CHAPTER X.

IN WHAT COURTS INDICTMENTS ARE COGNIZABLE.

I. JUDICIAL POWERS SETTLED BY FEDERAL CONSTITUTION.

§ 252. THE powers given to Congress under this head are:—

Summary of federal judicial powers given by Constitution.

To provide for the punishment of counterfeiting the securities and current coin of the United States.[1]

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

[1] Art. 1, § 8, cl. 6.
[2] Ibid. cl. 10.
[3] Ibid. cl. 14.
[4] Ibid. cl. 16.
[5] Ibid. cl. 16.

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.[1]

To enforce the rights established by the fourteenth and fifteenth amendments.[2]

§ 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 orders; but jurisdiction of crimes against the federal government, it is held, is not among these powers. Before an offence can become cognizable by the United States courts, so it is concluded, Congress must first recognize it as such, affix a punishment to it, and declare the court that shall have jurisdiction.[3]

Prevalent view is that federal judiciary has no common law powers.

§ 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.[4] In this case Chief Justice Jay, Judge Wilson, and Judge Iredell, of the Supreme Court, and Judge

Conflict of early rulings in this relation.

[1] Ibid. cl. 18. In this section the word *necessary* has been construed to mean *needful, requisite, essential,* and *conducive to,* and gives Congress the choice of the means best calculated to exercise the powers they possess; and under this construction it has been held that Congress has 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'Culloch *v.* State of Maryland, 4 Wheat. 413; 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.

[2] Whart. Com. Am. Law, §§ 591 *et seq.*

[3] U. S. *v.* Hudson and Goodwin, 7 Cranch, 32; U. S. *v.* Coolidge, 1 Wheat. 416. See Duponceau on Jurisdiction of U. S. Courts.

[4] Wharton's State Trials, 49.

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.[1] Then came Isaac Williams's case, where the same law was held by Chief Justice Ellsworth.[2]

Such was the state of the law when Judge Chase, in Worrall's case[3] (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;[4] and Chief Justice Marshall,[5] in more than one case, treats the same point as if settled by consent.[6] But in a case which occurred in the Circuit Court of Massachusetts[7] 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. The inference, he urged, was plain, that the Circuit Courts have cognizance of all offences against the United States; that what these offences were

[1] U. S. *v.* Ravara, Wharton's St. Tr. 91; 2 Dallas, 297.

[2] Wharton's State Trials, 651.

[3] 2 Dall. 297; Wharton's St. Tr. 189.

[4] See 1 W. C. C. R. 84, the report of which case appears to be defective in the conclusion of Judge Washington's opinion.

[5] U. S. *v.* Burr, 4 Cranch, 500.

[6] U. S. *v.* Bevans, 3 Wheat. 336; U. S. *v.* Wiltberger, 5 Wheat. 76.

[7] U. S. *v.* Coolidge, 1 Gall. 488.

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 report,[1] 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 it is now finally established that the common law, *as a source of jurisdiction*, is not recognized in the federal courts, this does not exclude the operation of the common law, *as a rule for the exercise of a jurisdiction previously given.* That the common law is necessarily thus appealed to will hereafter appear in the chapters discussing offences against the United States; and it will be seen that there is not one of these offences whose character is not, according to the construction given by the federal courts, determined by a resort to the common law.[5]

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; *infra*, § 256. 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.

[5] See particularly as to piracy, *infra*, § 1860, and see vindication of position

§ 256. While, therefore, it is settled that the federal courts have no jurisdiction of offences not declared to be such by federal statute, yet, as these statutes mostly designate offences by title, leaving their definition to the common law, it is the common law that is the final arbiter as to what such offences are. And even this formal restriction of federal jurisdiction to statutory offences is in some measure done away with by a statute, hereafter to be noticed more fully, by which conspiracies against the United States are made indictable.[1] Other common law offences against the United States are still cognizable in State courts, when committed within State limits, and where State cognizance of them is not prohibited by federal statute.[2] But when common law offences against the United States are committed on the high seas, or on exclusively federal territory, they are either punishable in the federal courts, or they are not punishable at all.

No formal jurisdiction of exclusively common law offences.

§ 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: 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.

Statutory jurisdiction of federal courts.

§ 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;[3] fitting

Includes offences against law of nations.

in the text in Whart. Com. Am. Law, §§ 12, 200, 452. Compare, also, Marbury *v.* Madison, 1 Cranch, 137; U. S. *v.* Outerbridge, 5 Saw. 620; Com. *v.* Kosloff, 5 S. & R. 545. This position is maintained in Duponceau on Juris. 3, and in Whart. St. Tr. 89. As to practice, when the question is open, the federal courts follow the courts of the State in which they sit. See U. S. *v.* Shepard, 1 Abb. U. S. 431.

[1] *Infra*, §§ 1356 *a*, 1785.

[2] *Infra*, § 266; 10 Wash. Writ. by Sparks, 535; Wharton's St. Trials, pp. 87, 88. An instance of common law jurisdiction being accepted as a matter of course is found in U. S. *v.* Meyer, cited Whart. Prec. 955, note. As illustrations of the rejection of common law jurisdiction, see 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.

[3] Rev. Stat. 1878, 5281; *infra*, § 1901.

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;[1] 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;[2] setting on foot, within the United States, any military expedition against a State at peace with the United States;[3] suing forth or executing any writ or process against any foreign minister, or his servants, the writs being also declared void;[4] 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.[5]

§ 259. (*b*) Under the second head, namely, offences against federal sovereignty, may be classed, treason against the United States and misprision of treason;[6] holding any treasonable correspondence with a foreign government;[7] recruiting soldiers to serve against the United States;[8] enlisting by a citizen within, or going out of the United States with intent to enlist in the service of any foreign State;[9] 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;[10] illegally holding office;[11] false personation in naturalization;[12] offences against the elective franchise;[13] false personation of owners of stock or other claim against the United States;[14] obstructing officers executing warrants under civil rights law;[15] conspiring to prevent a person from holding or accepting federal office;[16] injuring a person so holding office;[17] offences against Indians;[18] offences on Guano Islands;[19] political offences against the federal government committed by subjects abroad;[20] perjury and

Also offences against federal sovereignty.

[1] Rev. Stat. 1878, 5286; *infra*, § 1901.

[2] Rev. Stat. 5285; *infra*, § 1905.

[3] Rev. Stat. 5286.

[4] Ibid. 4062; *infra*, § 1899.

[5] Rev. Stat. 4064.

[6] Ibid. 5331–8. As to subsequent statutes, see *infra*, §§ 1782 *et seq.*

[7] Rev. Stat. 5335; *infra*, § 1789.

[8] Rev. Stat. 5337; *infra*, § 1786.

[9] Rev. Stat. 5287.

[10] Ibid.

[11] Ibid. 1787.

[12] Ibid. 5424; *infra*, §§ 1833 *et seq.*

[13] Rev. Stat. 5425–9, 5506, 5511–19, 5520, 5529, 5532; *infra*, §§ 1833 *et seq.*

[14] Rev. Stat. U. S. 5435–8.

[15] Ibid. 5516.

[16] Ibid. 5518.

[17] Ibid. 5518.

[18] Ibid. 2128, 2146, 2150.

[19] Ibid. 5576.

[20] *Infra*, § 274.

forgery abroad;[1] and the various offences defined in the statutes relating to the post-office;[2] to counterfeiting,[3] to piracy, revolt, and the slave-trade.[4] Under this head may be noticed conspiracies against the United States, as hereafter specified.[5]

Also offences against individuals on federal soil, or on ships, or depriving individuals of civil rights.

§ 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;[6] depriving any person of equal protection of law;[7] 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;[8] causing death on ship by explosive substances;[9] 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, etc.;[10] offences covered by statutes protecting persons on the high seas, or arms of the sea, or rivers, or bays within the admiralty jurisdiction of the United States, and out of the jurisdiction of particular States;[11] and kidnapping persons with intent to enslave.[12]

[1] *Infra*, § 276.
[2] Rev. Stat. U. S. 5463 *et seq.*
[3] Ibid. 5457.
[4] See Rev. Stat. U. S. 5413–80.
[5] *Infra*, § 1556 *a*.
[6] Rev. Stat. U. S. 5510.
[7] Ibid. 5519.
[8] 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. See U. S. *v.* Barney, 5 Blatch. 294; Reynolds *v.* People, 1 Col. Ter. 179. The mere reservation of the right "to serve State processes" in the ceded place, does not exclude federal jurisdiction. U. S. *v.* Davis, *ut supra*. 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.
[9] Rev. Stat. U. S. 5355.
[10] *Infra*, § 269. See R. S. of U. S. §§ 5339–40.
[11] Rev. St. U. S. 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 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*.
[12] Rev. Stat. U. S. 5525.

Also offences against property of federal government, or on federal soil, or on ships.

§ 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, etc., 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 accessary thereto;[6] and the various forms of robbery and larceny on the high seas.

Also against public federal justice and policy.

§ 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 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;[13] committing perjury, or causing another to do so, in any suit or controversy depending in any of the courts of the United

[1] Rev. Stat. U. S. 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. U. S. 5451.
[8] Ibid. 5500–2.
[9] Ibid. 5481–7.
[10] Ibid. 5486.
[11] Ibid. 5482 *et seq.*
[12] Ibid. 5481.
[13] Ibid. 5404–6.

States, or in any deposition taken in pursuance of the laws of the United States;[1] taking other forms of false oaths forbidden by acts of Congress;[2] endeavoring to defeat the course of justice;[3] circulating obscene literature through the mail or custom-house.[4]

§ 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.[5] 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.[6]

II. IN WHAT COURTS OFFENCES COGNIZABLE BY THE UNITED STATES ARE TO BE TRIED.

When the State and the Federal Courts have Concurrent Jurisdiction.

State courts have not concurrent jurisdiction, unless given by Congress.

§ 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.[7] 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."[8] How far the grant of exclusive jurisdiction extends is discussed in another work.[9]

§ 265. Statutes having been enacted by Congress giving, as to several lines of offences, concurrent jurisdiction to the State courts,

[1] Rev. Stat. 1878, 5392.
[2] *Infra*, § 276.
[3] Rev. Stat. 1878, 5407.
[4] Ibid. 1785. *Infra*, § 1831.
[5] See *infra*, § 748.
[6] Rev. Stat. U. S. 1878, 3833.
[7] Houston *v.* Moore, 5 Wheat. 27.
[8] Ibid. See U. S. *v.* Ames, Boston L. Rep. vol. ix. p. 295. As to concurrent jurisdiction, see Whart. Cr. Pl. & Pr. § 242.
[9] Whart. Com. Am. Law, § 524.

Conflict of opinion as to State jurisdiction.

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:—

As to offences distinctively against the United States, the States are independent sovereigns.

1. Congress cannot constitutionally confer on a State court jurisdiction over offences exclusively 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, or which directly affect the State or its population, are punishable in such State, notwithstanding the fact that such offences are also directed against the sovereignty of the federal government, unless the Constitution gives the federal government exclusive jurisdiction over the offence;[2] and even where the federal courts have exclusive jurisdiction of one aspect of an offence, this does not prevent a State court from prosecuting another aspect of the same offence.[3] 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.[4]

3. Offences exclusively against the United States are exclu-

[1] Prigg *v.* Com., 16 Peters, 539, 630.
[2] "A State court of original jurisdiction having the parties before it, may, consistently with federal legislation, determine cases at law or in equity arising under the Constitution or laws of the United States, or involving rights dependent on such Constitution or laws." Harlan, J., in Robb *v.* Connolly, 11 U. S. 624, cited *infra*, § 267. S. P., U. S. *v.* Wells, 15 Int. Rev. Rec. 56.
[3] *E. g.*, where the uttering a forged treasury note is prosecuted as an uttering in the federal courts, and as a cheat in the State courts. Whart. Com. Am. Law, § 524. *Infra*, § 293.
[4] *Infra*, §§ 273, 293. And see particularly Whart. Cr. Pl. & Pr. § 441. As to perjury, see *infra*, § 1275. As to treason, see *infra*, §§ 812–18. As to coining, in addition to points above given, see *infra*, § 749. As to larceny and mail robbery, see State *v.* Townsend, 1 Houst. C. C. 10.

sively cognizable in the federal courts; and offences exclusively against the States are exclusively cognizable in the State courts.[1]

[1] 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 assumed, 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 federal legislature could appropriate to itself the time, the duty, and the allegiance of State officials, and thereby put them under its immediate control. As to perjury, see *infra*, § 1275.

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; S. P. Com. *v.* Ketner, 92 Penn. St. 372. See Com. *v.* Fuller, 8 Met. 313; State *v.* Tuller, 34 Conn. 280. *Infra*, § 1041.

Hence even an accessary 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 accessary is not provided for by the federal statutes. Com. *v.* Felton, 101 Mass. 204. See Com. *v.* Ketner, 92 Penn. St. 372.

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 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

The federal courts, therefore, have no jurisdiction of offences exclusively against the States.[1]

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. At the same time, it is admitted in Connecticut, that offences against the federal government are exclusively cognizable in federal courts. State *v.* Tuller, *ut supra;* Ely *v.* Peck, 7 Conn. 240; *infra*, § 1041.

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; S. C., under name of Brown *v* U. S., 14 Am. L. Reg. N. S. 566; Shelly *v.* State, 11 Lea, 594; though it may be otherwise as to special aspects of perjury under federal statutes; *infra*, § 1275. See, on this topic, Whart. Com. Am. Law, § 524.

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 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 Missouri, it has been even said

[1] Bush *v.* Kentucky, 107 U. S. 110; U. S. *v.* Penn, 4 Hughes, 491.

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

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 independent jurisdiction, so far as such offences constitute cheats, either consummated or attempted, 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; State *v.* McPherson, 9 Iowa, 53; Sizemore *v.* State, 3 Head, 26; People *v.* White, 34 Cal. 183; though see Rouse *v.* State, 4 Ga. 136. See, for a fuller discussion, Whart. Com. Am Law, § 524.

In South Carolina, the courts at one time went the extreme length of 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 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 Pennsylvania it is settled that while the federal courts have exclusive jurisdiction of offences of which Pennsylvania has no common law or statutory cognizance, *e. g.*, embezzlement by officer of national bank (Com. *v.* Ketner, 92 Penn. St. 372); it is otherwise with offences of which Pennsylvania has common law or statutory jurisdiction, *e. g.*, forgery at common law. Com. *v.* Luberg, 94 Penn. St. 85.

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."

After noticing Buckwalter *v.* U. S., 11 S. & R. 193, and Huber *v.* Reily, 53 Penn. St. 118, the opinion thus proceeds: "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, providing 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 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." But any doubt that might arise on this point would not touch the indictability of passing counterfeit coin as cheats.

As will be hereafter seen, an indictment lies in the U. S. Circuit Court, under the federal statute, against a guardian for embezzling pension money paid to him for his ward. U. S. *v.* Hall, 98 U. S. 343, cited *infra*, § 1049.

[1] See Sergeant's Const. Law, 236, 287; Martin *v.* Hunter, 1 Wheat. 304; 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's Case, 16 Wis. 351; though see Spangler's Case, 11 Mich. 298; Willis, *in re*, 38 Ala. 429. In Whart. Cr. Pl. & Pr. §§ 783 *a*, 980 *et seq.* will be found rulings of the U. S. Supreme Court on the topics in the text.

[2] Farrand, *in re*, 1 Abbott U. S. 140; McDonald, *ex parte*, 9 Am. L. Reg. 662; 1 Low. 100; Ferrand *v.* Fowler, 2 Am. L. J. Rep. 4.

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 applicant is restrained, illegally or otherwise, under authority of the United States, whether by virtue of a formal commitment or otherwise.[2] But such claim was not recognized by the State courts, and cases are not infrequent in which by the latter tribunals persons held by the military authorities of the United States, under color of

Right of State courts to discharge from federal arrests.

illegal enlistments, have been discharged.[1] 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;[2] 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.[3]

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.[4] 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;[5] but at the same time each court, on application made to it for this writ, is compelled to determine where the limits of such sovereignty are to be placed.[6] 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

[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.

[2] Hopson, *in re*, 40 Barb. (N. Y.) 34; S. P., Anderson. *ex parte*, 16 Iowa, 595.

[3] Barrett, *ex parte*, 42 Barb. 479. See People *v.* Gaul, 44 Barb. 98; Martin, *in re*, 45 Barb. 142.

[4] Farrand, *in re*, 1 Abbott United States, 140.

[5] Ableman *v.* Booth, 21 Howard, 506; Sifford, *ex parte*, 5 Am. L. Reg. 659; Kelly, *ex parte*, 37 Ala. 474.

[6] Though see Farrand, *in re*, 1 Abbott U. S. 140.

offence against the United States, or go beyond such indictment.[1] 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.[2]

It is otherwise, however, in respect to matters of which the federal government has not exclusive jurisdiction. In such case the courts of the States "have the right to inquire into the grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the Constitution or the laws of the United States."[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]

[1] Hill, *ex parte*, 5 Nev. 154.

[2] Tarble's Case, 13 Wal. 399. This question is fully considered in Whart. Cr. Pl. & Pr. §§ 978 *et seq.*

That the validity of an enlistment may be inquired into by a federal court, see Schmeid, *ex parte*, 1 Dill. 587; McCall's Case, 5 Phila. 259, 271; McCall *v.* McDowell, 1 Abb. U. S. 212. In case of the enlistment of minors, this right is not taken away by the federal statutes of 1864, though it is now not within the jurisdiction of State courts. Neill, *in re*, 8 Blatch, 156; McDonald, *in re*, 1 Low. 100; 9 Am. L. Reg. 662. See Hanchett, *in re*, 18 Fed. Rep. 26; 16 Rep. 578.

[3] Harlan, J., Robb *v.* Connolly, 111 U. S. 624-639.

[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. 568; *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* McCardle, 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, Hemps. 306; U. S. *v.* Williamson, 3 Am. L. Rep. 729; Bennet *v.* Bennet, 1 Deady, 299; *Ex parte* Evarts, 7 Am. L. Rep. 79; Norris *v.* Newton, 5 McLean, 22; U. S. *v.* Rector, 5 McLean, 174; Veremaitre's

(752) "The several justices and judges of the said courts, 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]

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* Cheeney, 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* MacDonnell, 11 Blatch. 79, 170; *In re* Thomas, 12 Black, 370; *In re* Giacamo, 12 Blatch. 391; *In re* Stupp, 12 Blatch. 501; *In re* Bird, 2 Saw. 33; *In re* Bogart, 2 Saw. 396.

[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, 133; *Ex parte* Bridges, 2 Woods, 428. See Rev. Stat. U. S. 1878, 763. See Whart. Cr. Pl. & Pr. §§ 978 *et seq.*

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.

The courts of the United States have, it is ruled, not merely jurisdiction to inquire, on *habeas corpus*, into the legality of all commitments under federal process, civil or military,[1] but may issue the writ to discharge a federal officer arrested on State process, for his conduct in executing a federal writ.[2] The delicate questions arising in the exercise of this branch of jurisdiction are more fully considered in another volume.[3]

The writ, however, will be refused when the object is to review commitments under State penal process conflicting with no federal law.[4] 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*.[5]

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;[6] and in conformity with this principle, all offences committed on shipboard are regarded as cognizable by the sovereign to whom the ship belongs, no mat-

Offences on shipboard cognizable in country of flag.

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.

[1] Milligan, *ex parte*, 4 Wallace, 2; Meade's Case, 1 Brock. 324; Keeler, *ex parte*, Hemp. 306.

[2] 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. See Whart. Cr. Pl. & Pr. § 981.

[3] Whart. Cr. Pl. & Pr. §§ 981, 996 *b*.

[4] Dorr, *ex parte*, 3 Howard, U. S. 103; Norris *v.* Newton, 5 McLean, 92; U. S. *v.* Rector, Ibid. 174.

[5] Chase, C. J., giving unanimous judgment of Supreme Court, U. S. Richmond, April, 1869; Griffin, *in re*, 25 Texas (Sup.), 623. See Whart. Cr. Pl. & Pr. §§ 981, 993, 996, on this topic, showing (1) that the federal courts will discharge on all imprisonments under a State law conflicting with the federal constitution; (2) that on a *habeas corpus* the convictions even of a *de facto* court will not be reviewed; and (3) that State as well as federal courts can review arrests on extradition process. See, also, U. S. *v.* McClay, Deady, 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 Ibid. 174. See, as to extradition generally, Whart. Cr. Pl. & Pr. §§ 34 *et seq.*

[6] Whart. Con. of L. § 978.

ter 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, etc., 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 coast, 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 central criminal court

[1] R. *v.* Lopez, R. *v.* Sattler, Dears. & B. C. C. 525; 7 Cox C. C. 431.

In R. *v.* Serva, 1 Den. C. C. 104, it was held, according to the summary of Sir J. F. Stephen, "that the criminal law of England does not apply to foreigners on board a ship unlawfully in the custody of an English ship of war." On the other hand, "the liability," he adds, "to the English criminal law of foreigners on board English merchant vessels has been clearly established, even if they are on board without their own consent, and even if a foreign court has concurrent jurisdiction over them. This was decided by three cases—R. *v.* Lopez (1 D. & B. 525), and R. *v.* Sattler, decided in 1858, and R. *v.* Anderson (L. R. 1 C. C. R. 161), decided in 1868." 2 Steph. Hist. Cr. L. 3.

[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.

has jurisdiction of offences, primarily cognizable in admiralty, committed on British ships in foreign rivers, or at sea, though the offenders be foreigners.[1]

[1] R. *v.* Anderson, Law Rep. 1 C. C. R. 161; 11 Cox C. C. 198. See Lewis on For. Jur. p. 25. In R. *v.* Carr, 47 L. T. (N. S.) 450, jurisdiction was held to exist in the same court over receivers (British subjects) of goods stolen on board of a British ship in the port of Rotterdam.

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 include claims under Lord Campbell's Act. The appeal was dismissed.

In R. *v.* Keyn, L. R. 2 Ex. D. 23; 13 Cox, 403, a case growing out of the Franconia disaster, it was 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. The vote of the court, however, on this point was seven to six: 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.

This case, with the subsequent legislation, is discussed by me in 1 Crim. Law Mag. 701 *et seq.*

The points taken by Cockburn, C. J., in which a majority of the judges agreed, were as follows:—

"The extent of the realm of England is a question, not of international but of English law.

"There is no evidence that the sovereigns of this country ever either claimed or exercised any special jurisdiction over a belt of sea adjacent to the coast, though there is evidence that the admiral has always claimed jurisdiction over persons on board of British ships, wherever they might be, and that he formerly claimed jurisdiction over all persons and all ships in the four narrow seas. This claim, however, has long since been given up, and no other claim has ever been substituted for it.

"Hence there is no evidence that any British court has jurisdiction over a crime committed by a foreigner on board a foreign ship on the high sea, but within three miles of the coast." 2 Steph. Hist. Cr. Law, 31.

In Keyn's Case, according to Sir J. F. Stephen (2 Hist. Cr. Law, 10) four of the judges "seem to have been of opinion that a crime committed by an act which extends over more jurisdictions than one in space, is committed in the juris-

The same general principles are admitted in German and French jurisprudence.[1]

Federal courts have jurisdiction of crimes on high seas and out of State jurisdiction.

§ 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]

Sovereign has jurisdiction of sea within cannot shot from shore.

§ 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

diction in which it takes effect, whether or not it is also committed in the jurisdiction in which it begins to be done. In accordance with this view Baron Pollock and I lately held that a man who obtained goods from a merchant in Prussia by false pretences contained in a letter sent from Amsterdam, where he lived when he wrote the letter, obtained them in Prussia, and we refused a *habeas corpus* to prevent his extradition accordingly." This is in accordance with the ruling in U. S. *v.* Davis, 2 Sumn. 482.

[1] Whart. Con. of L. § 861.

[2] Brightly, pp. 207–209; Rev. Stat. U. S. 1878, 5372.

[3] Whart. 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.* Pirates, 5 Wheat. 184; U. S. *v.* Gordon, 5 Blatch. C. C. 18; and so, also, of a vessel lying in a harbor, fastened to the shore by a cable, and communicating with the shore by boats, and not with any inclosed 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 a 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.

[4] U. S. *v.* Baker, 5 Bl. C. C. 6.

bounding his coast to the distance of a cannon shot from low-water mark.[1]

2. *Offences by Subjects abroad.*

Subjects may be responsible to their own sovereign for offences 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 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."[4] 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

[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 Whart. Conf. of L. § 71.

But the authorities go beyond this limit. "Where an act," said Judge Vredenburgh (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. etc., 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 also *infra*, § 284, note. The jurisdiction is doubted in Rosc. Crim. Ev. pp. 246, 247.

[4] Dana's Wheaton, § 113.

Supreme Court, that the Constitution has application only to offences committed on the soil of the United States.[1]

Apportionment of this sovereignty between federal and State governments.

§ 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.[2] For an infringement of the laws of Massachusetts, he is responsible to Massachusetts; for an infringement of the laws of the United States, to the United States.

United States statutes give jurisdiction over offences in semi-civilized lands.

§ 273. By the Revised Statutes[3] 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."[4] By a subsequent section the same jurisdiction is extended 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.*"[5] 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.[6]

A similar jurisdiction is asserted by both German and French jurists over their subjects in barbarous or semi-civilized lands,[7]

[1] U. S. *v.* Dawson, 15 Howard, 467.

[2] 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, and as inclining to the same view, see People *v.* Merrill, 2 Parker C. R. 590; Cummins *v.* State, 12 Tex. Ap. 121. For bigamy, see *infra*, §§ 1685–1698.

[3] Ed. of 1878, 4084.

[4] See Stubbs *in re*, 11 Blatch. 124.

[5] Rev. Stat. 4088.

[6] See 11 Opinions Att'y.-Gen. 474. As to bigamy, see *infra*, §§ 1685–1696.

[7] Wharton, Com. of L. § 866; Fœlix, ii. p. 294. See Bar, § 138.

and it is now, partly by treaty, partly as a matter of international law, partly because in semi-civilized lands, the domestic authorities generally refuse to take cognizance of suits in which foreigners are concerned, a settled practice for civilized consular jurisdiction, in matters both criminal and civil, to be exercised not only in Asia and Africa but in Turkey.[1]

Also over political offences abroad.

§ 274. The act of January 30, 1790, 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;[2] and its continued existence is the strongest of 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,[3] 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."

§ 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 resident at the time of the offence,[4] and

[1] See Whart. Com. Am. Law, §§ 147, 171. In Hart *v.* Gumpach, L. R. 4 P. C. 439, the suit was brought originally at Shanghai in "Her Majesty's Court for China and Japan."

[2] 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.

[3] Brightly, Fed. Stat. ii. 154.

[4] Wendell's Blackstone, iv. p. 305; R. *v.* Azzopardi, 1 C. & K. 203; R. *v.* Anderson, 11 Cox C. C. 198; L. R. 1 C. C. 161. *Infra*, §§ 276–284. See Sir Geo Cornwall Lewis's work on Foreign Jurisdiction, etc. p. 20. As to bigamy, see *infra*, §§ 1685, 1696.

by the jurists of continental Europe this view is accepted as universally authoritative.[1] 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.[2] 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,[3] 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.[4]

Perjury and forgery before consular agents abroad, punishable in the home courts.

The same view is taken by German and French jurists.[5] 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.[6] In indictments for forgery, the venue may be laid, and the offence charged to have been committed, in any county where the offender was apprehended or in custody.[7]

§ 277. In England, in indictments for murder or manslaughter, or for being accessary before or after the fact to murder or man-

[1] Bar, p. 530, § 138; Ortolan, No. 880.

[2] See this discussed in the Kozta Case, and Trent Case, in Woolsey, § 81; Whart. Com. Am. Law, §§ 139, 146, 239.

[3] Brightly, 180. See Rev. Stat. U. S. 1878, 4083–4130.

[4] See Phillipi *v.* Bowen, 2 Barr, 20; Com. *v.* Kunzemann, 41 Penn. St. 429. *Infra*, § 1264.

[5] *Infra*, § 284. See Whart. Conf. of Laws, § 874.

[6] 37 Geo. III. c. 123, § 6; 52 Geo. III. c. 104, § 7.

[7] 1 Will. IV. c. 66, § 44.

slaughter, 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.[1] This provision applies to homicides committed by British subjects within the dominions of a foreign sovereign;[2] but, until afterwards amended, not to offences by foreigners, though committed on Englishmen, and on board English ships.[3]

Homicide by subjects abroad punishable in England.

3. *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 afterwards take up with impunity his residence in the United States, would not merely expose us to spoliation, but bring our government into contempt.

Extra-territorial principal may be intra-territorially indicted.

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 may hold 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 punishment 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

[1] 9 Geo. IV. c. 31, § 7.

[2] R. *v.* Sawyer, Rus. & Ry. C. C. 294; R. *v.* Azzopardi, 1 C. & K. 203; R. *v.* Anderson, 11 Cox C. C. 198. See R. *v.* Mattos, 7 C. & P. 458.

[3] 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.

government will punish a refugee for treason against a 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.

Principal responsible for extra-territorial acts.

§ 279. A party who in one jurisdiction puts in operation a force which does harm in another jurisdiction, is responsible in both jurisdictions for the harm.[2] That he is responsible in the place where he starts the wrong will be hereafter seen.[3] His responsibility in the place where the wrong takes effect is also generally recognized. 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;[4] 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;[5] that such is also the case when a man in one country incites an agent in another country to commit perjury;[6] 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;[7] 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;[8]

[1] Whart. Conf. of L. §§ 876, 910.

[2] *Supra*, §§ 248, 284, note; *infra*, §§ 287, 1207. See Whart. Conf. of L. §§ 877-921; Whart. Cr. Ev. § 112; Wooten *v.* Miller, 7 Sm. & M. 380; State *v.* Chapin, 17 Ark. 561; Hanks *v.* State, 13 Tex. Ap. 289, accepting views of text. See *infra*, §§ 287, 288, as to responsibility in the place of starting the offence.

In Indiana a statute making a foreign principal punishable for his agent's criminal acts within the State, has been held only to apply to persons who are principals in the commission of the offence. Johns *v.* State, 19 Ind. 421.

[3] *Infra*, §§ 287 *et seq.*

[4] 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. That the place of originating nuisance has jurisdiction see *infra*, § 288.

