R. v. Blenkinsop*, 2 C. & K. 531; 1 Den. C. C. 276; *R. v. Mitchell*, 1 Den. C. C. 282; and *R. v. Epps*, 4 F. & F. 81, in which the *name* was genuine, but the forgery was in making the address.

² See *infra*, § 671. As to bankers' pass-books, this has been frequently held: *R. v. Smith*, 9 Cox C. C. 162; *Leigh & C.* 168, where the entry of a

false deposit was made in the pass-book with intent to defraud a society of which the defendant was treasurer, and by showing them the false entries, to be continued in office as treasurer; *S. P.*, *R. v. Moody*, 9 Cox. 166; *L. & C.* 173; *Harrison's case*, 1 Leach, 180. The same reasoning applies to other pass-books.

See *Biles v. Com.* 32 Penn. St.

ery. The case is in fact the same as those elsewhere cited,¹ where it is properly ruled to be forgery for a person employed to fill up a blank to fill it up with a sum larger than his principal authorizes.²

But suppose the clerk is not directed by his employer to enter simply a particular statement in his books, but has a general discretion allowed him as to the mode of keeping the same, and suppose there are no specific commands from his employer as to the particular item alleged to be charged? Here we come to an apparent conflict of authorities, the first of which in point of time is a case in Pennsylvania, decided in 1859, where it was held that it was forgery for a confidential clerk to "make a false addition of one figure in the amount of cash received from bills receivable, in the month of August, 1856, and in the alteration of another true figure in said addition. The true addition was \$6,455.63; while the false addition was \$5,955.63, the first figure, 5, being an alteration of the original figure in the addition, which was a 6. The result of this forgery was to represent the cash received five hundred dollars less than the actual amount; and of course, to enable their clerk to abstract that sum from the funds of the firm." This was held forgery, first in the Philadelphia Quarter Sessions, and secondly, in the Supreme Court of the State. "The act in question," said Judge Ludlow, in the course of a lucid and well-argued opinion delivered by him in the court below, "was not only prejudicial to the rights of the prosecutors, but the writing, if genuine, might have been 'the evidence of their rights.' True, the 'journal' would not be received as evidence for the prosecutors in a suit of law, but in equity, for collateral purposes, it might have been evidence of their rights; and then, by the adjudged cases, the offence committed would have been forgery." "Again, the entry in question is, in substance, an acquittance, or in the nature of a receipt from the firm to the defendant; as confidential book-keeper, he receives the amount of the bills receivable; to discharge himself from liability, he enters the several items in the journal as the *agent of the firm*; and then, not as the agent of the firm, but as an individual and for his own wicked gain, so erases or alters, or makes a figure or figures in the sum total representing the addition of the entire

¹ See *infra*, § 671.

² See *Biles v. Com.* 32 Penn. St. 529.

make the alteration purport to be the act of *some other* person, which it is not."¹ Of course, after this summary disposal of the case, the counsel for the United States could say but little. They suggested, however, that the case before the court might be put on the same footing as that of *R. v. Hart*, where it was held forgery for an agent fraudulently to fill up a blank acceptance with a larger sum than was directed. To this, however, Chief Justice Cockburn replied: "There a man passed off as the acceptance of the acceptor a different sum from that the acceptor meant. This is a statement *to* the bank, not a statement put forward *by* the bank." Upon the reasoning above given two criticisms may be ventured. *First*, the definition proclaimed by Chief Justice Cockburn as ruling the case was afterwards rejected by the judges sitting in 1869 on a crown case reserved,² and a definition adopted which would have included the case now before us. *Secondly*, the position that a false statement made to the party defrauded is not forgery, when it might be if it purported to be made *by* the party defrauded, is in conflict with no less than three English cases, in which it is ruled that it is forgery for the treasurer of a benevolent or trades union society to make upon his banker's pass-book false entries of deposits; this book to be exhibited by him to his principals, for the purpose of covering his embezzlements and of retaining for a time his position as treasurer.³

§ 668. To sign the name of another, without authority, it need scarcely be repeated, is forgery at common law,⁴ providing something like deceptive similitude is attempted.⁵

¹ In this, as in other English decisions in which the United States were concerned during the late civil war, there is a hardness of tone towards the United States, which may be explained by the critical relations in which the two governments then stood. How far the ruling of the court here criticised was thus unconsciously affected need not now be discussed. It is enough for the present purpose to announce that, as will be seen, this ruling, in its distinctive peculiarities, was afterwards repudiated. As giving

the New York rule, see *People v. Phelps*, 49 How. Pr. 462.

² See *supra*, § 653; *R. v. Ritson*, L. R. 1 C. C. 200.

³ *R. v. Smith*, 9 Cox C. C. 162; *Leigh & Cave*, 168; *R. v. Moody*, 9 Cox C. C. 166; *Leigh & C.* 173; *R. v. Dodd*, 18 L. T. (N. S.) 89.

⁴ *R. v. Forbes*, 7 C. & P. 224; *R. v. Hill*, 8 C. & P. 274; *Dixon's case*, 2 Lewin, 178; *Com. v. Henry*, 118 Mass. 460. *Infra*, § 680.

⁵ *Abbott v. State*, 59 Ind. 70.

§ 670. It has been already stated that when there are two persons of the same name, it is forgery in one of them to use his name in such a way as to fraudulently charge another.¹ This rule properly applies to cases where the forging is done by the defendant as agent for the man of straw, or where the latter signs his name at the former's direction, and the former (the defendant) uses the signature so obtained to prejudice a responsible person bearing the same name.² Even when the names are not precisely identical, a conviction may be sustained. Thus, in an English case, *P. M.*, the defendant, undertook to get his mother-in-law "C. W.'s" name to two notes. Taking the notes to his wife, he induced her to sign them in her maiden name, "A. W.," and handed them over, saying, "Here are the notes." The jury convicted him on the ground that when he got his wife's name to the notes his intention was to use them as his mother-in-law's; and it was held by the judges, on a case reserved, that the conviction was right.³

It is admissible for the prosecution to introduce circumstantial evidence to prove that a nominal acceptor was a fiction, or mere man of straw.⁴

§ 671. We are now led to an important position which tends to rule many collateral questions in forgery. It is this: *When an agent has authority to fill with a particular sum a blank in a paper signed by his principal, it is forgery to fill the blank with a larger sum.* This has been held to be the law even in cases where the writer believed that the larger sum was due him.⁵ And an unauthorized filling of blanks falls generally under the same rule.⁶ But it is not forgery for a party, after an agreement is executed, to extend the *bona fide* terms agreed to by the other party.⁷

¹ *Supra*, § 657.

² *R. v. Epps*, 4 F. & F. 81; *Mead v. Young*, 4 T. R. 28; *R. v. Webb*, 6 Moore, 447, n.; *R. & R.* 405; *R. v. Mitchell*, 1 Den. C. C. 282; *Com. v. Foster*, 114 Mass. 311.

³ *R. v. Mahony*, 6 Cox C. C. 487.

⁴ *R. v. White*, 2 F. & F. 554; *R. v. King*, 5 C. & P. 123.

⁵ *R. v. Hart*, 1 Mood. C. C. 486; 7 C. & P. 632; *R. v. Wilson*, 2 C. & K. 527; 2 Cox C. C. 426; 1 Den. C. C. 284; *State v. Flanders*, 38 N. H. 324; *State v. Kroeger*, 47 Mo. 552.

⁶ *Wilson v. Commis.* 70 Ill. 46; *State v. Maxwell*, 47 Iowa, 454.

⁷ *Pauli v. Com.* 7 Weekly Notes of Cas. 396.

obligation may appear to be one on which the obligor is responsible. And if such description be erroneous, it is fatal, for the description, being material, cannot be rejected as surplusage.¹

It was once thought in England that, while the *forging* of a railway pass was indictable at common law, such was not the case as to *uttering*.² This distinction, however, cannot be maintained, and it may now be said to be acknowledged that in all cases where it is forgery to *make* an instrument, it is indictable at common law to *utter* such forged instrument.³

False making of another's signature to any statement exposing the latter to suit is forgery.

§ 686. The false making of the signature of another as authority for any statement which, if the writing were true, would expose that other to an action of assumpsit, or a suit for damages for deceit, will subject the person falsely writing or printing such signature to an indictment for forgery.⁴ But the statement must be one in some way calculated to expose to suit the party whose name is forged.⁵

§ 687. Forging and uttering a certificate of good character, with intent to defraud and with a capacity for defrauding, is indictable at common law,⁶ if there be anything in the recommendation on which a suit could be brought if it were valid.⁷

So of certificates of character.

§ 688. But there must be an intent to defraud a particular person. Hence, the false making of a diploma, and hanging it up in the defendant's house, without the intent to commit any particular fraud, has been held not to be forgery.⁸ And it has been held so of painting a picture, intending to represent that it was painted by an eminent artist, and writing that artist's name in the corner.⁹

But not, it seems, of diplomas.

¹ Com. v. Ray, 3 Gray, 441.

² R. v. Boulton, 2 C. & K. 604.

³ R. v. Sharman, Dears. C. C. 285; 6 Cox 312; 24 Eng. L. & Eq. 553.

⁴ Ames's case, 2 Greenl. 365; though see State v. Givens, 5 Ala. 747.

⁵ Ibid.; Jackson v. Weisiger, 2 B. Monroe, 214. Infra, § 691.

⁶ R. v. Toshack, T. & M. 207; 1 Den. C. C. 592; 4 Cox C. C. 38; R. v. Sharman, Dears. C. C. 285; 6 Cox

C. C. 312; R. v. Mitchell, 2 F. & F. 44; R. v. Moah, 7 Cox C. C. 503; Dears. & B. 550.

⁷ Hence a mere complimentary letter of introduction does not fall within the rule. Waterman v. People, 67 Ill. 91.

⁸ R. v. Hodgson, Dears. & B. 3; 7 Cox C. C. 122. Infra, §§ 709, 718, 1139 *et seq.*

⁹ R. v. Closs, D. & B. 460. Supra, § 681.

by himself.¹ But where several, by concert, are privy to the uttering of a forged note, which is uttered by one only in the absence of the others, he only who utters it, by the common law, is a principal; while the others are accessaries before the fact.² Under recent statutes, in many States, however, all are principals.³

§ 711. On the supposition that the crime of uttering and publishing is not complete until the paper is transferred and comes to the hands or possession of some person other than the felon, his agent or servant,⁴ where a note with forged indorsement is sent by the felon, by mail, from one county to an individual in another county, for the purpose of obtaining credit upon it, the crime is not consummated until the note is received by the person to whom it was sent; and the proper place of trial is the county to which the note was sent.⁵

Uttering is an independent offence. § 712. It is scarcely necessary to say that to constitute the offence of uttering, it is in no case requisite to show that the defendant had been implicated in the forgery.⁶

§ 713. The intention to defraud some one⁷ is at common law an essential to the completion of the offence,⁸ though it is not necessary to show that the prosecutor was actually defrauded.⁹ If

¹ Supra, §§ 209, 246; *R. v. Palmer*, 1 N. R. 96; *R. & R.* 72; *U. S. v. Morrow*, 4 Wash. C. C. R. 733; *Com. v. Hill*, 11 Mass. 136; *Hopkins v. Com.* 3 Met. 466; *a fortiori* where the agent was unconscious of the fraud. *R. v. Giles*, 1 Mood. C. C. 166. Supra, § 206.

² *R. v. Soares*, *R. & R.* 25; *R. v. Badcock*, *Ibid.* 249; *R. v. Stewart*, *Ibid.* 373; *R. v. Davis*, *Ibid.* 113. See *R. v. Morris*, *Ibid.* 210; 2 *Leach*, 1096; see also *R. v. Harris*, 7 C. & P. 416. Supra, § 217.

³ Supra, § 205.

⁴ Supra, §§ 287-9. *Com. v. Searle*, 2 Binn. 332; though see *Perkins's case*, 2 Lew. C. C. 150, where it was held that mailing is proof of uttering in the place mailed; supra, § 706, for cases where exhibition to another was held enough.

⁵ *People v. Rathbun*, 21 Wend. 509. See supra, §§ 287-9. *Infra*, § 747.

⁶ *Com. v. Houghton*, 8 Mass. 107; *Brown v. Com.* 8 Mass. 59.

⁷ *R. v. Hodgson*, 36 Eng. L. & Eq. 626; 7 *Cox C. C.* 122. See supra, § 694, that immediate effect is not necessary.

In Pennsylvania, under an indictment for forgery under the Act of March 31, 1860, § 169, it is unnecessary to prove an intent to defraud any particular person. *McClure v. Com.* 86 Penn. St. 353.

⁸ *R. v. Powell*, 2 W. Bl. 787; *R. v. Holden*, 2 Taunt. 334; *State v. Redstrake*, 10 Vroom, 365.

⁹ Supra, § 695; *R. v. Crook*, 2 Str. 901; *R. v. Goate*, 1 Ld. Ray. 737; *Com. v. Ladd*, 15 Mass. 526; *Com. v.*

face of the record the bank is a myth; even though the prosecution fails to prove that any such bank exists; yet, if the *bank note* be correctly described and proved according to the description, and if the person intended to be defrauded be also accurately described and adequately proved, then the prosecution can be sustained. For, if these two last conditions hold good, it matters not that the bank was extinct, or even that such a bank never existed at all.¹

VI. INTENTION.

§ 717. As has been already seen,² it is not forgery for a party to insert in a contract executed by the other side as well as by himself, a clause he understood the other side to have agreed to.³ It is the essence of forgery that it should be with fraudulent intention. It has also been shown that such intention is to be inferred from facts;⁴ and that *scienter* may be shown by other forgeries and fraudulent utterings.

§ 718. When the intention to defraud is established, it is no defence that the party intended to pay the forged paper or to save harmless the injured party,⁵ or that the claim to support which the document was forged was just.⁶ But the intention must in some way be proved. Thus, in an English case already noticed, A. forged a diploma of the College of Surgeons, intending to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and showed it to two persons with intent to induce that belief in them. This was held not to be an intent to defraud, though there was an intent to deceive.⁷

¹ Supra, § 660; infra, § 742; and see also generally U. S. v. Foye, 1 Curtis C. C. 364; State v. Hayden, 15 N. H. 355; People v. Davis, 21 Wend. 309; People v. Peabody, 25 Wend. 472; Com. v. Smith, 6 S. & R. 568; State v. Jones, 1 McM. 236.

² Supra, §§ 653, *et seq.*; and see Com. v. Henry, 118 Mass. 400.

³ Pauli v. Com. 7 Weekly Notes, 396.

⁴ Supra, § 713.

⁵ Supra, § 119; R. v. Forbes, 7 C. & P. 224; R. v. Cooke, 8 C. & P. 582; R. v. Geach, 9 C. & P. 499; Perdue v. State, 2 Humph. 494. As to larceny, infra, § 906.

⁶ State v. Cole, 19 Wis. 129; R. v. Wilson, 1 C. & K. 527. See R. v. Forbes, 7 C. & P. 224; R. v. Cooke, 8 C. & P. 582; State v. Kimball, 50 Me. 409. See supra, § 119.

⁷ R. v. Hodgson, D. & B. 3; cited Steph. D. C. L. art. 356. Supra, § 688.

the indictment; ¹ and secondary evidence may then be offered at the trial. As is elsewhere seen, ² there are authorities to indicate that in such case the indictment is by itself notice to produce. But by strict practice, notice to produce is necessary. ³ Where the notes are of a fictitious bank, it would seem that close description and proof of the bank are unnecessary; and so has it been held. ⁴

§ 722. The *scienter* is material, and should, independently of the statute, be both alleged and proved. ⁵ It is a good defence that the money was received innocently in the course of business. ⁶

Scienter in such case is material.

§ 723. *Intent* may be inferred in the same way as intent in cases of uttering. ⁷ Mere possession of the document as a curiosity will not sustain a conviction. ⁸

Intent to be inferred.

§ 724. It has been ruled that having in possession several forged bank notes, of different banks, at one time, with intent to pass them, and thereby to defraud the person taking them, constitutes but one offence; and that the defendant cannot be pursued severally on each note. ⁹

Having in possession several kinds of notes is one offence.

IX. INFERENCES OF FORGERY FROM EXTRINSIC FACTS.

§ 725. It need scarcely be repeated, that collateral mechanical evidences of forgery are always to be received for what they are worth. Thus it is admissible to show by an expert that the writing was traced over pencil; ¹⁰ that the water mark of the paper is repugnant; or that other circumstances exist which make it improbable that the writing is genuine. ¹¹

¹ Whart. Cr. Pl. & Pr. § 176.
² *Ibid*; *infra*, § 730.
³ See Whart. on Cr. Ev. §§ 212 *et seq.*; *People v. Stewart*, 4 Mich. 655; *Armitage v. State*, 13 Ind. 441.
⁴ *People v. Peabody*, 25 Wend. 472; *Sasser v. State*, 13 Ohio, 453.
⁵ *Owen v. State*, 5 Sneed, 494.
⁶ *U. S. v. Kenneally*, 5 Biss. 122.
⁷ See *supra*, §§ 713 *et seq.* See *Hopkins v. Com.* 3 Met. 460; *Hutchins v. State*, 13 Oh. 198; *Miller v. State*, 51 Ind. 405; *Perdue v. State*, 2 Humph. 494.