[5] R. *v.* Johnson, 7 East. 65; Com. *v.* Blanding, 3 Pick. 304. That place of mailing also has jurisdiction see *infra*, §§ 287, 288.

[6] Com. *v.* Smith, 11 Allen, 243.

[7] 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. See as to U. S. *v.* Davis, *infra*, § 288.

[8] 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*, where Lord Campbell affirmed the principle, but ruled an acquittal on other grounds. "The rule," said

that the forger in one State of a title to land in another State, may be punished in the latter State;[1] that a 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;[2] 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;[3] that he who gives poison in one jurisdiction which operates in another is responsible in the latter jurisdiction,[4] and so is a person who in one county advises another, by signals, when to commit a highway robbery in another county;[5] and that though an accessary before the fact is amenable in the place of accessary-

Chief Justice Beasley, of New Jersey, in 1864 (State *v.* Wyckhoff, 2 Vroom, 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." This view, as will be seen in a succeeding section, is sustained in several other States, though dissented from in Connecticut. Com. *v.* Grady, 34 Conn. 119; *infra*, § 280. Stripping the question of the artificial complications arising from the common law distinction between felony and misdemeanor, the better opinion is that the country of the starting and the country of the consummation of a crime have each jurisdiction in cases where there is a substantive offence in each. Thus, where the instruments for the commission of a homicide are prepared in England to be applied in France, England as well as France has jurisdiction of the conspiracy; and so the country of the sending of libels and of noxious compounds has jurisdiction as well as the country of receiving. *Infra*, §§ 287, 288, 292.

[1] Lindsay *v.* State, 38 Ohio St. 507; Hanks *v.* State, 13 Tex. Ap. 289. See Carr, *ex parte*, 28 Kan. 1.

[2] Com. *v.* White, 123 Mass. 430.

[3] Com. *v.* Gillespie, 7 Serg. & R. 469.

[4] 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 Ohio St. 131.

It makes no difference that the party implicated never was in the State where the offence was committed. Lindsay *v.* State, 38 Ohio St. 507.

[5] State *v.* Hamilton, 13 Nev. 386.

In this case it was proved that there was a conspiracy between the defendants and others to rob the treasure of Wells, Fargo & Co., on the road between Eureka and some point in Nye County, Nevada; that H. was to ascertain when the treasure left Eureka, and sig-

ship,[1] he may become, if directing the execution of the act, amenable in the place of consummation.[2] In a case of obtaining money by false pretences 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."[3] "It was a monstrous thing," Sir R. Phillimore is reported as saying at a meeting of the Law Amendment Society, in 1868, "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 presence at the crime is not an essential condition of indictability.[4]

Doubts in cases where agent is independently liable.

§ 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 instigator is so liable is expressly denied by the Supreme Court of New Jersey,[5] in a case in which it was ruled that unless the agent

nal 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 H. was a principal.

[1] *Infra*, § 287.

[2] *Supra*, § 225; State *v.* Ayers, 8 Baxt. 96.

[3] R. *v.* Garrett, 6 Cox C. C. 260; S. C., Dears. 232; and see R. *v.* Jones, 4 Cox C. C. 198; 1 Den. C. C. 551.

[4] Com. *v.* White, 123 Mass. 430; S. P., R. *v.* Manley, 1 Cox C. C. 104; R. *v.* Ball, 1 Cox C. C. 281.

[5] State *v.* Wyckoff, 2 Vroom, 65 (1864). The same distinction is taken in Lindsay *v.* State, 38 Ohio St. 507.

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 were simply an accessary before the fact, absent from the State at the principal offence, he could not, by the common law, be tried in New Jersey. The same view has been maintained as to felonies, in New Hampshire,[1] North Carolina,[2] and Arkansas,[3] though it is conceded that by statute the accessary may be made triable in the place of the overt act.[4] 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 accessary can only be tried in the place where he is accessary, 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;[5] and in misdemeanors the result is demonstrable, as it is in those States in which all accessaries 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;[6] or, on the same reasoning, he may be so indicted as principal in misdemeanor, or as inciter, when the offence in any of its aspects is a misdemeanor.[7] Even as to felonies, the rule that the absent accessary before the fact may be indicted in the country of the commission, where the principal is responsible, has been explicitly affirmed in Connecticut,[8] and is good in all those States in which

[1] State *v.* Moore, 6 Foster, 448.

[2] State *v.* Knight, 1 Taylor, 65. See Smith, *ex parte*, 6 Bost. Law Rep. 57.

[3] State *v.* Chapin, 17 Ark. 561.

[4] *Infra*, § 287.

[5] Ibid.

[6] *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; *infra*, § 247.

[7] Com. *v.* Smith, 11 Allen, 243. See R. *v.* Murdock, 2 Den. C. C. 298.

[8] 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

accessaries are by statute principals.[1] But the assertion of such jurisdiction in the place of consummation in no way impairs the jurisdiction of the place of accessaryship over the accessary.[2]

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.[3] 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.[4]

4. *Offences by Aliens in Country of Arrest.*

Aliens indictable in the country of the crime. Roman law.

§ 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,[5] "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 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."[6] 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 warlike designs against it.[7]

§ 282. "Local allegiance," says Blackstone, "is such as is due from an alien or stranger born, for so long time as he continues

Correspondence, 1868, pt. i. pp. 51, 129. For a report of these cases, and also for correspondence concerning the same, see same volume, pp. 341–348.

[1] See Com. *v.* Pettes, 114 Mass. 307. Jurisdiction in place of consummation supposes, it should be added, possession of the defendant's person, and is, therefore, ancillary to jurisdiction of place of concoction. *Infra*, § 287.

[2] *Infra*, § 287.

[3] Whart. Crim. Plead. & Prac. §§ 39 *et seq.*; State *v.* Smith, 1 Bailey, 283.

[4] Kraus, *ex parte*, 1 B. & C. 258; Scott, *ex parte*, 9 B. & C. 446; 4 M. & R. 361; Brewster *v.* State, 7 Vt. 118; Dow's Case, 18 Penn. St. 37. See, fully, Whart. on Cr. Pl. & Pr. § 27.

[5] Berlin, 1853, p. 83.

[6] For the United States Alien Act, authorizing the removal of alien enemies, see Brightly, i. p. 33; Rev. Stat. U. S. 1878, §§ 4067 *et seq.*

[7] Preussiches, St. G. B. § 70.

continues within the king's dominion and protection; and it ceases the instant the stranger transfers himself from the kingdom to another."[1] Indictments for political offences of all grades have been based on this form of allegiance.[2] In Guinet's case, which was a prosecution in the United States 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.[3] 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,[4] 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.[5] Such, also, is the tenor of a speech by Lord Lyndhurst in the House of Lords, in March, 1853.[6] 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

So in English and American law.

[1] Comm. ii. 377.

[2] See 27 Howell's St. Tr. 627; Peltier's Case, 28 Ibid. 530; R. *v.* Bernard, 1 F. & F. 240, cited *inf.* § 287, and cases cited *infra*, §§ 287, 1805.

[3] Whart. St. Tr. 93; U. S. *v.* Wiltberger, 5 Wheaton, 97; Whart. St. Tr. 185. The Act of July 31, 1861, punishing seditious conspiracy, applies to "persons within any State or Territory of the United States," embracing all residents. Aliens who, being domiciled in the country previous to the late civil war, gave aid and comfort to the enemy during the war, were held not exempt from prosecution for treason and giving aid and comfort to the enemy. Carlisle *v.* U. S., 16 Wall, 147; see U. S. *v.* Villato, 2 Dall. 370; Sprague, J., 23 Law Rep. 705.

[4] Diplomatic Cor. U. S., 1868, pt. i. p. 192; R. *v.* McCafferty, 10 Cox C. C. 603.

[5] See Cockburn on Nationality, London, 1869, p. 82, for other authorities to this effect.

[6] 124 Hansard's Parl. Deb. 1046, cited Whart. Conf. of L. § 904, and discussion in Crim. Law Mag. for March, 1885.

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 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 several acts of war were admissible against him on the trial.[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]

So as to Indians.

§ 282 *a*. An Indian, who is not, under the Federal Constitution, the member of an independent tribe, relieved as such from State jurisdiction, is indictable in a State court for an offence committed in such State, in violation of the laws of the State, in the same way as would any other foreigner residing in the State.[3] The State courts, also, have jurisdiction of homicides within their limits, even of tribal Indians by white men.[4] Power, it has been held, exists in Congress to prescribe punishment for the homicide of white men by Indians within Indian reserva-

[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.* Sa-coo-da-cut, 1 Abb. U. S. C. C. 377; U. S. *v.* Stahl, 1 Woolworth C. C. 192; State *v.* Doxtater, 47 Wis. 278; 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] Pickett *v.* U. S., 1 Idaho, N. S. 523.

tions;[1] and to regulate the sale of liquor or other commodities among Indian tribes, whether within or without State limits.[2] The complicated questions arising from conflicts of jurisdiction in this relation are elsewhere more fully discussed.[3] But it may now be regarded as settled, that Congress, even over Indian reservations, is supreme, subject only to the Constitution; and that this supreme authority may be exercised by treaty without specific legislation.[4] At the same time, by § 2146 of the Revised Statutes, Congress has expressly excepted from the jurisdiction of the courts over offences in Indian country, "crimes committed by one Indian against the person or property of another Indian," and offences committed by an Indian who has been punished by the local law of his tribe.[5]

But not so as to belligerents.

§ 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, provided 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.[6] But this only applies to cases where the subject is an officer or functionary of the foreign sovereign, or where the foreign sove-

[1] U. S. *v.* Martin, 8 Sawy. 473; 14 Fed. Rep. 814; see U. S. *v.* Bridleman, 7 Sawy. 243.

[2] Cherokee Tobacco Case, 11 Wall. 616; U. S. *v.* Shawmux, 2 Sawy. 118; U. S. *v.* Earll, 15 Chic. Leg. News (July, 1883), 359. See on this question Whart. Com. Am. Law, §§ 26, 265, 434.

[3] See Whart. Conf. of Laws, § 7; Whart. Com. on Am. Law, §§ 26, 265, 434; Walker on Indian Quest., Pamp. 1874; N. Am. Rev. Ap. 1873.

[4] Crow Dog, *in re*, 109 U. S. 556.

"That this (federal) legislation could constitutionally be extended to embrace Indians in the Indian country, wherever it operates of itself, without the aid of any legislative provision, was decided by this court in the case of U. S. *v.* Forty-three Gallons of Whiskey, 93 U. S. 188; see Holden *v.* Joy, 17 Wall. 211; The Cherokee Tobacco Case, 11 Wall. 616." Matthews, J., Crow Dog, *in re*, 109 U. S. 567. In this case it was held that under federal legislation and treaties the federal courts in Dakota had no jurisdiction of offences, in Indian reservations, of Indian on Indian. But see Sloan, *ex parte*, 4 Sawy. 330.

[5] Ibid. That the federal courts have exclusive jurisdiction of the homicide of white men by Indians on Indian reservations, see U. S. *v.* Monte, 2 West Coast Rep. 265.

[6] The Emulous, 1 Gall. 563; *supra*, § 94; *infra*, § 300.

reign adopts his act.[1] 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.[2]

5. *Offences by Aliens abroad.*

§ 284. As we have already seen,[3] 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

Extra-territorial offences against our rights

[1] *Infra*, § 310; Whart. Conf. 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; McLeod's Trial, by Gould, pamp.; Neilson's Choate, 215; Globe Newspaper, 1841, App. 422; 1 Am. Law Mag. 348, and compare John Quincy Adams's Diary, *in loco*; 6 Webster's Works, 244; Lawrence, Com. sur Wheat. iii. 430; Com. *v.* Blodgett, 12 Met. 56; 37 Am. Dec. 363. 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. 45, 81; Maisonnaire *v.* Keating, 2 Gall. 325.

Mr. Webster's position that in such case the quarrel is exclusively with the foreign sovereign, is contested by Dr. Lieber. See Lieber's Life, 149.

Lord Campbell, in his autobiography (Life, 2d ed. 1881, p. 19), says: "The affair of the Caroline was much more difficult. Even Lord Grey told me he thought we were quite wrong in what we had done. But assuming the facts that the Caroline had been engaged, and when seized by us was still engaged in carrying supplies and military stores from the American side of the river to the rebels in Navy Island, part of the British territory, that this was permitted, and could not be prevented, by the American authorities, I was clearly of opinion that although she lay on the American side of the river when she was seized, we had a clear right to seize and destroy her, just as we might have taken a battery erected by the rebels on the American shore, the guns of which were fired against the Queen's troops in Navy Island. I wrote a long justification of our government, and thus supplied the arguments used by our foreign secretary, till the Ashburton treaty hushed up the dispute."

[2] *Supra*, § 94; Whart. Conf. of L. § 909; 1 Hale, 433; 3 Inst. 50; Coleman *v.* State, 97 U. S. 509; Com. *v.* Holland, 1 Duvall, 182; Clark *v.* State, 37 Ga. 195; Hammond *v.* State, 3 Cold. (Tenn.) 129; though see U. S. *v.* Greathouse, 2 Abbott U. S. 364; *infra*, §§ 310, 1801. As to martial law, see Whart. Cr. Pl. & Pr. § 979; Whart. Com. Am. Law, § 217; *infra*, § 294.

[3] *Supra*, § 278.

made indictable in our courts. We may therefore hold that offences against our rights may be indictable though extra-territorially designed.[1]

may be intra-territorially indictable.

[1] 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 advocates 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's 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 meaning. It may mean the sum of all the possible objects of crime found

§ 285. Jurisdiction over aliens abroad is expressly claimed by the United States in cases of perjury and forgery before its consu-

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 *malu 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 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 voluntarily 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

lar officers; nor, as has been seen, can there be serious doubt that an alien who, when abroad, plans violations

Jurisdiction claimed in

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 wherein 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 question, 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 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 consid-

cases of forgery and perjury before consular officers.

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, 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]

erations 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 similar jurisdiction was assumed by us by the Act of January 30, 1799, making it a misdemeanor for an American citizen abroad to negotiate with foreign governments.

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 accessary 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, as we have seen, have been 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 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. The place of such residence has jurisdiction over the attempt or conspiracy as the case may be. The place of consummation has jurisdiction of the offence consummated on its soil. *Infra*, §§ 287–288.

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 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. See this view sustained in Hanks *v.* State, 13 Tex. Ap. 289.

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

[1] *Supra*, § 283; *infra*, § 310; Whart. Confl. 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 discussed,

Punishment in such cases.

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 or 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.

In Ham *v.* State, 4 Tex. App. 645, 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,

but it may be here mentioned that it is argued with great justice, by Bar, an eminent German jurist, that the punishment a sovereign can thus inflict can be only that which he would impose upon offences of the same grade committed by his 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]

§ 287. As has been seen, accessaries, in treason and in misdemeanors, are principals.[2] The common law rule is that the accessary is to be tried at the place where his guilty act of accessaryship took place;[3] though now, by statutes in several of the United States, he may be tried in the place having jurisdiction of the principal act,[4] and by more recent statutes, making all accessaries before the fact principals, the accessary before the fact, or instigator, is triable in the place of perpetration. In conspiracies, by the common law, each conspirator is responsible in any place where any overt act by any of his co-conspirators is done,[5] as well as in the place where the

Accessaries and co-conspirators liable in place of overt act.

3 Brewst. 575; Mooney *v.* State, 8 Ala. 328; State *v.* Ayers, 8 Baxt. 96; Francis *v.* State, 7 Tex. Ap. 501; 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] This latter point is decided in conformity with the text by Henke, i. § 90, and Heffter, § 26. To the same effect is the Roman law, L. 4 D. ad. leg. Jul. Maj. 48, 4, that *crimen majestatis* could only be committed by a subject against his own sovereign.

[2] *Supra*, §§ 223–4.

[3] That an accessary before the fact may be tried in the place of accessaryship, see further, State *v.* Moore, 6 Fost. 448; People *v.* Hall, 57 How. Pr. 342; State *v.* Wyckoff, 2 Vroom, 65; Johns *v.* State, 19 Ind. 421; State *v.* Knight, 1 Taylor (N. C.), 65; Riley *v.* State, 9 Hump. 646; State *v.* Chapin, 17 Ark. 561; People *v.* Hodges, 27 Cal. 240. And so of accessaries after the fact, Tully *v.* Com., 13 Bush, 142.

[4] See Wendell's Blackstone, iv. p. 305; Com. *v.* Pettes, 114 Mass. 307. Under the 2 & 3 Ed. VI. an accessary after the fact, it is said, is triable in the county in which he was accessary, 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; *Cf.* State *v.* Hamilton, 13 Nev. 386, cited *supra*, §§ 209, 213, 214, 219.

[5] *Supra*, §§ 205–248, 279; *infra*, § 1397; R. *v.* Ferguson, 2 Stark. N. P. C. 489; Com. *v.* White, 123 Mass. 430; Rogers, *ex parte*, 10 Tex. Ap. 655; Rogers *v.* State, 11 Tex. Ap. 288; Whart. Crim. Ev. § 111.

crime is concocted and started.[1] It is so, also, according to the English common law, with treason.[2] "If," said Chief Justice Marshall, in Burr's case, "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 leaguing 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

[1] The prevalent view now is, that a conspiracy in England, even by aliens, to commit a crime abroad is cognizable in England. Lord Campbell, in his autobiography (Life, 2d ed. 1881, p. 357), says: "I have had a fierce war with Sir Richard Bethell, Attorney-General of the late government (Lord Palmerston's, in 1857), upon the attempt to assassinate the Emperor of the French. I had laid down the law of conspiracy as it applied to foreigners residing in England. The government, by his advice, having determined on legislation, to make out the necessity for legislation, Bethell pretended that 'aliens, by conspiring in England to commit an offence beyond the seas, would not be subject to English law.' In the discharge of my duty, and by the advice of Lord Lyndhurst, I exposed this misrepresentation. All the law lords, *seriatim*, agreed with me. Bethell attacked us all scurrilously in the House of Commons, and I was obliged last night (March 2, 1858) to vindicate myself in the House of Lords." The opinions of the law lords are given in 148 Hans. Parl. Deb. 1851-4. The proceedings are noticed by me in detail in an article in the Crim. Law Mag. for March, 1885.

R. v. Bernard, 1 F. & F. 240, which was for participation in the Orsini conspiracy, was under a statute; but Lord Campbell, who tried the case, while holding the statute covered the offence, did not hesitate in the House of Lords to declare that the offence was indictable at common law. As the defendant was acquitted, the question did not receive final judicial revision.

During the civil war in the United States the British government frequently asserted the jurisdiction of its courts to punish persons engaged on British soil in conspiracies to commit crimes in the United States. This was held in reference to the "Greek fire" attempts in Canada, and to the alleged attempts to send infected clothing from Bermuda to New York. See North Am. Rev. for June, 1884 (p. 527), and Crim. Law Mag. March, 1885.

The question of venue in conspiracy is further discussed *infra*, § 1397. In accordance with the views of the text, persons sending from one of our States dynamite to injure property or life in England, would be indictable in the State from which the dynamite is sent. See Crim. Law Mag. March, 1885. As to libel on foreign sovereign see *infra*, § 1612 *a*. As to perjury to take effect abroad see Phillipi v. Bowen, 2 Barr, 20.

[2] *Infra*, § 1793.

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]

In continuous offences each place of overt act has cognizance.

§ 288. Conflicts of jurisdiction also arise when an offence is begun in one country to take effect in another.[4] 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,[5] 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,[6] it might be said that the place of consummation is the peculiar seat of the crime. So, in fact, under the common law, it has frequently been decided,[7] though it is settled that a concurrent jurisdiction exists in the place of starting the offence,[8]

[1] U. S. Diplom. Cor. 1868, pt. i. pp. 51, 193, 342; Whart. Conf. of L. § 878.

[2] Whart. Crim. Ev. §§ 111–12. *Infra*, §§ 292, 512.

[3] Ibid. *Infra*, § 292.

[4] The question of conflict of jurisdiction generally is discussed by me in 1 Crim. Law Mag. 689; and in the same Mag. for March, 1885.

[5] In U. S. v. Davis, 2 Sumner, 482; homicide by shooting a ball from a gun in a United States vessel *in a foreign port*, killing a person in a foreign ship, was held not to be indictable in a United States court. But this may be sustained on the ground that the shooting as well as the death was in the foreign port. See *supra*, § 279.

[6] Whart. Conf. of L. § 397. See *infra*, § 1621; Whart. Crim. Ev. § 113.

[7] Ibid.; *supra*, § 280; *infra*, § 292 *a*; R. v. Girdwood, 1 Leach, 169; R. v. Johnson, 7 East, 65; Com. v. Blanding, 3 Pick. 304; People v. Griffin, 2 Barb. 427; People v. Rathbun, 21 Wend. 533; Com. v. Gillespie, 7 S. & R. 469. As to libel, see Dana's Case, 7 Ben. 1.

In Rogers v. State, 11 Tex. Ap. 608, it was held that a party co-operating out of Texas in forging a deed to take effect in Texas, is indictable in Texas. See Rogers, *ex parte*, 10 Tex. Ap. 655. But this does not exclude jurisdiction of the place of forgery.

[8] *Infra*, § 1620; 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; 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; Green v. State, 66 Ala. 40 (cited *infra*, § 292); State v. Chapin, 17 Ark. 561. Compare Whart. Crim. Ev. § 113. That in libels sent by mail, the venue may be laid either in the place of mailing or in the place of reception see *infra*, § 1620.

supposing that the offence is indictable in the place of consummation.[1] The same distinctions apply to obtaining goods by false pretences by letter.[2] As has been already seen, attempts to commit crimes are cognizable in the place of the attempt,[3] and such, also, is the case with conspiracies and accessaryships.[4] But there can be no question that all parties concerned are also responsible at the place where the offence is consummated.[5] The mere fact, however, that a forged cheque has been drawn on a Kansas bank, does not give Kansas jurisdiction when the cheque was drawn and paid in Missouri.[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[8], 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 State, though unlawful in the place of the attempt, may not be punishable in the latter State.[9]

[1] See Lavina *v.* State, 63 Ga. 513; Rogers, *ex parte*, 10 Tex. Ap. 655; *infra*, § 292*a*.

[2] *Infra*, § 1206; R. *v.* Jones, 1 Den. C. C. 551; T. & M. 270. In R. *v.* Holmes, L. R. 12 Q. B. D. 23; 15 Cox, 343; 49 L. T. N. S. 540, it was held that where A. posted in England a letter to France, containing a false pretence, which induced the receiver of the letter to send money to A., A. was indictable in England for the false pretence. See *supra*, § 279; State *v.* House, 55 Iowa, 466. As will presently be more fully seen, where a letter containing a fraudulent non-accounting of goods by an agent is received 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. See R. *v.* Treadgold, 14 Cox C. C. 220; 39 L. T. (N. S.) 291.

[3] *Supra*, § 195.

[4] See *infra*, § 1397; *supra*, § 287.

[5] *Supra*, § 280.

[6] Carr, *in re*, 28 Kan. 1.

[7] Cited Whart. Conf. 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.

[8] *Infra*, § 1397.

[9] *Infra*, § 292*a*. See Whart. Conf. of L. §§ 482–489, 925. To this effect

The jurisdiction in cases of embezzlement is hereafter specially noticed.[1]

When a *nuisance* is created in one jurisdiction and operates in another jurisdiction, the courts of both jurisdictions, according to the better opinion, have cognizance of the offence,[2] though in some States it is held that where the injury is exclusively to real estate, the redress must be sought in the jurisdiction of the real estate.[3] Continuing nuisance.

Bigamy in this relation is hereafter discussed.[4]

§ 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.[5] 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.[6] In the United States this is a question of growing importance, as will be elsewhere seen.[7] Adjustment of punishment in such cases.

§ 290. In England, by statute, wherever a felony or misdemeanor is begun in one county and completed in another, the venue

are decisions rendered in 1856 by the Supreme Court at Berlin. See Bar, § 142, note 3*a*; and see *infra*, § 1621; Whart. Cr. Ev. § 113.

[1] *Infra*, § 1040.

[2] That a diversion of water made in one State which does injury in another is cognizable in the former State, see Stillman *v.* Man. Co., 3 Wood. & M. 538; Fort *v.* Edwards, 3 Blatch. 310; Rundle *v.* Canal Co., 14 How. 80; Miss. & Mo. R. R. *v.* Ward, 2 Black. 485; Worster *v.* Lake Co., 5 Fost. 525; State *v.* Lord, 16 N. H. 357; Maureli Co. *v.* Worcester, (Sup. Ct. Mass., 1884), 30 Alb. L. J. 409; State *v.* Babcock, 30 N. J. L. (1 Vroom) 29; Com. *v.* Lyons, 1 Penn. L. J. Rep. 497; Oliphant *v.* Smith, 3 Pen. & Watts, 180; Eldred, *in re*, 46 Wis. 530; Thayer *v.* Brooks, 17 Ohio, 489; Pilgrim *v.* Miller, 1 Bradw. 448; Armendiaz *v.* Stillman, 54 Tex. 623 (where the water was diverted in Texas and the injury done in Mexico). See remarks of Judge Story in Slack *v.* Walcott, 3 Mason, 508.

[3] Watts *v.* Kinney, 23 Wend. 484; 2 Hill, 82; Eachus *v.* Canal Co., 17 Ill. 534; Howard *v.* Ingersoll, 17 Ala. 780. See Wooster *v.* Man. Co., 37 Me. 246.

[4] *Infra*, § 1685.

[5] Whart. Conf. of L. § 920. See particularly, as to concurrent jurisdictions, Whart. Pl. & Pr. §§ 441 *et seq.*

[6] Ibid., citing Carpzov, Prac. iii. qu. 110, n. 23; Pütter, p. 203; Holtzendorff, 1870, p. 548. As to Massachusetts, see special statute.

[7] *Infra*, § 293; Whart. Crim. Pl. & Pr. §§ 441, 453.

may be laid in either county; and[1] 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.[2] And similar statutes exist in most of the United States, and have been held constitutional.[3]

Offences in carriages and boats.

§ 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.[4] 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, into which the goods are so brought, jurisdiction.[5] And as between the several United States, this jurisdiction has been ruled in many States to exist at common law.[6] In other States, such jurisdiction is held not to exist without a statute;[1] and statutes conferring the jurisdiction have been held to be constitutional.[2] By several courts it has been held that when the goods are stolen in Canada and brought into a State, the State courts have jurisdiction,[3] but this view is rejected in Massachusetts and Ohio,[4] as well as in those States which hold that at common law there is no liability for a larceny in a sister State.[5] In Connecticut the same rule is applied to the receivers of stolen goods.[6]

In larceny thief is liable wherever goods are brought.

[1] 7 Geo. IV., c. 64, § 13; 1 Vict. c. 36, § 37.

[2] See *infra*, § 1040.

[3] See People *v.* Dowling, 84 N. Y. 478; Powell *v.* State, 52 Wis. 17.

[4] Butler's Case, 13 Co. 55; 3 Inst. 113; R. *v.* Prowes, 1 Moody C. C. 349; R. *v.* Debraid, 11 Cox C. C. 207. See *infra*, § 930; and see Whart. Cr. 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 might 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.

[5] People *v.* Burke, 11 Wend. 129; Hemmaker *v.* State, 12 Mo. 453; State *v.* Williams, 35 Mo. 229; Cummings *v.* State, 1 Har. & J. 340; McFarland *v.* State, 4 Kans. 68; State *v.* Levy, 3 Stew. 123; La Vaul *v.* State, 49 Ala. 44; State *v.* Johnson, 38 Ark. 568; Hanks *v.* State, 13 Tex. Ap. 289.

In Cummins *v.* State, 12 Tex. Ap. 121, a statute providing that a thief bringing stolen goods into Texas from another State shall be indictable in Texas where the offence was larceny in such other State, was assumed to be constitutional, but it was held that in such case the law of the latter State should be proved as a fact.

[6] State *v.* Underwood, 49 Me. 181; Com. *v.* Andrews, 2 Mass. 14; Com. *v.* Holder, 9 Gray, 7; Cummings *v.* State, 1 Har. & J. 340; Worthington *v.* State, 58 Md. 403; Ferrill *v.* Com., 1 Duvall, 153; Hamilton *v.* State, 11 Ohio, 435; State *v.* Ellis, 3 Conn. 186; State *v.* Hill, 19 So. Car. 435; Watson *v.* State,

§ 292. *Jurisdiction of place of wound.*—By the early English common law, the place in which the mortal stroke was given had jurisdiction in cases of homicide. As there seemed, however, to be doubts in cases in which the blow was in one jurisdiction and the death in another, the statute of 2 & 3 Edward VI. c. 24, was passed, the effect of which, though very inartificially drawn, is to give the place of death jurisdiction.[7] This statute has been held to be part of the common law in several States in this country; but even where it is in force, it does not, according to the better opinion, divest the jurisdiction of the place where the blow was struck.[8]

In homicide place of wound and, by statute, place of death may have jurisdiction.

36 Miss. 593; State *v.* Williams, 35 Mo. 229; Meyers *v.* People, 26 Ill. 173; State *v.* Bennet, 14 Iowa, 479; Graves *v.* State, 12 Wis. 591; State v. Johnson, 2 Oregon, 115; State *v.* Newman, 9 Nev. 48. See *infra*, § 930.

[1] 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; Lee *v.* State, 64 Ga. 203; Simpson *v.* State, 4 Humph. 456; State *v.* Brown, 1 Hayw. 100; Beal *v.* State, 15 Ind. 378; Kiser *v.* Woods, 60 Ind. 538; People *v.* Loughridge, 1 Neb. 11; State *v.* Reonals, 14 La. An. 278. That the property must be brought into the State of process with felonious intent, see State *v.* Johnson, 38 Ark. 568.

[2] Simmons *v.* Com., 5 Bin. 619; Simpson *v.* State, 4 Humph. 461; People *v.* Williams, 24 Mich. 156; Beal *v.* State, 15 Ind. 378; McFarland *v.* State, 4 Kan. 68; State *v.* Adams, 14 Ala. 486; La Vaul *v.* State, 40 Ala. 44; State *v.* Butler, 67 Mo. 59. As to New York statute, see People *v.* Burke, 11 Wend. 129.

[3] *Infra*, § 930; State *v.* Bartlett, 11 Vt. 650; S. P., State *v.* Underwood, 49 Me. 181; State *v.* Williams, 35 Mo. 229.

[4] Com. *v.* Uprichard, 3 Gray, 440; Com. *v.* White, 123 Mass. 433; Stanley *v.* State, 24 Ohio St. 166.

[5] Simpson *v.* State, 4 Humph. 456; State *v.* Brown, 1 Hayw. 100; Beal *v.* State, 15 Ind. 378; People *v.* Longbridge, 1 Neb. 11.

[6] State *v.* Ward, 49 Conn. 429.

[7] That this jurisdiction is concurrent, see 1 Hale P. C. 426; 1 East P. C. 361; R. *v.* Sattler, D. & B. 52; 7 Cox C. C. 431.

[8] R. *v.* Hargrave, 5 C. & P. 510, where it was held that the blow was

Jurisdiction of place of death.—Unless by statute, such jurisdiction has been generally held not to exist.[1]

the offence; U. S. *v.* Guiteau, 1 Mackey, 498, 537, where the same position was taken where the blow was in the District of Columbia, and the death in New Jersey (overruling U. S. *v.* Bladen, 1 Cranch C. C. 548; U. S. *v.* Rolla, 2 Am. L. J. 638); Riley *v.* State, 9 Humph. 646; Stevenson *v.* State, 10 Mo. 503; Green *v.* State, 76 Ala. 40, where it was held that Alabama had jurisdiction, independently of the statute, when the blow was given in Alabama and the death was in Georgia; and see Robbins *v.* State, 8 Ohio St. 131; State *v.* Gessert, 21 Minn. 369; People *v.* Gill, 6 Cal. 637, to the same effect.

In New Jersey, in 1878, it was held that when a mortal blow is given within the jurisdiction of that State, and the death occurs in Pennsylvania, New Jersey has jurisdiction by statute. Hunter *v.* State, 40 N. J. L. 495, in which case the court left the common law question open, resting the decision on the New Jersey statute.

In State *v.* Kelly, 76 Me. 331, it was held that where the defendant died in the State of Maine from a wound inflicted on him in a United States fort, the State of Maine did not have jurisdiction. "The modern and more rational view," said the court, "is that the crime is committed where the unlawful act is done, and that the subsequent death, while it may be sufficient to confer jurisdiction, cannot change the locality of the crime. . . . How then can a State court take jurisdiction? Clearly it cannot, unless when a mortal blow is inflicted in a fort, and the person struck or wounded dies out of the fort, the crime is regarded as committed where the person dies; and this, as we have already stated, is a doctrine which we cannot sustain."

The decision in U. S. *v.* Guiteau, it should be added, has the implied sanction of the Supreme Court of the United States. In that court it has been the practice to review sentences in themselves erroneous by a writ of *habeas corpus*. This writ was applied for after the sentence in Guiteau's case, in a petition to Judge Bradley, who, after examining the briefs on both sides, refused the writ. Judge Bradley was the only judge of the Supreme Court then in Washington, but others were accessible, and there is little doubt that it was understood by the defendant's counsel that by no one of them would the writ be granted.

[1] 1 Hawk. P. C. C. 23, § 13; 31, § 13; Starkie's C. P., 2, 3, note, where the common law doubts on this subject, which led to the statute of Edward VI., are explained on the ground that juries were, by the old law, required to be *witnesses* of the material facts of the case; which condition was, in some cases, supposed to be satisfied by bringing the dead body to the county of the wound and having the trial there. In England, the statutes 8 & 9 Geo. IV., giving jurisdiction to England in cases of deaths occurring in England from wounds inflicted abroad has been held not to apply to the case of a foreigner dying in England from wounds received on a foreign vessel on the high seas. R. *v.* Lewis, D. & B. 182; 7 Cox C. C. 277; see Attorney-General *v.* Kwok-a-Sing, L. R. 5 P. C. 179; R. *v.* Anderson, L. R. 1 C. C. 164; cited *supra*, §§ 269, 275, 277; R. *v.* Seberg, L. R. 1 C. C. 264. As to common law see Co. Lit. 74 *b*; 3 Inst. 48; 1 East. P. C. 361; 1 Hale P. C. 426; 2 Ibid. 20, 163.

In the federal courts it is held that the place of death has no such jurisdiction (without a statute), unless such place is the place of the wound.[1] The jurisdiction is now conferred by statute.[2] In several States, statutes giving jurisdiction to the place of death (the wound being extra-territorial) have been held constitutional.[3] 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.[4] In Massachusetts, in a case in 1869, 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 the statute was constitutional and the conviction right.[5]

Law of place of performance may determine indictability.

§ 292 *a*. An agreement to do an act in a State where such an act is not unlawful, is not made unlawful by the fact that the agreement is unlawful in the place where it is made.[6] It is otherwise when the *lex fori*

[1] U. S. *v.* McGill, 4 Dall. 427; 1 Wash. C. C. 463; U. S. *v.* Armstrong, 2 Curt. C. C. 446.

[2] U. S. St. 1825, c. 65, 1857, c. 116; see Rev. Stat. 1042–1047.

In U. S. *v.* Doig, 4 Fed. Rep. 193, it was held that in a case of negligent homicide the place of the negligent misconduct must have jurisdiction.

[3] State *v.* Carter, 27 N. J. L. (3 Dutch.) 499; Com. *v.* Linton, 2 Va. Ca. 205; Riggs *v.* State, 26 Miss. 511; Turner *v.* State, 28 Miss. 684; Tyler *v.* People, 8 Mich. 326.

[4] State *v.* Carter, 3 Dutcher, 500.

[5] Com. *v.* Macloon, 101 Mass. 1. If, however, the defendants were foreigners, and the crime was committed out of the jurisdiction (as it was by the rule in Guiteau's Case), it is hard to see how the statute making the crime cognizable in Massachusetts can be held constitutional. See Walls *v.* State, 33 Ark. 365; *infra*, § 1685.

[6] *Supra*, § 288, and cases there cited; Whart. Conf. of L. §§ 398 *et seq.*; Richardson *v.* Rowland, 40 Conn. 565.

pronounces the contract illegal.[1] But, as we have seen, the place of performance has co-ordinate jurisdiction of the offence, no matter where the offender may have been at the time of such performance.[2] Thus, in addition to illustrations elsewhere given, it may be noticed that the place where a forged document is uttered, has jurisdiction of the offence of uttering;[3] and when there are indications coupling the forger with the utterer, has jurisdiction of the offence of forging the uttered document.[4] It has also been held that there is jurisdiction in liquor cases in the place where the liquor is delivered to the vendee or his agent.[5] And this is in conformity with the rule already stated that the place where a crime takes effect has concurrent jurisdiction of the crime.[6]

§ 293. As is elsewhere more fully shown, the same offence may be in one aspect cognizable by one sovereign, and in another

[1] Grell *v.* Levy, 16 C. B. N. S. 79.

[2] *Supra*, § 278. See Com *v.* Eggleston, 128 Mass. 414.

[3] Lindsay *v.* State, 38 Ohio St. 507.

[4] *Infra*, § 757.

[5] State *v.* Hughes, 22 W. Va. 743; But see Pilgreen *v.* State, 71 Ala. 368.

[6] See *supra*, §§ 271, 279; Whart. Conf. of L. §§ 871–921. See remarks of Sir J. F. Stephen, on Keyn's Case, *supra*, § 269.

It has been held in Massachusetts that a statute prohibiting the sale of game in certain seasons, does not apply to game killed outside of the State. Com. *v.* Hall, 128 Mass. 410. A contrary view has been taken of a similar statute in Illinois; Magner *v.* People, 97 Ill. 320, citing Whitehead *v.* Smithers, L. R. 2 C. P. D. 553. In People *v.* Noelke, 94 N. Y. 137, it was held that statutes prohibiting the sale of lotteries organized in other States are constitutional. At common law in prosecutions for the illegal sale of lottery tickets, it is no defence that the lottery was authorized by the laws of another state. Com. *v.* Dana, 2 Met. (Mass.) 329, and cases cited *infra*, §§ 1491 *et seq.* In State *v.* Lovell, 39 N. J. L. 463, it was held that to bet or hold stakes on horse races to be run out of the State is indictable in New Jersey. A letter written in one State, inciting N. to commit perjury in another State, renders the writer indictable in the latter State, although the contents of the letter were communicated to the person to whom it was addressed by an agent who participated in the offence. The writer of the letter is under these circumstances triable in the State to which the letter was sent. Com. *v.* Smith, 11 Allen, 243. An information at common law for a conspiracy between the captain and purser of a man-of-war, for planning and fabricating false vouchers to cheat the crown (which planning and fabrication were done upon the high seas), has been held in England triable in Middlesex, upon proof there of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there of a third person, a holder of one of such vouchers (a bill of exchange), for payment, which he there received. R. *v.* Brisac, 4 East, 164; see *infra*, § 1397.

aspect by another sovereign.[1] On the same principle an offence may in one aspect be cognizable by the State in its sovereignty, and in others by a municipal corporation.[2] 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 of the offence, absorbs the case, as a general rule, which action if *bonâ fide* and complete, is a bar to the action of the other sovereign.[3] But as to offences

Sovereign first prosecuting the offence absorbs it.

[1] *Supra*, §§ 266, 284; Whart. Cr. Pl. & Pr. §§ 441, 453; U. S. *v.* Marigold, 9 How. 560; Coleman *v.* State, *infra*; State *v.* Bergman, 6 Oregon, 341; State *v.* Augustine, 23 La. An. 119.

[2] Whart. Cr. Pl. & Pr. § 440.

[3] Whart. Cr. Pl. & Pr. §§ 441–442, 453; Taintor *v.* Taylor, 16 Wall. 367; State *v.* Horn, 70 Mo. 466. See Sizemore *v.* State, 3 Head, 26. 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 solder 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." In James's Case, 5 Crim. L. Mag. 216, it was held by the U. S. Dist. Ct. for the West. Dist. of Missouri, that a prisoner in the custody of his bondsmen on a State charge, cannot be taken from such custody by federal process, or for other kinds of offence against the federal government.

partly against one and partly against another sovereign, if the defendant is convicted and sentenced under one sovereign, the better opinion, as we have seen, is, that both have jurisdiction; and in such case the punishment inflicted under the first prosecution is to be taken into account in adjusting the sentence under the second prosecution.[1]

7. *Courts Martial and Military Courts.*

Martial law is law for an army; military law is law imposed by the army on a subjected country.

§ 294. The subject of courts martial and military courts falls more properly, so far as it concerns their practical relations, in another volume.[2] The positions there taken may be summed up as follows: (1) Martial law is law imposed on an army as such, governing it and its antagonists under arms, and is enforced by courts of officers under the authority of the commander-in-chief. It is not inconsistent with this principle that spies are tried by court martial. A spy puts himself more or less completely in the position of a member of the army within whose lines he is penetrating; and he cannot, therefore, dispute the jurisdiction of the court to which he has subjected himself. Military law, on the other hand, is the law imposed by the commander-in-chief of an army on a province which he has subjugated. While it is in force it is supreme, not only in military, but in civil affairs, so far as concerns non-belligerents. A military governor, for instance, does not interfere with the affairs of the army. These are governed by the commander-in-chief through his proper military machinery. The commander-in-chief, on the other hand, does not, after a military governor is appointed, interfere in the affairs of non-belligerents in the subject province. Courts martial are constructed under fixed

[1] Whart. Cr. Pl. & Pr. §§ 441, 442, 453. *Supra*, § 289; U. S. *v.* Amy, 14 Md. 152 *n.*; U. S. *v.* Cashiel, 1 Hughes, 552; Com. *v.* Tenney, 97 Mass. 50; Jett *v.* Com., 18 Grat. 953.

"Conviction and punishment of an accused in one sovereignty is no bar to his conviction and punishment in another, in which the offence was originally committed." McAllister, J., Phillips *v.* People, 55 Ill. 433; citing State *v.* Brown, 1 Hayw. 116; U. S. *v.* Amy, *ut supra;* Com. *v.* Andrews, 2 Mass. 14; Com. *v.* Green, 17 Mass. 540–7. See Whart. Cr. Pl. & Pr. *ut supra.* In Marshall *v.* State, 16 Neb. 121, it was intimated that when the penalty inflicted was in full satisfaction for the whole offence, the second prosecution might be barred.

[2] Whart. Cr. Pl. & Pr. §§ 439, 979, 997.

principles of selection of officers of suitable rank assisted by a judge advocate. Military courts are selected in any way the military commander of the province may determine, and may consist, more or less entirely, of civilians learned in the law. Courts martial are conducted in subordination to martial law, as an international system. Military courts are conducted in subordination to such a system of jurisprudence as the policy of the occupying forces prescribes, incorporating as much of the civil law of the conquered province as may be most convenient. Martial law excludes police control of civilians except so far as they interfere in military affairs. With the police control of civilians, military law is chiefly concerned. Courts martial are permanent, and run in parallel lines with civil courts; are not only consistent with, but essential to constitutional and liberal government; and are subject, so far as their right to imprison and punish is concerned, to the jurisdiction of the judiciary of the land.[1] Military law for the time being absorbs the local civil law and deposes the local judiciary, except so far as the military governor may allot to them authority. Martial law is permanent, cosmopolitan, and administered by courts special to each case. Military law is special, provincial, limited in duration to the period of military occupancy, yet usually administered while it lasts by a permanent court, hearing all cases of litigation that arise.[2]

Such is the primary meaning of martial law, as distinguished from military law. The term martial law, however, is used in a secondary sense, to denote the law imposed by the supreme authority of the country for the preservation of order in periods of insurrection, or other great public emergency.[3]

§ 295. (2) The judgment of a military court, having *de facto* authority in a province under military control, is a bar to further

[1] The King's Bench has always assumed this position in England (*e.g.*, in Governor Wall's Case); and in this country a similar supremacy has been maintained by the federal courts. It is no answer to this position, that the action of courts in granting writs of *habeas corpus* in reference to persons under martial control has been held inoperative. This is in subordination to the law of the land as pronounced by the Supreme Court of the United States, which, in all federal matters, involving the control of the federal army, is supreme. See Davison, *in re*, 21 Fed Rep. 618.

[2] See Whart. Cr. Pl. & Pr. § 979, note; Whart. Com. Am. Law, §§ 37, 579.

[3] See Whart. Com. Am. Law, §§ 37, 38.

Judgments of may be a bar.

prosecutions for the same offence in civil tribunals in the same country.[1] Whether the judgments of courts martial are a bar depends upon the question whether by the local applicatory civil law, such courts have jurisdiction.[2]

[1] See Coleman *v.* State, 97 U. S. 309, cited *supra*, § 293; Whart. Cr. Pl. & Pr. §§ 435, 439.

On the topic of the text see Benet on Military Law; De Hart, Military Law; Finlason on Martial Law; Poland's Military Dig.

[2] That belligerents when acting without authority of law, are subjected to penal discipline, see *infra*, § 283; that they may defend on ground of necessity, or superior order, see *supra*, §§ 95, 283; *infra*, § 310; that seizure by them of goods is not larceny, see *infra*, § 890. The N. Y. Penal Code of 1882, does not by its own exceptions apply to any power conferred by law on military authorities to punish offenders. That military and naval officers are subject to the law of the land see *infra*, § 431. See cases in Whart. Cr. Pl. & Pr. § 439.

BOOK II.

CRIMES.

PART I.—OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE.

§ 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 and feloniously 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 aforethought; but malice is a term which requires, as has been already seen, peculiar exposition and limitation.[2] Nor do the words "prepense" or "aforethought" relieve the definition from ambiguity. What is "prepense" 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.[3] 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

Murder is killing with malice aforethought.

[1] 3 Inst. 47, 51; 2 Ld. Raymond, 1487; 1 Hale, 425; 1 Hawk. c. 31, ss. 3, 8; Kel. 127; Fost. 256; 4 Blac. Com. 198; Lewis C. L. 394. See State *v.* Thomas, 78 Mo. 327; People *v.* Schmidt, 63 Cal. 28. As to malice, see *supra*, § 106.

[2] *Supra*, §§ 106 *et seq.*

[3] As to malice, see *supra*, §§ 106 *et seq.*; *infra*, §§ 313, 314.

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 will require a new definition to make it exact.[1]

Voluntary manslaughter is intentional killing in hot blood.

§ 304. Manslaughter is defined to be the unlawful and felonious killing of another, without malice aforethought.[2] Voluntary manslaughter is an intentional killing in hot blood, and differs from murder in this, that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice aforethought, which is the essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proprotionately lenient.[3]

[1] See Whart. on Homicide, § 2, and notes; and see Firty *v.* State, 3 Bax. 358.

According to Sir J. F. 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, in, 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. 191; 1 Hale, 449; 1 Hawk. c. 30, ss. 2, 3. See Bailey *v.* State, 70 Ga. 617; People *v.* Jamarillo, 57 Cal. 111.

[3] 1 East P. C. 232. R. *v.* Mawgridge, Kel. 124; Lord Cornwallis's Case, Dom. Proc. 1678; 2 St. Tr. 730; Parker, J., Selfridge's Case, 158; *Ex parte* Tayloe, 5 Cowen, 51; Com. *v.* Bob, 4 Dall. 125; Penn. *v.* Levin, Addison, 279; Com. *v.* Drum, 58 Penn. St. 9; Erwin *v.* State, 29 Oh. St. 186; Stout *v.* State, 90 Ind. 1; Com. *v.* Mitchell, 1 Va. Cases, 716; State *v.* Smith, 10 Rich. (Law) 341; Stokes *v.* State, 18 Ga. 17; Perry *v.* State, 43 Ala. 21; Murphy *v.* State, 31 Ind. 511; People *v.* Freel, 40 Cal. 436; Williams *v.* State, 15 Tex. Ap. 617.

By § 189 of the New York Penal Code

Involuntary manslaughter is negligent killing.

§ 305. Involuntary manslaughter, according to the old writers, is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed.[1] Hence it is involuntary manslaughter where the death of another occurs through the defendant's negligent use of dangerous agencies;[2] and so where death incidentally but unintentionally results in the execution of a trespass.[3]

The distinction, however, between voluntary and involuntary manslaughter is now obsolete, in most jurisdictions, so far as concerns the common law.[4] Unless it should be required by statute, the terms "voluntary" and "involuntary" are not now introduced either in indictment, verdict, or sentence. But where the distinction is made by statute, there can be no conviction of involuntary manslaughter on an indictment for voluntary manslaughter.[5]

Excusable homicide is either non-negligent, non-malicious kill-

§ 306. *Excusable homicide* is of three kinds: 1st. Where a man doing a *lawful* act, without any intention of hurt, non-negligently 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

of 1882 only two degrees of manslaughter are recognized: 1st. Homicides in commission of misdemeanors or in the heat of passion, but in a cruel or unusual manner; 2d. All other forms of homicide not murder, or excusable, or justifiable.

It is no defence to an indictment for manslaughter, that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was, therefore, murder; but the defendant in such case may, notwithstanding, be properly convicted of the offence of manslaughter. Com. *v.* M'Pike, 3 Cush. 181.

[1] *Infra*, §§ 329 *et seq.*, 371 *et seq.* See Buckner *v.* Com., 14 Bush, 601.

[2] *Infra*, §§ 329 *et seq.* R. *v.* Murray, 5 Cox C. C. 509; R. *v.* Chamberlain, 10 Ibid. 486; R. *v.* Rigmardon, 1 Lewin, 180; R. *v.* Timmins, 7 C. & P. 499; R. *v.* Dalloway, 2 Cox C. C. 273; R. *v.* Swindall, 2 C. & K. 229; R. *v.* Pargeter, 3 Cox C. C. 191; R. *v.* Lowe, 4 Ibid. 449; R. *v.* Smith, 11 Ibid. 210; State *v.* O'Brien, 3 Vroom, 169; Adams *v.* State, 65 Ind. 565.

[3] 1 Hale, 449; Fost. 270; R. *v.* Archer, 1 F. & F. 351; State *v.* Turner, Wright, 20; State *v.* Smith, 32 Me. 369; State *v.* Center, 35 Vt. 378. That there can be no aiders or abettors in involuntary manslaughter, see Adams *v.* State, 65 Ind. 565.

[4] See, however, *contra*, Price *v.* Com., 33 Grat. 819; Brown *v.* State, 34 Ark. 232.

[5] Com. *v.* Gable, 7 S. & R. 423; Walters *v.* Com., 44 Penn. St. 135; Bruner *v.* State, 58 Ind. 159.

ing, or homicide in self-defence or from necessity.

by misadventure.[1] 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 hereafter 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 committed in the defence of important rights; and where no more force is used and no other instrument or mode is employed, than is necessary and proper for such purpose.[2] 3d. Killing from necessity, which is elsewhere discussed.[3]

§ 307. *Justifiable homicide* is that which is committed, either,

Justifiable homicide is homicide in discharge of a duty.

1st. In discharge of a duty, such as by an officer executing a criminal pursuant to the death warrant and in strict conformity to the law;[4] 2dly. In prosecution of public justice, as where officers or their assistants kill as a necessary incident to an arrest;[5] or 3dly. For the prevention of any atrocious crime, attempted to be committed by force, such as murder, robbery, house-breaking in the night-time, rape, mayhem, or any violent act of felony against the person.[6] 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 apparently necessary to avert the danger or defeat the attempt.[7]

§ 308. The distinction, in result, between justifiable and excusable homicide is now practically abandoned.[8] In former times, in

[1] *Infra*, §§ 329 *et seq.*

[2] *Infra*, §§ 484 *et seq.*

[3] *Supra*, §§ 95 *et seq.*; *infra*, § 510.

[4] *Infra*, § 401.

[5] See *infra*, §§ 401 *et seq.*

[6] U. S. *v.* Wiltberger, 3 Wash. C. C. 515; and see State *v.* Rutherford, 1 Hawks, 78, 457; State *v.* Roane, 2 Dev. 58.

[7] 4 Bl. Comm. 182; 1 Russ. on Crimes, 657-660. *Infra*, § 484.

[8] According to Sir J. F. Stephen, "the ancient law was that in cases where homicide was proved to be strictly justifiable, the jury might acquit, but that in cases of homicide *per infortuniam* and *se defendendo*, they were to give a special verdict, and the prisoner was to be pardoned as of course, the reason being that the party forfeited his goods at common law." 3 Steph. Hist. Cr. Law, 76. But this

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 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.[1]

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.[2] 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.[3] 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.[4] Hence it follows that in cases of infanticide it must be shown that the child was born alive.[5] And for this purpose proof of an independent circulation on the part of the child is necessary.[6]

Deceased must have been living at mortal blow.

§ 309 *a*. As has been already fully illustrated, the death must be traced to the blow charged to the defendant.[7]

Death must be imputable to defendant's act.

§ 309 *b*. It follows from what has been said that accelerating a death of a person diseased or wounded, is homicide.[8]

Accelerating death of dying is homicide.

gave way early in the last century to the practice of taking "general verdicts of acquittal in plain cases of death *per infortuniam*, and also, it seems, of *se defendendo*." Ibid.

[1] See *infra*, § 545.

[2] 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.

[3] U. S. *v.* Hewson, 7 Boston Law Reporter, 361, per Story, J.

[4] Com. *v.* Harman, 4 Barr, 269; Whart. on Crim. Ev. §§ 324, 810.

[5] See Whart. on Crim. Ev. § 327.

[6] State *v.* Winthrop, 43 Iowa, 519. See *infra*, § 445.

[7] *Supra*, §§ 153 *et seq.*, 159; and see *infra*, § 340. See People *v.* Ah Luck, 62 Cal. 603.

[8] *Supra*, § 155 *a*. See State *v.* Castello, 62 Iowa, 404.

The homicide must not have been in legitimate public war.

§ 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 course of war;[1] 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.[2]

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.[3]

But homicide by any person forming part of a belligerent army, recognized as such, is not murder when committed in due course of war.[4] In such case the rule *respondeat superior* applies.[5] And

[1] Whart. Confl. of Laws, § 911; 3 Inst. 50; 1 Hale, 433. *Supra*, § 271; *infra*, § 575.

[2] 1 Hale, 433; 3 Inst. 50; State *v.* Gut, 13 Minn. 341.

[3] Jim *v.* Territory, 1 Wash. Ter. 76; and see proceedings in the Modocs' 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.

[4] *Supra*, § 283; Buron *v.* Denman, 2 Ex. 167; Secretary of State *v.* Kamachee, 13 Moore P. C. 22; 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, 337.

[5] *Supra*, §§ 94 *et seq.*, 283. This question is discussed in 2 Steph. Hist. Cr. Law, pp. 63 *et seq.*

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 general 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,

this immunity has been extended to acts done within the territory of one sovereign, under command of a foreign sovereign, in time of peace.[1]

There must be proof of *corpus delicti*.

§ 311. The *corpus delicti*, in all cases of homicide, must be proved as an essential condition of conviction. To the *corpus delicti*, in this sense, 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, and that the defendant was implicated in the crime. The evidence on these points is discussed in another volume.[2]

The death must have been within a year and a day from the injury.

§ 312. By the English common law the death must have occurred within a year and a day from the date of the injury received;[3] and, hence, an indictment which does not aver the death to have occurred within this limit is fatally defective.[4]

Malice to be inferred from circumstances.

§ 313. The old distinction between express and implied malice cannot be logically maintained.[5] There is no case of malicious homicide in which the malice is not inferred from the attendant circumstances; no case in which it is demonstrated as express. We have no power to ascer-

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 his 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] *Supra*, § 283.

[2] Whart. on Cr. Ev. §§ 324–25. See, also, 3 Whart. & St. Med. Jur. §§ 776 *et seq.* This definition of *corpus delicti* has been contested, it being assumed that *corpus delicti* means the dead body of the deceased. But the true meaning of the word is not "body of the deceased," but "body of the crime;" and this involves the essential features of the crime as bearing on the issue. Any other meaning of the term would render nugatory the limitations that the burden of the *corpus delicti* is on the prosecution, and that accomplices are to be corroborated as to the *corpus delicti*. As adopting the definition of the text, see State *v.* Dickson, 78 Mo. 439; Lovelady *v.* State, 14 Tex. Ap. 518; State *v.* Stowell, 60 Iowa, 535; Whart. Crim. Ev. §§ 324–5, 633.

[3] 3 Inst. 53. *Infra*, § 537.

[4] 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. § 15 for notes. This limitation is not contained in the definition of murder in the N. Y. Penal Code of 1882.

As to causal relations see *supra*, §§ 153, 157–58.

[5] *Supra*, § 113. As to what malice is, see *supra*, §§ 106 *et seq.*

tain 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.[1]

Malice in this sense may be considered under the following heads:—

1. Intent to kill.
2. Intent to do bodily harm.

When there is deliberate, unlawful killing, malice is inferred.

§ 314. Where there is a deliberate intent to kill, unless it be 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.[2] 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.[3]

The mode of proving malice, as is elsewhere more fully shown,[4] 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. The question is one of logic, not of formal law.[5] The inferences to be drawn from the weapons used are also elsewhere distinctively discussed.[6] As is noticed in a former section, it is not necessary to prove prior evil purpose in order to constitute malice.[7] Hence the term "malice aforethought" does not require proof of malice for any prior appreciable period.[8]

§ 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 a homicide in a duel that may be so ranked, *e. g.*, where

[1] *Supra*, § 122. See, for a full discussion of this question, Whart. Crim. Ev. § 734; and as to inference to be drawn from other crimes, Whart. Crim. Ev. § 30; and see Meyers *v.* Com., 83 Penn. St. 131.

[2] *Infra*, § 476.

[3] Mason's Case, Fost. 132; East P. C. c. 5, s. 53.

[4] Whart. Cr. Ev. § 734.

[5] Small *v.* Com., 91 Penn. St. 304.

[6] Whart. Cr. Ev. §§ 765, 768, 774–9.

[7] *Supra*, § 1156.

[8] Ibid. See U. S. *v.* Cornell, 2 Mason, 90; People *v.* Clarke, 7 N. Y. (3 Selden) 385; Green *v.* State, 13 Mo. 382; and cases cited *supra*, §§ 116, 117; *infra*, § 380.

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.[1] In all cases of such outrageous hurt as to make the death a natural consequence, we have a right to infer such an intent;[2] but it is otherwise when the hurt was less serious, and the presumption of an intent to kill less violent.[3] Independently of the statutes, it has been said that though A., in anger, from preconceived malice, intend only to severely *beat* B., 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.[4] So if a large stone be thrown at one with a deliberate intent to seriously hurt, though not to kill him, and it actually kills him, this is murder.[5] 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 mischieviously inflicted, with no intention seriously to hurt.[6]

If intent be only to inflict a slight hurt, offence is but manslaughter.

[1] Com *v.* Green, 1 Ashm. 289; Mayes *v.* People, 106 Ill. 306.

[2] See Wellar *v.* People, 30 Mich. 16; State *v.* Ah Lee, 8 Oregon, 214.

[3] Mayes *v.* People, 106 Ill. 306.

[4] Fost. 259. See *supra*, §§ 108–122.

[5] 1 Hale, 491.

[6] *Infra*, § 323. See, as taking a more stringent view, State *v.* Smith, 2 Strob. 77.

In Vermont, in a case showing peculiar depravity, 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.

§ 316. Under this head we may class attempts to produce miscarriage, 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.[1] It is otherwise, as will hereafter be seen, when there was no intent to do a severe injury, or where the result is attributable merely to negligence.[2]

Killing when intending to produce miscarriage is murder.

§ 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 authorities of the highest rank to be murder,[3] though if A.'s aim at B. was without malice, the offence would have been but manslaughter.[4] 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.[5] So where B., a police-

When unintended person is killed by mistake, it has been ruled that offence is same as if intended party has been killed.

[1] 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. In Missouri the indictment in such case must, it is said, aver that the woman was quick with child. State *v.* Emerick, 13 Mo. Ap. 493. But see *infra*, § 592; *supra*, §§ 185–6.

[2] *Infra*, §§ 325, 390.

[3] *Supra*, §§ 107–111, 121, 128; 1 Hale, 379, 439, 466; Dyer, 128; Kel. 111, 112, 117; Pult. de Pace, 124 *b*; Fost. 261; R. *v.* Plummer, 12 Mod. 627; R. *v.* Holt, 7 C. & P. 519; 1 Hawk. c. 31, 542; State *v.* Gilman, 69 Me. 163; State *v.* Cooper, 1 Green N. J. 381; Com. *v.* Dougherty, 7 Smith's Laws, Penn. 696; State *v.* Dugan, 1 Houst. C. C. 563; 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. 233; Durham *v.* State, 70 Ga. 264; Tidwell *v.* State, 70 Ala. 26; Golliher *v.* Com., 2 Duvall, 163; Angell *v.* State, 36 Tex. 542; State *v.* Raymond, 11 Nev. 98; State *v.* Brown, 7 Oregon, 186; State *v.* Johnson, Ibid. 210. See Lacefield *v.* State, 31 Ark. 275. In Halbert *v.* State, 3 Tex. Ap. 656; Taylor *v.* State, Ibid. 387; McConnell *v.* State, 13 Ibid. 387; cases of this class are held to be murder in the second degree. *Infra*, § 382.