⁸ *R. v. Harris*, 7 C. & P. 429.
⁹ *State v. Benham*, 7 Conn. 414; *People v. Van Keuren*, 5 Parker C. R. 66. See *State v. Eggesht*, 41 Iowa, 574; *Wh. Cr. Pl. & Pr.* §§ 468 *et seq.*
¹⁰ *R. v. Williams*, 8 C. & P. 434. See Wharton on Cr. Ev. §§ 844 *et seq.*
¹¹ Whart. Crim. Ev. §§ 764 *et seq.*, 844 *et seq.*; *Crisp v. Walpole*, 2 Hagg. 52; *Warren's Miscell.* 256; *Wills Circ. Ev.* 111; *Mossam v. Joy*, 10 St. Tr. 666.

be falsely made, forged, and counterfeited, and of willingly acting and assisting in the said false making, forging, and counterfeiting,

- change, an acceptance thereof, and an indorsement thereon.
- (270.) Second count, for uttering.
- (271.) Third count, for forging an acceptance.
- (272.) Fourth count, same stated differently.
- (273.) Fifth count, for forging an indorsement, &c.
- (274.) Sixth count, for publishing a forged indorsement, &c.
- (275.) For forgery at common law in antedating a mortgage deed, with interest, to take the place of a prior mortgage.
- (276.) At common law. Against a member of a dissolved firm for forging the name of the firm to a promissory note.
- (277.) Forging a letter of attorney at common law.
- (278.) Forgery of a bill of exchange. First count. Forging the bill.
- (279.) Second count. Uttering the same.
- (280.) Third count. Forging an acceptance on the same.
- (281.) Fourth count. Offering, &c., a forged acceptance.
- (282.) Sixth count. Offering, &c., forged indorsement.
- (283.) Forging and publishing a receipt for payment of money.
- (284.) Second count, for uttering.
- (285.) Forging a receipt under the North Carolina statute.
- (286.) Forging a *feri facias* at common law.
- (287.) Second count. Uttering same.
- (288.) Forgery of a bond at common law.
- (289.) At common law, by separating from the back of a note an indorsement of part payment.
- (290.) Forgery in altering a pedlar's license at common law.
- (291.) Forgery of a note which cannot be particularly described in consequence of its being destroyed.
- (292.) Forgery of a note whose tenor cannot be set out on account of its being in defendant's possession.
- (293.) Forgery of bond when forged instrument is in defendant's possession.
- (294.) Forgery at common law in passing counterfeit bank notes.
- (295.) Forgery of the note of a foreign bank as a misdemeanor at common law.
- (296.) Forging a bank note, and uttering the same, under English statute.
- (297.) Second count. Putting away same.
- (298.) Third count. Forging promissory note.
- (299.) Fourth count. Putting away same.
- (300.) Fifth count. Same as first, with intent to defraud J. S.
- (301.) Sixth count. Putting away same.
- (302.) Seventh count. Same as second, with intent to defraud J. S.
- (303.) Eighth count. Putting away same.
- (304.) Attempt to pass a counterfeit bank note under Ohio statute.
- (305.) Forging a certificate granted by a collector of the customs.
- (306.) Causing and procuring forgery, &c.
- (307.) Altering generally.
- (308.) Altering, &c., averring specially the alterations.
- (309.) Same in another shape.
- (310.) Uttering certificate as forged.
- (311.) Uttering certificate as altered.
- (312.) Forging a treasury note.
- (313.) Causing and procuring, &c.
- (314.) Altering same.

§ 728. If the indictment declare the instrument to be of a particular class, a variance between the evidence and the indictment in this respect is, it seems, fatal.¹ In another volume the meaning of the designations in most general use is considered as follows:—

- (a.) "Purporting to be," Whart. Cr. Pleading & Practice, § 184. Compare *infra*, § 737.
- (b.) "Receipt," "Acquittance," *Ibid.* §§ 185-6.
- (c.) "Bill of exchange," *Ibid.* § 187.
- (d.) "Promissory note," *Ibid.* § 188.
- (e.) "Bank note," *Ibid.* § 189.
- (f.) "Money," *Ibid.* § 190.
- (g.) "Goods and chattels," *Ibid.* § 191.
- (h.) "Warrant, order, or request for the payment of money," *Ibid.* §§ 192-3-4.
- (i.) "Deed," *Ibid.* § 196.
- (j.) "Obligation," "Undertaking," "Guaranty," *Ibid.* §§ 198-200.

Where a full setting out of the instrument is given, a technical designation of its character may, at common law, be dispensed with,² and when several designations are given, one of which is correct, those which are incorrect may be rejected as surplusage.³

¹ Whart. Plead. & Prac. §§ 183 *et seq.*; *Hart v. State*, 20 Ohio, 49. See, as indicating extent of this rule, *People v. Marion*, 29 Mich. 31; *State v. Maupin*, 57 Mo. 205.

² Whart. Plead. & Prac. §§ 184-198; *People v. Ah Woo*, 28 Cal. 205.

³ *State v. Crawford*, 13 La. An. 300; *R. v. Williams*, 2 Den. C. C. 61; 1 T. & M. C. C. 382; 4 Cox C. C. 256; 2 Eng. L. & Eq. 533 (1850). The indictment here charged the defendant with having forged "a certain warrant, order, and request, in the words and figures following," &c. It was objected that the paper, being only a request, did not support the indictment, which described it as a warrant, order, and request. But it was held that there was no variance, as the document being set out in full in the indictment, the description of its legal character became immaterial. Parke, B., suggested that the correct course would have been, to have alleged the uttering of one warrant, one order, and one request. "The principle of this decision seems to be," says the reporter, "that where an instrument is described in an indictment by several designations, and then set out according to its tenor, either with or without a *videlicet*, the court will treat as surplusage such of the designations as seem to be misdescriptions, and treat as material only such designations as the tenor of the indictment shows to be really applicable. And where the indictment is so drawn as to enable the court to treat as material only the tenor of the indictment itself, all the descriptive averments

But an omission to set forth the names of the signers of an uncurrent bank bill is not cured by a mere averment that the jurors cannot give a more particular description.¹

§ 731. The number of a bank bill or note, its vignettes, mottoes, and devices, and the words and figures in the margin, need not be set forth in the indictment.² When, however, descriptive devices are given, a variance is fatal.³ The copy of a bank bill must give the name of the State on the margin of the bill.⁴

Vignettes and mottoes need not be given.

§ 732. *Stamps*, though required by the local government to be affixed, need not, it would seem, be copied in the indictment, for the reason that their omission does not destroy the legal capacity of the instrument.⁵

Nor stamps.

§ 733. Matter purely extraneous need not be set forth.⁶ Thus in setting forth a counterfeit bank note literally, in an indictment for feloniously passing the same, it was held that the omission of an indorsement appearing to have been made on the note after it was issued was no variance.⁷ And so of the omission of the indorsement on a promissory note.⁸ And the reason of this is obvious. As each obligor on a note is suable independently on his particular obligation, so an indictment for forgery lies for the forgery of each such obligation, all the rest of the note being surplusage. The same rule applies to the forgery of one of several obligors of a bond.⁹ And whatever is surplusage need not be set out.¹⁰

Indorsements need not be given; nor surplusage.

Pendleton v. Com. 4 Leigh, 694; State v. Davis, 69 N. C. 313; U. S. v. Doebler, 1 Baldw. 519. See fully Whart. Plead. & Prac. § 176.

¹ Com. v. Clancy, 7 Allen, 537.
² Whart. Crim. Plead. & Prac. § 167; Whart. Crim. Ev. § 114; State v. Flye, 26 Me. 312; State v. Carr, 5 N. H. 371; State v. Wheeler, 35 Vt. 261; Com. v. Bailey, 1 Mass. 62; Com. v. Stevens, 1 Mass. 203; Com. v. Taylor, 5 Cush. 605; People v. Franklin, 3 Johns. Cas. 299; State v. Van Hart, 2 Harrison, 327; Com. v. Searle, 2 Binn. 332; Griffin v. State, 14 Oh. St. 55; Butler v. State, 22 Ala. 43.
³ Griffin v. State, 14 Oh. St. 55.

See Buckland's case, 8 Leigh, 732; Whart. Crim. Ev. § 114.

⁴ Com. v. Wilson, 2 Gray, 70.

⁵ Supra, § 697. See Com. v. McKean, 98 Mass. 9.

⁶ Whart. Crim. Plead. & Prac. § 180.

⁷ Com. v. Ward, 2 Mass. 397; Buckland's case, 8 Leigh, 732; Whart. Plead. & Prac. § 180.

⁸ Com. v. Ward, 2 Mass. 397; Perkins v. Com. 7 Grat. 651; Hess v. State, 5 Ohio, 5; Buckland v. Com. 8 Leigh, 732; Cocke v. Com. 13 Grat. 750. See Com. v. Adams, 7 Met. 50; Whart. Plead. & Prac. § 180.

⁹ State v. Davis, 69 N. C. 313.

¹⁰ State v. Ballard, 2 Murphy, 186; State v. Gardiner, 1 Ired. 27.

not be strict, in a purely arbitrary matter, in holding to an exact accordance between the "purport" and the "tenor."¹

§ 738. If we look at the point closely, there is a repugnancy on the face of an indictment which avers that the defendant "purporting to be" "forged" the "note of A. B.," for, if the note is forged, it is not the note of A. B.; and if it is the note of A. B. it is not forged. Hence, in the old practice, there have been cases in which the courts, following a strict logical necessity, have declared that the omission of "purporting to be" is fatal.² Yet this sharpness of criticism is not now pressed; and the present rule is, that if "purporting to be" is omitted, yet the court, assuming it to be meant, will intend it, if the question of repugnancy be raised.³ And it is now settled that "As follows" is a sufficient averment of citation in an indictment.⁴

§ 739. It has been already seen that it is necessary, in order to make an instrument the subject of an indictment for forgery, that it should be capable of being used as a proof in a legal action.⁵ We are not, however, to confine such capacity to suits in which the person whose name is forged is summoned as defendant, — *e. g.* actions on bills, bonds, &c. It equally answers the question if the forged instrument is, *primâ facie*, capable of being used as a defence (*e. g.* as a receipt) in a suit against the forger by the person whose receipt is forged. But unless the instrument forged appears by the indictment to be capable of being used as legal proof, at some time, or in some way, or at some place, the indictment is bad.⁶

At some time. — It is not necessary, therefore, to the validity

¹ State v. Jones, 1 M'Mullen, 236; Fogg v. State, 9 Yerg. 392.

² See R. v. Carter, 2 East P. C. 986.

³ R. v. Birch, 1 Leach, 79; 2 W. Bl. 790; State v. Gardiner, 1 Ired. 27. See Whart. Crim. Plead. & Prac. § 184.

⁴ Clay v. People, 86 Ill. 147; Whart. Crim. Plead. & Prac. § 168.

⁵ See also State v. Cook, 52 Ind. 574; and see generally Whart. Crim. Plead. & Prac. §§ 184-8.

⁶ See supra, §§ 680-696; R. v. Wilcox, R. & R. 50; Com. v. Ray, 3 Gray, 441; People v. Shall, 9 Cow. 778; Williams v. State, 51 Ga. 535.

An indictment for the forgery of an indorsement upon a note must contain an averment that the words alleged to have been forged bore such a relation to the note as to be the subject of forgery; and the necessity of such averment is not obviated by an averment that the note is lost. Com. v. Spilman, 124 Mass. 327.

defendant's intention to defraud V., or if, in fact V. might have been defrauded if the forgery had succeeded, it is sufficient to satisfy this allegation in the indictment; for where the intent to defraud exists in the mind of the defendant, it is sufficient, though, from circumstances of which he is not apprised, he could not in fact defraud the prosecutor;¹ and this even though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him.² On the other hand, if the instrument is one which could not possibly be used for fraud, the indictment cannot be sustained.³

§ 743 a. At common law, indictments for forgery or uttering forged instruments must charge the offence to have been done with intent to defraud some particular person or corporation.⁴ How this averment is sustained has been already seen.⁵ Although the party actually defrauded was a firm, yet, under the rule just stated, it is enough to aver an intent to defraud a member of the firm.⁶ It is not necessary that the person primarily defrauded should be averred in the indictment. It is enough if a party be averred as the one intended to be defrauded who is in the scope of the fraud, and who may possibly be defrauded if the forgery succeeds.⁷

¹ R. v. Holden, R. & R. 154.

² R. v. Sheppard, R. & R. 169. See R. v. Harvey, 2 B. & C. 261.

³ See supra, §§ 696, 739 *et seq.*; and also *People v. Stearns*, 21 Wend. 409; S. C., 23 Wend. 634; *Penns. v. Misner*, Add. 44; *West v. State*, 2 Zab. 212; *Clarke v. State*, 8 Oh. St. 630; *Colvin v. State*, 11 Ind. 361.

⁴ *Infra*, § 746; 3 Ch. C. L. 1042; R. v. Marcus, 2 C. & K. 356; *State v. Odel*, 2 Tr. Con. Rep. S. C. 758; 3 Brev. 552; *State v. Greenlee*, 1 Dev. 523; *State v. Harrison*, 69 N. C. 143; *Cunningham v. State*, 49 Miss. 685; *West v. State*, 2 Zab. 212; *Buckley v. State*, 2 Greene, 162. See, as to general averment of intent, Whart. Plead. & Prac. §§ 164-5. As to practice under Georgia statute see *State v. Calvin*, Charlton, 151. And see generally *State v. Jones*, 1 McM. 236; Com. v.

Smith, 6 S. & R. 568; *People v. Davis*, 21 Wend. 309; *People v. Peabody*, 25 Wend. 472.

⁵ *Supra*, § 713.

⁶ R. v. Hanson, C. & M. 334; *People v. Curling*, 1 Johns. 320. *Infra*, § 1226.

⁷ *Supra*, §§ 713, 743.

Thus in *U. S. v. Morris*, before Benedict, J., 1879, 19 Alb. L. J., 403, the prisoner was indicted under section 5443 of the Revised Statutes offices, charged with having forged a material indorsement upon a post-office money-order with intent to defraud C. M. Cady. A verdict of guilty was rendered, and thereupon the defendant moved in arrest of judgment, upon the ground that inasmuch as the indictment charges the intent to have been to defraud C. M. Cady, no offence against the United

§ 746. As a general rule, unless otherwise required by statutory construction, it is sufficient, when the party whose name is forged is in existence, to aver that the defendant uttered the instrument as true, without saying to whom.¹ When, however, an intent to defraud a particular person is a part of the case of the prosecution, the indictment must specify such person, or excuse his non-specification by the averment that he was unknown.²

The name of a corporation, when pleaded, must be accurately given.³

§ 747. To the general discussion of venue heretofore given⁴ it is now requisite to add a single observation as to the inference to be drawn in forgery, as to venue, from the proof of uttering in a particular place. Does uttering in a particular county justify a conviction of forging in such county? As thus baldly put, certainly not; and so has it been judicially held.⁵ A naked utterance in a particular county is not *per se* proof of forgery in such county. But, as has been already shown, there are inculpatory incidents which so strongly intensify in such cases the presumption of guilt as to compel a conviction of forgery; and when so, the conviction may be had for forgery as committed in the venue of the uttering.⁶

Place of uttering may be laid to be place of forgery.

XI. COINING.⁷

§ 748. Congress, as already has been noticed,⁸ has given the state courts concurrent jurisdiction in all cases of counterfeiting

425; *People v. Stearns*, 21 Wend. 409; *S. C.*, 23 Wend. 634; *West v. State*, 2 Zab. 292; *Hess v. State*, 5 Oh. R. 5; *Snell v. State*, 2 Humph. 347.

¹ *R. v. Trenfield*, 1 F. & F. 43; *U. S. v. Bejandio*, 1 Woods, 294.

² *Buckley v. State*, 2 Greene (Iowa), 162. *Supra*, § 743 a.

³ *Whart. Cr. Plead. & Prac.* § 110. Charging the defendant with passing counterfeit coin in payment to A. will not be sustained by evidence that

the defendant passed it in payment to B., through A., who was the innocent agent of the prisoner in the transaction. *Rouse v. State*, 4 Ga. 136.

⁴ *Supra*, § 711.

⁵ *R. v. Parkes*, 2 East P. C. 993; *Com. v. Parmenter*, 5 Pick. 279.

⁶ See *supra*, § 726.

⁷ See, for forms of indictment, *Wh. Prec.*, as follows:— (336.) For making, forging, and counterfeiting, &c., American coin, under act of Congress.

⁸ See *supra*, § 266.

whatever class, is an offence at common law in the State where the bad money is coined.¹

§ 749. In a prosecution for coining, the jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person using ordinary caution.² Thus in an English case, where the defendant had counterfeited the resemblance of a half guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was, the judges held that the offence was incomplete.³ In a later case, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely, immersion in diluted *aquafortis*, before they could pass as shillings; the judges held that the offence was not yet consummated.⁴ The same general view has been taken in this country.⁵

All participants are principals.⁶ § 750. All participants in the work of coinage are

¹ Supra, § 266.

² U. S. v. Morrow, 4 Wash. C. C. 733; U. S. v. Burns, 5 McLean, 24. Supra, § 700.

³ R. v. Varley, 2 W. Bl. 682; 1 East P. C. 164.

⁴ 1 Leach, 175.

⁵ U. S. v. Burns, 5 McLean, 24.

⁶ A person who takes base pieces of coin, which are brought to him ready made, having the impression and appearance of real coin, though of different color, and brightens them so as to give them the resemblance of real coin and render them fit for circulation, is guilty of counterfeiting. He completes the offence, and subjects thereby to the penalties of the law not only himself, but all who acted a part, and were present assisting in the transaction. *Rasnick v. Com.* 2 Va. Cas. 356. See supra, § 213.

The prisoner, with intent of coining counterfeit half dollars of Peru, procured dies in England for stamp-

ing and imitating such coin. He was apprehended before he had obtained the metal and chemical preparations necessary for making counterfeit coins. It was held that the procuring the dies was an act in furtherance of the criminal purpose sufficiently proximate to the offence intended, and sufficiently evidencing the criminal intent to support an indictment founded on it for a misdemeanor, although the same facts would not have supported an indictment for attempting to make counterfeit coin. *R. v. Roberts*, 33 Eng. L. & Eq. 553; 7 Cox C. C. 89; *Dears. C. C.* 539. See *R. v. Weeks*, 8 Cox C. C. 455. Supra, §§ 152 et seq.

The jury also found that the prisoner intended to make only a few counterfeit coins in England, with a view merely of testing the completeness of the apparatus before he sent it out to Peru. It was held, that even to make a few coins in England with

counterfeit; for there must be some intention to *defraud*.¹ On the other hand the staking counterfeit coin at a gaming table as good money is an attempt to utter or pass the same; and losing it at play is a passing of the same against law,² and so is the giving of counterfeit coin to a woman, as the price of connection with her.³ And it is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered.⁴

Guilty knowledge to be inferred from facts. § 753. The presumption to be drawn from other attempts to pass counterfeit coin, or its possession on the person, has been already noticed.⁵

Existence of genuine original not necessary to be proved. § 754. If the coin forged be a common coin, legal in the United States, it is not necessary to prove that there is an original which the forged coin counterfeits.⁶

Fraudulent diminution is coining. § 755. A genuine sovereign reduced in weight by filing off nearly all the original milling, and fraudulently making a new milling, is a "false and counterfeit coin."⁷

¹ *R. v. Page*, 8 C. & P. 122, *sed v. Ion*, 2 Den. C. C. 475. See *supra*, *quære*. See 1 Cox C. C. 250. *Supra*, § 706.

² *State v. Beeler*, 1 Brev. 482.

³ *R. v. —*, 1 Cox C. C. 250.

⁴ *R. v. Welch*, 2 Den. C. C. 78.

See *R. v. Radford*, 1 Den. C. C. 59; *R.*

⁵ *Supra*, § 715.

⁶ See *Daily v. State*, 10 Ind. 536;

U. S. v. Burns, *supra*.

⁷ *R. v. Hermann*, 14 Cox C. C.

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CHAPTER X.

BURGLARY.

I. BREAKING.

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- Breaking must be actual or constructive, § 759.
- Breaking an outside disconnected gate is not burglary, § 760.
- And so of detached outer covering to window, § 761.
- Breaking an inside room is burglary, § 762.
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- And so of entrance by conspiracy with servant, § 766.
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- Entrance of hand sufficient, § 775.
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- And so of entrance by chimney, § 777.
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V. OWNERSHIP.

- Occupier is to be generally regarded as owner, § 798.
- And so of servant who occupies at a yearly rent, § 799.
- House occupied by married woman to be laid as husband's, § 800.

Public building may be described as property of occupant, § 801. Transient guests' chambers are to be laid as the landlord's dwelling; otherwise with permanent guests, § 802. Permanent apartments are dwellings of occupants, § 803. Possession is sufficient if as against burglars, § 804. Owner may be indicted for burglary in his lodgers' apartments, § 805.

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IX. ATTEMPTS.

Attempts at burglary are indictable at common law, § 822.

Burglary is breaking into another's house by night with felonious intent.

§ 758. BURGLARY, at common law, is the breaking and entering the dwelling-house of another in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not.¹

I. BREAKING.

§ 759. There must be an actual or constructive breaking into the house.² Every entrance into the house by a trespasser is not a breaking. There must be evidence to prove that the doors were shut,³ for, should the door of a mansion-house stand open, and the thief enter, this is not a breaking. When the window of the house is open, and a thief, with a hook, or other instrument, draws out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaks the glass of a window, and, with a hook or other instrument, draws out some of the goods of the

¹ Hale's Sum. 49; 1 Russ. on Cr. 6th Am. ed. 786; 4 Bla. Com. 227; Com. v. Newell, 7 Mass. 247; State v. Wilson, Coxe, 439; Cole v. People, 37 Mich. 544. ² 1 Russ. on Cr. (6th Am. ed.) 786; Rolland v. Com. 82 Penn. St. 306; Clarke v. Com. 25 Grat. 908. ³ State v. Wilson, Coxe, 439.

§ 761. Cutting and tearing down a netting of twine, which is nailed to the top, bottom, and sides of a glass window, so as to cover it, and entering the house through such window, though it be not shut, constitute a sufficient breach and entry,¹ and so where a glass window was broken but the inside shutters were not moved.² But where a shutter-box partly projected from a house, and adjoined the side of the shop window, which side was protected by wooden panelling, lined with iron, it was held that the breaking and entering the shutter-box did not constitute burglary.³ And where the only covering to an open space in a dwelling-house was a cloak hung upon two nails at the top and loose at the bottom, and it was removed from one of the nails, it was doubted whether that was a sufficient breaking.⁴

§ 762. A burglary may be committed by a breaking on the inside; for though a thief enter the dwelling-house in the night-time, through the outer door left open, or by an open window, yet if, when within the house he turn the key, or unlatch a chamber door, with intent to commit felony, this is burglary.⁵ Hence where a servant, who sleeps

not opening into any of the buildings, was not a breaking of any part of the dwelling-house. *R. v. Bennett*, R. & R. 289.

¹ *Com. v. Stephenson*, 8 Pick. 354. See *People v. Nolan*, 22 Mich. 229.

² *R. v. Davis*, R. & R. 499; *R. v. Perkes*, 1 C. & P. 300; though see 2 East P. C. 487.

³ *R. v. Paine*, 7 C. & P. 135. In *Timmons v. State*, 34 Ohio St. 426, it was held that the force necessary to push open a closed, but unfastened, transom, that swings horizontally on hinges over an outer door of a dwelling-house, is sufficient to constitute a breaking in burglary under a statute which requires a forcible breaking. 19 A. L. J. 496; S. P., *Dennis v. People*, and other cases cited *infra*, § 767.

⁴ *Hunter v. Com.* 7 Grat. 641.

⁵ *R. v. Johnson*, 2 East P. C. 488;

State v. Scripture, 42 N. H. 485; *State v. Wilson*, Coxe, 439; *Rolland v. Com.* 85 Penn. St. 66. In this case, while the law in the text was conceded, it was contended that in the case of the opening of an inner door, it must be accompanied with an intent to commit a felony in the very room so entered.

To this, however, the court (*Paxson, J.*) replied: "We do not assent to this qualification of the common law rule. If a burglar, entering by an outer door or window incautiously left open, with the intent to commit a felony in a particular room in the house, as if he intends to rob a safe, with the location of which he is familiar, and in furtherance of his design, and to enable him to accomplish it successfully, opens the door of the adjoining room in the same house to gag and bind the owner sleeping therein, it is

tent to rob, raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they robbed the owner and bound the constable; this was held a burglary. So if admission be gained under pretence of business; or if one take lodgings with a like felonious intent, and afterwards rob the landlord; or get possession of a dwelling-house by false affidavits, without any color of title, and then rifle the house; such entrance, being gained by fraud, will be burglarious.¹ The entry in such case, however, must be immediate.²

§ 766. If a servant conspire with a robber, and let him into the house by night, this is burglary in both;³ for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open.⁴

§ 767. While there must be a breaking, removing, or putting aside something material, which constitutes a part of the dwelling-house, and is relied on as a security against intrusion, yet if the door or window opened was at the time of the attempt shut, being kept in its place only by its own weight,⁵ it is no matter, as we have seen, that there was no fastening by locks or bolts; a latch to the door, or the weight of the window or door, is sufficient,⁶ and, as has been

of a house, the owner has a right to presume that his visitor calls for the purpose of friendship or business. If, in obedience to the summons, he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner, and constitutes a construction, 2 Leach, 913. *Supra*, § 141; *infra*, §§ 770, 915.
⁵ *R. v. Haines*, R. & R. 450. *Supra*, § 759.
⁶ 1 Russ. on Cr. by Greaves, 787; *R. v. Hall*, R. & R. 355; *R. v. Russell*, 1 Mood. C. C. 377; *People v. Bush*, 3 Park. C. R. 552; *State v. Reid*, 20

And so of entrance by conspiracy with servant.

Locks or nails not a necessary protection.

§ 777. An entry down a chimney, as has been seen, is a sufficient entry, for the chimney is a part of the house.¹
 And so of entrance by chimney. An entry, however, through a hole in the roof left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening, and needs protection; whereas if a man choose to leave a hole in the wall or roof of his house instead of a fastened window, he must take the consequences.²

§ 778. If the instrument with which the house is broken happen to enter the house, but without any intention on the part of the burglar to effect his felonious intent (as, for instance, to draw out the goods) with it, this will not be a sufficient entry to constitute burglary.³ But it is otherwise if an intent be formed, but be desisted from through fear.⁴

§ 779. In a case where the house was broken and not entered, and the owner for fear threw out his money, it was holden to be no burglary; though clearly robbery, if taken in the presence of the owner.⁵

§ 780. Where the prisoner raised a window which was bolted, and thrust a crow-bar under the bottom of the shutter (which was about half a foot within the window), so as to make an indent on the inside of the shutter, but from the length of the bar his hand was not inside the house, there was held not to be a sufficient entry to constitute burglary.⁶ And so *a fortiori* where he merely broke open the outer shutter, but did not get his hand through the glass pane.⁷
 The entrance by guests at inns has been previously discussed.⁸

¹ R. v. Brice, R. & R. 450; State v. Willis, 7 Jones (N. C.), 190; Donohoo v. State, 36 Ala. 281; Franco v. State, 42 Tex. 276. Supra, § 768.

² R. v. Spriggs, 1 M. & R. 357. Supra, § 768.

³ R. v. Rust, 1 Mood. C. C. 184; Car. C. L. 293; S. C. by the name of R. v. Roberts, 2 East P. C. 487. See R. v. Hughes, 2 East P. C. 491.

⁴ State v. McDaniel, 1 Wins. (N. C.) No. 1, 248. See supra, § 187.

⁵ 2 East P. C. 486, 490. See supra, § 187.

⁶ R. v. Rust, 1 Mood. C. C. 184; Car. C. L. 293; S. C. by the name of R. v. Roberts, 2 East P. C. 487.

⁷ State v. McCall, 4 Ala. 648.

⁸ Supra, § 762.

Hence, burglary may be committed in a house or shop standing near enough to the dwelling-house to be used with it as appurtenant to it, or standing in the same yard, whether the yard be enclosed or open.¹ And a building used with a dwelling-house, and opening into an enclosed yard belonging thereto, was deemed parcel of the dwelling-house, though it also opened into an adjoining street, and though it had no internal communication with the dwelling-house.² In another case the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a stable and coach-house adjoined, all which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, &c., making altogether an enclosed yard. The workshop had no internal communication with the house, and it had a door opening into the street; its roof was higher than that of the dwelling-house; and the street door of the workshop was broken open in the night. It was held that this workshop was parcel of the dwelling, and that the conviction was right.³ And so as to a barn, part of the same group of buildings as the dwelling-house, and not separated from it by a public road.⁴

Com. 60 Penn. St. 103; *State v. Twitty*, 1 Hayw. 102; *State v. Wilson*, 1 Hayw. 242; *Armour v. State*, 3 Humph. 379. "Shops," "store-house," "store," "counting-house," "warehouse," and "out-house," as statutory terms, are the subjects of future distinct definition. *Infra*, § 792.

¹ See 1 Hale, 558; *Brown's case*, 2 East P. C. 493; *Garland's case*, *Ibid.*; *People v. Snyder*, 2 Parker C. R. 23; *Quinn v. People*, 2 Hun, 336; S. C., 71 N. Y. 561; *State v. Langford*, 1 Dev. 253; *State v. Wilson*, 1 Hayw. 242; *State v. Twitty*, 1 Hayw. 102.

² *R. v. Lithgo*, R. & R. 357.

³ *R. v. Chalking*, R. & R. 334.

The provision of the N. Y. Revised Statutes (2 R. S. 668, § 16), declaring that no building shall be deemed a dwelling-house within the meaning of the provision relating to burglary, unless the same be found to be joined to,

immediately connected with, and part of a dwelling-house, is intended to mean no structure, itself a building separate from, and independent of, the dwelling-house of the owner, i. e. uninhabited out-houses, isolated from the dwelling, and does not apply to the lower story of a dwelling used as a store, although having no internal communication with the upper stories. *Quinn v. People*, 71 N. Y. 561.

⁴ *Pitcher v. People*, 16 Mich. 142.

Adjoining to the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house; and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roofs of the dwelling-house, kiln, and dairy were of different heights. It was held, that the

men engaged in the repairs sleep there in order to protect it, it will not make any difference; ¹ nor though the house is ready for the reception of the owner, and he has sent his property into it preparatory to his own removal, does it become for this reason his mansion.² And where the landlord of a house purchased the furniture of his out-going tenant, and procured a servant to sleep there in order to guard it, but without any intention of making it his own residence, a breaking into the house was not considered to be a burglary.³ It is otherwise when the house is occupied by servants as part of the owner's family.⁴

§ 785. The mere casual use of a tenement will not suffice.⁵

Nor building casually used.

Where neither the owner nor any of his family have slept in the house, it is not his dwelling-house, though he had used it for his meals and all the purposes of his business, and so a breaking into it is not a burglary.⁶

§ 786. If a man die in his leasehold house, and his executors put servants in it, and keep them there at board wages, burglary may be committed in breaking into it, and it may be laid to be the executor's property.⁷

Otherwise as to building occupied by executors.

"Chambers" and "lodging rooms"

§ 787. A dwelling-house is deemed any permanent building in which a party may dwell and lie, and as such, burglary may be committed in it. A set of cham-

the same common enclosure, the centre building was held not to be the subject of burglary, being evidently a distinct tenement, the adjoining houses being the respective abodes of individuals. *Egginton's case*, 2 East, P. C. 494; 2 B. & P. 508; S. C., 2 Leach, 913. But this case rests on refinements which cannot be reconciled with more recent adjudications.

A two-storied house, of which the front room on the first floor was used as a storehouse, and the back room (which also contained a few boxes of goods, and communicated with the front by a door in the partition) as a sleeping-room by the owner, while the clerks, who were unmarried men, and took their meals at a hotel, slept in

the rooms on the second floor, is a dwelling-house, both within the common law definition of burglary, and under §§ 3308-9 of the Alabama Code. *Ex parte Vincent*, 26 Ala. 145.

¹ 1 Leach, 186.

² *R. v. Hallard*, 2 East P. C. 498; *R. v. Thompson*, 2 East P. C. 498; 2 Leach, 771. *Infra*, § 815.

³ *R. v. Davis*, 2 Leach, 876; *R. v. Smith*, 2 East P. C. 497; *R. v. Fuller*, 2 East P. C. 498; 1 Leach, 196.

⁴ *Infra*, § 790.

⁵ 1 Hale, 557. *Though see State v. Wilson*, 1 Hayw. 242; *Armour v. State*, 3 Humph. 379.

⁶ *R. v. Martin*, R. & R. 108; *Fuller v. State*, 48 Ala. 273.

⁷ 2 East P. C. 499.

*Entrance, as well as breaking, must be averred.*¹

§ 819. That burglary and larceny may be joined is elsewhere seen. When larceny is joined to burglary, the defendant may be acquitted of one, and found guilty of the other.² Thus if the prisoner be charged that he feloniously and burglariously broke and entered the dwelling-house of J. S., and then and there certain goods of J. S. feloniously and burglariously did steal, &c.; the indictment comprises two offences, namely, burglary and larceny; and therefore he may be acquitted of the burglary if the case be so upon the evidence, and found guilty only of the larceny.³ But in such case, if the prisoner be acquitted of the larceny, he cannot, as has been seen, be found guilty of the burglary, unless there be an intent to steal charged; because, unless intent be charged, the larceny constitutes part of the burglary.⁴ And if larceny be not charged, there can be no conviction of larceny.⁵ Whether the sentence, in case of a conviction of the double offence, can be for burglary *plus* larceny, depends upon local practice and sometimes statutory prescription.⁶

¹ *Supra*, § 773, 818; *Pines v. State*, 50 Ala. 153; *State v. Whitby*, 15 Kans. 402; *Whart. Plead. & Prac.* §§ 243, 465.

² *Supra*, § 27; *R. v. Vandercom*, 2 East P. C. 519; *State v. Squires*, 11 N. H. 37; *Com. v. Hope*, 22 Pick. 1; *Crowley v. Com.* 11 Met. 575; *Stoops v. Com.* 7 S. & R. 491; *Com. v. Brown*, 3 Rawle, 207; *State v. Hayden*, 45 Iowa, 11; *Clarke v. Com.* 25 Grat. 908; *Berry v. State*, 10 Ga. 511; *Bell v. State*, 48 Ala. 684; *State v. Alexander*, 56 Mo. 131; *State v. Turner*, 63 Mo. 436.

In Mississippi it has been ruled that on an indictment for burglary and larceny a general verdict of guilty is a verdict of guilty of burglary alone. *Roberts v. State*, 55 Miss. 421.

³ See also *State v. Brady*, 14 Vt. 353; *State v. Cocker*, 3 Harring. 554; *Shepherd v. State*, 42 Tex. 501.

⁴ See *Whart. Crim. Plead. & Prac.* §§ 465-8; *R. v. Furnival*, R. & R. 445; *Jones v. State*, 11 N. H. 269.

⁵ *State v. Warner*, 14 Ind. 572; *Fisher v. State*, 46 Ala. 717; *Roberts v. State*, 14 Ga. 8.

⁶ See *Kite v. Com.* 11 Met. 581; *State v. Henley*, 30 Mo. 509, sustaining double sentence; and *Breese v. State*, 12 Oh. St. 146, declaring for burglary alone; and see *Lyons v. People*, 68 Ill. 271. When the conviction is for larceny, the grade is determined by value, as in other cases of larceny. *State v. Barker*, 64 Mo. 232.

On a conviction for breaking and entering a store, and stealing therefrom, the prosecuting officer may enter a *nolle prosequi* as to the breaking and entering, and thereby leave the defendant punishable for the simple larceny alone. *Anon.* 31 Me. 592.

cases of doubt, so as to adapt, as has been already observed, the intent to any contingency of the trial.¹

IX. ATTEMPTS.

Attempts
indictable
at common
law. § 822. An attempt at burglary is indictable at common law,² and breaking the yard of a dwelling-house with intent to commit burglary is such an attempt.³

P. C. 510; R. v. Dobbs, 2 East P. C. 518. ² Supra, § 185; R. v. Spanner, 12 Cox C. C. 155; R. v. Bain, L. & C.

¹ 2 East P. C. 515; 2 Leach C. C. 1105, note. See Bell v. State, 48 Ala. 684. ³ Com. v. Smith, 6 Phila. 305.

tended to the burning of a stack of corn; though the common law in this respect is now superseded by statutes.

§ 835. Temporary absence of the occupants does not cause a building usually inhabited to cease to be a dwelling-house,¹ though the building must be usually dwelt in.² Where the indictment charges burning a "dwelling-house," which is the statutory term, a building which was built for a dwelling-house and had been occupied as such, but not within some months previous to its being burned, nor was so occupied at that time, is not a dwelling-house under the statute,³ and a building designed for a dwelling-house, constructed in the usual manner, not entirely painted or glazed, and not yet occupied, is not a "house" to be the subject of arson at common law.⁴ It is otherwise under statutes, however, making indictable the burning of "buildings."⁵

But not a deserted or unfinished building.