[4] *Supra*, §§ 120, 121, 128; Levett's Case, Cro. Car. 538; Fost. 262; 1 Hawk. c. 31, s. 44; Leach, 151; R. *v.* Connor, 7 C. & P. 438; Morris *v.* Platt, 32 Conn. 75; Com. *v.* Dougherty, 7 Smith's Laws, Penn. 696; Bratton *v.* State, 10 Humph. 103; Aaron *v.* State, 31 Ga. 167.

[5] 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

man, is lawfully endeavoring to arrest A., and A. shoots at the policeman, and accidentally kills C., this has been held to be murder in A.[1] 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.[2] Under the present usual statutory provisions, the offence in the last case would be murder in the second degree.[3]

§ 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.[4] The reason given is that in the killing, C. was substituted for B., and that the killing of C. is to be treated, on the basis of this substitution, just as we would treat the killing of B.[5] But, as has been argued, we cannot positively affirm that B. would have been killed had not C. intervened. It may be, for instance, in a case of shooting of this class, that the very faltering which led to the miss-shot was caused by a want of resolute purpose; it may be that a great distance was

Objections to this view.

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 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 R. *v.* Mawgridge, Kelyng, 131, 132; 9 St. Tr. 61; Manier *v.* State, 6 Baxt. 595. In State *v.* O'Niel, 1 Houst. C. C. 468, it was held, that where a police officer with a warrant fires a pistol at B., a person attempting to escape arrest on a charge of misdemeanor, and kills C., the killing of C. is murder in the second degree. *Supra*, § 120; *infra*, § 346.

[1] Angell *v.* State, 36 Tex. 542.

[2] State *v.* Smith, 3 Strobh. 77.

[3] See *infra*, §§ 375 *et seq.*

[4] See discussion in 10 Cent. L. J. pp. 57 *et seq.*

[5] See this discussed more fully in Whart. on Homicide, §§ 48–9; and by Bar, in his treatise on Causalzusammenhange. As to variance in respect to intent, see Whart. Crim. Ev. §§ 149, 150.

taken at which to shoot at B. as the result of an unwillingness to make a sure shot.[1] At all events, so it is objected, we have here the spectacle of an attempt,—an offence which has a milder punishment,—visited with the severe punishment of the consummated offence, simply because the defendant has accidentally committed a distinct offence. When A. sees C. approaching whom he mistakes for B., and says, "This is B., whom I will kill," and then kills C. thus intervening, A. is guilty of murder as to C., since it was at C. that he aimed.[2] But if he did not aim at C., but C. was killed by a glance shot, then the offence is but negligent homicide as to the person killed, and an attempt as to the other person. To attempts, a milder punishment is assigned, on the ethical ground that as a usual thing a consummated crime supposes greater care in preparation, and greater firmness in execution, and therefore involves a higher degree of criminality, than does an unconsummated crime. The question is not to be confounded with that of *dolus alternativus*, which exists when A., intending to shoot either B. or C., shoots C., and which is murder, for in such case there is at once a killing and an intent to kill the person killed.[3] Nor can we fall back, it is insisted, on *a priori* reasoning based on the defendant's intent, and hold that because the defendant intended to kill and a killing followed, therefore the intent to do one thing and the doing another are to be fused into one malicious killing. A., for instance, manufactures shells to be exported in violation of neutrality statutes, when a shell explodes and kills C. This, on the principle here contested, is 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 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

[1] See *supra*, §§ 107–14–120–128.

[2] See *supra*, § 120.

[3] See *supra*, § 186; and see R. *v.* Holt, 7 C. & P. 518; R. *v.* Lallement, 6 Cox C. C. 204.

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 A.'s survey, when he undertook to effectuate his evil intent, the case is murder;[2] if not, but the killing arose from the negligent use of the instrument by A., the case is manslaughter.[3] 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 even 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.[4] We may further illustrate the difficulties attending the prevailing doctrine by the case of an executioner, who, when intending to kill a condemned prisoner on the gallows, negligently kills a bystander. On principle, such killing ought to be manslaughter. But on the rulings before us it is justifiable homicide in execution of the law. A., to take another case, in aiming, in self-defence, a blow at B., negligently kills C. According to the prevalent view, A. should be acquitted,[5] while on principle he should be convicted of manslaughter.

[1] See *supra*, §§ 107, 121, 128.

[2] See State *v.* Lee Vines, 34 La. An. 1079.

[3] This view is accepted by Bramwell, J., in R. *v.* Horsey, cited *infra*, § 320.

[4] R. *v.* Champneys, 2 M. & R. 26; State *v.* Benham, 7 Connect. 414; People *v.* Warren, 1 Parker C. R. 338; Vaughan *v.* Com., 2 Va. Ca. 273; State *v.* Standifor, 5 Porter, 523; Manier *v.* State, 6 Baxt. 595. See, also, cases cited Whart. on Cr. Ev. § 587; Whart. Cr. Pl. & Pr. § 468.

[5] Plummer *v.* State, 4 Tex. Ap. 310.

On the other hand, if A. kills C., whom he mistakes at the time of the attack for B., this, as we have seen, is murder as to C.[1]

Malice to a class covers malice to an individual.

§ 319. When an action unlawful in itself was done with deliberation, and with intention of killing, or inflicting grievous bodily harm, though the intention be not directed to any particular person, and death ensues, it will be murder at common law;[2] though if such an original intention does not appear, which is matter of fact, and to be collected from circumstances given in evidence, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death; because the act upon which death ensued was unlawful.[3] Thus, if a person breaking in an unruly horse wilfully ride him among a crowd of persons, the probable danger being great and apparent, and death ensue from the viciousness of the animal, it is murder at common law.[4] If, also, a man recklessly and maliciously throw from a roof into a crowded street, where passengers are constantly passing and repassing, a heavy piece of timber, calculated to produce death to such as it might strike, and death ensue, the offence is murder at common law.[5] It is also murder to kill by firing maliciously into a crowd,[6] or by maliciously putting an obstruction on a railway track.[7]

[1] See, to this effect, Barcus v. State, 49 Miss. 17; *supra*, §§ 109, 120.

[2] 1 Hawk. c. 29, s. 12; R. v. Fretwell, L. & C. 443; 9 Cox C. C. 471; Hopkins v. Com., 50 Penn. St. 9; Com. v. Drum, 58 Penn. St. 9; Jackman v. State, 71 Ind. 149; Wright v. Com., 75 Va. 914; Herrin v. State, 33 Texas, 638; Robinson v. State, 54 Ala. 86. See this question discussed *supra*, §§ 111–113; *infra*, §§ 382–83.

[3] *Infra*, § 344; 1 Russ. on C. 539; Foster, 261; Golliher v. Com., 2 Duvall, 163.

[4] 1 Hale, 476; 4 Black. Com. 200; 1 East P. C. 231. *Infra*, § 353.

[5] Com. v. Dougherty, 7 Smith's Laws (Penn.) 696; Boles v. State, 9 S. & M. 284; *infra*, § 351.

[6] Golliher v. Com., 2 Duvall, 163; State v. Edwards, 71 Mo. 312; R. v. Fretwell, L. & C. 443; 9 Cox C. C. 471. *Supra*, § 120; *infra*, §§ 344, 383. That malice is to be inferred in such cases, see Smith v. Com., 100 Penn. St. 324.

"A., for the purpose of rescuing a prisoner, explodes a barrel of gunpowder in a crowded street, and kills a number of persons, intending to explode the barrel of powder in the crowded street. A. commits murder, although he may have no intention at all about the people in the street, or may hope that they will escape injury." R. v. Desmond, cited by Sir J. F. Stephen, Dig. Cr. L. art. 223. On this Sir J. F. Stephen thus comments: "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 evidence not the least worth reporting. See 11 Cox C. C. 146." This case is further discussed in the London Law Times for May 20, 1882.

[7] Presley v. State, 59 Ala. 98; see Jackman v. State, 71 Ind. 149.

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.[1]

But when act is negligent, offence is but manslaughter.

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,[2] or in negligently driving in the public streets,[3] or in negligently driving a locomotive engine;[4] then the offence is but manslaughter.

By older writers killing with intent to commit collateral felony is murder.

§ 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.[5] 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 ensues against or beside the intent of the party, it will be murder; but, on the other hand, if the intent goes no further than to commit a bare trespass, it will be manslaughter. The illustration usually given is that where A. shoots at the poultry of B., and, by accident, kills B. himself; if A.'s intent were to steal the poultry, which must be collected from cir-

[1] 1 Hale, 475; 3 Inst. 57; 1 East D. C. 231; Boles v. State 9 Sm. & M. 284.

[2] R. v. Hull, Kel. 40; R. v. Rigmardon, 1 Lewin, 180. *Infra*, § 351.

[3] R. v. Timmins, 7 C. & P. 499; R. v. Grout, 6 C. & P. 629; R. v. Dalloway, 2 Cox C. C. 509. *Infra*, § 353.

[4] See *infra*, § 348.

[5] *Infra*, § 384.

cumstances, it will be murder, by reason of that felonious intent; but if it were done wantonly and without that intent, it will be merely manslaughter.[1] It is true that in England the rule is not infrequently so shaded as to bring it into harmony with the principle maintained in these pages. Thus we find that Bramwell, J., after stating in a homicide case the rule as given by the old writers, goes on to say that the law, however, is that a man is not answerable except for the natural and probable result of his own act, and announcing that unless the death was a "natural and probable result" of the felony primarily in view, the defendant could not be convicted of the murder.[2] It may also be confidently asserted, that, if a man should now be tried for a homicide, which though consequent on killing a tame fowl, was not only unintended by the defendant, but was in no way a "natural or probable result" of an intended larceny, there is no English or American judge who would not say that the homicide was not murder but manslaughter. Yet, nevertheless, the old common law rule continues to be proclaimed as unquestioned law by courts in the United States,[3] incompatible as it is both with logic and with humanity.[4]

At common law, this doctrine is unsustainable by reason.

§ 321. Where a legislature creates a statutory offence, the statutory definition is absolute; but when there is no statutory enactment, the doctrine that the intent to commit a felony, when collateral to an accidental homicide, constitutes murder, must be rejected for the following rea-

[1] Fost. 258–9; Plummer's Case, 1 Hale, 475; 3 Inst. 56; Kel. 117; 6 St. Tr. 222; 1 Hawk. c. 29, s. 11, c. 31, s. 41. In Barrett's Case we have the rule affirmed by Cockburn, C. J., cited Stephen's Dig. C. L. art. 223; and Sir J. F. Stephen tells us that if "A. shoots at a domestic fowl, intending to steal it, and accidentally kills B.," this is murder. Ibid.

[2] R. *v.* Horsey, 3 F. & F. 287. See *supra*, § 318.

[3] See, particularly, Smith *v.* State, 33 Me. 48; State *v.* McNab, 20 N. H. 160; Com. *v.* Dougherty, 7 Smith's Laws, 696; State *v.* Cooper, 1 Green, N. J. 361; State *v.* Smith, 2 Strobh. 77; State *v.* Shelledy, 8 Iowa, 477; State *v.* Moore, 25 Iowa, 128; Weller *v.* People, 30 Mich. 16.

[4] See note to Whart. on Hom § 56. That the English rule in this respect is founded on a mistake of the early authorities is shown by an article in the London Law Times for August 24, 1878. See, however, article in same paper for July 19, 1884, p. 215. The rule is strangely vindicated by Mr. Greaves, 1 Russ. on Cr. 740. As illustrating the way in which the rule is practically evaded, see R. *v.* Horsey, 3 F. & F. 287. As bearing on the question collaterally, see Thompson *v.* Dashwood, L. R. 11 Q. B. D. 43.

sons: A man who does not intend to commit murder is held guilty of murder, an offence to which a malicious intent to take life or to do grievous bodily harm is essental. The indictment avers a malicious intent to kill the deceased, and a conviction is directed, although the case on both sides shows that there was no such intent, but that the blow was given with an intent entirely different. The only excuse to be given for this is that when all felonies were capital, it made no difference to the defendant what was the felony he was charged with committing. But this reason, such as it is, no longer exists. Larceny and murder have assigned to them distinct punishments; and it is no longer a matter of indifference to the defendant for which he is to be tried. Nor is it a matter of indifference to juries. A jury must feel itself far more willing to convict a man of larceny than to convict him of murder simply because he intended to steal a tame fowl. Of course this assumes 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.

Proper course is to indict for attempt and for manslaughter.

§ 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]

[1] See on this topic *supra*, §§ 109–11.

§ 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. 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:—

Unintentional homicide incident to an unlawful act is manslaughter.

§ 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.[1] 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.[2]

So in respect to assaults.

§ 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.[3] 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.[4]

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.[5]

So as to riots.

[1] 1 Hale, 475; 1 Hawk. c. 29, s. 11; c. 31, s. 41. *Supra*, § 167; *infra*, § 617.

[2] R. *v.* Archer, 1 F. & F. 351.

[3] 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.

[4] See *supra*, § 316; *infra*, § 450. As to Illinois statute to this effect see Beasley *v.* People, 89 Ill. 571.

[5] See *infra*, § 395.

§ 327. The same rule was applied, as has been seen, 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.[1]

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.[2]

So as to suicide.

III. NEGLIGENT HOMICIDE.

§ 329. We have already seen[3] 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.[4]

Omission in discharge of a lawful duty indictable.

§ 330. As, in conformity with the definition just stated, the responsibility must be one specially imposed on the defendant, the omission to perform acts of mercy, even though death to another result from such omission, is not within the rule.[5] 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

Omission to perform acts of mercy not indictable.

[1] State *v.* Center, 35 Vt. 378. See *supra*, §§ 315–16.

[2] 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.

[3] *Supra*, § 130.

[4] 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; Robins *v.* State, 9 Tex. Ap. 666, 671, and cases in following sections.

An omission to discharge a duty as to drainage may be indictable. R. *v.* Wharton, 12 Mod. 510.

[5] *Supra*, § 132. See Connaughtry *v.* State, 1 Wis. 159; Burrell *v.* State, 18 Tex. 713.

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 ;[1] and the same reasoning has been applied to a mother who neglects to supply the wants of a lunatic illegitimate child.[2] 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.[3]

Sir J. F. Stephen states the rule as follows: "Every person under a legal duty, whether by contract or by law, or by the act of taking charge, wrongfully or otherwise, of another person, to provide the necessaries of life for such other person, is criminally responsible for the neglect of that duty if the person to whom the duty is owing is, from age, health, insanity, or any other cause, unable to withdraw himself from the control of the person from whom it is due ; but not otherwise."[4]

§ 331. By the distinction before us we are able to support the decisions making the father or the master penally responsible for

[1] R. *v.* Smith, 2 C. & P. 449. It is otherwise if the control be exclusive. R. *v.* Porter, L. & C. 394 ; 9 Cox C. C. 449. *Supra*, §§ 152–169. See, also, State *v.* Preslar, 3 Jones N. C. 421.

[2] R. *v.* Pelham, 8 Q. B. 959.

[3] R. *v.* Smith, L. & C. 607 ; 10 Cox C. C. 82. *Supra*, §§ 152–169 ; *infra*, §§ 447, 1563.

[4] Dig. C. L. art. 213.

He gives the following illustrations :—

(1) A. neglects to provide proper food and lodging for her servant B. (who is of weak mind, but twenty-three years old) ; B.'s life is shortened by such neglect. A. is criminally responsible if B. was in such an enfeebled state of body and mind as to be helpless and unable to take care of herself, or was under the dominion and restraint of A. and unable to withdraw herself from A.'s control ; otherwise, not. R. *v.* Smith, L. & C. 607.

(2) B., a girl of eighteen, comes from service to the house of her mother A., and is there confined of a bastard child. A. does not provide a midwife, in conquence of which B. dies. A. is not criminally responsible for this omission. R. *v.* Shepherd, L. & C. 147.

(3) A. persuades B., an aged and infirm woman, to live in his house, and causes her death by neglecting to supply her properly with food and fire, she being incapable of providing for herself from age and infirmity. A. is criminally responsible for his neglect. R. *v.* Marriott, 8 C. & P. 425. See R. *v.* Wagstaffe, 10 Cox C. C. 530 ; R. *v.* Downes, L. R. 1 Q. B. D. 25.

omission to supply food and clothing to child or apprentice ;[1] but holding that the mother, unless she assumes such exclusive charge, is not so responsible.[2] Thus, an unmarried woman, eighteen years of age, who usually supported herself by her own labor, being about to be confined, returned to the house of her stepfather and her mother. She was taken in labor (the stepfather being absent at his work), and in consequence of the mother's neglect to use ordinary diligence in procuring the assistance of a midwife, the daughter died in her confinement. There was no proof that the mother had any means of paying for the services of a midwife. 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.[3]

Otherwise as to lawful duties. Parent and child.

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.[4] And the same rule applies where a child is unjustifiably exposed to the weather.[5]

§ 332. A husband is responsible for his wife's death caused by her want of necessaries ; though to support such an indictment it should appear that the wife was in such a 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.[6] And so a husband is indictable for homicide, who sees without interference his wife take a poison he knows to be deadly, the case being one in which his interference would have prevented the wrong.[7]

Husband and wife.

[1] R. *v.* Waters, T. & M. 57 ; 1 Den. C. C. 366 ; R. *v.* Edwards, 8 C. & P. 611 ; R. *v.* Middleship, 5 Cox C. C. 275 ; R. *v.* Squire, 1 Russ. on Cr. 621 ; R. *v.* Lowe, 4 Cox C. C. 449 ; 3 C. & K. 123 ; R. *v.* Ryland, L. R. 1 C. C. 99 ; 10 Cox C. C. 569 ; 1 Ben. & H. Lead. Cas. 49 ; State *v.* Hoit, 3 Foster, 355. As to parents' duty to child, see *supra*, § 156 ; *infra*, §§ 359, 447, 1563–67.

[2] R. *v.* Saunders, 7 C. & P. 277 ; R. *v.* Edwards, 8 C. & P. 611 ; R. *v.* Shepherd, 9 Cox C. C. 123 ; L. & C. 147. *Infra*, §§ 359 *et seq.*

[3] R. *v.* Shepherd, 9 Cox C. C. 123 ; L. & C. 147. *Infra*, § 359.

[4] R. *v.* Conde, 10 Cox C. C. 547 ; R. *v.* Bubb, 4 Ibid. 455. *Infra*, §§ 359–1563–67.

[5] *Infra*, § 1562. As to neglect of child by mother in birth, see *infra*, § 445.

[6] *Infra*, §§ 358, 1563 ; R. *v.* Plummer, 1 C. & K. 600 ; State *v.* Presslar, 3 Jones Law (N. C.), 421.

[7] R. *v.* Paine, *infra*, § 1563.

§ 333. The keeper of an asylum or prison, who undertakes, to the exclusion of others, to take care of a pauper, or lunatic, or prisoner, is penally responsible for the death of such pauper, lunatic, or prisoner naturally resulting from the defendant's reckless neglect.[1] And a person who accepts the guardianship of another is bound adequately to discharge such guardianship,[2] and is indictable for death caused by his reckless neglect.[3]

Keepers, jailers, etc.

§ 334. In cases, however, where the party charged is unable to supply the necessary succor, he ceases to be responsible.[4] But this responsibility is not divested, in countries where poor-houses exist, by poverty: for in such cases the person owing the duty is bound to report the case to the public authorities for their relief.[5] And in an indictment against a parent for neglecting to provide sufficient food and clothing for a child of tender years, for whom he is bound by law to provide, it is not necessary to aver that the parent was, at the time of the alleged offence, of sufficient ability to perform the duty so imposed upon him.[6]

Incapacity a defence.

§ 335. A parent is not indictable for the death by starvation of a child competent to assist itself,[7] unless the parent in some way shut the child off from obtaining assistance;[8] nor a master under like conditions for the death of a servant.[9]

So is capacity on part of person neglected.

[1] *Infra*, §§ 334, 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 Whart. & St. Med. Jr. § 242.

[2] See R. *v.* Bubb, 4 Cox C. C. 455; R. *v.* Hook, Ibid.

[3] R. *v.* Nicholls, 13 Ibid. 75.

[4] 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 Denn. C. C. 325. See *infra*, §§ 359 *et seq.*

[5] R. *v.* Mabbett, 5 Cox C. C. 339; R. *v.* Chandler, Dears. C. C. 453; though see R. *v.* Shepherd, Leigh & C. 147; 9 Cox C. C. 123. See *infra*, §§ 359 *et seq.*

[6] R. *v.* Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569.

[7] R. *v.* Friend, R. & R. 20; R. *v.* Shepherd, 9 Cox C. C. 123; L. & C. 147.

[8] R. *v.* Waters, T. & M. 57; 1 Den. C. C. 356; 2 C. & K. 864. *Supra*, § 156; *infra*, § 459.

[9] Anon. 5 Cox C. C. 279; R. *v.* Smith, 8 C. & P. 153; R. *v.* Smith, L. & C. 607; 10 Cox C. C. 82; *infra*, § 360; though see R. *v.* Ridley, 2 Camp. 650.

§ 336. Where from a conscientious conviction that God would heal the sick, and not from any intention to avoid the performance of their duty, the parents of a sick child refused to call in medical assistance, though well able to do so, and the child consequently died, this was held at common law not culpable homicide,[1] though otherwise under statute.[2] And even under statute the death, in order to convict, must be imputable to the neglect.[3]

Conscientious opinion as to duty, when a defence.

§ 337. When we come to omissions by those in charge of machinery, ships, and railways, the question arises, Was the defendant specially charged with a particular office? Did injury to another ensue as a regular and usual consequence from his omission? If so, the defendant is to be held penally responsible.[4] Hence such responsibility has been held to attach where an engineer leaves a steam-engine in charge of an incompetent person;[5] where the officers of a vessel omit to keep a proper lookout;[6] where a pilot omits to make himself properly understood by a foreign helmsman;[7] where the officer in charge omits to ventilate a mine;[8] where a railway tender omits to give the proper signal;[9] where an iron founder, employed to supply a cannon for a public celebration, instead of recasting a piece that had burst, fills up the crevice with lead;[10] where a mechanic, employed for the purpose in a colliery, omits to plank up a shaft;[11] where a switch-

Engineers and other officers liable for omissions.

[1] R. *v.* Wagstaffe, 10 Cox C. C. 530 R. *v.* Hines, cited Whart. on Hom. § 131. See *supra*, § 156. And see Albrecht *v.* State, 6 Wis. 74; *infra* §§ 1563 *et seq.*

[2] R. *v.* Downes, L. R. 1 Q. B. D. 25; 13 Cox C. C. 111.

[3] R. *v.* Morby, L. R. 8 Q. B. D. 571; 15 Cox C. C. 35; 45 L. T. N. S. 288. See report in Central Law Jour. for June 2, 1882.

[4] *Supra*, § 133; R. *v.* Hughes, D. & B. C. C. 248; R. *v.* Haines, 2 C. & K. 368; R. *v.* Lowe, Ibid. 123; 4 Cox C. C. 449, and see cases cited *infra*, §§ 343, 369, 1586.

[5] See *supra*, §§ 152–69; R. *v.* Lowe, 4 Cox C. C. 449; but merely to leave a machine at rest does not *per se* confer responsibility. Hilton's Case, 2 Lewin, 214. But see *infra*, § 370, for criticism.

[6] R. *v.* Lowe, 4 Cox C. C. 449; 3 C. & K. 123; R. *v.* Spence, 1 Cox C. C. 352, modifying R. *v.* Allen, 7 C. & P. 153; and R. *v.* Green, Ibid. 156.

[7] R. *v.* Spence, 1 Cox C. C. 352.

[8] R. *v.* Haines, 2 C. & K. 368. *Infra*, § 360.

[9] R. *v.* Pargeter, 3 Cox C. C. 191.

[10] R. *v.* Carr, 8 C. & P. 163, cited *supra*, § 154. *Infra*, § 369.

[11] R. *v.* Hughes, 7 Cox C. C. 301.

tender omits properly to turn a switch ;[1] 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.[2] 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.[3] 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.*[4] 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.[5]

So of persons employed to give notice of danger.

§ 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.[6] A man, for instance, working with snow or shingles on a roof, may throw such snow or shingles on a street, if he give proper notice to the passers-by, and he is indictable for injury accruing from failure to give notice.[7] The reason is that, from the very nature of the work in which he is engaged, such warning can only be accurately given by himself. A stranger, on the other hand, who sees the snow or timber about to fall, is not so indictable, because on him rests no special responsibility. By the same process may we solve other

[1] State *v.* O'Brien, 3 Vroom, 169. See R. *v.* Pardenton, 6 Cox C. C. 247. *Infra*, § 369.

[2] Com. *v.* Metr. R. R., 107 Mass. 236. See, also, as to negligence of railroad 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.

[3] U. S. *v.* Knowles, 4 Sawyer, 517.

[4] R. *v.* Gray, 4 F. & F. 1098; R. *v.* Barrett, 2 C. & K. 343.

[5] See Whart. on Hom. § 80.

[6] 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 wanted. An explosion follows, and C. is killed. Both A. and B. have killed C. R. *v.* Haines, 2 C. & K. 368, as cited Steph. Dig. art. 220.

[7] Archbold's C. P. 9th ed. 9; 3 Inst. 70; Foster, 263. So, also, the case in Pauli Rec. Sent. v. 23. § 12. "*Si putator ex arbore, cum ramum dejiceret, non proclamaverit, ut vitaretur, atque ita praeteriens ejusdem ictu homo perierit, etsi in legem non incurrit, in metallum damnatur.*"

questions which not unfrequently arise. A railway subaltern neglects to give the proper signal, and a collision results; and here, if the subaltern in question was specially charged with the duty of signalling, he is criminally responsible; otherwise not.[1] A light-house keeper permits his light to go out and a vessel is consequently wrecked. Is he penally responsible? Certainly so, if he is specially charged with the office of light-house keeper at that point, and if this is the kind of light on which seamen depend for guidance. But supposing a number of persons residing on the shore, are in the habit of keeping lights in their windows, the omission of one of these persons to light his windows, from which serious mischief ensues, would not be indictable. The same distinction may be applied to parties employed to give fire-alarms.[2] In such cases, also, the party employed to give notice is not indictable for the omission when he had no knowledge of the danger, such want of knowledge not being imputable to his negligence.[3]

No indictment lies for failure in discretionary duty.

§ 339. If the duty is one merely discretionary, no indictment lies for its non-performance. Hence, trustees having power to repair roads are not criminally responsible for the death of a person resulting from an omission on their part to repair.[4]

There must be a causal connection between the negligence and the injury.

§ 340. The distinction in this respect between a *condition* and a *cause* has been already discussed.[5] A condition is a prior act without which a subsequent act cannot exist. A. sells to B. an explosive oil, which afterwards, from omission on B.'s part to take due care, explodes. The sale from A. to B. is a condition of the subsequent explosion, but A. is not the cause of the explosion, if it be shown that the oil when sold was in the condition in which oils of the same class are regularly brought to market. On the other hand, if the oil was not in such condition, but was of such a character that it would explode unless precautions unusual and unnecessary in regular business were taken by the purchaser, then A. by his

[1] R. *v.* Pargeter, 3 Cox C. C. 191; R. *v.* Spence, 1 Ibid. 352; R. *v.* Benge, 4 F. & F. 504. *Infra*, §§ 348–9, 1585.

[2] See Whart. on Hom. § 81.

[3] Com. *v.* Hartwell, 128 Mass. 415.

[4] R. *v.* Pocock, 17 Q. B. 34; 5 Cox C. C. 172. See *supra*, § 154, for Sir J. F. Stephen's summary of this case. And see distinction taken, *supra*, § 130.

[5] See *supra*, §§ 130, 153 *et seq.*; and see, also, R. *v.* Pelham, 8 Q. B. 959.

misconduct in selling the oil in such a state is the cause of the explosion, and is penally responsible for its results. So the city of B. distributes unwholesome water which it obtains from C. under a contract made with the latter. C. is the *condition* of the distribution, but he is not the *cause*, unless the water which he supplied the city was unwholesome at the time of the supply.[1]

A husband and a wife, to take another illustration, disagree, and she subsequently, when he has left her, wanders from the house and perishes in the woods. Here the disagreement may be the *condition* of the wife's death, but not its *cause*, if she leaves the house of her free will and not paralyzed by terror produced by his violence.[2]

A physician acts negligently in the treatment of a wound. The person wounding is responsible for the death, if the physician's negligence was such as is ordinarily incidental to medical practice.[3] The physician's negligence was a *condition* of the death; the wound its *cause*.[4]

Even if an injury be given by A., which puts B. in a position in which he receives a fatal wound, this is not homicide in A., unless the wound was the natural and probable result of his act.[5]

Master liable for servant.

§ 341. In all that relates to the management of the master's business the servant is to be regarded as the master's instrument; and as the master is responsible for the defective or mischievous action of his machine, so is he responsible for the defective or mischievous action of his servant.[6] When, however, the servant leaves the orbit prescribed by his master and undertakes excursions on his own account, then the master's responsibility ceases. We here fall back on the principle elsewhere invoked, that there must be a direct causal connection between the defendant's malfeasance or nonfeasance and the injury.

[1] Stein *v.* State, 37 Ala. 123. *Supra*, §§ 153 *et seq.*

[2] State *v.* Preslar, 3 Jones N. C. 421. *Supra*, § 334; and see as to causal relation *supra*, §§ 152–69.

[3] *Supra*, § 164.

[4] As to contributory negligence, see *supra*, § 163.

[5] *Supra*, § 169.

[6] See *supra*, §§ 135, 247; *infra*, §§ 1422, 1503; Com. *v.* Metrop. R. R., 107 Mass. 236; Com. *v.* Boston R. R., 126 Mass. 61,—cases under a special statute making corporations indictable for negligence of servants. *Supra*, §§ 91 *et seq.* And see R. *v.* Medley, 6 C. & P. 292; R. *v.* Dixon, 3 Maule & S. 11; Tuberville *v.* Stampe, 1 Ld. Ray. 264; Com. *v.* Nichols, 10 Met. 259; Com. *v.* Morgan, 107 Mass. 199.