IV. OWNERSHIP.

§ 836. At common law it was once thought essential to aver the possession to be that of the person at the time the legal owner,⁶ but this is now modified, partly by statute and partly by judicial revision. Thus in New York, after an elaborate examination of the authorities, it was held that, under the Revised Statutes, the house or building set fire to or burned must be described as the barn or building of the *person in possession*; and it was accordingly decided, when the building burned was alleged in the indictment as the building of the owner, and the proof was that, at the time

Ownership at common law must be established.

¹ Johnson v. State, 48 Ga. 116.

² Dick v. State, 53 Miss. 384.

³ Com. v. Barney, 10 Cush. 478; Hooker v. Com. 13 Grat. 763; Mc-Lane v. State, 4 Ga. 335; State v. Sutcliffe, 4 Strobb. 372.

Under the New York statute it is enough if a human being be within the house, irrespective of the liability of such person to danger. Woodford v. People, 62 N. Y. 117.

⁴ State v. M'Gowen, 20 Conn. 245.

⁵ R. v. Edgell, 11 Cox C. C. 132; R. v. Manning, L. R. 1 C. C. 338; 12 Cox C. C. 106.

But what remains of a wooden dwelling-house, after a previous fire, which left only a few rafters of the roof, and injured the sides and floors so as to render it untenable, and which was being repaired, is not a building, within sec. 7 of 32-33 Vict. c. 22, so as to be the subject of arson. R. v. Labadie, 32 Up. Can. Q. B. 429; 1 Green C. C. 257.

⁶ See Glandfield's case, 2 East P. C. 1034; Com. v. Wade, 17 Pick. 395.

In Glandfield's case it appeared that the out-houses burned were the

may be rejected as surplusage.¹ In Maine, however, "set fire to" has been held to be equivalent to "burn."²

§ 840. Laying the burning to be of a house is sufficient even at common law, without saying a dwelling-house.³ But where the statutory term is "dwelling-house," the latter term should appear in the indictment.⁴ In Glandfield's case the indictment, which was framed on the stat. 9 Geo. 1, stated the burning to be of out-houses generally, which was ruled by Heath, J., to be sufficient, without stating of what denomination of out-houses, such being the description in the statute 9 Geo. 1.⁵

§ 841. The house must at common law ordinarily be laid to be the house of another.⁶ Ownership must be laid, and proved as laid.⁷ "Belonging to" is a sufficient averment of ownership.⁸ But a special ownership is sufficient; it not being necessary that the ownership should be in fee.⁹ A mere servant, however, should not be laid as owner,¹⁰ though generally, as we have seen, proof of possession will sustain averment of ownership.¹¹ But at the same time, if

¹ Polsten v. State, 14 Miss. 463. See Hester v. State, 17 Ga. 130.

² State v. Taylor, 45 Me. 322, *sed quare*. As to indictment generally, see Woodford v. People, 62 N. Y. 117; Page v. Com. 26 Grat. 943; State v. Keel, 54 Mo. 182; State v. Moore, 61 Mo. 276; Thomas v. State, 41 Tex. 27; Wolf v. State, 53 Ind. 30; Davis v. State, 52 Ala. 357; Mott v. State, 29 Ark. 147; People v. Shainwold, 51 Cal. 468.

³ See 1 Hale, 567; Com. v. Posey, 4 Call, 109.

⁴ McLane v. State, 4 Ga. 335; State v. Sutcliffe, 4 Strobbh. 372. *Supra*, § 835.

⁵ 2 East P. C. 1036. See Hester v. State, 17 Geo. 130.

⁶ 2 East P. C. 1034; Martha v. State, 26 Ala. 72. And see *supra*, § 834; but see, as to Louisiana, State v. Elder, 21 La. An. 157; and compare Young v. Com. 12 Bush, 243.

⁷ Whart. Plead. & Prac. § 109. *Supra*, §§ 798, 836; *infra*, § 932; State v. Fish, 3 Dutch. 323; Marten v. State, 28 Ala. 71. As to corporate owners see McGary v. People, 45 N. Y. 153.

⁸ Com. v. Hamilton, 15 Gray, 480.
⁹ State v. Lyon, 12 Conn. 487.
¹⁰ Rickman's case, 2 East P. C. 1034.

¹¹ *Supra*, § 837.

A room in a large building, separately leased by the owner of the building to a merchant, who occupied it as a store, and having no direct communication with the other parts of the building, is properly laid in an indictment for arson as the property of the lessee. State v. Sandy, 3 Ired. 570. See Shepherd v. People, 19 N. Y. 537.

On an indictment for setting fire to a barn in the night-time, whereby a dwelling-house was burned, charging the barn to be the property of G. and N., it appeared that G. was the gen-

there are several tenants of a building, separated in distinct apartments, the burning must be averred to be of the property of the particular tenant of the part burned.¹

The pleading of the name of the party defrauded has been elsewhere fully considered.²

§ 842. The law in respect to fraud on insurance companies has been already noticed.³ A variance in this respect is fatal at common law. But it is no ground for *arresting judgment* on an indictment for arson with intent to defraud an insurance company, that the name of the company is inaccurately stated.⁴ If the owners are a company of individuals, their names should be given.⁵ Where the statute makes wilful burning by itself indictable, or where the offence is arson at common law, the intent to defraud need not be alleged.⁶

Intent to defraud should be correctly stated.

VI. BURNING HOUSES WITH INTENT TO FRAUD INSURERS.

§ 843. As we have already seen, it is not an indictable offence at common law for a person to burn his own house with intent to defraud insurers.⁷ In most jurisdictions, however; statutes are in force making this an indictable offence.⁸ A possibility of fraud is sufficient under the statute.⁹

Such burning has been made arson by statute.

eral owner of the barn, and that part of it was in the occupancy of N., and a part of it used for the purposes of a stage company, who had hired it from G., by parol agreement, for no specified time, G. himself being a member and agent of the company, and exercising no different control over this part of the premises than he exercised over the other way stations of the company. It was held that the company, and not G., was occupant of this part of the barn, and that the allegation of the indictment that the property was N.'s and not G.'s was not supported by the proof. *Com. v. Wade*, 17 Pick. 395.

In Vermont, on an indictment for burning a public meeting-house, un-

der a statute, it is not necessary to aver who are its owners. *State v. Roe*, 12 Vt. 93.

¹ *State v. Toole*, 29 Conn. 344; *State v. Tonnerly*, 9 Iowa, 436; *Shepherd v. People*, 19 N. Y. 537.

² *Wharton's Precedents* (389). *Supra*, § 816.

³ *Supra*, §§ 716, 739; *infra*, § 843.

⁴ *People v. Hughes*, 29 Cal. 257.

⁵ *People v. Schwartz*, 32 Cal. 160.

⁶ *R. v. Heseltine*, 12 Cox C. C. 404.

⁷ *Supra*, § 830.

⁸ See *State v. Hurd*, 51 N. H. 176; *Shepherd v. People*, 19 N. Y. 537; *People v. Henderson*, 1 Parker C. R. 560; *People v. Schwartz*, 32 Cal. 160.

Though there are several insurers,

⁹ *R. v. Doran*, 1 Esp. 127; *R. v. Kitson*, *Dears. C. C.* 187; *State v.*

Watson, 63 Me. 128; *Jhons v. People*, 25 Mich. 500.

VII. ATTEMPTS.

§ 844. *Attempts* to commit arson may be prosecuted when the burning is not consummated;¹ and it has been ruled that such prosecutions may be maintained when one solicits another ineffectually to commit the offence;² or wilfully uses any means to communicate fire.³

Indictable at common law.

the offence of burning with intent to defraud such insurers is but a single crime. *Com. v. Goldstein*, 114 Mass. 272. As to proving intent see *supra*, § 831.

In an indictment for setting fire to a building with intent to defraud the insurers, the guilty intent must be averred, and the names of the parties to be defrauded accurately given. *Staden v. People*, 82 Ill. 432; *aff. Wallace v. People*, 63 Ill. 451.

¹ *R. v. Taylor*, 1 F. & F. 511; *R. v. Clayton*, 1 C. & K. 128; *Com. v. Flynn*, 3 Cush. 525; *State v. Johnson*, 19 Iowa, 230. *Supra*, § 173.

² *People v. Bush*, 4 Hill N. Y. 133. But see *supra*, § 179.

³ *Supra*, § 173.

The attempt, however, must have causal relation to the act; *supra*, § 178; and the means must be adapted to the ends; §§ 180 *et seq.* See § 187 as to abandonment of attempt.

CHAPTER XII.

ROBBERY.

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| <p>I. FROM THE PERSON OR IN THE PRESENCE.
Robbery must be from the person or in the presence of prosecutor, § 847.</p> <p>II. MUST BE ANIMO FURANDI.
Goods must be taken <i>animo furandi</i>, § 848.</p> <p>III. TAKING AND CARRYING AWAY.
Goods must be taken and carried away, § 849.</p> <p>IV. FORCE AND FEAR.
Taking must be through force or fear, § 850.</p> <p>V. NATURE OF THREATS.
Threat calculated to produce terror sufficient, § 851.</p> <p>VI. CHARGING UNNATURAL CRIME.
Extortion by charging unnatural crime is robbery, § 852.</p> | <p>VII. DEFENDANT HAVING TITLE.
Where goods are taken under claim of title offence is not made out, § 853.</p> <p>VIII. SNATCHING.
Snatching without struggle is no robbery, § 854.</p> <p>IX. AGAINST THE WILL.
Taking must be against the will, § 855.</p> <p>X. CONSENT.
Consent no defence if obtained by fear, § 856.</p> <p>XI. INDICTMENT.
Proper technical averments must be made, § 857.
May be a conviction of larceny, § 858.</p> |
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ROBBERY AT COMMON LAW.

§ 846. ROBBERY is the felonious and forcible taking of the property of another from his person, or in his presence, against his will, by violence or by putting him in fear. The property taken must be the subject of larceny, whether common law or statutory.¹

I. FROM THE PERSON OR IN THE PRESENCE.

§ 847. It must appear that the taking was from the person or in the presence of the prosecutor.² Where it appeared Robbery that with the prosecutor was a third person, who had must be from the

¹ R. v. Cannon, R. & R. 146; R. v. Snelling, 4 Binn. 379; Turner v. State, Hemming, 4 F. & F. 50. 1 Ohio St. 422; Kit v. State, 11

² R. v. Grey, 2 East P. C. 708; R. Humph. 167; Crews v. State, 3 Cold. v. Hamilton, 8 C. & P. 49; U. S. v. (Tenn.) 350; Stegar v. State, 39 Ga. Jones, 3 Wash. C. C. 209; Com. v. 583.

Attempts at Robbery, and Assaults with intent to rob, are elsewhere generally discussed.¹

C. C. 185; *Hickey v. State*, 23 Ind. 21; *State v. Jenkins*, 36 Mo. 372. See conviction of felonious assault under indictment for robbery.

Howard v. State, 25 Oh. St. 399, for ¹ See supra, §§ 179 *et seq.*, 641 *et seq.*

To larceny *lucri causa* is essential by Roman law, § 895.
 And so by early English law, § 896.
 Otherwise by later English cases, § 897.
 Unreasonableness of these rulings, § 898.
 In the United States qualification of *lucri causa* required, § 899.
 Pawning master's goods with intent to return is not larceny, § 900.
 Appropriating lost goods *animo furandi* is larceny, § 901.
 Otherwise when there is no means of knowing at the time who the owner was, § 902.
 Notice of ownership may be inferred from facts, § 903.
 Such inference may be refuted by proof of *bona fide* attempt to find owner, § 904.
 Where there are ear-marks, reasonable diligence should be shown, § 905.
 Intent to restore only for reward makes offence larceny, § 906.
 Returning lost goods does not purge felony, § 907.
 Same rule as to cattle, § 908.
 Intent to steal coupled with belief that owner may be found, constitute larceny, § 909.
 But not larceny unless belief that owner may be found and felonious intent concur, § 910.
 Larceny for railroad officer to appropriate things found in cars, § 911.
 Not larceny for persons employed to find goods to appropriate them, § 912.
 Nor for assignee of finder to retain goods, § 913.

III. TAKING.

Taking must be in some way proved. Need not be secret, § 914.
 Consent of owner to taking does not bar prosecution in cases where the consent is that defendant should have only a bare charge, and where the consent was obtained by fraud or mistake, § 915.
 Consent cannot be given by unauthorized agent, § 916.

No defence that goods were exposed by owner to theft, § 917.
 Not larceny for wife to take away her husband's goods, or for person merely assisting her, § 918.
 But otherwise for person assisting adulterous wife, § 919.
 In such case defendant must be connected with the taking, § 920.
 Larceny in a man to steal his own goods from bailee to charge bailee, § 921.
 Joint tenant or tenant in common of chattel cannot steal chattel unless in hands of bailee, § 922.
 Distance of moving immaterial, § 923.
 Taking need not be by hand, § 924.
 Killing of animals not a sufficient carrying away, § 925.
 Enticing or trapping animals not taking until seizure, § 926.
 Party must be present at taking as principal, § 927.
 A thief carrying goods from county to county may be convicted in either county, § 928.
 All assenting to asportation are principals, § 929.
 Conflict of opinion as to whether when goods are stolen in one State the thief may be convicted in another State where the goods are brought, § 930.
 When several things are taken by one unbroken act this is a single larceny, § 931.

IV. OWNERSHIP.

Ownership, absolute or special, will sustain an indictment, § 932.
 Counts may vary ownership, § 932 a.
 Ownership may be inferentially proved, § 933.
 Variance as to may be fatal, § 934.
 Of joint tenants and tenants in common must be jointly laid, § 935.
 General owner may be charged with stealing from special owner, § 936.
 Grave-clothes and coffins to be laid as property of executor, § 937.
 As against strangers, property may be laid in either bailor or bailee, § 938.

Property cannot be laid in servant or child, § 939.

Nor in married woman, § 940.

Goods of corporation must be laid as such, § 941.

Goods levied on may be laid as property of officer or owner, § 942.

Not larceny at common law for servant to steal goods not yet arrived in his master's possession, § 943.

Specific ownership of stolen coin must be shown, § 944.

Goods stolen from thief may be laid as property of either thief or owner, § 945.

Things stolen from mail may be laid as property of owner, § 946.

Clothes of child may be laid as property of father, § 947.

Stealing simultaneously goods of different owners makes more than one offence, § 948.

Owner may be laid as unknown, § 949.

Goods of deceased person to be averred to be property of executor, § 950.

V. VALUE.

Some value must be attached to things stolen, § 951.

Lumping valuation insufficient when conviction is only for stealing part, § 952.

When there is a statutory limit value must conform to statute, § 953.

Larceny may be laid of piece of paper, § 954.

Value may be inferentially shown, § 955.

VI. BY SERVANTS AND OTHERS HAVING BARE CHARGE.

Larceny for servant having bare charge to convert to his own use, § 956.

So as to others having bare charge, § 957.

So as to persons with or by whom goods are inadvertently left or obtained, § 958.

And so of letter-carrier stealing letter, § 959.

And so of clerk, without discretion,

stealing goods of employer, § 960.

Otherwise when property of goods is in clerk, § 961.

And where the master has not had possession of goods, § 962.

VII. BY BAILEES.

Bailee not chargeable with larceny unless there be original fraudulent intent, § 963.

Where bare possession is fraudulently obtained, subsequent conversion is larceny, § 964.

Otherwise when property in goods is passed, § 965.

No such property passes with possession fraudulently obtained from servant or bailee as precludes prosecution for larceny, § 966.

Bailee liable when bulk or package is fraudulently broken though possession was obtained *bona fide*, § 967.

And so where bailment is fraudulently determined by bailee, § 968.

And so where bailment expires by itself, § 969.

By statute bailees are open in other cases to prosecution, § 970.

VIII. BY ASSIGNEE OR VENDEE.

Sale obtained by force does not transfer property, § 971.

Sale to bar larceny must be complete, § 972.

Transfer by ring-dropping bargain not such a sale, § 973.

Transfer must be assent of two minds to one thing, § 974.

Conditional transfer does not bar larceny, § 975.

No defence that goods were obtained by legal process when such process is fraudulent, § 976.

IX. INDICTMENT.

Various counts may be joined, § 978.

Ownership must be stated, § 979.

X. VERDICT, § 980.

XI. RESTORING ARTICLES STOLEN.

By statute stolen goods are to be restored, § 981.

Goods may be followed in hands of assignees with notice, § 981 a.

§ 869. No larceny at common law can be committed of animals in which there is no property, either absolute or qualified; as of beasts that are *ferae naturae* and unreclaimed; such as deer, rabbits,¹ hares and conies in a forest, chase, or warren;² "coons,"³ fish in an open river or pond;⁴ or wild fowls, rooks, for instance,⁵ at their natural liberty.⁶ A marten caught in a trap in the woods cannot be a subject of larceny even when it is in the trap;⁷ and according to Sir Thomas Wilde, C. J., not only is a wild animal itself not the subject of larceny, but it imparts its character to the cage in which it is confined.⁸ Bees are *ferae naturae*, and although confined to the top of a tree by the owner of the tree, yet while they remain in the tree, and are not secured in a hive, they are not the subject of a felony.⁹ But where

sever it, and *after about an hour's time or so* come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and in that interval the property lodgeth in the right owner as a chattel.' The period which must elapse between the severance and the carrying away has been differently stated as 'a day;' 'an hour exactly;' 'any time;' 'afterwards.' But the question as to whether the taking be or be not larceny does not depend upon the lapse of time. If the property be detached by the owner or by a person other than the wrong-doer, it becomes *eo instanti* the subject of larceny. If the subsequent carrying away by the wrong-doer be in pursuance of his original trespass involved in the severance, no matter what length of time may elapse between the two, then it would seem upon principle not to be a larceny. To hold otherwise is to attempt to avoid one 'subtle and unsatisfactory distinction' by the engrafting upon it another as subtle and unsatisfactory."

1 Green's C. C. 340.

¹ R. v. Read, L. R. 3 Q. B. D. 131; 37 L. T. 722.

² See R. v. Townley, L. R. 1 C. C. 315.