The interposition of a human will acting independently of the defendant and in an eccentric orbit, or the interposition of some extraordinary natural phenomenon, breaks this casual connection.[1] Hence where A., through his servants, makes fireworks in his house, contrary to statute, the master is not responsible for an injury caused by an independent culpable mismanagement of the fireworks by one of the servants.[2]

No defence that business was lawful.

§ 342. To an indictment for negligence it is no defence that the defendant's business was lawful. If he acts negligently, and from his negligence, as a natural, usual, and likely result, death follows, it is undoubtedly manslaughter.[3] Such also is the law with regard to manufacturers and workmen;[4] to persons having charge of children or dependents,[5] and to officers of steam and other vessels.[6]

Negligent use of dangerous agencies indictable.

§ 343. Whoever possesses a dangerous agency must take such care of it as good business men, under such circumstances, are accustomed to apply; and if from his neglecting to exercise such care death ensue to another, he is liable for manslaughter.[7] Illustrations of this principle will be given in the following sections.

Negligent use of firearms imputable.

§ 344. Wantonly, though without malice, and without considering the probable consequences, to discharge firearms, the shot from which will pass a place where persons are likely to be, is negligence, whose results are imputable to the person offending.[8] *A fortiori* is it manslaughter in the

[1] *Supra*, § 246.

[2] Bennett's Case, Bell C. C. 1.

[3] *Supra*, §§ 152–169.

[4] *Infra*, § 359. See R. *v.* Bennett, Bell C. C. 1; 8 Cox C. C. 74.

[5] *Infra*, §§ 351, 1563 *et seq.*

[6] *Infra*, § 352 *et seq.*

[7] See *supra*, §§ 133, 154, 161, 166; *infra*, § 369, and see R. *v.* Sullivan, 7 C. & P. 641; R. *v.* Carr, 8 C. & P. 163; R. *v.* Hutchinson, 9 Cox C. C. 555; R. *v.* Weston, 14 Ibid. 346; U. S. *v.* Warner, 4 McLean, 463; U. S. *v.* Freeman, 4 Mason, 505; People *v.* Melius, 1 N. Y. Cr. 39; State *v.* O'Brien, 3 Vroom, 169; State *v.* Hoover, 4 Dev. & Bat. 365. As to the use of spring-guns and man-traps see *infra*, § 507.

[8] Burton's Case, 1 Stra. 138; People *v.* Fuller, 2 Parker C. R. 16; Sparks *v.* Com., 3 Bush, 111; State *v.* Roane, 2 Dev. 58; Studstill *v.* State, 7 Ga. 2; Collier *v.* State, 39 Ga. 31; Bizzell *v.* Booker, 16 Ark. 308; State *v.* Vance, 17 Iowa, 138; State *v.* Hardie, 47 Iowa, 647; State *v.* Emery, 68 Mo. 77. 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 was loaded, and she was killed. This was held

common law if one negligently discharge a gun in, or towards a public place or street, and kill one whom he does not see.[1] Where the shooting is malicious the offence is murder.[2] Of course if the discharge was in performance of any legal duty the law is otherwise.[3] Nor is it manslaughter when the person using the weapon (there being no negligence) is not aware that it was loaded.[4]

manslaughter. For other illustrations of practical jokes, see State *v.* Roane, 2 Dev. 58; Collier *v.* State, 39 Ga. 31. *Infra*, § 373 *a*. And see Errington's Case, 2 Lew. 217; R. *v.* Conner, 7 C. & P. 438; Adams *v.* State, 65 Ind. 565; Robertson *v.* State, 2 Lea, 239.

[1] *Supra*, § 161; R. *v.* Campbell, 11 Cox C. C. 323; R. *v.* Jones, 12 Ibid. 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; R. *v.* Salmon, L. R. 6 Q. B. D. 79, 14 Cox C. C. 494, where the defendant was firing a rifle at a target, and killed a boy in a garden 393 yards distant, the boy being out of sight, and where the conviction was affirmed by the court of Crown Cases Reserved. See Comments in London Law Times, Dec. 11, 1880, p. 95; Whart. on Neg. §§ 92, 836, 853. See Haack *v.* Fearing, 5 Robertson, 528.

[2] See *supra*, § 319; Golliher *v.* Com. 2 Duvall (Ky.), 163. In R. *v.* Noon, 6 Cox C. C. 137, the defendant fired a pistol at C. on horseback and killed D. This was held murder, though it was said that if the object had been by "appropriate" means (*e. g.*, firing in the air) to frighten C.'s horse, the offence would have been manslaughter. See *infra*, § 373 *a*.

[3] R. *v.* Hutchinson, *supra*.

Where deer had entered a cornfield, 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

[4] Nelson *v.* State, 6 Baxt. 595.

§ 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

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 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 administer 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.

So as to intoxicating liquors.

administered, producing death in the recipient, the person administering is guilty of manslaughter.[1]

Officers of railroads liable for death ensuing from their want of care.

§ 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 accustomed 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.[2] 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 reckless; and that the question whether due care was shown was for the jury.[3]

Where there is duty there is liability.

§ 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;[4] and he is responsible if he leave the engine in charge of an incompetent person.[5] But it has been ruled in England, that unless the law imposes a duty on the owners of a railroad to watch a crossing, they are not responsible for injuries which might have been avoided by having a guard at the crossing. Thus where 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 charter 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

[1] R. *v.* Martin, 3 C. & P. 211; R. *v.* Packard, 1 C. & M. 236. See, fully, Whart. on Hom. § 93.

[2] See topic discussed at large in Whart. on Neg. §§ 645, 798. As to statutory penalties on corporations, see *supra*, § 91.

[3] 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.

[4] R. *v.* Birchall, 4 F. & F. 1087. When there is malice, it is murder. See Golliher *v.* Com., 2 Duvall (Ky.), 163.

[5] R. *v.* Lowe, 4 Cox C. C. 449.

manslaughter.[1] But it is otherwise when a railway tender or watchman undertaking to act as such, to the exclusion of others, neglects to give the proper signal.[2]

But must be specific duty.

§ 350. In such cases a specific personal duty must be proved. Thus, where the prisoner was the driver and the deceased was the fireman of a steam-engine on a railway, and the death of the latter was caused by the engine coming into collision with a train standing on the same line of rails, owing to a neglect on the part of the person in charge of the engine to

[1] R. *v.* Smith, 11 Cox C. C. 210.

[2] *Supra*, §§ 125, 130 *et seq.*, 133, 329.

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 prisoner's train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger, so as to make it mean not "stop," but "proceed with caution;" that the trains were started by the superior officers of the company irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to the prisoners except the signal for caution; and that their train was being driven at an excessive rate of speed; and that then they did not slacken immediately on perceiving the signal, but almost immediately, and that as soon as they saw the preceding train, they did their best to stop, but without effect. It was held, *first*, that the special rules, so far as not consistent with the general rules, superseded them; *secondly*, that if the prisoners honestly believed they were observing them, and they were not obviously illegal, they were not criminally responsible; and, *thirdly*, that the fireman being bound to obey the directions of the engine driver, and, so far as appeared, having done so, there was no case against him. R. *v.* Trainer, 4 F. & F. 105. See as to engineer, Com. *v.* Kuhn, 1 Crumrine (Pittsburg), 13. *Infra*, § 1586. As to causal relation, see *supra*, §§ 152–169, 338.

Where a fatal railway accident had been caused by one train running off the line, at a spot where rails had been taken up, without allowing sufficient time to replace them, and also without giving sufficient, or, at all events, effective warning to the engine driver; and it was the duty of the foreman of the plate-layers to direct when the work should be done, and also to direct effective signals to be given; it was held, that though he was under the general control of an inspector of the district, the inspector was not liable, but that the foreman was, even although there had also been negligence on the part of the engine driver in not keeping a sufficient lookout. R. *v.* Benge, 4 F. & F. 504. And clearly where an officer charged with the duty neglects to give the proper signs, whereby a collision occurs, causing death, such officer is guilty of manslaughter. R. *v.* Pargeter, *supra*, §§ 337, 338; *infra*, § 1586. But the indictment must aver the omission to give due signals, to make evidence to this point admissible. Com. *v.* Fitchburg R. R., 126 Mass. 472.

keep a sufficient lookout, and there was evidence that it was the duty of the prisoner or of the deceased to keep a lookout, but there was no evidence as to which of the two was charged with the duty at the time of the collision; it was held that as there was no specific duty proved on the defendant, he was entitled to an acquittal.[1] Nor where a statute imposes penal liability for injury to passengers, is a railway corporation indictable for an injury sustained by a person who, the train having overshot a station, has left the train when in motion, and is struck by another train while making his way to the station.[2]

Killing by negligently dropping articles manslaughter.

§ 351. It is manslaughter negligently to drop articles on a 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.[3]

On the other hand, 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 held guilty of manslaughter, as, under the circumstances, the method taken of raising the cask was not sufficiently guarded and no due notice was given.[4]

Liability of steamboat officers for negligence.

§ 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

[1] R. v. Gray, 4 F. & F. 1098.

[2] Com. v. Boston & Me. R. R., 129 Mass. 500. See, however, as to contributory negligence, *supra*, §§ 163–4.

[3] R. v. Hull, Kel. 40.

[4] R. v. Rigmardon, 1 Lewin, 180.

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.[1] *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.[2] A part owner, assuming the duty of an officer, is responsible under the act;[3] but one officer is not liable for another's negligence, unless participating in or promoting such negligence.[4] *Casus*, or inevitable accident, is, of course, a good defence.[5] If the death is imputable to the imprudence of the deceased, the defendant is not liable unless such imprudence was a natural result of the defendant's negligence.[6]

The responsibility of steamboat officers for collisions is gauged by the same tests as that of other persons wielding dangerous agencies.[7]

Death produced by careless driving is manslaughter.

§ 353. Independently of the principles just announced which bear with as equal force upon land as upon water collisions, it must be remembered that there are cases in which the driving of an unsafe horse, like the navigating of an unsafe ship, makes the offending party guilty of manslaughter if death ensue. Thus if a person, breaking an unruly horse, ride him amongst a crowd of people, and death ensue from the viciousness of the animal, though this appear to

[1] U. S. v. Collyer, Appendix Whart. on Hom.; and see, also, U. S. v. Warner, 4 McLean, 463; U. S. v. Taylor, 5 Ibid. 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, 2 Blatch. 528.

[2] U. S. v. Warner, 4 McLean, 463; U. S. v. Keller, 19 Fed. Rep. 633. See Steamboat New World v. King, 16 How. U. S. 469. In U. S. v. Doig, 4 Fed. Rep. 193, it was held that the place of misconduct has in such cases jurisdiction. *Supra*, § 292.

[3] U. S. v. Collyer, *ut supra*.

[4] Ibid.; S. P., R. v. Allen, 7 C. & P. 153; R. v. Gregory, 2 F. & F. 153; R. v. Birchall, 4 Ibid. 1087.

[5] U. S. v. Warner, 4 McLean, 463.

[6] Whart. on Hom. § 105; U. S. v. Warner, 4 McLean, 463.

[7] R. v. Taylor, 9 C. & P. 672; R. v. Allen, 7 Ibid. 153; R. v. Green, Ibid. 156.

have been done heedlessly and incautiously, and not with an intent to do mischief, the crime will be manslaughter;[1] while it would be murder if the rider intended to divert himself with the fright of the crowd,[2] or to have seriously injured any one whom he might strike.[3]

Rapidity which puts the horse out of control imposes liability.

§ 354. Certain particular conditions, however, must be maintained in driving, which it is well to keep in mind. Any degree of rapidity on a thoroughfare, inconsistent with the degree of check with which the horses may be held, may make the owner responsible; and this rule applies though it appear that prior caution by the person struck might have kept him out of danger, unless such want of caution was the immediate cause of the disaster.[4]

Care to be that usual to prudent drivers.

§ 355. The care to be exercised is that which careful drivers are accustomed to use.[5] Hence, a driver who fails to exercise such care and thereby injures another is penally responsible.[6] As a rule, care is to be proportioned to

[1] 1 East P. C. 231.

[2] 1 Hawk. P. C. c. 31, s. 68.

[3] 1 Hale, 475; Foster, 263; Lee *v.* State, 1 Cold. (Tenn.) 62. *Supra*, §§ 111, 113, 319.

[4] Whart. on Neg. §§ 306, 323, 388; R. *v.* Walker, 1 C. & P. 320; R. *v.* Mastin, 6 Ibid. 396; R. *v.* Timmins, 7 Ibid. 499; R. *v.* Swindall, 2 Carr. & Kir. 229; 2 CoxdC. C. 273. *Supra*, §§ 147, 163.

[5] Whart. on Neg. §§ 31–46. Compare R. *v.* Huggins, 2 Stra. 882; 2 Ld. Ray. 1574; 1 Hale P. C. 486.

[6] 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 though 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.

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.[1]

All parties concerned liable as principals.

§ 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.[2] And this rule holds good in respect to all cases where an injury is produced.

[1] R. *v.* Swindall, *ut supra;* Comp. *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 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, if he does not 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.* Watson, 1 Phila. 24; 7 Penn. St. 365.

[2] R. *v.* Swindall, 2 C. & K. 229; 2 Cox C. C. 141. *Supra*, § 353.

to an innocent third person by a collision between two parties who are both negligent.[1]

Letting loose noxious animals.

§ 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,[2] or was in such a position that he should have known of such tendencies.[3] If the mischief was undesigned by the defendant, the offence is manslaughter; if designed, murder.[4]

Killing of helpless person by negligent act is manslaughter.

§ 358. The doing an act, or the imperfect performance of a duty towards a person who is helpless, which naturally and ordinarily leads to the death of such person, is murder, if death or grievous bodily harm is intended; and manslaughter, if the cause is negligence.[5]

Death of child by parent's neglect is manslaughter.

§ 359. So far as concerns the neglect of a mother to properly 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

[1] Colegrove *v.* N. Y. and N. H. R. R., 20 N. Y. 492; aff. S. C. 6 Duer, 382; Lockhardt *v.* Lichtenthaler, 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, Ibid. 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.

[2] R. *v.* Dant, L. & C. 567; 10 Cox C. C. 102.

[3] *Supra*, § 207; Whart. on Neg. § 904.

[4] See fully Whart. on Hom. § 125.

[5] 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. F. Stephen (Dig. C. L. art. 223) thus states the point in Walters's 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."

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.[1] To constitute murder there must be means to relieve, and wilfulness in withholding relief.[2] 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.[3] Hence, as we have seen, it is not necessary to aver in the indictment possession of means by the parent.[4]

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 parent's neglect to supply his wants is not the subject of indictment.[5] Nor can the parent's conscientious errors of judgment in matters of medical treatment be at common law punished.[6]

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.[7] Pufendorf tells us[8] 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.[9]

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.[10]

To place a helpless infant child in such a position that it cannot

[1] *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 Ibid. 455; R. *v.* Conde, 10 Ibid. 547; R. *v.* Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569. See, however, R. *v.* Knights, 2 F. & F. 46.

[2] R. *v.* Saunders, 7 C. & P. 277.

[3] *Supra*, § 335; R. *v.* Mabbett, 5 Cox C. C. 339; R. *v.* Bubb, 4 Ibid. 455.

[4] R. *v.* Ryland, L. R. 1 C. C. 99; 10 Cox C. C. 569.

[5] *Supra*, § 335; *infra*, § 1585; R. *v.* Shepherd, 9 Cox C. C. 123; L. & C. 147.

[6] *Supra*, § 336.

[7] Nichole *v.* Allen, 3 C. & P. 36.

[8] Book 4, c. 11, s. 6.

[9] 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.

[10] R. *v.* Saunders, 7 C. & P. 277.

live is murder if the intent be to kill; and manslaughter if the desertion be negligent.[1]

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.[2]

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 necessaries of life.[3] This rule undoubtedly applies to jailers and almshouse keepers, and persons undertaking the voluntary charge of lunatics.[4] 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.[5]

But it is necessary that the guardianship should be special.[6] And, as has already been seen,[7] a brother, omitting to supply his idiot brother with food, is not, in default of proof of such obligation, indictable for the omission.[8] It is otherwise if the control be exclusive and absolute.[9]

Physician liable for lack of ordinary diligence and skill.

§ 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.[10] If he does not possess the skill or apply the care usual among good practitioners of his school under the circumstances, and

[1] R. *v.* Walters, C. & M. 164; R. *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.

[2] Self's Case, 1 East P. C. 226; 1 Leach C. C. 137; 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 Ibid. 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.

[3] *Supra*, § 333; *infra*, § 1585.

[4] 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, Ibid. 47 n., and other cases cited *supra*, § 333.

[5] R. *v.* Marriott, 8 C. & P. 425.

[6] R. *v.* Pelham, 8 Q. B. 959.

[7] *Supra*, § 331; *infra*, §§ 1563 *et seq.*

[8] R. *v.* Smith, 2 C. & P. 449.

[9] R. *v.* Porter, L. & C. 394; 9 Cox C. C. 449; R. *v.* Edwards, 3 C. & P. 611. *Supra*, §§ 330–1.

[10] Whart. on Neg. § 730. See as to question of causal relation, *supra*, § 157. This subject is discussed at large in 3 Whart. & St. Med. Jur. §§ 765 *et seq.* See Bost. Med. Jour., Dec. 4, 1884, 544.

his patient dies in consequence of his neglect, then he is chargeable with manslaughter.[1]

The burden is on the prosecution to prove negligence.[2]

Not responsible if patient was direct cause of injury.

§ 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.[3] The question of assent on the part of the patient is to be determined by all the circumstances in the case.[4]

No difference between licensed and unlicensed practitioner

§ 364. It was at one time held in England that persons not graduated and licensed as physicians are to be held to a severer accountability than persons who are so graduated and licensed.[5] But the 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 where there is no deceit, if there be a *bona fide* and honest attempt by the defendant to do his best, and if he possess skill and knowledge requisite for the position he claims.[6] On the other hand, whoever undertakes

[1] 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 Ibid. 525; R. *v.* Markuss, 4 F. & F. 356; R. *v.* Macleod, 12 Cox C. C. 534; Matheson's Case, 1 Swinton, 593; State *v.* Hildreth, 9 Ired. 440; State *v.* Hardister, 38 Ark. 605; 3 Whart. & St. Med. Jur. § 765. For cases at large see Whart. on Hom. §§ 143–4. See, also, Com. *v.* Green, 80 Ky. 178.

[2] R. *v.* Bull, 2 F. & F. 201; R. *v.* Spencer, 10 Cox C. C. 525; State *v.* Schulz, 55 Iowa, 628, discussed in 3 Whart. & St. Med. Jur. § 765. See Brown *v.* State, 38 Tex. 482, that reasonable doubt must acquit.

[3] *Supra*, §§ 157, 162–3; McCandless *v.* McWha, 22 Penn. St. 261; S. C., 25 Ibid. 95. See the qualifications in Hibbard *v.* Thompson, 109 Mass. 286; Brown *v.* State, 38 Tex. 482.

[4] *Supra*, § 144.

[5] 4 Black. Com. 197; 1 Hale, 429. Brit. c. 5; 4 Inst. 251; R. *v.* Simpson, Willcock's L. Med. Prof. Append. 227.

[6] R. *v.* Van Butchell, 3 C. & P. 629; R. *v.* Williamson, Ibid. 635; R. *v.* Spiller, 5 Ibid. 333, coram Bolland, B., and Bossanquet, J. See, also, Lamphier *v.* Philpot, 8 Ibid. 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 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, reason-

to deal with a dangerous remedy ought to acquaint himself with its properties; and if, from ignorance of what he ought to know and professes to know, the death of the patient ensues, he is indictable for manslaughter.[1] It is true that a more lenient view has been taken by high authorities in this country;[2] it being held that it is a defence in such cases that the defendant's ignorance was honest. But this only holds good where such ignorance is excusable. A layman, for instance, advising a quack medicine on the faith of its general reputation, would not be responsible for the bad consequences. It would be otherwise with respect to ignorance of a matter with which it is the party's duty to be acquainted.[3] A specialist, therefore, who ignorantly applies dangerous remedies which prove fatal, but with whose character he ought to have been acquainted, is indictable for manslaughter.[4]

Culpable ignorance in any view imposes liability.

§ 365. Hence, whatever may have been the views expressed in some of the earlier cases,[5] a person practising medicine or surgery is bound to know the nature of the remedies he prescribes, and the treatment he adopts; and he is responsible criminally for any injuries resulting from his ignorance in this relation.[6] *A fortiori*, where he is pursuing a plan of bold imposture, he is liable for injuries produced by his ignorance, and this whether he be with or without a degree.[7]

Careless or ignorant use of dangerous agent is negligence.

§ 366. Proof of the use or administration of dangerous agencies by an incompetent person is evidence from which culpable negligence can be inferred.[8]

§ 367. It matters not whether the medical man is dealing with a patient as a feed physician or as a volunteer friend. Thus in a case tried before Denman, 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]

able, and competent degree of skill." See R. *v.* Simpson, 1 Lew. C. C. 172; R. *v.* Ferguson, Ibid. 181; Com. *v.* Thompson, 6 Mass. 134.

[1] See 3 Whart. & St. Med. Jur. § 765.

[2] Rice *v.* State, 8 Mo. 561; State *v.* Schulz, 55 Iowa, 628.

[3] Whart. on Neg. §§ 415 *et seq.*

[4] Com. *v.* Pierce, Sup. Ct. Mass. 1884, 18 Rep. 757.

[5] Com. *v.* Thompson, 6 Mass. 134.

[6] See *supra*, §§ 343, 345.

[7] *Supra*, § 362; R. *v.* Long, 4 C. & P. 398; R. *v.* Long, 4 Ibid. 423; R. *v.* Macleod, 12 Cox C. C. 534; see Ann *v.* State, 11 Humph. 159; Parsons *v.* State, 21 Ala. 434; Holmes *v.* State, 23 Ibid. 17; State *v.* Hardister, 38 Ark. 605; See Com. *v.* Stratton, 114 Mass. 303.

[8] R. *v.* Crick, 1 F. & F. 519; R. *v.* Crook, Ibid. 521; R. *v.* Markus, 4 Ibid. 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

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

midwife, the care and charge of B. 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 Case, the prisoner was a blacksmith, drunk, and wholly ignorant 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 workman who are guilty of negligence in their application of such powers to practical use.[1]

The jury should be directed, however, to acquit, if the care usual with good workmen under similar circumstances was shown.[2]

So when death is caused by negligent desertion of post.

§ 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 not leaving machinery in the public path is not liable for

[1] R. *v.* Carr, 8 C. & P. 163, cited *supra*, §§ 154, 337.

[2] Rigmardon's Case, 1 Lew. 180; Fenton's Case, Ibid. 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 circumstances 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*, §§ 131 *a*, 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. See *supra*, § 130.

injuries caused by the interposition of an independent responsible agent.[1]

IV. KILLING IN ATHLETIC SPORTS.

Prize-fighters liable for manslaughter in case of non-malicious killing of antagonist.

§ 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 such circumstances, all participants encouraging a prize-fight in which death ensues are also guilty of manslaughter.[2]

And so of participants in unlawful sports.

§ 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.[3] In

[1] R. *v.* Hilton, 2 Lewin C. C. 214. This case can only be sustained on the ground that the steam engine was not in the public path. The same distinction may be taken as to elevators in private houses, the proprietors of which are not responsible for the interference of meddlers.

[2] R. *v.* Murphy, 6 C. & P. 103; R. *v.* Young, 8 Ibid. 844; and see §§ 232, 451, as to limitations. So far as the opinion of Littledale, J., in R. *v.* Murphy, goes to affirm that all present at a prize-fight are indictable, it is overruled by R. *v.* Coney, cited *infra*, §§ 372, 636; *supra*, § 212. As to liability in such cases, see *infra*, § 636.

[3] Fost. 260. See *supra*, § 211 *a*. 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

such cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained; and meetings of this kind have also a strong tendency in their nature to a breach of the peace.[1] Nor does provocation operate to acquit. Thus in a case of old date, where the prisoner had killed his opponent in a boxing match, it was held that he was guilty of manslaughter; though he had been challenged to fight by his adversary in public trial of skill in boxing, and was also urged to engage by taunts, and the occasion was sudden.[2] Hence the English custom of cock-throwing, at Shrovetide, has been considered unlawful and dangerous; and accordingly, where a person throwing at a cock, missed his aim, and killed a child who was looking on, Mr. J. Foster ruled it to be manslaughter; and, speaking of the custom, he says: "It is a barbarous, unmanly custom, frequently productive of great disorders, dangerous to the bystanders, and ought to be discouraged."[3] So throwing stones at another wantonly in play, being a dangerous sport, without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, and by such means killing a person, will be manslaughter.[4]

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 excessive strength, is manslaughter. R. *v.* Bradshaw, 14 Cox C. C. 63. See *infra*, § 636; *supra*, § 142.

In R. *v.* Orton, 39 L. T. (N. S.) 293; 14 Cox C. C. 226, the evidence was that a number of person assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as at prize-fights. The combatants fought for about forty minutes with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators. It was held that if this was a mere exhibition of skill in sparring, it was not illegal; but if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize-fight, whether the combatants fought in gloves or not. It was subsequently held, however, that mere voluntary presence at such a fight does not make the party so present guilty of aiding and abetting. R. *v.* Coney, L. R. 8 Q. B. D. 534; 15 Cox C. C. 46; 46 L. T. (N. S.) 307; *supra*, § 211. See comments in Law Times, Dec. 17, 1881, p. 111.

[1] 1 East P. C. c. 5, s. 42, p. 270.

[2] Ward's Case, 1 East P. C. 270.

[3] Fost. 261.

[4] 1 Hawk. P. C. c. 29, s. 5. See *infra*, § 636.

§ 373. Persons who take part in lawful athletic games, and fairly follow the rules belonging to such games, are not responsible for deaths accidentally resulting therefrom.[1] But in such cases, if the weapons used are of a dangerous and unsuitable character, and are employed with recklessness which leads to death, the offender, in case of death, is guilty of manslaughter. Thus, in an early English case, the 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.[2] 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.[3] 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.

But not so in lawful athletic sports.

§ 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

[1] See Penn *v.* Lewis, Addison, 270; and see fully argument in Whart. on Hom. § 163; as to assaults, *infra*, § 636; Fenton's Case, 1 Lew. 179. *Infra*, § 636.

[2] 1 Hale, 472.

[3] Ibid. 473; Fost. 260.

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.[1] In accordance with this view it has been held manslaughter to cause death by ducking another;[2] 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;[3] by shooting with a gun, though for the mere purpose of alarming;[4] by throwing stones into a coal pit in sport;[5] by upsetting a cart as a joke;[6] by administering, as a joke, excessive quantities of intoxicating liquor.[7] But when a piece of turf was thrown in sport by one of a party digging it at another, and death ensued, an acquittal was directed.[8]

In practical jokes responsibility attaches.

V. CORRECTION BY PERSONS IN AUTHORITY.

§ 374. When death ensues, in consequence of correction by parents, masters, and others having lawful authority, and such correction is considered only reasonable, the death will be treated as accidental.[9] Where, however, the correction exceeds the bounds of due moderation, either in the measure of it, or in the instrument made use of for the purpose, it will be either murder or manslaughter, according to

Killing by undue correction, manslaughter.

[1] R. *v.* Powell, 7 C. & P. 641; State *v.* Hardie, 47 Iowa, 647. See article in 22 Alb. L. J. 184; and see cases cited *supra*, § 344.

[2] 1 East P. C. 236.

[3] R. *v.* Errington, 2 Lew. 217.

[4] State *v.* Roane, 2 Dev. 58. *Supra*, § 344. And so when the pistol was shot only as a frolic. Smith *v.* Com., 100 Penn. St. 324; State *v.* Hardie, 47 Iowa, 647.

[5] Fenton's Case, 1 Lewin, 179. *Infra*, § 631; *supra*, § 259. See Hill *v.* State, 63 Ga. 578.

[6] R. *v.* Sullivan, 7 C. & P. 641. In this case a carman was in the front part of a cart, loading it with sacks of potatoes, and a boy pulled the trapstick out of the front of the car, but not with intent to do the man any harm, as he had seen it done several times before by others; and in consequence of the trapstick having been taken out, the cart tilted up, and the deceased was thrown out on his back on the stones, and the potatoes were shot out of the sacks, and fell on and covered him over, and he died in consequence of the injuries then received. It was held that as the intent was to commit a mere trespass, the boy was guilty of manslaughter.

[7] R. *v.* Martin, 3 C. & P. 211; R. *v.* Packard, 1 C. & M. 246. *Supra*, § 347.

[8] R. *v.* Conrahy, 2 Cr. & Dix. 86. See R. *v.* Waters, 6 C. & P. 328; *supra*, § 125.

[9] 1 East P. C. 261. *Supra*, § 259.

the circumstances.[1] If done with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter;[2] if with a dangerous weapon, likely to kill or maim, and with cruelty, it will be murder; due regard being had in both instances to the age and strength of the party.[3] So, as was said in a case already cited, if a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who notwithstanding compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast and is drowned thereby, and his death is occasioned by such misconduct in the master; under such circumstances it is murder in the master. If there be no malice in the master, the crime is reduced to manslaughter.[4] So if a father, without malice, beats his son for theft so severely with a rope that he dies, it is only manslaughter; if with malice, it is murder;[5] and so for a person *in loco parentis* to cruelly overwork or maltreat a child, producing its death.[6]

A schoolmaster who, on a boy's return to school, wrote to his parents, proposing to beat him severely, in order to subdue his alleged obstinacy, and on receiving his father's reply, assenting thereto, beat the boy for two hours and a half secretly in the night, and with a thick stick, until he died, was held guilty only of manslaughter, no malice being proved.[7]

VI. STATUTORY DISTINCTIONS.

§ 375. According to the older common law authorities, not only was it murder to kill another, though the intent was merely to

[1] R. *v.* Griffin, 11 Cox C. C. 402, where death from a blow given by a father to a child two and a half years old, was held manslaughter; and see R. *v.* Conner, 7 C. & P. 438.

[2] Anon., 1 East P. C. 261.

[3] Fost. 262; Kel. 28, 133; 1 Hale, 454, 457, 473, 474; 1 Hawk. c. 29, s. 5; 1 Leach, 378; R. *v.* Conner, 7 C. & P. 438; R. *v.* Cheeseman, 7 Car. & P. 455; State *v.* Harris, 63 N. C. 1, a case of death by extremely cruel chastisement by one *in loco parentis*. For other cases see *infra*, §§ 631–4.

[4] U. S. *v.* Freeman, 4 Mason C. C. 505. See U. S. *v.* Knowles, 4 Sawyer, 517, cited *supra*, § 337.

[5] Anon., 1 East P.C. 261. *Infra*, § 631.

[6] R. *v.* Cheeseman, 7 C. & P. 455. See 2 Twiss's Lord Eldon, 36; State *v.* Harris, 63 N. C. 1. *Supra*, § 360.

[7] R. *v.* Hopley, 2 F. & F. 202. *Infra*, §§ 630–2. See Com. *v.* Randall, 4 Gray 36. And as to schoolmaster's right to chastise, see *infra*, § 632.

severely hurt, but it was considered murder if homicide were unintentionally committed by a person when engaged in a collateral felony. It is true, that so long as all killing incidental to a felonious purpose was punishable with death, there was no practical call for a classification of such killings. But when under humaner auspices it was felt that death should only be assigned as a punishment to homicides specifically and maliciously intended, it was found necessary to distinguish between this class of murders and murders in which there was no such intent. It was for this purpose that legislative action was invoked. The statute, however, in which the distinction first found formal expression was not a law imposed by the legislature on the people, but a law which had grown into practical acceptance with the people, and had then been put into technical shape by the legislature. Juries for generations had refused to convict of murder unless a specific intent to take life had been shown; or, if they did convict, when there was no such proof, it was with a recommendation to mercy, which withdrew from the sentence at least the incident of punishment by death.[1]

Old English law indifferent to gradations of guilt.

[1] This process of evolution is thus stated: "Pennsylvania may be taken as a conspicuous illustration of the position that, at least in the earlier stages of a community, laws, moulded by the conditions of a people, are inspired by its conscience and needs, and not dictated by a sovereign. Pennsylvania was in part settled by English colonists, who, it has been repeatedly declared, brought with them the English common law. In Pennsylvania, down to the Revolution, the British Parliament was as absolute as in England. Yet not only did the judges of the Supreme Court, in answer to a request from the legislature, announce that numerous of the oldest British statutes had never been in force in the State, but they declared, as a rule, that British statutes, made even before the settlement of the province, were not in force in it unless 'convenient and adapted to the circumstances of the country.' The judges do not say, 'we decide that these statutes are not to be regarded as hereafter in force.' What they virtually say is: 'These statutes never were in force here.' But why? They had been enacted by the British Parliament, many of them before Pennsylvania had been settled; and a series of other statutes were declared to be in force because enacted by the British Parliament; this being held to be the case with the statute of limitations, 32 Hen. VIII.; the statute of additions, 1 Hen. V.; the statute of escapes, 13 Edw. I.; and, what is still more remarkable, the statutes of mortmain. Whart. Com. Am. Law. § 23. It was in this way that capital punishment fell into gradual disuse in Pennsylvania in all but murder cases; and even in murder, the distinction of degrees, as now existing, was adopted in practice before it was formulated in legislation.

§ 376. By the following analysis the distinctive features of the statutes of several States can be seen at a glance:— General analysis of statutes.

MURDER IN THE FIRST DEGREE.

	ENUMERATED INSTANCES.	GENERAL DEFINITION.
Maine	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."
New Hampshire	"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."
Massachusetts .	Murder "in the commission of or in an attempt to commit any crime punishable with imprisonment for life,[1] or committed with extreme atrocity or cruelty."[2]	Murder "committed with deliberately premeditated malice aforethought."
New York . . .	Murder "when perpetrated without any design to effect death by a person engaged in the commission of any felony."[3] By § 183 of the Penal Code of 1882, this is extended so as to include *attempt* at felonies.	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,[4] 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."[5]
Pennsylvania .	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."
Connecticut . .	Ibid.	Ibid.
New Jersey . .	Ibid.	Ibid.
Michigan . . .	Ibid.	Ibid.
Missouri . . .	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.
Virginia . . .	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.
Tennessee . . .	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] This includes all crimes on which such punishment may be inflicted. Com. *v.* Pemberton, 118 Mass. 36.

[2] As to what constitutes "extreme atrocity or cruelty," see Com. *v.* Desmarteau, 16 Gray, 1; Com. *v.* Devlin, 126 Mass. 253.

[3] See *infra*, §§ 380, 384.

[4] A death unintentionally caused by cruel beating is not within this clause. Darry *v.* People, 2 Parker C. R. 606; 6 Seld. 120.

[5] Act of May 29, 1873. As to this statute see Leighton *v.* People, 88 N. Y. 117.

The earliest of these statutes was that of Pennsylvania, and was drafted by the first Mr. William Rawle and 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.

Pennsylvania and cognate statutes leave distinction between murder and manslaughter untouched, making specific intent to take life the peculiar feature of murder in the first degree.

§ 377. The general definition of the Pennsylvania and cognate statutes does not affect the common law distinction between murder and manslaughter;[1] 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. Between murder (embracing under the terms both degrees) and manslaughter, the distinction remains as at common law.[2]

[1] *Infra*, 388.

[2] Resp. *v.* Bob, 4 Dallas, 146; Penn. *v.* Honeyman, Addison, 148; Penn. *v.* Lewis, Ibid. 283; Com. *v.* Green, 1 Ashmead, 289; Com. *v.* Murray, 2 Ibid. 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; State *v.* Jones, 1 Houst. Cr. 21; Bennett *v.* Com., 8 Leigh, 745; Slaughter *v.* Com., 11 Ibid. 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 Ibid. 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 Ibid. 671; Riley *v.* State, 9 Ibid. 646; Bratton *v.* State, 10 Ibid. 103; Warren *v.* State, 4 Cold. 130; Petty *v.* State, 6 Baxt. 610; State *v.* Shoultz, 25 Miss. 128; People *v.* Potter; 5 Mich. 1; State *v.* Curtis, 79 Mo. 594; State *v.* Stoeckli, 71 Ibid. 559; Nye *v.* People, 35 Mich. 16; Baker *v.* People, 40 Ibid. 411; People *v.* Barry, 31 Cal. 357; People *v.* Josephs, 7 Ibid. 129; People *v.* Haun, 44 Ibid. 96; People *v.* Doyell, 48 Ibid. 85; Milton *v.* State, 6 Neb. 136; State *v.* Raymond, 11 Nev. 98; Savage *v.* State, 18 Fla. 909; Territory *v.* Romaine, 2 New Mex. 114; 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 Tex. 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. *Supra*, §§ 106–122; *infra*, §§ 380 *et seq.*

As to Alabama, see Fields *v.* State, 52 Ala. 348; Simpson *v.* State, 59 Ibid. 1. The distinction between the Alabama and the Pennsylvania statutes is given in Mitchell *v.* State, 60 Ibid. 26.

In Delaware the statute, while preserving the common law distinction between murder and manslaughter, makes murder with express malice aforethought murder in the first degree, while murder in the second degree includes all other cases of common law murder. This is held to exclude from murder in the first degree murder incidental to felonies. State *v.* Jones, 1 Houst. Cr. 21; State *v.* Buchanan, Ibid. 79; State *v.* Green, Ibid. 217; State *v.* Boice, Ibid. 355.

In Texas the distinction is also that of malice express, and of malice implied, though the grade is made to depend on the nature of the instrument used. Primus *v.* State, 2 Tex. Ap. 369; Jones *v.* State, 3 Ibid. 150; Tooney *v.* State, 5 Ibid. 163; Gardenhire *v.* State, 6 Ibid. 147; Lanham *v.* State, 7 Ibid. 126; Rye *v.* State, 8 Ibid. 163; Robins *v.* State, 9 Ibid. 666; Eanes *v.* State, 10 Ibid. 421; Hill *v.* State, 11 Ibid. 456. But see *supra*, § 113; *infra*, § 392.

Under the Texas statute, homicide with intent to do serious bodily harm which will probably end in death, may be murder in the first degree. Cox *v.* State, 5 Ibid. 493.

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

§ 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 seen that on this point there exists some conflict of authority. Keeping in view the severity which the construction of a penal statute

"Wilful" means specifically willed.

of this State." The Supreme Court on this point say: "The sixth instruction is correct under the statute of this State. Homicide" ("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 in State *v.* Nueslin, 25 Mo. 111. See State *v.* Joeckel, 44 Ibid. 234.

In State *v.* Green, 66 Ibid. 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, makes homicide murder in the first degree, although such homicide was not "wilful, deliberate, or premeditated."

In State *v.* Wieners, 66 Ibid. 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 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, under the statute, be wilful or premeditated or deliberate in order to be murder in the first degree, the question is open to doubt. See *infra*, § 384, Souther *v.* Com., 7 Grat. 673. The question 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," etc., 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 *et seq.*"

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.[2] These cases are all murder at common law, but it is plain that they want the essential features of deliberation to make them murder under the statutes before us. Under these statutes the deliberate intent must be "to take life."[3]

"Deliberate" to be regarded as qualifying "killing."

§ 380. To establish the predicate of "premeditated," which, under most of the statutes, is an essential incident of murder in the first degree,[4] it has been said that a positive previous intent to take life must be shown;[5] but this opinion has since been recalled by the court that delivered it,[6] 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.[7] But

"Premeditated" an essential incident.

[1] See Felton *v.* U. S. 96 U. S. 699.

[2] *Infra*, § 388. As to meaning of deliberation, see *supra*, § 117; State *v.* Sharp, 71 Mo. 218; State *v.* Cooper, Ibid. 436, and cases in next note.

[3] State *v.* Mitchell, 64 Ibid. 191; State *v.* Melton, 67 Ibid. 594; Nye *v.* People, 35 Mich. 16. As to N. Y. statute see People *v.* Batting, 49 How. Pr. 392.

[4] See State *v.* Curtis, 70 Mo. 594; State *v.* Lopez, 15 Nev. 407.

[5] Mitchell *v.* State, 5 Yerger, 340.

[6] State *v.* Andrews, 2 Tenn. 6; Dale *v.* State, 10 Yerg. 551. *Supra*, §§ 116–7.

[7] Hill *v.* Com., 2 Grat. 594; State *v.* Turner, Wright, 30; State *v.* Curtis, 70 Mo. 594. See *infra*, § 392; *supra*, §§ 116–17.

Sir J. F. 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

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, etc.—there is a substantial concurrence of authority on the general meaning of *premeditation*. It involves a prior intention to do the act in question.[1] It is not necessary, however, that this intention should have been conceived for any particular period of time.[2] It is as much premeditation, if it entered into the mind of the guilty agent a moment before

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.

[1] State *v.* Wieners, 66 Mo. 13; State *v.* Williams, 69 Ibid. 110; Binns *v.* State, 66 Ind. 428; Schlencker *v.* State, 9 Neb. 300.

[2] *Supra*, § 117; *infra*, § 388; U. S. *v.* Neverson, 1 Mack. (U. S.) 152; Keenan *v.* Com., 44 Penn. St. 55; Warren *v.* Com., 36 Ibid. 45; Kilpatrick *v.* Com., 31 Ibid. 198; Green *v.* Com., 83 Ibid. 75; Donnelly *v.* State, 2 Dutch. (N. J.) 463; Shoemaker *v.* State, 12 Ohio, 43; State *v.* Clifford, 58 Wis. 477; Whiteford *v.* Com., 6 Rand. Va. 721; Hill *v.* Com., 2 Grat. 594; Bailey *v.* State, 70 Ga. 617; Miller *v.* State, 54 Ala. 155; Queen *v.* State, 1 Lea, 285; Swan *v.* State, 4 Humph. 136; Clark *v.* State, 8 Ibid. 671; McKenzie *v.* State, 26 Ark. 334; State *v.* Dunn, 18 Mo. 419; State *v.* Jennings, Ibid. 435; State *v.* Hayes, 23 Ibid. 287; State *v.* Holmes, 54 Ibid. 153; State *v.* Mitchell, 64 Ibid. 191; State *v.* Hill, 69 Ibid. 451; State *v.* Kilgore, 70 Ibid. 391; State *v.* Curtis, 70 Ibid. 594; State *v.* Sharp, 71 Ibid. 218; People *v.* Cotta, 49 Cal. 166; Milton *v.* State, 6 Neb. 136; Schlencker *v.* State, 9 Ibid. 300; State *v.* Ah Mook, 12 Nev. 144. In Indiana, the statute is construed to require that an intention should be proved or be inferred to have been formed by the defendant prior to the act; Fahnestock *v.* State, 23 Ind. 231; but this does not differ from the view of the text. See Binns *v.* State, 66 Ind. 428. In Texas, the view of the text is vigorously combated. Atkinson *v.* State, 31 Tex. 440; Ake *v.* State, 30 Ibid. 466; S. C., 31 Ibid. 416. But see Duebbe *v.* State, 1 Tex. Ap. 159; Craft *v.* State, 3 Kansas, 450. See, also, Bivens *v.* State, 6 Eng. 455. In Alabama, under the code, the killing must be "wilful, deliberate, malicious, and premeditated" which involves prior thought. Smith *v.* State, 68 Ala. 424.

the act, as if it entered ten years before.[1] And the reason of this is obvious. In the first place, if in order to make murder in the first degree it be necessary that the idea should be proved to have been conceived a week or a day ahead, there will be no murder in the first degree at all, for the guilty party will take care that the conception be concealed until the limitation is passed. In the second place, all psychological investigation shows that the process of mental conception lies beyond the scrutiny of exact observation.[2] Hence judges have generally united in holding that while there must be some sort of *pre*meditation,—*i. e.*, the blow must not be the incident of mania or a sudden paroxysm of passion, such as suspends the intellectual powers,—whether there has been such premeditation is for the jury; and they are to be governed, in their determination of this question, under the instructions of the court, by a logical examination of all the facts in the case. The question, in other words, is one of fact, not of arbitrary technical law.[3] But

[1] People *v.* Clark, 3 Selden, 385; Com. *v.* Daley, 4 Penn. L. J. 150; Wright *v.* Com., 33 Grat. 880; McDaniel *v.* Com., 77 Va. 281; Dains *v.* State, 2 Humph. 439.

[2] "In this case we have to deal only with that kind of murder in the first degree described as wilful, deliberate, and premeditated. Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offence. Therefore, if an intention to kill exists, it is wilful. If this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated." Agnew, C. J., Com. *v.* Drum, 58 Penn. St. 9. See, also, McCue *v.* Com., 78 Ibid. 185; State *v.* Holme, 54 Mo. 162; McQueen *v.* State, 1 Lea, 594; Gray *v.* State, 4 Bax. 332.

[3] Resp. *v.* Mulatto Bob, 4 Dallas, 145; Green *v.* Com., 83 Penn. St. 75; Quigley *v.* Com., 84 Ibid. 18; Collier *v.* State, 69 Ala. 247; State *v.* White, 30 La. An. 364; King *v.* State, 4 Tex. Ap. 256; Jones *v.* State, Ibid. 436; Irwin *v.* State, 19 Fla. 872. Whart. Crim. Ev. §§ 734 *et seq.* *Supra*, §§ 116, 117.

Under the New York statute it has been held that the "deliberate and premeditated design" must precede the killing for an appreciable period of time, no matter how brief, which may suffice for reflection and consideration, and the formation of a definite purpose. People *v.* Majone, 91 N. Y. 211; S. C., 12 Abb. N. C. 187. But it is not necessary to show motive or prior ill feeling. People *v.* Cornetti, 92 N. Y. 85. See *supra*, § 117, for other cases. To the same general effect see Simmerman *v.* State, 14 Neb. 568.

In Missouri it has been held that a charge defining premeditation as "thought for any length of time, however short," is defective in omitting "beforehand." State *v.* Harris, 76

when premeditation is shown, an intermediate provocation, not involving bodily danger, does not reduce the degree.[1]

Facts from which premeditation may be inferred.

§ 381. There are, however, certain facts which, when proved, justify, in cases where courts are at liberty to charge on matters of fact, instructions to the jury that from them, as a matter of logic, a deliberate intent to take life may be inferred.[2] Where a man intelligently and maliciously makes use of a weapon likely to take life, the party assailed being unarmed;[3] 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;[4] where the act is part of a conspiracy to destroy persons of a particular class;[5] where the facts indicate peculiar cruelty;[6] such evidence, when standing by itself, entitles us to hold, as a presumption of fact, that the intention to take life was deliberate.[7] The same view was taken where the defendant loaded a pistol, took aim at, and shot the deceased;[8] where he deliberately procured a butcher's knife and sharpened it for the avowed purpose of killing the deceased;[9] where

Mo. 361. See State *v.* McGinnis, Ibid. 326.

The definition of premeditation as "thought beforehand, for any length of time, however short, has too often and too long had the sanction of this court to be repudiated now." Henry, J., State *v.* Snell, 78 Ibid. 243.

[1] State *v.* Clifford, 58 Wis. 477.

[2] See Whart. on Cr. Ev. §§ 734 *et seq.*; and see *supra*, §§ 313, 314; Green *v.* Com. 83 Penn. St. 75; Lanahan *v.* Com., 84 Ibid. 80; Nevling *v.* Com., 98 Ibid. 323; Beltram *v.* State, 9 Tex. Ap. 280; Gaitan *v.* State, 11 Ibid. 544.

[3] Kilpatrick *v.* Com., 31 Penn. St. 198; McGinnis *v.* Com., 102 Ibid. 66; Abernethy *v.* State, 101 Ibid. 322; Howell's Case, 26 Grat. 995; Mitchell *v.* Com., 33 Ibid. 872.

[4] Campbell *v.* Com., 84 Penn. St. 187.

[5] Ibid.; Carroll *v.* Com., 84 Ibid. 107; Kehoe *v.* Com., 85 Ibid. 127; Smith *v.* State, 7 Tex. Ap. 414; Pharr *v.* State, Ibid. 472; Graves *v.* State, 14 Ibid. 113; Duran *v.* State, Ibid. 195; Stanley *v.* State, Ibid. 315; State *v.* Clifford, 58 Wis. 477; State *v.* Kearley, 26 Kan. 77; State *v.* Anderson, 10 Oreg. 448; State *v.* Burke, 71 Ala. 377.

[6] State *v.* Mahly, 68 Mo. 315.

[7] Resp. *v.* Mulatto Bob, 4 Dal. 145; Com. *v.* Williams, 2 Ashmead, 69. See State *v.* Spencer, 1 Zab. 196.

[8] Com. *v.* Smith, 7 Smith's Laws, 696.

[9] Com. *v.* O'Hara, 7 Smith's Laws App. 594. See Green *v.* Com., 83 Penn. St. 75; Lanahan *v.* Com., 84 Ibid. 80;

he concealed a dirk in his breast, stating, shortly before the attack, that he knew where the seat of life was;[1] where he thrust a handspike deeply into the forehead of the deceased.[2] But it is not necessary, to warrant a conviction of murder in the first degree, that the instrument should be such as would necessarily produce death.[3] Thus where the weapon of death was a club not so thick as an axe-handle, the jury, under the charge of the court, rendered a verdict of murder in the first degree, it appearing that the blow was induced by a deliberate intention to take life,[4] though it was otherwise when the weapon was a crowbar, suddenly caught up.[5] The same inference of premeditation is drawn with still greater strength from the declared purpose of the defendant,[6] as where the defendant said he intended "to lay for the deceased, if he froze, the next Saturday night," and where the homicide took place that night;[7] where he said: "I am determined to kill the man who injured me;"[8] where he declared, the day before the murder, that he certainly would shoot the deceased;[9] where, in another case, the language was: "I will split down any fellow that is saucy;[10] and

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 Commonwealth, 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 Ibid. 18. But see Whart. Cr. Ev. §§ 734–764.

[1] Bennett's Case, 8 Leigh, 749.

[2] 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.* Tooby, 2 Rice's Digest, 104; Casat *v.* State, 41 Ark. 511; Moore *v.* State, 15 Tex. Ap. 2; Short *v.* State, Ibid. 381; Gomez *v.* State, Ibid. 327.

[3] See McDaniel *v.* Com., 77 Va. 281.

[4] Com. *v.* Murray, 2 Ashmead, 57.

[5] Kelly *v.* Com., 1 Grant, 484.

[6] Stewart *v.* State, 1 Ohio St. 66; Whart. Cr. Ev. §§ 756 *et seq.* See Nevling *v.* Com., 98 Penn. St. 323; State *v.* Dickson, 78 Mo. 439.

[7] Jim *v.* State, 5 Humph. 145.

[8] Com. *v.* Burgess, 2 Va. Cases, 484; Whart. Crim. Ev. §§ 756 *et seq.*

[9] Com. *v.* Smith, 7 Smith's Laws, 696.

[10] Resp. *v.* Mulatto Bob, 4 Dallas, 146.

where a grave had been prepared a short time before the homicide, though the deceased was not ultimately placed in it, the whole plan of action being changed.[1] But inferences of this class are matters of reasoning, not of formal jurisprudence; and when the statute leaves the matter to the jury, a court is not justified in absolutely directing the jury to find for a particular degree.[2]

Killing B. when the intent was to kill C. is murder in the first degree.

§ 382. Where A., with intent to kill B., shoots at B. and kills C., without particular intent to kill C., the offence has been held murder at common law.[3] Is it murder in the first degree under our statutes? Supposing the case to be one in which we can legitimately infer deliberation and intent, the answer, at the first view, would be in the affirmative. It is objected, however, that in such case there is no exclusive intent to take the life taken. But is this essential to murder in the first degree? If it be necessary to a conviction of murder in the first degree that such an intent should be exactly proved, could there be ever such a conviction? A., for instance, thinks that he is injured by B., and A., therefore, shoots B. under the impression that he shoots one by whom he has been injured. But is this impression ever coincident with the truth? Can we recall any case of malice in which the defendant's passions did not, more or less, create an ideal object of enmity? Would it be any defence to the shooting of B. that A. supposed B. to be a different character from what he really was, and that therefore his shooting B. was a mistake? If we negative these questions, we can only do so by assuming the position that the grade of a malicious homicide is not reduced by the fact that the defendant mistook his relations to the person whom he killed. And there are several collateral reasons, suppos-

[1] Com. *v.* Zephon, MS., Phil. 1844.

[2] Hopt *v.* U. S., 110 U. S. 574; People *v.* Raten, 63 Cal. 421, 433; Whart. Cr. Pl. and Pr. § 812. "The jury must not be imperatively required to render a verdict for a particular degree of homicide." Adams *v.* State, 29 Ohio St. 415; affirm. Diesbach *v.* State, 38 Ibid. 369. To same effect see Abernethy *v.* State, 101 Penn. St. 322.

[3] See *supra*, §§ 110–120, 317. Callahan *v.* State, 21 Ohio St. 306; State *v.* Raymond, 11 Nev. 98. To the same effect, see Com. *v.* Dougherty, 7 Smith's Laws, 698; Com. *v.* Flavel, Phil. 1846, MSS.

As differing from the above, see Bratton *v.* State, 10 Humph. 103. In McConnell *v.* State, 13 Tex. Ap. 390, the grade in such cases is held to be murder in the second degree.

ing that the person killed was the one whom the defendant aimed at, why we should not limit this principle by excluding from it cases where A. kills C. by mistaking him for B. *First*, in such a killing we have the constituents necessary to the guilt of murder in the first degree—deliberation, intent, malice, and killing. *Secondly*, the policy of society eminently requires that life should be protected by the application of this principle; for while I may elude the attack of one with whom I know myself to be at enmity; no prudence on my part can ward off from me an attack which mistakes me for another, and to prevent such attack I must rely exclusively on the protection of the law. *Thirdly*, the question of particular intent is one as to which it is difficult to apply an exact gauge; and if it is necessary to prove in each case an exact intent to kill the particular person, just prosecutions must often fail, because in most cases, from the inherent imperfection of evidence, no such proof can be supplied. At the same time we must remember, as we have already observed,[1] that were the question still open, the true course, in cases where the intent was to kill B., and C. was negligently killed by the blow meant for B., C. not having been aimed at by A., is to indict for an attempt to kill B., and for the negligent manslaughter of C.[2]

Grade of homicide when the individual killed is one of a group generally attacked determined by the general intent.

§ 383. Where A. maliciously aims at a body of men, intending to kill any one of them, and kills B., the offence is murder in the first degree; if he intends only to hurt seriously, it is murder in the second degree.[3] The first of these propositions is settled by the reasoning of the last section.[4] If A., intending maliciously to kill B., kills C. instead of B., is guilty of murder in the first degree, *a fortiori* is this the case where A., when killing C., kills one of a group of persons, some one of whom he intended to kill. On the other hand, if his intent was only to do serious bodily harm, his offence, though murder at common law, is only murder in the second degree under the Pennsyl-

[1] *Supra*, §§ 120, 319; and see Pliemling *v.* State, 46 Wis. 516.

[2] *Supra*, §§ 109–111, 120, 319.

[3] See *supra*, § 319; State *v.* Edwards, 71 Mo. 312; Aiken *v.* State, 10 Tex. Ap. 610.

[4] See *supra*, §§ 119, 319. In Alabama this is prescribed by statute, which, however, is only declaratory of the common law; Presley *v.* State, 59 Ala. 98; Washington *v.* State, 60 Ibid. 10.

vania and cognate statutes, it not containing the necessary constituent of an intent to kill.[1]

Killing in perpetration, or attempted perpetration, of arson, rape, robbery, burglary (or other offences specified in this connection in statute), not necessarily murder in the first degree.

§ 384. It has sometimes been said that a homicide in the perpetration of, or attempt to perpetrate any arson, rape, robbery, or burglary, is, under the Pennsylvania and cognate statutes, murder in the first degree. But it must be remembered that the statutes under criticism do not say that "*Homicide*," when so committed, shall be murder in the first degree, but that "*Murder*," when so committed, shall be murder in the first degree. Nothing, therefore, that is not murder at common law 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 either in the first or the second degree under the statutes, although it is a homicide committed in perpetration of one of the specified felonies.[2] On the other hand, if the offence would

[1] Under the Alabama code the offence would be murder in the first degree. Washington *v.* State, 60 Ala. 10.

[2] State *v.* Dowd, 19 Conn. 388; Com. *v.* Hanlon, 3 Brewst. 461; S. C., 8 Phil. R. 401; Chauncy, *ex parte*, 2 Ashm. 227; State *v.* Earnest, 70 Mo. 520; Pharr *v.* State, 7 Tex. Ap. 472. See Com. *v.* Jones, 1 Leigh, 610, and comments in Whart. on Hom. § 184. In New York this view does not seem to be accepted. People *v.* Van Steenburgh, 1 Park C. R. 39, though see Buel *v.* People, 18 Hun, 489; S. C., 78 N. Y. 492. In Buel *v.* People, the defendant, while attempting to ravish a girl, passed a strap around her neck, by which she was strangled. This was held murder in the first degree; a decision not inconsistent with the text, as the offence would have been murder at common law. See to same effect, Cox *v.* People, 19 Hun, 430; 80 N. Y. 500, where the murder was incidental to burglary. See State *v.* Brown, 7 Oreg. 186. 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 dissuades 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, etc., killing*," so that to some degree the bearing of the latter definition on the enumerated instances is weakened. Souther *v.* State, 7 Grat. 678.

That "other felony" in the Missouri statute must be some felony not necessarily incident to the assault, see State *v.* Shock, 68 Mo. 352; *supra*, § 377.

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.

have been murder at common law, then, although there was no intent to take life, the case, if the homicide were committed in the perpetration or attempt at perpetration of an enumerated felony, is murder in the first degree under the statutes.[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

[1] Ibid. Com. *v.* Pemberton, 118 Mass. 36; Buel *v.* People, 78 N. Y. 492; Com. *v.* Hare, Whart. Hom. Ap.; Com. *v.* Daley, 4 Penn. L. J. 357; Howell *v.* Com., 26 Grat. 995; Moynihan *v.* State, 70 Ind. 126; Riley *v.* State, 9 Humph. 646; Tooney *v.* State, 5 Tex. Ap. 163; Pharr *v.* State, 7 Ibid. 472.

[2] *Supra*, § 346. See Diesbech *v.* State, 38 Ohio St. 365.

[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 Ibid. 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. As to distinction in Texas, see Tooney *v.* State, 5 Tex. Ap. 163.

In State *v.* Wells, 61 Iowa, 633, the evidence was that the defendant, a convict in the State's prison, administered to one of the guards, in order to effect an escape, chloroform in such quantities as to produce death. This was held to be murder in the first degree under a statute which provides that "all murder which is perpetrated by means of poison, of lying in wait, or by any kind of wilful, deliberate, and premeditated killing . . . is murder in the first degree." In the opinion of the court there are some expressions to the effect that the clause above cited covers all cases of intentional poisoning. But the proper view is that only cases of murder at common law are, when effected by poison, under this clause, murder in the first degree. That this particular case was murder at common law may be maintained on two grounds: (1) that the chloroform was administered in such a way as to be a deadly poison; (2) that this offence was collateral to an indictable felony.

In State *v.* Dowd, above cited, the court said: "If any case can be supposed where murder may be committed by means of poison, and not be the result of such an act (deliberate), then a conviction of murder in the second degree may be legal."

In State *v.* Wagner, 78 Mo. 644, the poison was laudanum administered to the deceased for the purpose of fraudulently inducing him to part with his

time, where the evidence shows that the death was effected by intentional and malicious poisoning, the court, where this is not precluded by statute, may tell the jury that the offence is murder in the first degree.[1]

Homicide committed by means of poison or lying in wait, not necessarily murder in the first degree.

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 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.[2]

§ 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.[3]

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;[4] nor is it enough that the offence consists in

Under the statutes, "attempt" must be a substantive offence.

property. This, being murder at common law, was held murder in the first degree under the Missouri statute; the court at the same time saying, "a homicide by poison is not necessarily murder at common law, Whart. on Hom. § 92," recognizing, therefore, the distinction in the text.

[1] Shaffner *v.* Com., 72 Penn. St. 60; People *v.* Hall, 48 Mich. 482. See *supra*, § 392.

[2] See People *v.* Miles, 55 Cal. 207.