³ Warren v. State, 1 Greene (Iowa), 106. "The principle is well settled," says Greene, J., "that taking from another's possession an animal *ferae naturae*, or of a base nature, in contemplation of law will not render a person liable for larceny; though the right of the owner would be protected by a civil action. As this principle applies, by common law, to monkeys, bears, foxes, &c., it will evidently apply to coons."

⁴ State v. Krider, 78 N. C. 481.

⁵ Hannam v. Mockett, 2 B. & C. 934; 4 D. & R. 518.

⁶ 1 Hale, 511; Post, 366; Hannam v. Mockett, 2 B. & C. 934; R. v. Townley, L. R. 1 C. C. 315; 12 Cox C. C. 59; R. v. Read, L. R. 3 Q. B. D. 131; Wallis v. Mease, 3 Binn. 546; Warren v. State, 1 Greene (Iowa), 106.

⁷ Norton v. Ladd, 5 N. H. 203.

⁸ R. v. Powell, cited *infra*, § 876.

⁹ Gillett v. Mason, 7 Johns. 16; Wallis v. Mease, 3 Binn. 546; Cock v. Weatherby, 5 Sm. & M. 333. It is otherwise when they are reclaimed-

keys;¹ and pea-hens;² and bees in hives, and their honey,³ though it is for the jury to say whether animals *ferae naturae* are tamed, so as to be the subjects of larceny.⁴ But all valuable domestic animals, as horses,⁵ and all animals *domitae naturae*, which serve for food, as swine, sheep, poultry,⁶ and the product of any of them, as eggs, milk from the cow while at pasture,⁷

and nothing to designate them as reclaimed or tame, it is otherwise. Com. v. Chace, 9 Pick. 15.

¹ State v. Turner, 66 N. C. 618; R. v. Halloway, 1 C. & P. 128.

² Com. v. Beaman, 8 Gray, 497. See other cases cited § 869.

³ Harvey v. Com. 28 Grat. 941. See State v. Murphy, 8 Blackf. 498.

⁴ R. v. Cheafor, 2 Den. C. C. 361; 5 Cox C. C. 367; 8 Eng. Law & Eq. 598, Exchequer Chamber, sitting upon Crown Cases Reserved. Present: Lord Campbell, Mr. Baron Alderson, Mr. Baron Platt, Mr. Justice Talfourd, and Mr. Baron Martin. Lord Campbell said: "This case was not argued, but we are called upon to give judgment. It was tried at the Nottingham quarter sessions on the 7th of July, 1851. William Cheafor was indicted for feloniously stealing four tame pigeons, the property of John Mansell, alleged to be reclaimed. The pigeons, at the time they were taken, were in the prosecutor's dove-cote over a stable on his premises, being an ordinary dove-cote, having holes at the top, and having a door on the floor, which was kept locked. The prisoner entered the dove-cote at twelve o'clock at night, and took away the pigeons. The prisoner's counsel contended that the pigeons, being at liberty to go out at any time, were not reclaimed, and were not the subject of larceny. The chairman directed the jury that the view contended for by the prisoner's counsel was correct, and the pigeons

were not the subject of larceny; but the jury took a better view of the law than the judge, and found the prisoner guilty. Judgment was postponed till the opinion of the court had been given as to whether the direction of the chairman was right, and whether the prisoner was properly punishable. Now we think the direction of the learned chairman was wrong, because it comes to this: Is it possible there can be larceny committed of tame pigeons? because the pigeon from his nature must have egress to the open air, and unless it has a hole for that purpose it cannot get out. According to the direction of the learned chairman there can be no larceny committed of chickens, of geese, or ducks. It was a pure question of fact for the jury whether the pigeons were tame and reclaimed; the jury seem to have come to a very proper conclusion, that they were tame pigeons and reclaimed. The pigeons were the subject of larceny, although they had the opportunity of getting out and enjoying themselves. We shall direct that judgment be passed at the next quarter sessions." Conviction affirmed. See also R. v. Howell, reported 1 Bennett & H. Lead. Cases, 65; though see R. v. Brooks, 4 C. & P. 131.

⁵ Infra, § 908. But not when abandoned by owner. Johnson v. State, 36 Tex. 375.

⁶ Including *pea-hens*, as has been seen. Com. v. Beaman, 8 Gray, 497

⁷ Foster, 99.

imals must show they are the subjects of larceny. animal which is the subject of larceny.¹ "Oysters," however, may be designated generally as such.² So, when the carcass of an animal *ferae naturae* is stolen, the indictment must aver the animal to be "dead," so as to make it the subject of larceny.³ When an animal is equally the subject of larceny whether alive or dead, it is not necessary to aver that it is "dead."⁴

"One ham" is a sufficient description, without further designation.⁵

§ 876. *Choses in action*, including bonds and notes of all classes, according to the common law, are not the subjects of larceny, being mere rights of action, having no corporeal existence;⁶ though, as will presently be seen, a person may be indicted for stealing the paper on which they are written.

Choses in action are not subjects of larceny.

§ 877. Hence, deeds, mortgages, and leases are not "goods and chattels;"⁷ and at common law are not the subjects of larceny.⁸

Nor are other securities at common law.

§ 878. Bonds, notes, bank notes, receipts, and bills, being mere *choses in action*, and of no intrinsic value, were not held the subjects of larceny at common law.⁹ It has been determined in England, indeed, that a rail-

¹ *Supra*, § 870.

² *State v. Taylor*, *supra*.

³ *R. v. Edwards*, R. & R. 497; *Com. v. Beaman*, 8 Gray, 498; *R. v. Galliers*, *supra*; *State v. Jenkins*, *supra*; *Whart. Plead. & Prac.* § 209.

⁴ See *R. v. Puckering*, 1 Mood. C. C. 242; *State v. Pollard*, 53 Me. 124.

⁵ *R. v. Galliers*, *supra*. See *Whart. Plead. & Prac.* §§ 208-9.

⁶ *R. v. Green*, Dears. 323; *R. v. Johnson*, 3 M. & S. 539; *Com. v. Rand*, 7 Met. 475; *People v. Griffin*, 38 How. (N. Y.) Pr. 475; *State v. Dill*, 75 N. C. 257; *Whart. Plead. & Prac.* § 191; *Archbold's C. P.* 9th ed. 165.

⁷ *Whart. Plead. & Prac.* § 191.

⁸ 2 East P. C. 596; *R. v. Westbeer*, 1 Leach, 12; *R. v. Powell*, 14 Eng.

L. & Eq. 575; 2 Den. C. C. 408; 5 Cox C. C. 396.

⁹ *Archbold's C. P.* 9th ed. 165; *R. v. Watts*, 24 Eng. C. L. 573; 2 Den. C. C. 14; 4 Cox C. C. 336; *U. S. v. Bowen*, 2 Cranch C. C. R. 133; *U. S. v. Carnot*, *Ibid.* 469; *People v. Griffin*, 38 How. (N. Y.) Pr. 475; *Moore v. Com.* 8 Barr, 260; *State v. Tillery*, 1 N. & McC. 9; *Culp v. State*, 1 Porter, 33. Bank notes are not excepted from this category because they are issued by an incorporated bank. *R. v. Murtagh*, 1 Crawf. & Dix, 355; *R. v. Pearson*, 1 Moody, 313; *R. v. Morrison*, 8 Cox C. C. 194; *Bell C. C.* 158; *Thomasson v. State*, 22 Ga. 499. See *Com. v. Rand*, 7 Met. 475; *State v. Bonwell*, 2 Harring. 529.

way ticket is a chattel;¹ but this has been doubted.² By statutes, however, generally adopted, *choses in action* are recognized as property, and the stealing of them made penal. In what way, under the statutes of the several States, bank notes are to be described, has been examined in another work.³ The mode of proving such averments is also distinctively discussed.⁴

In order, under the statutes, to render bonds, notes, &c., the subjects of larceny, they must be, at the time of taking, legally valid and subsisting securities for the payment of money, or some specific article of value.⁵

§ 879. Must a prosecution for larceny of the prosecutor's signature to negotiable paper fail because it has no value to him? This question has received conflicting answers. No doubt the paper, while in the prosecutor's hands, is of no value. But as the moment it is taken from his hands he is liable to be sued on it, the better opinion is that it is under the statutes goods and chattels.⁶

¹ *R. v. Boulton*, 1 Den. 508; 2 C. & K. 917.

² *R. v. Kilham*, L. R. 1 C. C. R. 261; Steph. Dig. C. L. art. 288.

An unstamped written agreement for building cottages, under which work has been, and is being, carried on, is not capable of being stolen. *R. v. Watts*, Dear. 326.

A pawnbroker's ticket is capable of being stolen. *R. v. Morrison*, Bell C. C. 158; Steph. Dig. art. 268.

³ See Whart. Crim. Plead. & Prac. §§ 168 *et seq.*

⁴ Whart. Crim. Ev. §§ 114 *et seq.* See also *State v. Wilson*, 2 Rep. Const. Ct. 495; *State v. Holbrook*, 13 Johns. 90.

In cases of larceny, questions frequently arise as to the meaning of descriptive terms. These terms are considered in another volume as follows:—

"Purporting to be," Whart. Plead. & Prac. § 167; "Receipt," § 185; "Acquittance," § 186; "Bill of exchange," § 187; "Promissory note,"

§ 188; "Bank note," § 189; "Treasury note," § 189 *a*; "Money," § 190; "Goods and chattels," § 191; "Warrant, order," &c., §§ 192–4; "Deed," § 197; "Obligation," § 198; "Undertaking," § 199; "Guaranty," § 200; "Property," § 201; "Piece of paper," § 202.

⁵ *R. v. Craven*, R. & R. 14; *R. v. Phipoe*, 2 Leach, 673; *R. v. Hart*, 6 C. & P. 106; *R. v. Clark*, R. & R. 181; 2 Leach, 1036; *Wilson v. State*, 1 Por. 118; Whart. Plead. & Prac. §§ 213–17.

⁶ The authorities are thus accurately classified by Van Syckle, J., in *State v. Thatcher*, 35 N. J. 445:—

"This question has been discussed in cases of larceny, where the thing stolen must be of some value to the prosecutor. In Clark's case (*Russell & Ryan's C. C.* 181) the defendant was indicted under 2 George 2, c. 25, for stealing reissuable notes, the property of Large & Son, while in the course of transmission to them after they had been paid. It was held that the drawers could not have any val-

England of introducing into indictments for the larceny of bank notes counts for the larceny of "one piece of paper, of the value of one penny," and in several cases such counts have been held sufficient to support a conviction.¹ In New York, however, it was held that the stealing of a letter was not indictable, as it is of no intrinsic value.² And in England the law seems to be that where a *chose in action* is valid and the stealing of it is indictable by statute, the "piece of paper" is absorbed in it, and the indictment must describe the thing stolen as a *chose in action*. Where, however, the *chose in action* is a nullity, the paper itself may be described.³ At all events, if the *chose in action* is one for stealing which no indictment lies, it is, for this purpose, a nullity, and the "piece of paper" becomes the object of larceny.⁴

§ 881. Bank bills, complete in form, but not issued, are the property of the bank, and may be so treated in criminal proceedings for receiving them with knowledge of their having been stolen.⁵

So of un-
issued
bank bills.

§ 882. Some value must be shown to belong to paper alleged to be stolen;⁶ but this value may be inferentially shown. Thus, in a prosecution for the larceny of a bank note it is not necessary to prove that the note is a genuine one and of some value, by any positive evidence. If the jury shall be satisfied from the evidence that the prisoner feloniously stole the

Value may
be inferen-
tially
shown.

instead of so doing he converted it to his own use. It was held by the judges that even if the check was void under the 13th section of the stat. 56 Geo. 3, c. 184, the prisoner might be properly convicted for stealing a piece of paper. *R. v. Perry*, 1 C. & K. 725.

¹ *R. v. Perry*, 1 C. & K. 727; *S. C.*, 1 Den. C. C. 69; *R. v. Clark*, R. & R. 181; *R. v. Bingley*, 5 C. & P. 602; *R. v. Vyse*, 1 Moody C. C. 218. *Infra*, § 954; and see *Wh. Pl. & Pr.* § 202.

² *Payne v. People*, 6 Johns. 103. And see *Moore v. Com.* 8 Barr, 260. But in neither of these cases was the question of the larceny of "a piece of paper" put to the court exclusively.

In *Payne v. People*, the indictment charged "a piece of paper on which a certain letter" was written; in *Moore v. Com.*, simply a receipt.

³ *R. v. Watts*, 24 Eng. Law & Eq. 573; 2 Den. C. C. 14; 4 Cox C. C. 336; *R. v. Powell*, 14 Eng. Law & Eq. 575; 2 Den. C. C. 408; 5 Cox C. C. 396; *R. v. Green*, Dears. 323; *R. v. Vyse*, 1 Moody C. C. 218. *Infra*, § 951.

⁴ See *infra*, § 954.

⁵ *People v. Wiley*, 3 Hill, 194. See *R. v. Ranson*, R. & R. 232; 2 Leach, 1090, 1093; *R. v. Vyse*, 1 M. C. C. 218.

⁶ See *infra*, §§ 951 *et seq.*; *U. S. v. Nott*, 1 McLean, 499.

bank note, and afterwards passed it away as a genuine note, the prisoner has, by those acts, precluded himself from calling on the prosecution for further proof of the paper being genuine and valuable.¹ But on the trial of an indictment for stealing foreign bank bills, when such passing is not proved, it is incumbent upon the prosecutor to produce at least *prima facie* evidence of the existence of such banks and of the genuineness of the bills.²

Evidence that bills of the same kind have been received and passed away in the ordinary course of business, as part of the currency of the country, would be proof of such facts. But the fact that a witness for the prosecution, a broker, had exchanged the bills alleged to have been stolen, giving other money for them, after the larceny, he not speaking of any former knowledge of such bills, or expressing any belief as to their genuineness, has been held to be no evidence that the bills were genuine.³

§ 882 a. Though the circulation of the bills of the banks of other States is prohibited, and they are declared by local law to be worthless, yet in the hands of a *bond fide* holder they are property, and may be the subject of larceny.⁴

Money acquired by the illegal sale of intoxicating liquors may nevertheless be the subject of larceny from the possessor,⁵ and so as to the liquor itself.⁶

Nor does the fact that particular articles are used for gaming purposes change the law. Thus larceny lies for stealing gaming materials.⁷ So it is larceny to steal things stolen by the thief.⁸

The question whether goods and chattels include securities has been distinctively discussed.⁹

¹ Com. v. Burke, 12 Allen, 182; Cummings v. Com. 2 Va. Cas. 128. Infra, § 955.

² People v. Caryl, 12 Wend. 547; but see Johnson v. People, 4 Denio, 364; People v. Jackson, 8 Barb. 637. Infra, § 955; and see Whart. on Ev. § 1290.

³ Johnson v. People, 4 Denio, 364.

⁴ Starkey v. State, 6 Oh. St. 266. As to parallel case of forgery see supra, §§ 698-9. As to papers actually valueless see infra, § 882 b.

⁵ Com. v. Rourke, 10 Cush. 397; State v. May, 20 Iowa, 305.

⁶ Com. v. Coffee, 9 Gray, 139.

⁷ Bales v. State, 3 W. Va. 685.

⁸ Infra, § 945.

⁹ Whart. Plead. & Prac. §§ 168-191. Supra, § 848.

Two or three English cases may be here noticed. In one of them the defendant was indicted for receiving certain country bankers' notes; and the indictment in one count charged these notes as "valuable securities," and in



§ 882 *b*. If the instrument stolen is one on which a claim could under no circumstances at any time be maintained, then even under a statute designating such instrument, it is not the subject of larceny. Thus, where a debtor procured his creditor to sign a receipt for the debt, under the pretence that he was about to pay him, and then took it from him with a criminal intent, and without paying the money, it was held that he was not guilty of larceny, the receipt never having taken effect by delivery, and being therefore worthless.¹

An instrument of no value not larcenous.

II. INTENT.

§ 883. To constitute larceny, it is necessary that the goods should be taken feloniously, without the owner's consent. Hereafter we will consider what the law is when such consent is obtained by fraud.² Under the present head, we limit ourselves to inquiring what "feloniously," or "felonious intent," in this sense means. For it should be remembered that every taking of the property of another, without his knowledge or consent, does not amount to larceny. To make it such, it must be accompanied by circumstances which demonstrate a felonious intention to deprive the possessor permanently of the thing taken.³ Hence it is not larceny merely to borrow.⁴

Intent must be to deprive possessor permanently of thing taken.

another, as "pieces of paper," the goods and chattels of the prosecutor, and it appeared that the notes had been paid in London, and were in the possession of a partner of the firm, who was taking them to the country to be reissued, when they were stolen. The judges held that they were properly described in the indictment as goods and chattels; but some of the judges doubted whether they were valuable securities within the meaning of the statute 8 Geo. 4, c. 29, s. 5. *R. v. Vyse*, 1 Moody C. C. 218. The halves of notes, if stolen, should be described as goods and chattels. *R. v. Mead*, 4 C. & P. 535. It seems,

however, that a security which is in full force, as an uncanceled bond or note, does not in England fall under the head of "goods and chattels." *R. v. Powell*, 14 Eng. Law & Eq. 575; 2 Den. C. C. 403. See § 879.

¹ *People v. Loomis*, 4 Denio, 380. See *Moore v. Com.* 8 Barr, 260.

² *Infra*, § 964.

³ *R. v. Holloway*, 2 C. & K. 942; *Smith v. Shultz*, 1 Scammon, 492; *Hart v. State*, 57 Ind. 102; *Phelps v. People*, 55 Ill. 334; *State v. Fisher*, 70 N. C. 78; *State v. Watson*, 7 S. C. 67; *State v. Hawkins*, 8 Porter, 461; *Witt v. State*, 9 Miss. 671; *Hite v. State*, 9 Yerger, 198; *Fulton v.*

⁴ *Infra*, §§ 885-6.

§ 884. The *intent* being necessary to complete the offence, if a man, under the honest impression that he has a right to the property, takes it into his possession, it is not larceny.¹ If the sheep of A. stray into the flock of B., and

B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another.² If, under color of arrear of rent, although none be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony.³ If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be.⁴

The same rule applies when a person sells property in his possession which he believes he owns.⁵

State, 13 Ark. 168; Johnson v. State, 36 Tex. 375. See Wright v. State, 5 Yerger, 154; Long v. State, 11 Fla. 295. *Infra*, §§ 961, 967.