[3] See this point examined *supra*, §§ 320 *et seq.*

[4] See *supra*, § 180.

mere solicitation; or in purpose without distinctive overt act.[1] "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."[2]

§ 388. Murder in the second degree includes all cases of common law murder[3] where the intention was not to take life, of which murder, when the intent was only to do great bodily hurt, may be taken as a leading illustration.[4] 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.[5] And this is the case generally wherever the mind, from any form of disturbance, is incapable of framing a specific purpose.[6] It has been also held that where the offence is murder, but there is no proof of intent, the grade is the

Murder in the second degree includes 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.

[1] *Supra*, § 179.

[2] Thompson, C. J., Kelly *v.* Com., 1 Grant, 486.

[3] That "malice aforethought" is essential, see Daly *v.* People, 39 Hun, 182; State *v.* Curtis, 70 Mo. 594; State *v.* Stoeckli, 71 Ibid. 559; Brooks *v.* State, 90 Ind. 428; People *v.* Grigsby, 62 Cal. 482; Bohannon *v.* State, 15 Neb. 209.

[4] Com. *v.* Dougherty, 7 Smith's Laws, 698; Whiteford *v.* Com. 6 Rand. (Va.) 721; State *v.* Robinson, 73 Mo. 306; State *v.* Erb, 74 Ibid. 199; Allsup *v.* State, 5 Lea, 362; State *v.* Decklotts, 19 Iowa, 447. See Washington *v.* State, 53 Ala. 29; State *v.* Hill, 69 Mo. 451; Harris *v.* State, 36 Ark. 127; Caldwell *v.* State, 41 Tex. 86; Hill *v.* State, 11 Tex. Ap. 456. As to Delaware statute, see State *v.* Jones, 1 Houst. C. C. 21; State *v.* Hamilton, Ibid. 101; State *v.* Gardner, Ibid. 146; State *v.* Green, Ibid. 217; State *v.* Till, Ibid. 233; State *v.* Boice, Ibid. 355; State *v.* Rhodes, Ibid. 476.

[5] Com. *v.* Hare, 4 Penn. Law Jour. 257; and see Com. *v.* Sherry, App. Whart. on Hom.; Com. *v.* Neills, 2 Brewst. 553. *Supra*, §§ 47, 118. It is said in Missouri, that mental excitement and disturbance produced by insults consisting only of words, may reduce the offence to murder in the second degree. State *v.* Ellis, 74 Mo. 207; State *v.* Kotowsky, Ibid. 247.

[6] *Supra*, § 47.

second degree.[1] But premeditation is essential, as in other cases of murder.[2]

Murder in drunkenness is murder in the second degree.

§ 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] When, however, the defendant voluntarily made himself drunk in anticipation of the crime, the offence is murder in the first degree.[5]

Killing a woman in an attempt to produce abortion, murder in the second degree.

§ 390. As has been already noticed, if a pregnant woman be killed in an attempt to produce abortion in her, and it appears 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.[6] And on the principles already expressed, this may be defended in all cases where the

[1] Harris *v.* State, 8 Tex. Ap. 90; Douglass *v.* State, Ibid. 520; Hubby *v.* State, Ibid. 597.

[2] State *v.* Lewis, 74 Mo. 222.

[3] See cases cited *supra*, §§ 47, 48, 51, 52; Willis *v.* Com., 32 Grat. 929; State *v.* Trivas, 32 La. An. 1086.

[4] Carpenter, J., State *v.* Johnson, 40 Conn. 136; see 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 actual 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.

[5] *Supra*, § 49; Nevling *v.* Com., 98 Penn. St. 323; State *v.* Robinson, 20 W. Va. 713.

[6] *Supra*, §§ 316, 325; *infra*, § 450; Com. *v.* Jackson, 15 Gray, 187; Chauncy, *ex parte*, 2 Ashm. 227; State *v.* Moore, 25 Iowa, 128; Yundt *v.* People, 65 Ill. 372.

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.

Murder in second degree a compromise courts are unwilling to disturb.

§ 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.[1]

In cases of doubt presumption is for murder in second degree.

§ 392. The character of the presumption to be drawn in cases of malicious killing is elsewhere independently discussed.[2] 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. Wherever the killing is with a deadly weapon, and there is evidence aliunde showing that this was 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 prosecution.[3] Stripping the case of these incidents, however, and supposing that simply

[1] Whart. on Hom. § 193; Slaughter *v.* Com., 11 Leigh, 682; State *v.* Ostrander, 30 Mo. 18; State *v.* Hudson, 59 Ibid. 135; State *v.* Cooper, 71 Ibid. 436; State *v.* Mewherter, 46 Iowa, 88. See, however, Clem *v.* State, 42 Ind. 420; Pliemling *v.* State, 46 Wis. 516; State *v.* Mahly, 68 Mo. 315.

[2] See Whart. Crim. Ev. §§ 734, 764.

[3] Murray *v.* Com., 79 Penn. St. 311; Kehoe *v.* Com., 65 Ibid. 127.

a malicious killing be proved, then the inference is of murder in the second degree.[1]

Common law indictment for murder sustains either degree.

§ 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.[2] The same principle has been recognized

[1] *Supra*, § 118; Whart. on Cr. Ev. §§ 334, 721; Com. *v.* Drum, 58 Penn. St. 9; O'Mara *v.* Com., 75 Ibid. 424; Brown *v.* Com., 76 Ibid. 319; Laros *v.* Com., 84 Ibid. 230; State *v.* Walters, 45 Iowa, 389; Hill *v.* Com., 2 Grat. 594; McDaniel *v.* Com., 77 Va. Ap. 281; Mitchell *v.* State, 5 Yerg. 340; Witt *v.* State, 6 Cold. 5; Davis *v.* State, 10 Ga. 101; Green *v.* State, 69 Ala. 6; State *v.* Holme, 54 Mo. 153; State *v.* Evans, 65 Ibid. 574; State *v.* Gassert, Ibid. 352; State *v.* Winge, 66 Ibid. 181; State *v.* Testerman, 68 Ibid. 408; State *v.* Eaton, 75 Ibid. 586; State *v.* Phelps, 76 Ibid. 319; 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 Ibid. 698; Ake *v.* The State, 30 Ibid. 473; Lindsay *v.* The State, and Williams *v.* The State, decided at this term." Ogden, J., Hamby *v.* State, 36 Ibid. 523; *supra*, § 377.

[2] State *v.* Verril, 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 Ibid. 245; Cox *v.* People, 80 Ibid. 500; Com. *v.* White, 6 Binn. 183; Com. *v.* Flannagan, 7 Watts & S. 415; McCue *v.* Com., 78 Penn. St. 185; Graves *v.* State, 45 N. J. L. 347; Com. *v.* Miller, 1 Va. Cas. 310; Com. *v.* Gibson, 2 Ibid. 70; Com. *v.* Wicks, Ibid. 387; Livingston's Case, 14 Grat. 592; Cargen *v.* People, 39 Mich. 540; State *v.* Lessing, 16 Minn. 75; Hines *v.* State, 8 Humph. 597; Mitchell *v.* State, 5 Yerger, 340;

in cases where murder is committed in the attempt to commit arson, rape, robbery, etc., 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 reason-

Poole *v.* State, 2 Baxter, 288; Taylor *v.* State, 11 Lea, 708; People *v.* Lloyd, 9 Cal. 54; People *v.* Bonilla, 38 Ibid. 699; State *v.* Millain, 3 Nev. 409; State *v.* Thompson, 12 Ibid. 140; State *v.* Hing, 16 Ibid. 307; People *v.* Ah Choy, 1 Idaho N. S. 317; Gehrke *v.* State, 13 Tex. 568; White *v.* State, 16 Ibid. 206; Wall *v.* State, 18 Ibid. 682; Henrie *v.* State, 41 Ibid. 573; Evans *v.* State, 6 Tex. Ap. 513; Bohannan *v.* State, 14 Ibid. 380; McAdams *v.* State, 25 Ark. 405; Leschi *v.* Terr., 1 Wash. Ter. 23; Brannigan *v.* Terr., 3 Utah, 133. See State *v.* Cleveland, 58 Me. 564; Hogan *v.* State, 30 Wis. 437; Davis *v.* State, 39 Md. 355.

As to Florida, see Bird *v.* State, 18 Fla. 493.

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 Ibid. 58. But see State *v.* Kilgore, *infra*.

As to California, see People *v.* Wallace, 9 Cal. 30; People *v.* Lloyd, Ibid. 54; People *v.* Stevenson, Ibid. 273; People *v.* Dolan, Ibid. 576; People *v.* Murray, 10 Ibid. 309; People *v.* Choisier, Ibid. 310; People *v.* Urias, 12 Ibid. 325.

In Connecticut, under the Revised Statutes, providing that the "degree of the crime shall be alleged," it is sufficient, after stating the crime in the usual common law form, to add that the defendant did thereby commit murder in the first degree. Smith *v.* State, 50 Conn. 193. And see, also, State *v.* Hamlin, 47 Conn. 95; State *v.* Smith, 38 Ibid. 397.

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.

As to Montana, see Territory *v.* McAndrews, 3 Mont. 158.

As to Kansas, see State *v.* Fooks, 29 Kan. 425; State *v.* Brown, *infra*.

[1] Com. *v.* Flannagan, 7 Watts & Serg. 415.

[2] See *supra*, § 376; and particularly 1 Whart. & St. Med. Jur. §§ 181, 214, 227.

sonable 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.[1] 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 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 cases of murder in the first degree. Hence, also, under an indictment in the common law form the prosecution may put in evidence killing by poison, or killing with the intent to commit arson, rape, robbery, or burglary,[2] or killing by lying in wait.[3]

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.[4]

[1] This has been even held when the statute makes a "sound mind" a constituent of murder. Fahnestock *v.* State, 23 Ind. 231. See Dumas *v.* State, 63 Ga. 600.

[2] Roach *v.* State, 8 Tex. Ap. 478. See, as to indictment in New York, Cox *v.* People, 80 N. Y. 500.

[3] State *v.* Kilgore, 70 Mo. 546.

[4] 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 Ibid. 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, as we have seen, a statute was passed in 1870 declaring

§ 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.[1] 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."[2] In Maryland this has been held essential.[3] But such a degree of particularity is inconsistent with the practice which has been generally sustained.[4] And, in any view, an acquittal or conviction of the minor degree on an indictment good for the major is an acquittal of the major.[5] But the verdict must specify the degree.[6] And defendants, whether joint principals, or principals and accessaries, may be convicted of different degrees.[7]

Verdict should specify degree.

VII. RIOTOUS HOMICIDES.

§ 395. When an unlawful assemblage takes place for the redress of a supposed *public* wrong, and particularly where its object is the overturn of government, or the resistance of executive, legislative, or judicial authority as such, participation in it, to the extent of levying war against the government for these public purposes, becomes treason. Where, however, the intention is to redress a private or social grievance, and to incidentally resist process merely so far as may be necessary to effect the private or social end, the offence amounts not to the

When war is levied against government for private purposes, and killing follows, indictment should be for homicide.

that in all indictments of murder the degree shall be charged. State *v.* Hamlin, 47 Conn. 95, cited *supra*. 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.

[1] See Com. *v.* Herty, 109 Mass. 348; Keefe *v.* People, 40 N. Y. 348; Davis *v.* State, 39 Md. 355; State *v.* Grant, 7 Oregon, 414.

[2] See *infra*, § 541.

[3] State *v.* Flannigan, 6 Md. 166. See *infra*, § 541; Weighurst *v.* State, 7 Md. 445.

[4] Whart. Cr. Pl. & Pr. §§ 736 *et seq.*

[5] See authorities given more fully, *infra*, § 541; Whart. Cr. Pl. & Pr. §§ 465, 742.

A verdict of guilty of murder in the second degree "is equivalent to an express acquittal of the defendant for murder in the first degree, and the defendant could successfully plead the proceedings in this case in bar of any subsequent prosecution against him for the same offence." McMillan, C. J., State *v.* Lessing, 16 Minn. 80, 187.

[6] *Infra*, § 543.

[7] *Supra*, § 236.

dignity of treason, and if during its commission life is lost, the offender may be tried for homicide. Two observations, however, may properly be made in this connection: (1) Even supposing treason exists, the felony of murder or manslaughter does not *merge* in it. Merger only exists where a misdemeanor and a felony form a constituent part of the same act, as where an attempt to commit a larceny and the larceny itself unite. In such cases it is the felony alone that can be prosecuted. But *two* felonies cannot thus coalesce, for being each of equal grade neither sinks into the other. (2) The domains of treason have become restricted within limits which 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]

Co-rioters principals in riotous killing.

§ 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, 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."[2] And the principle applies to cases of unlawful assembly not amounting to riot.[3]

But not in collateral crimes.

§ 397. It should be observed, however, that while the parties are responsible for consequent acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals. Thus 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.[4] 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.[5]

[1] U. S. *v.* Hanway, 2 Wall. Jr. 139.

[2] *Supra*, § 213; 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; R. *v.* McNaughton, 14 Cox C. C. 576; 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; Lamb *v.* People, 96 Ibid. 73; State *v.* Simmons, 6 Jones (Law) N. C. 21; People *v.* Brown, 59 Cal. 345.

[3] R. *v.* McNaughton, 14 Cox C. C. 576.

[4] *Supra*, §§ 214-220; R. *v.* Skeet, 4 F. & F. 931; R. *v.* Hawk, 3 C. & P. 394; R. *v.* Collison, 4 Ibid. 565; R. *v.* Warner, 5 Ibid. 525; R. *v.* Price, 8 Cox C. C. 96; R. *v.* Manning, 2 C. & K. 887; U. S. *v.* Gibert, 2 Sumn. 19.

[5] R. *v.* Turner, 4 F. & F. 339.

§ 398. Where a sudden popular movement is got up for the purpose of redressing some supposed grievance, the 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, in which all voluntary participants, passive or active, are responsible.[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]

Presence without intent to kill involves manslaughter.

§ 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] Under the statute above analyzed, 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.

Killing by lynch-law is murder in the first degree.

§ 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 there be cooling time, offence may be murder.

[1] See *supra*, §§ 213 *et seq.*; R. *v.* Murphy, 6 C. & P. 103; R. *v.* Collison, 4 Ibid. 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 Ibid. 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.

If he do, and slay his assailant, the offence will be murder or manslaughter, according to the particular circumstances.[1] 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 original provocation to the fatal blow. What interval of time is necessary to exclude the hypothesis of continuousness is, of course, dependent upon the circumstances of the case and the temperament of the individuals. But a good test is the interposition of other subject matters in the mind, and its intermediate voluntary adoption of other topics. Thus it has been ruled that if, between the provocation received and the mortal blow given, the prisoner fall into other discourse or diversion, giving him a reasonable time for cooling; or if he take up and pursue any other business or design not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his attention was called off from the subject of the provocation, any subsequent killing of his adversary, especially where a deadly weapon is used, is murder.[2] It is obvious, therefore, that no measurement of time can be adopted in this respect. In periods of great public excitement, when men's minds have been so absorbed with a particular topic as to be incapable of considering anything else, a much greater period is required to cool after a supposed provocation than under ordinary circumstances. Care, however, should be taken in this as well as in all similar cases, lest the public excitement be used as a cloak for private cupidity or revenge.[3]

§ 400. The law, as we will hereafter observe,[4] is that private citizens, may of their own authority, lawfully endeavor to suppress a riot, and for that purpose may even arm themselves, and that whatever is honestly done by them in the execution of that object will be supported and justified by the common law.[5]

Private persons may kill in suppression of riot.

[1] *Infra*, §§ 478–482; and see *supra*, § 114.

[2] Com. *v.* Green, 1 Ashm. 289.

[3] See *infra*, §§ 476–478.

[4] *Infra*, §§ 404–406.

[5] *Infra*, § 404; State *v.* Roane, 2 Dev. 58. *Infra*, §§ 404, 405.

VIII. HOMICIDE BY OFFICERS OF JUSTICE.

§ 401. Homicide committed by the sheriff in execution of a warrant to that effect is of course justifiable, entitling him to an acquittal.[1] It is important to observe, however, that the judgment and sentence must be strictly followed, since if death is inflicted otherwise than directed the officer will be guilty of manslaughter, at least, if not of murder.[2] If the judgment be hanging, and the officer behead the party, this is said to be murder;[3] 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.[4] A subaltern cannot defend himself by a warrant from an unauthorized superior.[5]

Killing in obedience to warrant justifiable.

§ 402. With the exceptions hereafter stated, officers of the law, when their authority to arrest or imprison is resisted, will be justified

[1] *Infra*, § 508.

[2] 1 Hale, 501; 2 Ibid. 411; 3 Inst. 52, 211; 4 Bl. Com. 179. See *supra*, §§ 94, 307; *infra*, § 508.

[3] 1 Hale, 433, 454, 466, 501; 2 Ibid. 411; 4 Black. Com. 179.

[4] Sir J. F. 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." *Infra*, § 411. For C. J. Cockburn's charge, see *supra*, § 8.

[5] *Supra*, §§ 94, 310; U. S. *v.* Carr, 1 Woods, 480.

in opposing force to force even if death should be the consequence;[1] yet they ought not to come to extremities upon every slight interruption, without a reasonable necessity.[2] 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.[3]

And so when necessary to effect an arrest.

The cases under this head may be 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 this will amount to murder.[4] 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;[5] and if there be resistance, and an affray ensue, during which the party sought to be arrested is slain, the offence will also be but manslaughter.[6] But 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.[7]

Officer intentionally killing a person flying from civil arrest chargeable with murder.

[1] Compare *infra*, § 411; R. *v.* Dadson, 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. See on this point § 204 of N. Y. Penal Code of 1882.

[2] 1 East P. C. 297.

[3] 1 Hale, 481; Fost. 291.

[4] 1 Hale, 481; Fost. 291. *Infra*, § 416.

[5] R. *v.* Tranter, 1 Stra. 499.

[6] Fost. 293, 294.

[7] State *v.* Anderson, 1 Hill S. C. 327.

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;[1] but the offence will amount only to manslaughter if it appear that death was not intended.[2]

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.[3] And it is manslaughter for an officer to kill a prisoner in prevention of an escape when the escape could be prevented by less violent means.[4]

§ 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,[5] but not a homicide committed in pursuit, unless special authority be given, or the pursuit be conducted according to law.[6] So far as concerns officers armed with a warrant, 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 he had adequate grounds to believe 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.[7] Such is the old law; but in States where the distinction between felonies and misdemeanors is done away with,

Otherwise in respect to felonies

[1] See State *v.* O'Neil, 1 Houst. C. C. 468, cited *supra*, § 317.

[2] 1 East P. C. 302; R. *v.* Smith, 4 Black. Com. 201, note. See State *v.* Oliver, 2 Houst. (Del.) 585. *Infra*, § 429.

[3] 1 East P. C. 525. See Clements *v.* State, 50 Ala. 117.

[4] Reneau *v.* State, 2 Lea, 239.

[5] *Infra*, §§ 426–429, 440, 488, 497, 537; Pond *v.* People, 8 Mich. 150; Oliver *v.* State, 17 Ala. 487; Dill *v.* State, 25 Ibid. 15; 1 East P. C. 259. See Whart. Cr. Pl. & Pr. § 8.

[6] 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.

[7] R. *v.* Hagan, 8 C. & P. 167; U. S. *v.* Travers, 2 Wheel. C. C. 510; 1 Brunf. (U. S.) 467; State *v.* Roane, 2 Dev. 58; People *v.* Burt, 51 Mich. 199; Reneau *v.* State, 2 Lea, 720; Whart. Cr. Pl. & Pr. §§ 8, 9, 13.

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.[1] 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; for if, in these cases, fresh pursuit be made, and *a fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. The same rule holds if a felon, after arrest, break away as he is carried to jail, and his pursuers cannot retake without killing him. But if he may be taken, in any case, without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not.[2]

Killing by officer justifiable in prevention of escape in felonies.

§ 407. As has been already observed, if officers of the law, when engaged in the preservation of the peace, find it necessary to take life, such homicide is justifiable. The rule is not confined to the instant the officer is on the spot, and at the scene of action, engaged in the business which brought him thither, for he is under the same protection going to, remaining at, or returning from the same; and, therefore, if he come to do his office, and meeting great opposition, retire, and in the retreat is killed, this will amount to murder. He went in obe-

Killing justifiable when necessary to preserve peace.

[1] 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 Whart. Cr. Pl. & Pr. §§ 1–17.

[2] Ibid.; R. *v.* Allen, 7 C. & P. 153; R. *v.* Green, Ibid. 156; U. S. *v.* Jailer, 2 Abb. U. S. 280; Wright *v.* State, 44 Tex. 645. As to escape see *infra*, § 1672; *supra*, § 361.

dience to the law, and in the execution of his office, and his retreat was necessary to avoid the danger which threatened him. And upon the same principle, if he meet with opposition by the way, and is killed before he come to the place, such opposition being intended to prevent his doing his duty, which is a fact to be collected from the circumstances appearing in evidence, this will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him. It follows from this that if such an officer successfully resists those who seek to obstruct and hinder him from proceeding to the lawful execution of his duty in such respect, he is justified, even should the lives of the assailants, their aiders and abettors, be taken, from the necessary extent of the resistance so made.[1]

Lawful arrest unlawfully executed imposes responsibility.

§ 408. An arrest, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party who, while performing it, in the prosecution of his purpose causes the death of another person, guilty of murder,[2] though if the officer act without malice, and the irregularity be trivial, the offence may be only 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.[3]

Legal warrant necessary.

§ 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.[4] The offence is manslaughter if the arrest is *bonâ fide* and without malice.[5]

[1] *Infra*, § 1555; King, P. J.—4 Penn. Law Jour. 29. See Whart. Cr. Pl. & Pr. § 16.

[2] See *supra*, § 139.

[3] 1 East P. C. 297; 1 Hale, 481, 488, 494; 2 Ibid. 84; Caffe's case, 1 Ventr. 216; State *v.* Roberts, 52 N. H. 492; State *v.* Hull, 34 Conn. 132. *Supra*, § 139.

[4] 1 East P. C. 312. *Infra*, § 432; Whart. Cr. Pl. & Pr. §§ 1–17.

[5] R. *v.* Carey, 14 Cox C. C. 214. See O'Connor *v.* State, 64 Ga. 125; Georgia *v.* O'Grady, 3 Woods, 496; State *v.* Port, 3 Fed. Rep. 124.

Private persons interfering act at their risk.

§ 410. Private persons who, without warrant, undertake to bring felons to justice, are indictable for manslaughter if they unnecessarily take life to prevent an escape;[1] and if they act even under apparent necessity, they are indictable for manslaughter if their belief that a felony was committed was in any way negligent.[2] And if the object is to prevent the commission of a felony, the person so interfering is indictable for manslaughter, unless his action in killing was necessary to prevent enormous wrong.[3]

So as to military and naval officers.

§ 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.[4] And a subaltern cannot defend himself, if he act maliciously, by his superior's commands.[5]

Officer when in danger of life may kill person charged with misdemeanor attempting to escape.

§ 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.[6] The case is then one of homicide in self-defence.

IX. HOMICIDE OF OFFICERS OF JUSTICE AND OTHERS AIDING THEM.

Intentional killing of arresting officer is murder.

§ 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.[7] And it has been decided

[1] *Infra*, § 497; *supra*, § 406.

[2] *Infra*, § 432.

[3] Fost. 318. *Infra*, § 497.

[4] *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, and notices in Thurlow Weed's Life. As to Eyre's Case, see *supra*, § 401, note.

[5] Ibid. See U. S. *v.* Jones, 3 Wash. C. C. 209; Com. *v.* Blodgett, 12 Met. 57. *Supra*, §§ 401 *et seq.*

[6] State *v.* Anderson, 1 Hill S. C. 327. *Infra*, § 454; and see Forster's Case, 1 Lew. 187; cited Whart. on Hom. § 220.

[7] Whart. on Hom. § 225; Fost. 270–271; 1 Hale, 494; 2 Ibid. 117-8; U. S. *v.* Travers, 2 Wheeler's C. C. 495; 1 Brunf. (U. S.), 467; Phillips *v.* State, 66 Ga. 755; Fleetwood *v.* Com., 80 Ky. 1; State *v.* Green, 66 Mo. 631; Angell *v.* State, 36 Tex. 542. See Com. *v.* Drew, 4 Mass. 391; State *v.* Underwood, 75 Mo. 230. *Supra*, § 407.

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.[1] But to sustain a charge of murder it must appear that the person slain had 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;[2] unless, indeed, he were an officer within his proper district, and known, or generally acknowledged, to bear the office he had assumed.[3] 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.[4]

But manslaughter when arrest is illegal.

§ 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 who has authority in such cases to arrest, and such authority is announced, the killing has been held to be murder;[5] but if the arresting party is a private person, manslaughter;[6] the reason given being that the constable has authority, by law, to arrest in such case, but a private person has not.[7] 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.[8] But if an arrest, under color of legal authority, be illegally attempted or enforced, the better opinion now is that the killing of the person arresting, not in malice, but in resisting the arrest, is but manslaughter.[9] And

[1] 1 Hawk. P. C. c. 31, ss. 48, 54.

[2] Fost. 272. *Infra*, § 418; Mockabee *v.* Com., 78 Ky. 380.

[3] 1 Hawk. P. C. c. 31, ss. 49, 50.

[4] 1 Hale, 438. See Ibid. 446; 1 Russ. on Cr. 535. *Supra*, §§ 219, 236.

[5] 1 Hawk. c. 28, s. 12; 2 Hale, 84, 87, 91; and see R. *v.* Porter, 12 Cox C. C. 444; R. *v.* Ford, R. & R. 329; Drennan *v.* People, 10 Mich. 169; People *v.* Pool, 27 Cal. 572.

[6] See 2 Hale, 83, 92.

[7] See, as to arrest, Whart. Cr. Pl. & Pr. §§ 1–17.

[8] See Samuel *v.* Payne, 1 Doug. 359.

[9] 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.* Davis, Ibid. 785; R. *v.* Thompson, 1 Moody C. C. 80; R. *v.* Carey, 14 Cox C. C. 214; Com. *v.* Carey, 12 Cush. 246; Com. *v.* Drew, 4 Mass. 391; Tackett *v.* State, 4 Yerg. 392; Galvin *v.* State, 6 Cold. 291; Poteete *v.* State, 9 Baxt. 261; Noles *v.* State, 26 Ala. 31; Roberts *v.* State, 14 Mo. 146; Jones *v.* State, Ibid. 409; State *v.* Oliver, 2 Houst. 585; Rafferty *v.* People, 69 Ill. 111; S. C., 72 Ibid. 37; People *v.* Burt, 51 Mich. 199; State *v.* Belk, 76 N. C. 10. See Tiner *v.* State, 44 Tex. 128; Ross *v.* State, 10 Tex. Ap. 455. In State *v.* List, 1 Houst. C. C., 133, it was held manslaughter when an officer after being fired at by A., pursued, armed with a pistol, A. into A.'s house, and there was killed by A.

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.[1] 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.[2] 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,[3] while under a statute such case may be murder.[4] But 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.[5]

[1] *Infra*, §§ 465–8; State *v.* Oliver, 2 Houston, 585; Drake *v.* State (Neb. 1883) 18 Rep. 790; State *v.* Anderson, 1 Hill S. C. 327; State *v.* Tiner, 44 Tex. 128; Alford *v.* State, 8 Tex. Ap. 545. See Whart. Cr. Pl. & Pr. §§ 5 *et seq.*; *infra*, § 417.

[2] *Supra*, § 412.

[3] R. *v.* Porter, 12 Cox C. C. 444; 1 Green's C. R. 155.

[4] State *v.* Green, 66 Mo. 631.

[5] Rafferty *v.* People, 72 Ill. 73; Roberts *v.* State, 14 Mo. 138.

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 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 according reasonable provocation." If, however, the crime was committed maliciously, during deliberate attempt to rescue, the irregularity of the warrant does not constitute any defence.

§ 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 protection, as has been already observed, is not confined to the period when the peace officer is at the scene of action; 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] if his authority is not known, the killing in hot blood is manslaughter.[4]

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.[5]

§ 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 reasonable 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

Bailiff's powers limited to arrest.

[1] Russ. on Cr. 535 *et seq.*; R. *v.* Gardner, 1 Mood. C.C. 390; R. *v.* Hagan, 8 C. & P. 167. On the general question may be consulted State *v.* Ferguson, 2 Hill, S. C. 619; People *v.* Pool, 27 Cal. 572.

[2] R. *v.* Thompson, 1 Mood. C. C. 78. *Supra*, § 407; *infra*, § 430.

[3] Ibid. As will hereafter be seen, illegal action of officers may be forcibly resisted. *Infra*, §§ 646 *et seq.*

[4] Fleetwood *v.* Com., 80 Ky. 1. See State *v.* Johnson, 76 Mo. 121.

[5] R. *v.* Hems, 7 C. & P. 312—Williams, J.; R. *v.* Hagan, 8 Ibid. 167—Bolland, B., and Coltman, J. See R. *v.* Porter, 12 Cox C. C. 444.

authority to kill him, though he cannot overtake or secure him by any other means.[1]

§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, this 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 he has no notice, this is homicide in self-defence, if the killing was apparently necessary to save the defendant's life; nor does it matter that the officer was legally seeking to arrest the defendant, the defendant having

If there be no notice, killing in self-protection is not murder.

[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; S. C., 72 Ibid. 73. See Whart. Pl. & Pr. §§ 5 *et seq.*; *infra*, § 648.

[4] Whart. Cr. Pl. & Pr. § 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, Ibid. 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. See People *v.* Brown, 59 Cal. 345.

[5] Fost. 311; 1 Hale, 315, 583. *Infra*, § 1555; Whart. Cr. Pl. & Pr. § 16.

no notice of the fact.[1] Nor should it be supposed that this exemption from distinctive liability, in cases where the officer's official character is not known, is founded on technical reasoning. Not only is it essential to the rights of the citizen that he shall be required to submit to arrest only when the official character of the demand is made known to him, but it is essential to the dignity of the State that its servants should be sheltered by these official prerogatives only when they are acting legally, and give notice that they so act. And it has been held, as we have seen, only manslaughter when a person arresting for a breach of the peace, having authority so to arrest, but not giving notice of such authority, is killed in hot blood by the person arrested.[2] On the other hand, if the killing be malicious, and not in self-defence, the offence is murder.[3]

It should, however, be remembered that if the defendant knows the person apprehending to be an officer, he cannot set up as a defence his erroneous belief that the proceedings are irregular.[4]

Warrant must be executed by party named or his assistant.