In State v. Fenn, 41 Conn. 590, an officer of a bank with which a note of the defendant had been left for collection called on the defendant with the note for payment. The defendant asked to be allowed to see the note, and on its being handed to him walked out of the room with it and secreted or destroyed it. It was held that the court below properly charged the jury, that if the defendant obtained possession of the note with felonious intent the act was theft.

¹ R. v. Hall, 3 C. & P. 409; R. v. Halford, 11 Cox C. C. 88; Merry v. Green, 7 M. & W. 623; State v. Barrackmore, 47 Iowa, 684; McDaniel v. State, 8 Sm. & M. 401; State v. Homes, 17 Mo. 379; State v. Conway, 18 Mo. 321; State v. Deal, 64 N. C. 270; State v. Gaither, 72 N. C. 458; Morningstar v. State, 55 Ala. 148; State v. Thomas, 30 La. An. 600; Herber v. State, 7 Tex. 69; Kay v. State, 40 Tex. 29; Smith v. State, 42 Tex. 444.

Infra, § 899. This, however, does not apply to a claim founded on an illegal usage. Com. v. Doane, 1 Cush. 5.

A person gleaning corn, erroneously believing he has a right to do so, is not guilty of larceny. Steph. Dig. C. L. citing 2 Russ. Cr. 164-5.

B., a game-keeper, takes snares set by A., a poacher, and a dead pheasant caught therein. A., honestly believing that the snares and pheasant were his property, and that he had a legal right to them, forces B., by threats, to return them. This is not robbery, and, if no violence were used, would not be theft. R. v. Hall, 3 C. & P. 409, cited Steph. Dig. *ut supra*.

² 1 Hale, 506; Hall v. State, 34 Ga. 208. And so if the original taking was negligent. R. v. Riley, 6 Cox C. C. 88; cited *infra*, § 886.

³ 1 Hale, 509. See *infra*, § 1194.

⁴ 1 Hale, 509. And see R. v. Hall, 3 C. & P. 409; Com. v. Doane, 1 Cush. 5; State v. Bond, 8 Iowa, 540.

⁵ The prisoner's wife hired a bedstead at 1s. per week, and within a fortnight afterwards the prisoner sold it to a broker, his wife being present

execution;¹ these may be trespasses, but are not felonies, because the returning the thing taken sufficiently evinces that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use.²

But it has been also said, that where the original taking was a trespass, there a subsequent felonious intent makes the offence larceny. Thus, when an article is obtained fraudulently and by trespass, any subsequent conversion, no matter what may have been the intermediate intent, is larcenous.³ With this may be coupled a case where a man, driving away a flock of lambs, negligently took a lamb belonging to a third party, and then subsequently finding out the fact, feloniously converted the lamb to his own use. It was held that this was larceny.⁴ But, generally, to constitute the offence there must be a fraudulent intent when possession is obtained.⁵

§ 886. We may therefore conclude that mere borrowing, without fraudulent intent, is not larceny.⁶ “If we were to hold,” said Lord Denman, “that wrongfully borrowing a thing for a time, with an intention to return it, would constitute a larceny, many very venial offences would be larcenies.”⁷ As a rule, to constitute larceny, it is essential that there should be an intent to deprive the owner *permanently* of his property. But if the original intent was felonious, then, on conversion, the larceny is complete.⁸

¹ Com. v. Greene, 111 Mass. 392.

² See also State v. Ware, 62 Mo. 597. Where a party removed a valuable article, part of a wreck, from a wharf on which it had been placed, and had taken it into his own house, and had afterwards denied the possession of it; it was held, that the question for the jury on an indictment for larceny was, whether at the time he originally took it he meant to steal it. R. v. Hore, 3 F. & F. 315.

³ State v. Coombs, 55 Me. 477; Richards v. Com. 13 Grat. 803; and infra, §§ 900, 964.

⁴ R. v. Riley, 14 Eng. L. & Eq. 545; 6 Cox C. C. 88; 1 Dears. C. C. 149.

⁵ State v. Wood, 46 Iowa, 116.

⁶ Steph. Dig. C. L. art. 306; 1 Hale P. C. 509; R. v. Phillips, 2 East P. C. 662; R. v. Addis, 1 Cox C. C. 78.

⁷ R. v. Holloway, 2 C. & K. 942; S. C., 1 Den. C. C. 414, per Lord Denman, C. J.; a case where it was held not to be larceny to carry some dressed skins to another part of a warehouse, and there to claim pay for work falsely pretended to have been done on them. But see R. v. Richards, 1 C. & K. 532. Supra, § 885.

⁸ Supra, § 885; infra, § 963; and also Starkie v. Com. 7 Leigh, 752; Richards v. Com. 13 Grat. 803; State v. Bryant, 74 N. C. 124.

§ 887. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; and such evidence may be overcome by proof of an original intent to defraud. And wherever it appears that the goods were taken with the intention of depriving the owner of them, and appropriating them to the taker's own use, his afterwards returning them will not purge the offence.¹ And even though he intended at the time to return the goods, yet if the bailment was originally fraudulently obtained, the mere intent to return is no defence.²

§ 888. In respect to false personation, we strike upon another of those subtle distinctions which are so numerous in this department of law. A. goes to B. and says, "I am C., who is well known to be a man of wealth; sell me these goods." If the goods are sold on this pretence, it is obtaining goods on false pretences, but not larceny, because the whole property is passed in the sale with the vendor's consent.³ If, however, A. says, "I am sent by C. to carry the goods to him," which is false; and thus obtains possession of the goods; this is larceny, in cases in which B. intends to part only with the possession of the goods to A.⁴ But here we encounter a sub-

Returning goods does not purge guilt.

Buying by false pretence is not larceny; but otherwise when only possession of the goods, but not the property, is obtained by the false pretence. False personation.

¹ See 1 Hawk. c. 34, s. 2; R. v. Pheathon, 9 C. & P. 552; R. v. Wright, 9 C. & P. 554, n.; State v. Coombs, 55 Me. 477; State v. Bonwell, 2 Harring. 529; Eckles v. State, 20 Ohio St. 508; State v. Scott, 64 N. C. 586.

² R. v. Wright, 9 C. & P. 554; R. v. Trebilcock, 7 Cox C. C. 408; Dears. & B. C. C. 453; State v. Coombs, 55 Me. 477; Com. v. Coe, 115 Mass. 481. Supra, § 119.

In an early case, it was proved that the defendants took two horses out of the prosecutor's stables at night, without his leave, and having rode them about thirty miles left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken on the same day, at the distance of fourteen miles from the inn,

walking in a direction from it; the jury found the defendants guilty, but at the same time found, specially, that the defendants meant merely to ride the horses the thirty miles, and to leave them there, without an intention to return for them, or otherwise dispose of them; and ten of the judges held that this was no felony, as there was no intention in the prisoners to change or appropriate the property. R. v. Phillips, 2 East P. C. 662.

³ R. v. Atkinson, 2 East P. C. 673; R. v. Adams, 1 Den. C. C. 38. See infra, §§ 914-6; State v. Anderson, 47 Iowa, 142.

⁴ R. v. Gillings, 1 F. & F. 36; R. v. Hench, R. & R. 163; State v. Brown, 25 Iowa, 561; State v. Lindenthal, 5 Rich. 237. See infra, §§ 966, 1142.

ordinate distinction. Suppose A., pretending to be C., goes to B. and fraudulently obtains from B. certain goods of C., which are in B.'s hands as bailee. Is this larceny in A.? It certainly is, because B. has no intention of passing the property in the goods to A.; or to any one; as he (B.) considers himself to have no property in the goods to pass.¹ This distinction has been vindicated in Massachusetts in the following case: "Sanderson had left his watch at a watch-maker's to be repaired, and the defendant went to the shop, pretending to be Sanderson, asked for the watch, paid for the repairing, and took the watch with a felonious intent." "These acts," said Chapman, J., "constitute larceny at common law. The case is like that of *Rex v. Longstreeth*, 1 Mood. C. C. 137. The defendant in that case went to a carrier's servant, and obtained from him a parcel by falsely pretending to be the person to whom it was directed. It was held to be a larceny, because the servant had no authority to deliver it to him, so that no property passed to him, but the mere possession feloniously obtained. So in this case the watch-maker had no authority to deliver the watch to the defendant, and the latter obtained no property in it, not even the qualified property of a bailee, but a mere felonious possession, which is the essence of the crime of larceny."²

Seizing
weapon in
self-defence is
not larceny.

§ 889. To seize a weapon in supposed self-defence is not larceny, though the person so taking afterwards, from a fraudulent subsequent purpose, converts the weapon to his own use.³

And so of
taking by
a belligerent.

§ 890. The same rule applies to taking by a soldier, recognized as part of a hostile belligerent army.⁴

Whether
forced sale
is larceny
depends

§ 891. It depends upon circumstances what offence it is to force a man in the possession of goods to sell them. If the defendant takes them, and throws down more than their value, it will be evidence that it was only

¹ *R. v. Robins*, Dears. C. C. 418; *R. v. Wilkins*, 2 East P. C. 673; *R. v. Longstreeth*, 1 Mood. C. C. 137.

² *Com. v. Collins*, 12 Allen, 181. See also *Com. v. Lawless*, 103 Mass. 425. There is a statute in Massachusetts making the obtaining of goods by false personation larceny, but the first, if not the second, of these deci-

sions is based on the common law. See also *Com. v. Whitman*, 121 Mass. 361; and Sir J. Stephen's remarks *infra*, § 1009.

³ *R. v. Holloway*, 5 C. & P. 524; *U. S. v. Durkee*, 1 McAllist. 196.

⁴ *Whart. Conf. of Laws*, § 911; *Com. v. Holland*, 1 Duvall, 182; *Hammond v. State*, 3 Cold. 129. *Infra*, § 1799.

county
may be
convicted
in either
county.

goods may thus have been carried.¹ The rule applies as well to property which is made the subject of larceny by statute, as to property which is the subject of larceny by the common law.²

The rule, however, does not apply to cases where there has been a transmutation of the property on its transit; so that an indictment describing it as it was when originally stolen would cease to describe it as it was when it arrived at the county where the trial takes place;³ nor to cases where after a joint larceny there has been a severance before asportation;⁴ nor to statutory qualifications of larceny,⁵ as stealing from dwelling-houses.

§ 929. One aiding or abetting in a larceny in one county, and afterward concerned in the possession and disposal of the

¹ *Supra*, § 291; *R. v. Parkin*, 1 *Mood. C. C.* 45; 1 *Hale*, 507; 1 *Hawk. P. C. c.* 33, s. 52; 3 *Inst.* 113; *State v. Mills*, 17 *Me.* 211; *State v. Somerville*, 21 *Me.* 14; *State v. Underwood*, 49 *Me.* 181; *Com. v. Dewitt*, 10 *Mass.* 154; *Haskins v. People*, 16 *N. Y.* 344; *People v. Burk*, 11 *Wend.* 129; *Com. v. Cousins*, 2 *Leigh*, 708; *Morrissey v. People*, 11 *Mich.* 329; *Johnson v. State*, 47 *Miss.* 671; *State v. Brown*, 8 *Nev.* 208; *People v. Mellon*, 40 *Cal.* 648.

² *Com. v. Rand*, 7 *Met.* 475; *Com. v. Simpson*, 9 *Met.* 138.

A. took the horse, wagon, and harness of B. from his stable by a trespass, and drove to a neighboring town. While on the way, he changed the horse for another, which was in a pasture by the roadside. He then drove to another county, and there sold the second horse. It was held, that although when he took the property he intended to return it, he might nevertheless be convicted of larceny in the county where he committed the trespass. *Com. v. White*, 11 *Cush.* 483.

³ *R. v. Halloway*, 1 *C. & P.* 127; *R. v. Edwards*, *R. & R.* 497. As where turkeys are stolen alive in one county

and there killed and carried dead into another county. *R. v. Edwards*, *R. & R.* 497. Or where a brass furnace has been stolen in one county and there broken up and the pieces carried into another county. *R. v. Halloway*, 1 *C. & P.* 127. In such case the indictment must describe the chattel as it was in the county where the indictment was found. *Com. v. Beaman*, 8 *Gray*, 497.

⁴ *R. v. Burnett*, 2 *Russ. on Cr.* 174. But if there be a joint larceny in one county and one of the thieves carry the goods into the other county, and they afterwards all concur in securing the goods in the latter county, they may be jointly indicted in that county. *R. v. County*, 2 *Russ. on Cr.* 329.

When there is one continuing transaction, though there may be several distinct asportations in law, yet the party may be indicted for the final carrying away, and all who concur are guilty, though they were not privy to the first or intermediate act. *State v. Trexler*, 2 *Car. L. R.* 90; *R. v. Firth*, *L. R.* 1 *C. C.* 172. *Infra*, § 931.

⁵ *R. v. Thompson*, 2 *Russ. on Cr.* 174; *R. v. Millar*, 7 *C. & P.* 665.

based on English statutes, it is generally agreed that theft may be committed by a member of a corporation to the prejudice of that corporation upon a thing which is the property of the corporation.¹

§ 937. An indictment for stealing grave-clothes or coffins must state them to be the goods and chattels of the executor or administrator; ² or if there be no will or no administration, it should seem that they may be laid to be the goods of the person who defrayed the expenses of the burial, or of the ordinary, if the shroud were not purchased with the money of the deceased. So, if a coffin be stolen, it may be described in the same manner; or if from length of time it be difficult to ascertain the personal representatives of the deceased, it may be laid as the property of a person unknown; but it cannot be described as the property of the church-wardens of the parish from which it was stolen.³

As against strangers property may be laid in either bailor or bailee. § 938. Whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either; ⁴ and "every person to whom the general owner of a movable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not divested if the special owner parts with the possession under a mistake."⁵ Thus, goods left at an inn,⁶ or intrusted to a person for safe keeping,⁷ or for sale,⁸

¹ *Ibid.*; citing *Roscoe's Cr. Ev.* 8th ed. 652.

² 2 *Hale*, 181; *Haynes's case*, 12 *Co. 113.* *Supra*, § 863.

³ *Anon.* 2 *East P. C.* 652.

⁴ *Supra*, § 932; *R. v. Remnant*, *R. & R.* 136; 4 *C. & P.* 391; *R. v. Vincent*, 9 *Eng. L. & Eq.* 548; 3 *C. & K.* 246; 2 *Den. C. C.* 467; 5 *Cox C. C.* 537; *R. v. Bird*, 9 *C. & P.* 44; *State v. Somerville*, 21 *Me.* 586; *State v. Grant*, 22 *Me.* 171; *Com. v. O'Hara*, 10 *Gray*, 469; *Com. v. McLaughlin*, 103 *Mass.* 435; *Com. v. Whitman*, 121 *Mass.* 361; *Com. v. Butts*, 124 *Mass.* 449; *People v. Bennett*, 37 *N. Y.* 117; *People v. McDonald*, 48 *N.*

Y. 61; *Phelps v. People*, 72 *N. Y.* 334; *Huling v. State*, 17 *Oh. St.* 583; *Yates v. State*, 10 *Yerg.* 549; *Owen v. State*, 6 *Humph.* 330; *State v. Mullen*, 30 *Iowa*, 203; *State v. Stanley*, 48 *Iowa*, 221; *Moseley v. State*, 42 *Tex.* 78; *Langford v. State*, 8 *Tex.* 115. But see *State v. Washington*, 15 *Rich.* 39; and *infra*, §§ 944, 1009; *supra*, § 932.

⁵ *Steph. Dig. C. L. art.* 282; citing *R. v. Vincent*, 2 *Den. C. C.* 464.

⁶ *R. v. Todd*, 2 *East P. C.* 653.

⁷ *R. v. Taylor*, 1 *Leach*, 395; *Yates v. State*, 10 *Yerg.* 549.

⁸ *People v. Smith*, 1 *Parker C. R.* 329.

fraudulently obtained from servant or bailee as precludes prosecution for larceny.

was held to be consummated in a case where some wheat, not the property of the prosecutors, but which had been consigned to them, was placed in one of their storehouses in the care of a servant, E., who was to deliver the wheat only to the orders of the prosecutors or their managing clerk, C., when the defendant, who was in the employ of the prosecutors, obtained the key of the storehouse from E., and was allowed to remove a quantity of the wheat, upon the fraudulent representation to E. that he had been sent by C., and was to take the wheat to the Brighton railway station;¹ and it has been held larceny for a person to take *animo furandi* from a post-office clerk a larger sum than he is entitled to, knowing the money not to be his.² But it is otherwise when absolute property is transferred by an authorized agent or bailee. This being the case, as the cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine orders, and to judge of their genuineness, it is not larceny but false pretence to obtain money on a forged check from such cashier.³

¹ R. v. Robins, 29 Eng. L. & Eq. 544; 6 Cox C. C. 420; Dears. C. C. 418. See supra, § 888. Compare R. v. Aickles, 2 East P. C. 675; S. C., 1 Leach, 294; R. v. Wilson, 8 C. & P. 114; State v. Watson, 41 N. H. 533; Cary v. Hotailing, 1 Hill N. Y. 311. Supra, § 892.

² R. v. Middleton, 12 Cox, 260, cited at large supra, § 916; and see R. v. Oliver, cited 4 Taunt. 274; and see comments in London Law Times, Sept. 21, 1878, p. 347. As distinguished from text, see R. v. Walsh, R. & R. 215; R. v. Metcalf, 1 Mood. C. C. 433.

In Com. v. Barry, 125 Mass. 390, the evidence was that, in pursuance of a preconcerted plan with B., A. entered the baggage-room of a R. R. station, where B. had a valise checked, and presenting a check corresponding with the one on the valise, obtained permission from the baggage-master to place a package in the valise. While

the attention of the baggage-master was called away by B., A. changed the checks on the valise and a trunk, which was standing underneath the valise, and immediately passed out of the room. By means of this substitution of checks, the trunk was carried to a station other than that intended by its owner. B. went on the same train with it, and on arrival at the station received it, took it with him, and appropriated its contents. It was held that A. was guilty of larceny of the trunk and its contents.

³ R. v. Prince, L. R. 1 C. C. 150; 11 Cox C. C. 193. Supra § 916.

Where a letter addressed to J. M., St. Martin's Lane, Birmingham, enclosing a bill of exchange, drawn in favor of J. M., was delivered to the defendant, whose name was J. M., and who resided near St. Martin's Lane, Birmingham, but, in truth, the letter was intended for a person of the name of J. M., who resided in New

Goods stolen from a servant may be thus recovered by the master, if the goods be laid in the indictment as the master's property.¹

Lofft, 88; R. v. Powell, 7 C. & P. 1 Hale P. C. 542.
640.

CHAPTER XIV.

RECEIVING STOLEN GOODS.

I. OFFENCE GENERALLY.

Receiving is a substantive offence, § 982.

Fact of stealing may be proved by testimony of thief, but not by his confessions, § 982 a.

Guilty knowledge must be proved, § 983.

Such knowledge may be inferred, § 984.

Inference may be derived from possession, § 985.

If larceny be proved defendant cannot be convicted of receiving, § 986.

Claim of title is a defence, § 987.

Honest intent is a defence, § 988.

If charge be joint, joint act of reception must be proved, § 989.

Receiving must be substantively proved, § 990.

✓ Reception must be from thief, § 990 a.

Receiving goods with intent to receive reward is within rule, § 991.

Wife cannot be convicted of receiving goods stolen by husband; but husband is responsible for conniving at his wife's guilty reception, § 992.

Reception against will of thief is not within rule, § 993.

Conflict as to whether indictment lies in one State for receiving goods stolen in another, § 994.

Place of reception to be inferentially proved, § 995.

Reception after statutory larcenies indictable, § 996.

II. INDICTMENT.

Name of thief need not be given, § 997.

Not necessary to aver conviction of thief, § 998.

Scienter is necessary, § 999.

Time and place need not be stated, § 1000.

"Taking" or "stealing" must be averred, § 1001.

Goods must be accurately described, § 1002.

Value must be averred, § 1003.

Counts may vary with ownership, § 1004.

Counts for larceny and receiving may be joined, § 1005.

Simultaneous reception of goods of different owners not one offence, § 1006.

I. OFFENCE GENERALLY.

§ 982. RECEIVING stolen goods is no longer to be considered as an accessory offence. It is now a substantive offence, if not by common law, at least by statute.¹

§ 982 a. The first point to be shown, in an indictment for receiving stolen goods, is that the goods were stolen,² and to prove

¹ *Infra*, §§ 997 *et seq.*; *Com. v. Berry*, 116 Mass. 1.

² *O'Connell v. State*, 55 Ga. 296. See *Owen v. State*, 52 Ind. 379.

ing fails, when on an indictment for receiving proof transpires to show that the defendant was also an accessory before the fact. The offences are so distinct that one can neither be said to merge in the other, nor is commission of the one in any way incompatible with conviction of the other. Hence, in defiance of such testimony the defendant, if there be sufficient evidence of guilty receiving, may be convicted of such receiving.¹

§ 987. Evidence that the thief had at one time been lawfully employed to sell such articles to the prisoner will warrant an acquittal, in the absence of any evidence that the prisoner knew that the authority had been withdrawn.²

Claim of title a defence.

§ 988. If the intent be honest (*e. g.* to receive goods for owner or to entrap and detect the thief), of course the offence is not constituted.³ But on the other hand, it is not necessary, as in larceny, that the offence should be *lucri causa*. It is enough if the object be to shelter or accommodate the thief.⁴ And an intent to get by the receiving a reward is *a fortiori* sufficient to satisfy the statutes.⁵

Honest intent a defence.

When the statute requires an intent it must be laid.⁶

§ 989. If two defendants be indicted jointly for receiving, a joint act of receiving must be proved in order to convict both.⁷ Proof that the goods were found in their joint

If charge be joint, joint act of

the florin, and took from his employer's till some money, and gave R. as his change 18s. 6d., which R. put in his pocket and went away with it. On leaving the place he took some silver from his pocket and was counting it when he was arrested. On entering the bar signs of recognition took place between T. and R., and R. was present when T. took the money from the till. The jury convicted T. of stealing and R. of receiving. It was ruled that this was evidence which the judge ought to have left to the jury as reasonable evidence upon which R. might have been convicted as a principal in the second degree; and that therefore the

conviction of R. for receiving could not be sustained.

¹ *State v. Coppenburg*, 2 Strobb. 273.

² *R. v. Wood*, 1 F. & F. 497; and see *supra*, §§ 884-85; but see *Cassels v. State*, 4 Yerg. 149; *Wright v. State*, 5 Yerg. 154.

³ *Supra*, §§ 88, 226-230.

⁴ *R. v. Richardson*, 6 C. & P. 335; *R. v. Davis*, 6 C. & P. 177; *Com. v. Bean*, 117 Mass. 141; *State v. Rushing*, 69 N. C. 29.

⁵ *Supra*, § 119; *infra*, §§ 991, 1416.

⁶ *Pelts v. State*, 3 Blackf. 28.

⁷ *R. v. Messingham*, 1 Mood. C. C. 257.

specified day goods "before then" stolen, may be sustained by proof of his receiving after the theft goods stolen on a later day.¹

§ 1001. It has been ruled that when it is charged that the "Taking" goods were "feloniously stolen," it is not necessary to add the words "taken and carried away."² But or "stealing" must be averred. merely "carry" without being followed by "away" is defective.³

§ 1002. The indictment should describe the goods with accuracy, and a variance in this particular will be fatal.⁴ Goods must be accurately described. If, however, as in larceny, the crime be established in respect to only a single article, though the indictment describe several, the defendant may be convicted.⁵

It is not necessary to allege that the goods were received upon any consideration passing between the thief and the receiver.⁶

§ 1003. The rule of value laid down as to larceny applies equally to receiving stolen goods.⁷ It may here be specially recalled that no judgment can be pronounced in either offence except for specific articles as charged in the indictment.⁸ Value must be averred.

§ 1004. Separate counts may be introduced averring separate owners. It has been held that there may be as many Counts may vary with ownership. counts, under the statute, for receiving as there are counts for stealing, and that the prosecutor ought not to be put to elect.⁹ Ownership, when known, must in some way be averred.¹⁰

¹ Com. v. Campbell, 103 Mass. 436.

See Com. v. Cohen, 120 Mass. 198.

² Com. v. Lakeman, 5 Gray, 82.

³ Com. v. Adams, 7 Gray, 43.

⁴ People v. Wiley, 3 Hill (N. Y.), 194. As to how goods are to be set out see Whart. Plead. & Prac. § 206; Whart. Crim. Ev. § 121; and as to the designation of written instruments, Whart. Plead. & Prac. § 167; Whart. Crim. Ev. § 114.

⁵ People v. Wiley, *ut supra*; Whart. Plead. & Prac. §§ 250, 470, 736.

⁶ Hopkins v. People, 12 Wend. 76.

⁷ See *supra*, § 952; and see also State v. Watson, 3 R. I. 114.

⁸ Where an indictment charges a

defendant with receiving various articles of stolen property, knowing them to be stolen, and specifically describes each article, and avers the value thereof, and he pleads that he is "guilty of receiving fifty dollars' worth of said property, in manner and form as set forth in the indictment," no valid judgment can be rendered against him on such plea. O'Connell v. Com. 7 Met. 460.

⁹ R. v. Beeton, 2 C. & K. 960; S. C., 1 Den. C. C. 414. See Com. v. Cohen, 120 Mass. 198; Whart. Plead. & Prac. § 293.

¹⁰ State v. McAloon, 40 Me. 133; Whart. Crim. Ev. § 97. *Supra*, § 932.

CHAPTER XV.

EMBEZZLEMENT.

I. AGAINST SERVANTS AND OTHERS APPROPRIATING GOODS NOT YET COME TO THEIR MASTER.

Statutes not designed to overlap the common law. Larceny at common law cannot be embezzlement under statute, § 1009.

Statutes make it embezzlement for servant or clerk to appropriate master's goods before he receives them, § 1010.

Employment need not be permanent, § 1011.

Mere volunteer not within the statute, § 1012.

Servant employed to change note or sell produce is within statute, § 1013.

Compensation is requisite to constitute service, § 1014.

Members of societies or partners not servants within statute, § 1015.

Goods may be followed through successive reinvestments, § 1016.

The "servant" need not be the servant of the prosecutor, § 1017.

Servant includes employees of all kinds, § 1018.

But not those invested with fiduciary discretion, § 1019.

Middleman is not a servant, § 1020.

"Clerk" includes commercial traveller, § 1021.

"Agent" is wider in meaning than clerk, § 1022.

"Virtue of employment" as test in old statutes, § 1023.

Not necessary that thing embezzled should have been received in direct conformity with employer's directions, § 1024.

Prosecutor's title not material as against third person, § 1025.

No defence that money received was under restricted limit, § 1026.

If case is larceny at common law, it is not embezzlement, *e. g.* where goods are taken after reaching master, § 1027.

Embezzlement covers only cases which common law larceny does not include, § 1028.

Diverging views in New York, § 1029.

Fraud is to be inferred from facts, § 1030.

No defence that money was received from another servant, § 1031.

Goods must have been received on account of master, § 1032.

Goods must not belong to the defendant, § 1033.

Middleman may be prosecutor, § 1034.

Corporation may be prosecutor, but not illegal corporation, § 1035.

No defence that a worthless security was given in place of that embezzled, § 1036.

Conversion of produce enough, § 1037.

No defence that principals have no title to money, § 1038.

No defence that a trap was laid for the defendant, § 1039.

Defendant may be tried in any place of embezzlement, § 1040.

Embezzlements created by federal statutes must be tried in federal courts, § 1041.

Simultaneous embezzlements may be joined, § 1042.

Fiduciary relations must be averred, § 1043.

Goods embezzled must be accurately stated, § 1044.

When a felony, term "feloniously" must be used, § 1045.

Servant of joint masters may be averred to be servant of either, § 1046.

Embezzlement may be joined with larceny, § 1047.

Bill of particulars may be required, § 1048.

II. AGAINST TRUSTEES, AGENTS, BAILEES, AND OTHERS APPROPRIATING GOODS RECEIVED BONA FIDE.

Statute covers cases of trustees or agents fraudulently appropriating goods received *bona fide* for principal, § 1049.

If case is larceny at common law, prosecution fails, § 1050.

"Officer" may be a *nomen generalissimum*, § 1051.

"Trustee" may include treasurer of bank, § 1052.

Fraud to be inferred from circumstances, § 1053.

"Agents," § 1053 a.

Copartners and members of common society not "agents," § 1054.

"Bailee" to be used in restricted sense, § 1055.

Person not capable of contracting may be bailee, § 1056.

Goods need not have been received from prosecutor, § 1057.

Conversion must be inconsistent with bailment, § 1058.

Some act of conversion must be in jurisdiction, § 1059.

Indictment must conform to statute § 1060.

Special conditions of particular statutes must be satisfied, § 1061.

At common law, indictment for larceny is not enough, § 1062.

Evidence inferential, § 1062 a.

III. PUBLIC OFFICERS.

Embezzlement by, a statutory offence, § 1063.

IV. RECEIVING EMBEZZLED GOODS.

Indictable at common law, § 1064.

I. AGAINST SERVANTS AND OTHERS APPROPRIATING GOODS NOT YET 'COME TO THEIR MASTER.

§ 1009. EMBEZZLEMENT is an intentional and fraudulent appropriation of the goods of another by a person intrusted with the property of the same.¹ In the common law definition of larceny, we must remember, there are two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps is caused by the position that to maintain larceny it is necessary that the stolen goods should have been at so metime in the prosecutor's possession.² The second

Statutes not designed to overlap the common law. Larceny at common law cannot be embezzlement by statute.

¹ See *U. S. v. Conant*, U. S. Dist. Ct. 1879, Bost. Daily Adv. June 17, 1879.

² See *supra*, § 943.

Sir J. Stephen, in a note (No. xvii.) to his Digest of Cr. Law, says:—

"I do not think it would be possible to assign to the expressions 'possession,' 'actual possession,' 'constructive possession,' 'legal possession,' senses which would explain and reconcile all the passages in which

these phrases occur in works of authority. Some of them, indeed, are absolutely contradictory. Thus it is said that the taking in larceny must be a taking out of the possession of the owner. It is also said that the owner retains the legal possession notwithstanding the larceny. If both of these propositions were true, it would follow that larceny could never be committed at all. Again, we are told, on the other hand, that the taking in larceny must be a taking out of the

note or sell produce as his possession is the possession of his master.¹ If, however, he obtain change for the note or sell the goods, and then secrete or abscond with the produce, this is not larceny, but embezzlement, as the owner never was in possession.² But a person employed specially, merely to get a check cashed, "for which he was to receive sixpence," is not a servant under the statute.³ And the same view has been taken as to a broker undertaking, on a particular occasion, to purchase a certain bill.⁴

§ 1014. It is essential to constitute a servant that his services should be for some consideration. Yet this consideration need not be money; for if it consists in clothes, food, or home, it is, on general principles, sufficient to sustain an action against the servant for neglect, and hence a prosecution for embezzlement. Even a right given to the servant to receive the gratuities and fees of an office is enough;⁵ and *a fortiori* is this the case with commissions on a proportion of the profits,⁶ when such are fixed by rule.⁷ There must, however, be *wages* or compensation in some shape, or else the prosecution fails.⁸

§ 1015. A prosecution cannot be maintained against members of societies or against partners for embezzlements of this class: because (1.) the possession of the particular member or partner is the possession of the whole society or firm;⁹ and (2.) such members or partners cannot be *servants* under the act to the firms or societies to which they belong.¹⁰ For the same reason a city officer, having a

¹ *Supra*, §§ 956 *et seq.*
² *R. v. Sullens*, 1 Mood. C. C. 129;
R. v. Winnall, 5 Cox C. C. 326; *R. v. Hartley*, R. & R. 139; *R. v. Keena*, 11 Cox C. C. 123; *L. R. 1 C. C. 113*;
R. v. Gale, 13 Cox C. C. 340; *State v. Foster*, 37 Iowa, 404; *Johnson v. Com.* 5 Bush (Ky.), 430.
³ *R. v. Freeman*, 5 C. & P. 534.
See R. v. Mayle, 11 Cox C. C. 150.
See People v. Dalton, 15 Wend. 581.
⁴ *Com. v. Davis*, 7 Bost. Law Rep. 94, per Allen, J.

⁵ *See R. v. Adey*, 1 Den. C. C. 571;
R. v. White, 8 C. & P. 742.
⁶ *R. v. McDonald*, L. & C. 85; 9 Cox C. C. 10.
⁷ *R. v. Hartley*, R. & R. 139; *R. v. Thomas*, 6 Cox C. C. 403.
⁸ *R. v. Tyree*, L. R. 1 C. C. 177; 11 Cox C. C. 241. *See R. v. Stainer*, L. R. 1 C. C. 231.
⁹ *See supra*, § 935; *infra*, § 1054.
¹⁰ *R. v. Marsh*, 3 F. & F. 523; *R. v. Bren*, L. & C. 346; 9 Cox C. C. 398; *R. v. Taffs*, 4 Cox C. C. 169. *See Com. v. Berry*, 99 Mass. 428, and *see infra*, § 1054.

master is held not to exist where A., being insolvent, assigns his estate to assignees for the benefit of creditors, and is appointed by them as agent to collect the debts due the estate ;¹ nor where the bailiff of a county court in England receives funds for the high bailiff ;² nor where a person employed to get orders for goods and to receive payment for them is at liberty to get the orders and receive the money when and where he thinks proper, being paid by a commission on the goods sold ;³ nor where there is nothing but an illusory salary, and where the whole business is left very much to the agent's discretion ;⁴ nor where the prosecutors decline to appoint B. as an "agent," but say, "For all business you do for us we shall be happy to pay you a commis-

R. v. Stainer, L. R. 1 C. C. R. 230. In the argument on this case both sides assumed that, if the society was criminal, the conviction could not be sustained. Cockburn, C. J., said : 'It is unnecessary to consider how far the criminal purpose of a society might affect its title to property.' As stolen property may be stolen from the thief who stole it (1 Hale P. C. 507), the question might deserve consideration if it ever arose. R. v. Hunt, in the next illustration, is in point, yet it is only a *nisi prius* decision.

"The servant of a society, the members of which took an unlawful oath under 37 Geo. 3, c. 123, and 52 Geo. 3, c. 104, cannot be convicted of embezzlement for misappropriating the funds of the society. R. v. Hunt, 8 C. & P. 642, by Mirehouse (Com. Serj.), after consulting Bosanquet and Coleridge, JJ."

¹ R. v. Barnes, 8 Cox C. C. 129.

² R. v. Glover, L. & C. 466; 9 Cox C. C. 500.

³ R. v. Bowers, L. R. 1 C. C. 41. *Infra*, § 1021. See, to same effect, R. v. Negus, 42 L. J. M. C. 62; L. R. 2 C. C. 34. "Where the prosecutor said: 'I paid the prisoner commission but

no salary; he was not obliged to be at my office at any particular time, excepting on Friday and Saturday, to account for what money he had received for me; I did not give the prisoner directions to go to any particular place for orders; he went where he pleased,' it was held that he was not a clerk or servant. R. v. Marshall, 11 Cox C. C. 490, C. C. R. But where the prisoner was bound by the terms of his agreement, 'diligently to employ himself in going from town to town and soliciting orders,' he was ruled by Lush, J., to be a clerk or servant. That learned judge, in remarkably clear language, thus states the law: 'If a person says to another carrying on an independent trade, If you get any orders for me I will pay you a commission, — and that person receives money and applies it to his own use, he is not a 'clerk or servant;' but if a man says, I employ you and will pay you, not by salary, but by commission,' — then the person employed is a servant.' R. v. Turner, 11 Cox C. C. 551." Roscoe's Cr. Ev. p. 447.

⁴ R. v. Walker, Dears. & B. 600; 8 Cox C. C. 1. See R. v. Mayle, 11 Cox C. C. 150.

in which the embezzlement statutes are couched, so that on their face they seem to include all fraudulent conversions by agents of all classes. But if we look at the general object of the embezzlement statutes rather than at their mere terms, we must conclude, contrary to the decisions of the courts in the States just mentioned, that the statutes legitimately include only such cases of appropriations by agents as are not reached by common law prosecutions for larceny.¹

§ 1051. The term "officer," when used alternatively with "cashier," or with any other phrase indicating it to be a *nomen generalissimum*, is to have a wide application. In Massachusetts, for instance, it has been held to embrace the president and the directors of a bank.²

§ 1052. The term "trustee" has in England been held to include the case of a person who was the secretary, trustee, and treasurer of a savings bank, and who, by the rule of the bank, was required to hand over money deposited with him to the treasurer, who was then required to hand it over when demanded to the trustees, whose duty it was to invest it in the public funds.³

¹ See for reasoning sustaining this supra, §§ 1027-9; and see also *State v. Coombs*, 55 Me. 477; *People v. Cohen*, 8 Cal. 42; *Fulton v. State*, 18 Eng. (Ark.) 168; *Cobletz v. State*, 36 Tex. 353.

² *Com. v. Wyman*, 8 Met. 247.

³ *R. v. Fletcher*, L. & C. 180; 9 Cox C. C. 189. As to Alabama statute see supra, § 1029. As to Mass. Stat. 1859, c. 233, see *Com. v. Hays*, 14 Gray, 62. It is embezzlement to fraudulently convert the proceeds of a promissory note given to the defendant to sell and pay over such proceeds to a third person. It would be otherwise, however, if as broker he had authority to mix the proceeds with his own funds. *Com. v. Foster*, 107 Mass. 221; *Com. v. Libbey*, 11 Met. 64.

The Pennsylvania Revised Code, § 114, provides that if any person

"being a banker, broker, attorney, merchant, or agent, and being intrusted, for safe custody, with the property of any other person, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate to or for his own use, or the use of any other person, such property, or any part thereof, he shall be guilty of a misdemeanor." This section is taken from Act of 20 & 21 Vict. c. 54, which has been the subject of several of the adjudications already given under this particular statute. It is therefore clear that under it larceny is not indictable. *Com. v. Newcomer*, 49 Penn. St. 478.

In *U. S. v. Taintor*, 11 Blatchf. 374, the defendant was indicted under the 55th section of the National Banking Act of June 3, 1864 (13 U. S. Stat. at Large, 116), for embezzling,

the indictment the purpose for which the defendant was intrusted with the property;¹ and the specific act of fraud with which the defendant is charged.²

§ 1062. A mere common law indictment for larceny is not enough, unless made so specially by statute. In England at one time an opinion was ventured at *nisi prius*, to the effect that a common law indictment for larceny would be good in embezzlements by bailees;³ but this case was exceptional, and not only was not followed in subsequent adjudications, but was practically overruled by a series of decisions already referred to, in which it was held that the special nature of the trust should be set forth. These were followed by the 24 & 25 of Victoria, c. 96, s. 3, which provided

Tex. 162. In Massachusetts, the particulars of embezzlement need not now (by statute) be stated. *Com. v. Bennett*, 118 Mass. 443.

¹ *Com. v. Smart*, 6 Gray, 15; *People v. Cohen*, 8 Cal. 42.

² *Com. v. Wyman*, 8 Met. 247. As giving a laxer view see *State v. Stimson*, 4 Zab. 9; and *State v. Porter*, 26 Mo. 201; and see *Com. v. Newcomer*, 49 Penn. St. 478.

An indictment of B. for embezzling securities in money held by him from H. in "trust and confidence to be by B. safely kept for H. until H. shall call for the same," sets forth a trust on the part of H. with sufficient exactness to warrant a conviction of B. on proof of his fraudulent conversion of the trust funds so held. *Com. v. Butterick*, 100 Mass. 1.

In *Wright v. People*, 61 Ill. 382, it was held that the Illinois Act of March 4, 1869, entitled an act for the protection of consignors of fruit, grain, flour, &c., to be sold on commission, which provides that any warehouseman, storage, forwarding or commission merchant, who, having converted to his own use the proceeds or profits arising from the sale of any goods, otherwise than as instructed by the consignor of the

goods, on demand of the consignor fails to deliver over the proceeds or profits of such goods, after deducting the usual per cent. on sales as commissions, shall be guilty of a misdemeanor, &c., being a penal statute, must receive a strict construction; and an actual demand to be made by the consignor upon the commission merchant is an indispensable prerequisite to a conviction under it.

In a case under this statute, the prosecutor testified that, when he went to the place of the accused, the latter said: "I know what you have come for, but it is impossible for me to pay you anything now." The witness stated that the accused knew well enough what he had come for, and this was all the demand he claimed to have been made. It was held that while in a civil cause where a demand was necessary, such evidence might be sufficient for a jury to find a waiver, yet, in this action, it was insufficient. The demand should be made in such a manner as to fairly apprise the merchant that he would be subject to the penalties of the statute if he failed to comply. *Ibid.*

³ *R. v. Haigh*, 7 Cox C. C. 403.

that in prosecutions of bailees fraudulently converting the bailed goods, an indictment for larceny should be sufficient. Where a statute to this effect is not in operation, it is essential, in all cases of embezzlement as distinguished from larceny, that the fiduciary character and duties of the bailee should be set forth in the mode already specified.¹

We have already seen that counts for larceny may be joined with those for embezzlement.²

§ 1062 a. The evidence in cases of embezzlement, both as to the nature of the trust, the embezzling act, and the intent, is inferential.³

Evidence
inferential.

¹ Supra, § 1043.

² Supra, § 1047.

³ *As to Nature of Trust.*—The acting in an office is sufficient proof of authority. Whart. Cr. Ev. §§ 834–5. Thus if a person receives money as steward of another, this is sufficient evidence of his being a steward to support an indictment for embezzling such money. *R. v. Beacall*, 1 C. & P. 312; *R. v. Wellings*, 1 C. & P. 454, 457.

And where there has been a written agreement between master and servant, in which the nature of the service is defined, on an indictment for embezzlement against the latter, parol evidence of the service is inadmissible, unless notice has been given to produce the agreement. *R. v. Clapton*, 3 Cox C. C. 126. The presumption of due appointment applies also to the person from whom goods are embezzled, if he be a trustee.

Thus where a clerk to a savings bank was convicted on an indictment charging him with embezzlement, the property being laid in T.; and in order to prove that T. was a trustee of the bank, he was called, and stated that since the commission of the offence he had been acting as a trustee, but that before that date he had attended only one meeting, having on that oc-

casional been requested to do so lest there should be a deficiency of trustees; but he was also a manager of the bank, and it did not appear that any act was done by him at that meeting which he might not have done as a manager; it was held that this was insufficient evidence of acting to support the inference of the legal appointment of T. as a trustee, and that the conviction was wrong. *R. v. Essex, Dears. & B. C. C. 369*; 4 Jur. N. S. 15; 7 Cox C. C. 384.

An admission, also, by a person indicted as servant to guardians of the poor of a parish, such admission being contained in the condition of his bond for the performance of his duties as treasurer, coupled with an act of parliament specifying those duties, is sufficient evidence of the nature of his appointment. *R. v. Welch*, 1 Den. C. C. 199; 2 C. & K. 296.

That a decoy has been used is no defence. Supra, § 149. Thus where B., a brewer, sent his drayman, S., out with porter, with authority to sell it at fixed prices only; and S. sold some of it to P. at an under price, but did not receive the money at the time; B., having heard of this, unknown to S., told P. to pay S. the amount, which P. did, and S., when asked for it by B., denied the receipt of the money;

III. PUBLIC OFFICERS.

§ 1063. Public officers, under statutes varying in different jurisdictions, are made indictable for embezzlement. The statutes, however, are so various, abounding in such numerous distinctions, that it would exceed the limits of the present work to exhibit them in detail.¹

Embezzlement by statutory officers.

embezzlement was held to be made out. *R. v. Aston*, 2 C. & K. 413.

Intent may be inferred from absconding. Thus where S., a servant of M., being sent to receive rent due M., received it, and immediately went off with it to Ireland; it was held that this was evidence from which the jury might infer that S. intended to embezzle the money. *R. v. Williams*, 7 C. & P. 338. *Supra*, § 1030.

Other acts of embezzlement may be introduced to prove intent. *Wh. Crim. Ev.* § 53. Thus where an indictment charged the prisoner with having embezzled three sums of twenty-one pounds, the moneys of his employers, he being a clerk or servant, evidence having been given of the embezzlement of these sums, it was then proposed to give evidence of other sums not charged in the indictment, but which had also been embezzled; and this was admitted, to show that if it should be contended the sums charged in the indictment were subjects of a mistake in keeping the accounts, there being many other sums unaccounted for, admitting evidence of such sums would assist the jury in determining what value was to be attached to the suggestion. *R. v. Richardson*, 8 Cox C. C. 448; 2 F. & F. 343.

Denial of Receipt necessary. — It is not enough to prove that a clerk has received a sum of money without entering it in his book, unless there is also evidence that he has denied its

receipt. *R. v. Jones*, 7 C. & P. 833. But this denial may be inferential.

Thus where it was the duty of a banking clerk to receive money, and to pay it either into a box or a till, of each of which he kept the key, and to make corresponding entries in a book, the evidence was that on the morning of the day in question he had thus debited himself with £1,762; and on being called on in the evening by his employer to produce his money, he threw himself on his employer's mercy, and said he was about £900 short. It was ruled that this was evidence upon which the jury might convict, although no evidence was given of the persons from whom the money was received, or of the coin of which it consisted. *R. v. Grove*, 7 C. & P. 635; 1 M. C. C. 447. *Supra*, §§ 1030, 1053.

¹ For rulings under such statutes see *U. S. v. Cook*, 17 Wall. 168; *U. S. v. Taintor*, 11 Blatch. 374; *U. S. v. Conant*, Lowell, J., Cent. L. J. 1879, 129; *State v. Walton*, 62 Me. 106; *State v. Boody*, 53 N. H. 610; *Com. v. Morrisey*, 86 Penn. St. 416; *Calkins v. State*, 18 Oh. St. 366; *State v. Newton*, 26 Oh. St. 265; *State v. Brandt*, 41 Iowa, 593; *State v. Munch*, 22 Minn. 67; *State v. Smith*, 13 Kans. 274; *Hoyt v. State*, 50 Ga. 313; *Johnson v. Com.* 5 Bush, 430; *State v. Leonard*, 6 Cold. 307; *State v. Bittinger*, 55 Mo. 596; *State v. Flint*, 62 Mo. 393; *State v. Doherty*, 25 La. An. 119; *Gibbs v. State*, 41 Tex. 491. An indictment will lie for the embez-

IV. RECEIVING EMBEZZLED GOODS.

§ 1064. There is no question that to receive knowingly embezzled goods is a misdemeanor at common law where-
Indictable at common law. ever the embezzlement is made penal by statute. But aside from this view, wherever embezzlement is made

and for certain purposes, he may be considered the owner of it himself. The questions here are: Was he a public officer? Has he fraudulently converted to his own use money which he had in his possession and under his control, by virtue of his office? It is set forth in the indictment that the defendant, being a public officer, to wit, the collector of taxes of the town of Alton, did, by virtue of his office and while employed therein, receive and have in his possession certain money to a large amount, to wit, the amount of nine hundred dollars, of the property of the town of Alton, and the said money did then and there unlawfully and fraudulently embezzle and convert to his own use, and so did steal, take, and carry away the same. The defendant's demurrer admits the facts alleged, and his counsel might as well attempt to argue that there was no larceny, because in the very nature of the case, there was no actual taking and carrying away of the money from the possession of the inhabitants of Alton, as because it was not, perhaps, to all technical intents and purposes, their property before it had been paid in to their treasurer. It is not necessary for us to decide whether it was or not. It may have been precisely because of technical difficulties in determining to whom money thus situated belongs that the legislature omitted to require it. It is guarded by this statute because, to whomsoever it belonged, it came to this defendant's possession, and into his control, by virtue of his

office. When thus received, this statute makes the fraudulent appropriation of it to his own use, in violation of his official oath, tantamount to larceny, and punishable as such, though there is no felonious taking and asportation from the possession of the owner, and though the fraudulent official and his sureties may be held bound by his contract with the town to account for it under circumstances when an ordinary bailee would be excused. If necessary, the allegation as to the ownership of the money might be treated as surplusage. It was the fraudulent breach of official duty and trust, which but for this statute could not be held to amount to larceny, that the legislature aimed to punish. That collectors of taxes are public officers there can be no doubt. They are specially mentioned among those that are to be chosen at the annual town-meetings in pursuance of R. S. c. 3, § 10. Even in the absence of such special statutory recognition, they have been so regarded, and held liable to the penal provisions of statutes of like character with that under which this indictment is found.

"The case of *The People v. Bedell*, 2 Hill, 196, arose under a New York statute, which provides that 'where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty . . . shall be a misdemeanor punishable as herein described.'

"The defendant was appointed col-

larceny by statute, then receiving embezzled goods stands on the same footing as receiving stolen goods.¹

lector of the Geneva Village Corporation, by the trustees, and gave bonds for the faithful discharge of his duty. Warrants and tax-bills were given him for collection. He finally went off a defaulter for from three to five hundred dollars, and was indicted under this statute. It was objected that the charter of the village corporation did not authorize the appointment by trustees, and, if it did, defendant was not a public officer within the meaning of the statute. The collector is not mentioned among the officers to be chosen for the corporation, but power is given to the trustees to appoint one attorney, street commissioner, fire-wardens, and certain other officers specially named, and also 'such other officers as shall be authorized by this act.' The collector is not named in any list of officers in the act; but one section provides that 'the collector shall collect all moneys which shall be ordered by the corporation to be raised by tax.' Hereupon, in an opinion drawn by Bronson, J., the court held: I. That the collector was one of the officers authorized by the act, and might be appointed by the trustees. II. That he was a public officer; and that officers of such a corporation are 'none the less public officers because their powers are confined in narrow territorial limits.' The court remark that he was required to take the oath and to give bail for the faithful performance of his duties, 'and he was not the less a public officer because the office is not mentioned in the statute enumeration and classification of public officers.'"

In *State v. Boody*, 53 N. H. 610, it was held that a selectman is a "pub-

lic officer," and may be "a receiver of public money" within the intentment of c. 257, § 7, of the Maine Gen. Stats.

In the course of his opinion, Foster, J., said: "But the terms of the statute relating to embezzlements are not restricted nor defined by the application and definitions of the provisions of title xvii.; and, as used in § 8 of c. 258, Gen. Stats., the term 'public corporation' may properly be applied to a town.

"Of this there can be no doubt. Every municipal corporation is necessarily a public corporation. 'All corporations intended as agencies in the administration of civil government are public, as distinguished from private, corporations. Thus, an incorporated school district or county, as well as a city, is a public corporation; but the school district or county, properly speaking, is not, while the city is, a municipal corporation. All municipal corporations are public bodies, created for civil or political purposes; but all civil, political, or public corporations are not, in the proper use of language, municipal corporations.' Dillon Mun. Corp. § 10.

"In this State, public corporations are understood to include all those which are created for public purposes, and whose property is devoted to the object for which they are created. Such, it is said, are counties, towns, parishes, school districts, &c. Private corporations are those which are created for the immediate advantage of individuals. Such, it is said, are insurance and manufacturing companies, and such, also, are canals, turnpikes, toll-bridges, and railroads, although the uses of these latter are public.

¹ *Supra*, § 996.

Dartmouth College v. Woodward, 1 N. H. 116, 117; Eustis v. Parker, 1 N. H. 275; School District v. Blaisdell, 6 N. H. 199; Concord Railroad v. Greeley, 17 N. H. 47; Foster v. Lane, 30 N. H. 305; Petition of Mt. Washington Road Co. 35 N. H. 134.

"It may not be entirely certain upon which of the two sections, 7 and 8, the public prosecutor relied in framing the indictment. He seems to have incorporated the language of both in the description of the official position of the respondent. He is called a public officer, and also a receiver of public money, to wit, a selectman; and he is charged with the embezzlement and fraudulent conversion of public money.

"Omitting the superfluous and unnecessary words 'and receiver of public money,' the respondent is described as 'a public officer, to wit, a selectman;' and such an officer is clearly included within the provisions of sec. 8; and, under that section, with proper averments in the indictment, the respondent would probably be chargeable.

"But it seems more probable that the prosecuting officer intended, by the framing of his bill, to charge the respondent under sec. 7, since he has used, in his description of the offender, the terms a 'public officer' and a 'receiver of public money,' terms that are not employed in sec. 8, which applies in terms to 'any officer, agent, or servant of any corporation, public or private.' And we can have little doubt that the later compilers of the statutes, and the legislature of 1867, intended to enlarge the provisions of the Revised Statutes, c. 213, § 4, by extending them to municipal corporate agents; not confining them to state officers. This is indicated by the collocation of § 7, c. 257, Gen. Stats. which (while its phraseology

is retained without modification) is extracted from the chapter entitled 'Officers against the State' in the Revised Statutes, and where, as we have seen, it is associated with no other subjects than treason and misprision, and incorporated into the chapter entitled 'Frauds and Embezzlements,' where it becomes associated with kindred subjects, while the remainder of the chapter from which, as sec. 4, it is taken, is reenacted in the General Statutes under the title of 'Treason and Misprision.' Gen. Stats. c. 265.

"If, then, § 7 of c. 257, Gen. Stats. may be applied, as we think it well may, to the servant or agent of a municipal corporation, the offender and the offence are described in this indictment fully and plainly, substantially and formally. It would be ridiculous to require the State to prove the precise source from which the money taken and converted was derived. The money in the officer's hands may have come from various sources, and have been so mingled and confused as that the portion thereof embezzled and converted could by no possibility be designated, such fund having no ear-mark.

"By the terms of the statute, any public officer, being a receiver of public money, who shall fraudulently convert the same to his own use, shall be punished.

"By the terms of the indictment, the respondent is described as being a public officer and receiver of public money, to wit, a selectman, &c., and is charged with fraudulently converting to his own use a specified sum, being the property and money of the town, which, as selectman, he had received.

"The word 'embezzle' is used in the indictment; but this may be rejected as surplusage, since it means no