§ 420. The English rule is, that the warrant must be executed by the party named or described in it, or by some one assisting such party, either actually or constructively.[5]

Warrant continues in force until executed.

§ 421. There is no time at common law at which an unexecuted warrant ceases to have effect; even after a party is brought before a magistrate, it is of force until judgment.[6]

Warrant in wrong name or with no offence, inoperative.

§ 422. If a constable, having a warrant to apprehend A. B., arrest C. B. under the warrant, such arrest is illegal, although C. B. were the person against whom the magistrate intended to issue the warrant, and although the person who made the charge before the magistrate pointed out C. B. as the man against whom the warrant was issued.[7]

[1] R. *v.* Ricketts, 3 Camp. 68; Yates *v.* People, 32 N. Y. 509; Logue *v.* Com., 38 Penn. St. 265; State *v.* Underwood, 75 Mo. 230; State *v.* Johnson, 76 Ibid. 121. See Com. *v.* Kirby, 2 Cush. 577; Com. *v.* Cooley, 6 Gray, 350; People *v.* Muldoon, 2 Parker C. R. 13; Johnson *v.* State, 26 Tex. 117. Compare *supra*, § 87. As to right to resist illegal acts of officers, see generally *infra*, §§ 646–8.

[2] Fleetwood *v.* Com., 80 Ky. 1.

[3] *Supra*, § 414.

[4] R. *v.* Bentley, 4 Cox C. C. 406.

[5] R. *v.* Whalley, 7 C. & P. 245, 795; Whart. Cr. Pl. & Pr. § 1; R. *v.* Patience, 7 C. & P. 775.

[6] Dickenson *v.* Brown, Peake N. P. 307; R. *v.* Williams, R. & M. 387.

[7] Hoye *v.* Bush, 1 Man. & Gr. 775; so, also, Com. *v.* Crotty, 10 Allen, 403, where a warant specifying the defendant's name as John Doe or Richard Roe, whose other name is to complainant unknown, is held void. See Whart. Cr. Pl. & Pr. § 5. R. *v.* Hood, 1 Mood. C. C. 281.

It has also been held that a warrant omitting to state an offence is illegal.[1]

Falsity of charge no alleviation.

§ 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]

Warrant without seal void.

§ 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 of murder.[4]

Informality not amounting to illegality

§ 425. Where, however, a warrant is merely informal, but not illegal or insensible, its informality will be no palliation for the killing of the officer intrusted with its execution.[5]

[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 Ibid. 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.

[5] 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 Ibid. 452; R. *v.* Downey, 7 Q. B. 281; State *v.* Oliver, 2 Houst. 585. In R. *v.* Allen, *ut supra*, Lord Blackburn wrote the following letter in reply to an application of counsel for the granting of a reserved case:—

"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 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 when the warrant under which the officer is acting is not sufficient to

§. 426. It is not necessary that a warrant be shown to the party to be arrested, provided its substance be mentioned.[1] Indeed, as is elsewhere stated,[2] if reading the warrant to the defendant is a prerequisite to an arrest, the defendant might never be arrested, for he might decline to wait to hear the warrant read.[3]

Warrant need not be shown.

§ 427. As is elsewhere seen,[4] not only officers of justice but private persons are empowered to make arrests in cases where felonies can in no other way be prevented. Independently of this principle, which is not now under discussion, an officer, though without a warrant, has a right to arrest on charge of felony; and if the fact of his being an officer be known to the party attempted to be arrested, killing by the latter of the former will be murder, though no felony was in fact committed.[5]

Arrest on charge of felony lawful without warrant.

§ 428. A class of statutes exist both in England and in this country which give authority not only to constables but also to private persons to apprehend parties *found committing* certain offences specified in such statutes. In these cases it is requisite that the authority to apprehend should be strictly pursued, and the party supposed to be guilty must be apprehended either committing the offence or upon immediate and fresh pursuit.[6] Independently of such statutes, it is held that an officer can arrest for all offences committed in his

Arrest may be made during offence without warrant.

justify in arresting or detaining the prisoner, 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." (Lond. Law Times, May 20, 1882.)

[1] 2 Hawk, P. C. c. 13, s. 28; though see State *v.* Garrett, 1 Wins. N. C. 144; Gen Stat. Mass. c. 158, § 1.

[2] Whart. Cr. Pl. & Pr. § 7.

[3] See R. *v.* Allen, 17 L. T. N. S. 222; Com. *v.* Cooley, 6 Gray, 350; Arnold *v.* Steeves, 10 Wend. 514; State *v.* Townsend, 5 Harring. 487; Wolf *v.* State, 19 Ohio St. 248; Drennan *v.* People, 10 Mich. 169. See, however, under English statute, R. *v.* Davis, L. & C. 64.

[4] Whart. Cr. Pl. & Pr. §§ 8–16. *Supra*, § 405; *infra*, § 495.

[5] R. *v.* Woolmer, 1 Mood. C. C. 334; Boyd *v.* State, 17 Ga. 194.

[6] R. *v.* Curran, 3 C. & P. 397; Hanway *v.* Boultbee, 1 Moo. & Rob. 14; R. *v.* Fraser, R. & M. C. C. 419; R. *v.* Phelps, C. & M. 180; 1 Russ. on Cr. 605; Wolf *v.* State, 19 Oh. St. 248. See People *v.* Burt, 51 Mich. 199.

presence;[1] though it is said in New York that this right is limited to felonies and breaches of the peace.[2]

§ 429. But however it may be with offences committed in the presence of the officer, it is clear that in other cases the officer's right to arrest without warrant is limited to felonies which the defendant is reasonably suspected to have committed, and to breaches of the peace of which a renewal may be expected.[3] But where a serious assault is threatened, and there is a probability of its execution, then the officer may arrest without warrant.[4]

For past offences, right limited to felonies and breaches of the peace.

§ 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.[5]

Killing of officer arresting on reasonable suspicion is murder.

Whatever would amount to probable cause in an action for malicious prosecution is reasonable suspicion to justify an arrest.[6]

§ 431. Military and naval officers, when acting without authority, are to be treated as private citizens, and are responsible as such.[7] 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.[8]

Military and naval officers governed by the same rules.

[1] *Supra*, §§ 391–2; Derecourt *v.* Corbishley, 5 E. & B. 188; R. *v.* Mabel, 9 C. & P. 474; Com. *v.* Deacon, 8 S. & R. 48; State *v.* Brown, 5 Harring. 505. See R. *v.* Light, 7 Cox C. C. 389; D. & B. 332.

[2] Butolph *v.* Blust, 5 Lans. 84; Boylston *v.* Kerr, 2 Daly, 220.

[3] *Supra*, §§ 404–5; Whart. Cr. Pl. & Pr. §§ 1–10; Galliard *v.* Laxton, 2 B. & S. 363. See 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.

[4] R. *v.* Light, D. & B. C. C. 332; Baynes *v.* Brewster, 11 L. J. M. C. 5.

[5] *Supra*, § 427; R. *v.* Ford, R. & R. 329; R. *v.* Thompson, 1 Mood. C. C. 80.

[6] *Supra*, § 411. See Whart. Cr. Pl. & Pr. §§ 1–10; R. *v.* Dadson, T. & M. 389; 2 Den. C. C. 35.

[7] *Supra*, § 411.

[8] Case of the Crew of the Pitt Packet, 4 Bost. Law Rep. 369. See *supra*, § 411, as to Spencer's Case.

§ 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.[1] 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 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*."[2]

Persons aiding officers entitled to protection as officers.

§ 433. The same sanction is, with certain restrictions hereinafter 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.[3] 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.[4]

So as to private persons lawfully arresting independently of officer.

[1] 1 Hale, 462, 463; Fost. 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. Cr. Pl. & Pr. §§ 8, 10 *et seq.* *Supra*, § 410.

[2] R. *v.* Phelps, 1 C. & M. 480; R. *v.* Porter, 12 Cox C. C. 444; State *v.* Oliver, 2 Houst. 585.

[3] Fost. 309; Jackson's Case, 1 East P. C. 298; Brooks *v.* Com., 61 Penn. St. 352. See, however, *supra*, §§ 410, 432; *infra*, §§ 435, 497.

[4] 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; People *v.* Raten, 63 Cal. 421.

§ 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,[1] a party interfering on this principle should be clear, first, that a felony has already been committed, or that an apparent attempt to commit a felony is being made by the party arrested.[2] In the former case it must appear that the felony was apparently 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, unless apparently 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.[3]

Pursuer must show that felony was committed and that the person flying was guilty.

§ 435. Where a felony is in the process of commission, a private person is authorized to interfere and arrest without a warrant.[4] But such felony must, in order to authorize the killing of the felon, be one of violence, involving serious consequences;[5] and a stranger, who interferes in a fight not in itself likely to be fatal, and kills one of the combatants, is chargeable at least with manslaughter.[6]

Private person may interfere to prevent crime.

§ 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

Indictment found, good

[1] *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.

[2] 2 Inst. 52, 172; Fost. 318; Samuel *v.* Payne, Dougl. 359; and in Coxe *v.* Winan, Cro. Jac. 150, it was holden that, without a fact, suspicion is no cause of arrest; and 8 Ed. IV. 3, 5 Hen. VII. 5, 7 Hen. IV. 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.

[3] 1 Hale, 490; Fost. 318. See State *v.* Rutherford, 1 Hawks, 457.

[4] *Infra*, § 495; R. *v.* Hunt, R. & M. 93; R. *v.* Price, 8 C. & P. 282.

[5] *Infra*, § 495.

[6] Com. *v.* Johnston, 5 Grat. 660. See *infra*, § 495 *et seq.*; R. *v.* Canniff, 9 C. & P. 359; R. *v.* Caton, 12 Cox C. C. 624; *supra*, § 220.

cause of arrest by private persons.

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.[1]

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.[2] 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.[3] 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.[4]

In case of public disorder officers may enter houses to arrest.

§ 439. Questions not unfrequently arise, says Sir William Russell,[5] as to the authority of constables and other officers to interfere with persons in inns or beer-houses. It is no part of a policeman's duty to turn a person out of an inn, although he may be conducting himself improperly there, unless his conduct tends to a breach of the peace.[6] Neither is it the duty of a policeman to prevent a person from going into a room in a public house, unless a breach of the peace was likely to be committed by such person in that room.[7] But if a person make such a noise and disturbance in a public house as would create alarm and disquiet the neighborhood, this would be such a breach of the peace as would justify a policeman in taking the party into custody, provided it took place in the presence of the policeman, or the policeman was attracted by the uproar in the

[1] Dalt. c. 170, s. 5; 1 East P. C. c. 5, s. 68, p. 301.

"There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." Beckworth *v.* Philby, 6 B. & C. 638.

[2] *Infra*, § 623. See Whart. on Neg. § 646, and cases there cited.

[3] R. *v.* Mann, 6 Cox C. C. 461.

[4] R. *v.* Bright, 4 C. & P. 387.

[5] 1 Russ. on Cr. 602.

[6] Wheeler *v.* Whiting, 9 C. & P. 262.

[7] R. *v.* Mabel, Ibid. 474—Parke, B.

house, or was called in by the landlord.[1] And unless the peace of the neighborhood be disturbed, or there be danger of the perpetration of a felony, the officer interferes at his own risk.[2]

An officer may also interfere in cases of flagrant breaches of the peace and attempted felonies in private houses, in which cases, if the danger be apparently urgent and extreme, he may enter, notifying his office, without a warrant;[3] and when he is armed with a warrant he may break open the doors to arrest, if he previously notify his business and be refused admittance.[4] He may also, after demand, break into a house, without warrant, to re-arrest an escaped prisoner.[5] But, as to civil suits, the defendant in his own house is privileged from arrest.[6]

Private persons interfering to quell riots should give

§ 440. Private persons interfering in riots for the furtherance of public justice, should expressly avow their intention, or their killing will be but manslaughter.[7] If there be a malicious intention to kill, however, the case is murder.[8]

[1] Howell *v.* Jackson, 6 Ibid. 723—Parke, B.

[2] R. *v.* Preble, 1 F. & F. 325.

[3] Whart. Cr. Pl. & Pr. §§ 18 *et seq.*; 2 Hawk. P. C. c. 14, s. 7; Shaw *v.* Charitie, 3 C. & K. 21.

[4] Fost. 320; 1 Russ. on Cr. 627; Elsee *v.* Smith, 1 D. & R. 97; and see, also, the excellent notes of Messrs. Hare & Wallace to Semayne's Case, 1 Smith's Leading Cases, 164.

Compare Lannock *v.* Brown, 2 B. & A. 952; State *v.* Hooker, 17 Vt. 659; Hooker *v.* Smith, 19 Ibid. 659; Glover *v.* Whittenhall, 6 Hill (N. Y.), 597, 599; Curtis *v.* Hubbard, 1 Ibid. 337; People *v.* Hubbard, 24 Wend. 369; Kneas *v.* Fitler, 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.

[5] Cahill *v.* People, 106 Ill. 621. It is held that in such cases the officer, even without notice, may 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.

[6] See *infra*, § 503.

[7] Fost. 310, 311; U. S. *v.* Travers, 2 Wheeler's C. C. 510; 1 Brunf. (U. S.) 467; 1 East P. C. c. 5, s. 58, p. 510. See *supra*, §§ 418 *et seq.*; *infra*, § 494.

[8] State *v.* Ferguson, 2 Hill S. C. R. 619. See R. *v.* Bourns, 5 C. & P. 120.

notice of their purpose.

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.[1]

Time of execution of arrest.

§ 442. The officer must also be careful not to make an arrest on a *Sunday*, except in cases of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority. But process may be executed in the night-time as well as by day.[2]

Manslaughter when officers take opposite parts.

§ 443. Where officers accidentally, and without malice, take opposite parts in an affray, and one of them is killed, this, says Lord Hale, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other;[3] but upon this it has been remarked, that perhaps it had been better expressed to have said, that inasmuch as they acted not so much with a view to keep the peace as in the nature of partisans to the different parties, they acted altogether out of the scope of their characters as peace officers, and

[1] Tooley's Case, 2 Lord Raym. 1296. It is said that watchmen and beadles 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. Ibid. c. 12, s. 20; Poph. 208; State *v.* Maxcy, 1 McMul. 503. But this prerogative is liable to great abuse, and should be kept within strict bounds. See article in 20 Alb. L. J. p. 215; Roberts *v.* State, 14 Mo. 138; Whart. Cr. Pl. & Pr. § 80. That statutes authorizing summary arrest of vagrants are constitutional, see People *v.* Forbes, 4 Park. C. R. 611; State *v.* Maxcy, 1 McMul. 501; Roberts *v.* State, 14 Mo. 138, and cases cited in Whart. Cr. Pl. & Pr. § 80. As to vagrants, see more fully Whart. Cr. Pl. & Pr. § 80. As to night-walkers, see *infra*, § 1446.

[2] 9 Co. 66 a; 1 Hale, 457; 1 Hawk. P. C. c. 31, s. 62. See Whart. on Hom. § 281.

[3] 1 Hale, 460.

without any authority whatever.[1] If the sheriff, says the same authority, have a writ of possession against the house and lands of A., and A., pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ.[2]

A. aiding B., when arrested is in the same position as B.

§ 444. Whoever joins with a defendant in resisting process is in the same position, if he have notice, as the defendant himself.[3] But malice in such case is imputable only to those who knew the officer was acting in an official capacity.[4]

Persons interfering to release prisoners cannot take advantage of the informality of the warrant.[5]

X. INFANTICIDE.

When death occurs before child has independent circulation, offence not homicide; otherwise, when the child is

§ 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.[6] 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,

[1] 1 East P. C. c. 5, s. 71, p. 304.

[2] 1 Hale, 460; Anon. Exeter Sum. Ass. 1793; 1 East P. C. c. 5, s. 71, p. 305; 1 Russ. on Cr. 627.

[3] Hugget's Case, Kel. 59. See 1 Hale, 456; Cro. Car. 378; Fost. 312 *et seq.*; R. *v.* Warner, R. & M. C. C. R. 385. See remarks of Pollock, C. B., in R. *v.* Davis, L. & C. 64. And see, also, R. *v.* Hunt, 1 Mood. C. C. 93; R. *v.* Curran, 3 C. & P. 397; R. *v.* Price, 8 Ibid. 282; R. *v.* Wier, 1 B. & C. 261; Kel. 87; R. *v.* Whithorne, 3 C. & P. 394; Jackson's Case, 1 Hale, 464, 465; 1 Hawk. c. 31; 4 Co. 40 b.; R. *v.* Luck, 3 F. & F. 483; R. *v.* Dadson, 2 Den. C. C. 35; State *v.* Murray, 15 Me. 100; Wolf *v.* State, 19 Oh. St. 248; State *v.* Garrett, Winston N. C. 144; Boyd *v.* State, 17 Ga. 194; State *v.* Hilton, 26 Mo. 199. *Supra*, § 418.

[4] State *v.* Zeibart, 40 Iowa, 169.

[5] R. *v.* Allen, 17 L. T. N. S. 222. See *infra*, §§ 1672 *et seq.*

[6] 3 Inst. 50; 1 Hawk. 31, § 16; R. *v.* Senior, 1 Mood. C. C. 346; R. *v.* West, 2 Cox C. C. 500; 2 C. & K. 784; R. *v.* Poulton, 5 C. & P. 329; R. *v.* Wright, 9 Ibid. 754; Evans *v.* People, 49 N. Y. 86. See discussion of this question in

born alive and dies after birth from injuries prior to birth.

and dies thereof.[1] 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,[2] supposing it does not derive its power of existence from its connection with its mother.[3] But it must be proved that the child has actually been born into the world in a living state;[4] and the fact of its having breathed, so it has been decided, is not a conclusive proof thereof.[5] It has also been held that if a person intending 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 air, 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.[6] If the

Dietrich *v.* Northampton (Mass. 1884), 30 Alb. L. J. 383.

[1] 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 reason on which the opinions of the last two writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be assumed that such fact never can be clearly established.

[2] R. *v.* Trilloe, 1 C. & M. 650; 2 Mood. C. C. 260; Evans *v.* People, 49 N. Y. 86; Com. *v.* Donahue, 8 Phila. R. 623. See *infra*, § 446.

[3] R. *v.* Handley, 13 Cox C. C. 79.

[4] Wallace *v.* State, 7 Tex. Ap. 570; 10 Ibid. 255; *supra*, § 309.

[5] R. *v.* Sellis, 1 Mood. C. C. 850; S. C., 7 C. & P. 850. *Infra*, § 446. See cases cited *supra*, § 309.

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 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 Ibid. 25; R. *v.* Enoch, 5 Ibid. 539; R. *v.* Wright, 9 Ibid. 754; R. *v.* Poulton, 5 Ibid. 329, cited at large in Whart. on Hom. § 446.

[6] R. *v.* West, 2 C. & K. 784.

misconduct was merely reckless, without an intent to kill, the offence is manslaughter.[1]

Birth is a question of fact.

§ 446. Whether the child was born alive is a question of fact to be determined by all the circumstances of the case. 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.[2] The question of killing is in like manner to be determined by inference from all the facts.[3]

Killing of child by negligent exposure is manslaughter.

§ 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, this 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]

XI. SUICIDE.

Surviving principal in suicide indictable for murder.

§ 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.[5] 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.[6] Nor is it necessary to prove that the deceased would not have killed himself without the defen-

[1] R. *v.* Handley, 13 Cox C. C. 79.

[2] R. *v.* Middleship, 5 Cox C. C. 275; State *v.* Winthrop, 43 Iowa, 519; *supra*, § 309.

[3] Peters *v.* State, 67 Ga. 29; *supra*, § 309.

[4] R. *v.* Walters, C. & M. 164; 2 Lew. 220; R. *v.* Middleship, 5 Cox C. C. 275. See, fully, *supra*, §§ 56, 331, 359; *infra*, §§ 1563 *et seq.*

[5] R. *v.* Sawyer, 1 Russ. Cr. & M. 670; R. *v.* Dyson, R. & R. C. C. 528.

[6] *Supra*, § 216; R. *v.* Dyson, R. & R. 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.

dant's coöperation; nor does it make any difference that the deceased was at the time under sentence of death.[1]

At common law there can be no conviction of accessaries before the fact to suicide.

§ 449. As at common law the principal must be convicted before a conviction of the accessary, there can be at common law no conviction of an accessary before the fact to suicide, because the suicide is beyond the process of the courts.[2] But by statutes in England and several of the United States, the advising another to commit suicide is made a substantive indictable offence.[3]

Killing may be murder when incident to producing an abortion.

§ 450. A woman desires to miscarry of a child with which she is pregnant, and assents to an operation for this purpose; and dies from the operation. Whether, in such case, the offence is murder or manslaughter, depends largely on the intent as appearing on the whole case.[4] If the intent were to kill or grievously injure her, the offence is murder; it is manslaughter if the intent were only to produce the miscarriage, the agency not being one from which death or great injury would be likely to result.[5] But suppose the operation 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.[6]

Consent of deceased no bar to prosecution for homicide.

§ 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.*[7] Of this we may recur to an illustration given in Pennsylvania in 1826, in which it was held

[1] 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.

By statute in Missouri the offence is manslaughter, State *v.* Ludwig, 70 Mo. 412.

[2] R. *v.* Leddington, 9 C. & P. 79; R. *v.* Russell, 1 M. C. C. 356; R. *v.* Fretwell, 1 Mood. C. C. 356.

[3] See *supra*, § 142; *infra*, § 451. As to Ohio, see Blackburn *v.* State, 23 Oh. St. 165.

By § 175 of the N. Y. Penal Code of 1882, whoever "wilfully in any manner encourages, advises, assists, or abets another person in attempting to take the latter's life," is guilty of a felony.

[4] See *supra*, §§ 325, 390.

[5] R. *v.* Gaylor, D. & B. C. C. 288; 7 Cox C. C. 288. *Supra*, §§ 325, 390.

[6] See as to Illinois statute making it murder to kill incidental to an abortion unless the abortion was necessary, Beasley *v.* People, 89 Ill. 571. *Infra*, § 591.

[7] See *supra*, §§ 142, 372.

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."[1]

Killing another with his consent in order to avoid greater evil.

§ 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?[2] 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 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

[1] Smith *v.* Com. 14 S. & R. 69.

[2] Sir J. F. Stephen, Cr. L. art. 203, takes the view given in the text, saying, "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery assumes their truth."

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]

Manslaughter, etc.

§ 453. Killing another, unintentionally and negligently, such other being desirous of committing suicide, is manslaughter.[2]

Attempts, etc.

§ 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]

Loss of self-control essential to this defence.

§ 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]

Words of reproach no adequate provocation.

§ 455 *a*. Where the evidence shows an intent on the part of the defendant to kill, no words of reproach, no matter how grievous, 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.[6]

[1] See *infra*, §§ 509, 510.

[2] See Com. *v.* Mink, 123 Mass. 422, cited *supra*, § 328. And see *infra*, § 428.

[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. By § 178 of the N. Y. Penal Code of 1882, an attempt to commit suicide is made a felony.

[4] As to burden of proof as to provocation, see Whart. Cr. Ev. § 334.

[5] Steph. Dig. C. L. art. 225. See Patterson *v.* State, 66 Ind. 428; Silver *v.* People, 107 Ill. 563; Thomas *v.* People, 61 Miss. 60.

[6] 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; 1 Brunf. (U. S.)

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 and explained by insulting words.[1]

By statute in some jurisdictions "insulting words and conduct to a female relative" are regarded as sufficient provocation to reduce homicide under their immediate influence to manslaughter.[2]

When the person is touched, then provocation reduces degree.

§ 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]

467; Com. *v.* York, 9 Metcalf, 93; Yates *v.* People, 32 N. Y. 509; Green *v.* Com., 83 Penn. St. 75; Abernethy *v.* State, 101 Ibid. 322; State *v.* O'Neal, 1 Houst. C. C. 58; State *v.* Draper, 1 Ibid. 531; State *v.* Tackett, 1 Hawks, 210; State *v.* Merrill, 2 Dev. 269; State *v.* Curry, Jones, N. C. 280; State *v.* Carter, 76 N. C. 20; Ray *v.* State, 15 Ga. 223; Jackson *v.* State, 45 Ibid. 198; Malone *v.* State, 49 Ibid. 210; Bird *v.* State, 55 Ibid. 17; Ross *v.* State, 59 Ibid. 248; Handy *v.* State, 68 Ibid. 612; Wortham *v.* State, 70 Ibid. 336; Taylor *v.* State, 48 Ala. 180; Judge *v.* State, 58 Ibid. 406; Brown, *ex parte*, 65 Ibid. 446; Roberts *v.* State, 68 Ibid. 515; Rapp *v.* State, 14 B. Mon. 614; State *v.* Starr, 38 Mo. 270; State *v.* Evans, 65 Ibid. 574; State *v.* King, 78 Ibid. 555; Preston *v.* State, 25 Miss. 383; Evans *v.* State, 44 Ibid. 762; Edwards *v.* State, 47 Ibid. 581; Williams *v.* State, 3 Heisk. 376; People *v.* Freeland, 6 Cal. 96; People *v.* Butler, 8 Ibid. 435; People *v.* Turley, 50 Ibid. 469; State *v.* Shippey, 10 Minn. 223; Martin *v.* State, 30 Wis. 216; Johnson *v.* State, 27 Tex. 758; Dawson *v.* State, 33 Ibid. 491; Myers *v.* State, 33 Ibid. 525; Jennings *v.* State, 7 Tex. Ap. 350; State *v.* Anderson, 4 Nev. 265; State *v.* Crozier, 12 Ibid. 300. See qualifications stated in R. *v.* Rothwell, 12 Cox. C. C. 145.

[1] 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 Ibid. 16; Williams *v.* State, 3 Heisk. 376; Mitchell *v.* State, 41 Ga. 527; State *v.* Keene, 50 Mo. 357; and see cases cited *infra*, §§ 468 *et seq.*

[2] Williams *v.* State, 3 Heisk. 376; People *v.* Turley, 50 Cal. 469; Hill *v.* State, 5 Tex. Ap. 2; Hudson *v.* State, 6 Ibid. 555; Richardson *v.* State, 9 Ibid. 612; Eanes *v.* State, 10 Ibid. 421.

[3] See Erwin *v.* State, 29 Oh. St. 186; State *v.* Burt, 51 Mich. 260.

[4] See State *v.* Smith, 77 N. C. 488.

[5] 1 Hale, 455. *Infra*, § 472; Felix *v.* State, 18 Ala. 720.

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. 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]

Interchange of blows reduces to manslaughter.

§ 457. Though words of slighting, disdain, or contumely will not of themselves make such a provocation as to lessen the crime to manslaughter; yet if A. use insulting language to B., and B. thereupon strike A., but not mortally, and then A. strike B. back, and then B. kill A., this is but manslaughter. The stroke by A. is deemed a new provocation, and the conflict a sudden falling out; and the killing is therefore considered only manslaughter.[2] And in a sudden fight thus arising it is immaterial who struck the first blow.[3]

A slighter provocation extenuates when intent is only to chastise.

§ 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.[4] 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

[1] Kel. 135; 1 Hale, 455.

[2] Ibid.; R. *v.* Ayes, R. & R. 166; U. S. *v.* Mingo, 2 Curtis C. C. 1; Com. *v.* Biron, 4 Dall. 125; State *v.* Davis, 1 Houst. C. C. 13; State *v.* Massage, 65 N. C. 480; State *v.* Abarr, 39 Iowa, 185; Petty *v.* State, 6 Bax. 610. *Infra*, § 471.

[3] R. *v.* Snow, 1 East P. C. 214; R. *v.* Rankin, R. & R. 43; Com. *v.* Biron, 4 Dall. 125; State *v.* Massage, 65 N. C. 480.

[4] Fost. 291; 4 Black. Com. 200; Com. *v.* Greep, 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.

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 as would probably, at the given distance, have occasioned death or great bodily harm.[1]

[1] Hazel's Case, Ibid. 368; 1 East P. C. 236.

Where a man, who was sitting drinking in an alehouse, 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. 239; 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 held 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, Ibid. 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,

§ 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. Where there has been time for cooling, which is to be determined by the temper and conditions of the defendant,[1] the offence is murder; if otherwise manslaughter. Thus, where a man finds another in the act of adultery with his wife, and kills him or her[2] in the first transport of passion, he is only guilty of manslaughter, and that of a nature entitled to the lowest degree of punishment,[3] for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But, as has been already shown, the killing of an adulterer deliberately, and upon revenge, is murder.[4] 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.[5] The same reason makes it murder for a man deliberately, after time for cooling, to kill his wife whom he has found in adultery, if the intent to take life be shown.[6] The same distinctions are applicable to the killing by a father of one attempting indecent liberties with his son.[7]

Husband in hot blood killing adulterer, guilty of manslaughter.

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.

[1] *Infra*, § 480.

[2] Pearson's Case, 2 Lew. 216.

[3] Manning's Case, 1 Ventr. 212; Raym. 212; R. *v.* Kelly, 2 C. & K. 814; People *v.* Horton, 4 Mich. 83; Com. *v.* Whitler, 2 Brewst. 388; Maher *v.* People, 10 Mich. 212; Briggs *v.* State, 35 Ind. 492; State *v.* John, 8 Ired. 330; State *v.* Samuel, 3 Jones (N. C.) Law, 74; State *v.* Neville, 6 Ibid. 433; State *v.* Holme, 54 Mo. 153. See People *v.* Cole, Cent. Law J. July 30, 1874. As to cooling time, see *infra*, §§ 480, 1496.

[4] 1 Russell on Crimes, 525; State *v.* Pratt, 1 Houst. C. C. 249; 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; State *v.* Holme, 54 Mo. 153; State *v.* France, 76 Mo. 681; People *v.* Hurtado, 63 Cal. 288. See Turner *v.* State, 70 Ga. 767.

[5] See Biggs *v.* State, 29 Ga. 723. Comp. *infra*, § 496.

[6] 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.

[7] In R. *v.* Fisher, 8 C. & P. 182, the verdict was manslaughter, though the court charged that, if there was deliberation, the offence was murder.

§ 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 a 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 in-

Same principle to be extended to cases of punishment, when in hot blood, of attacks on the chastity of

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. Check *v.* State, 35 Ind. 492. See R. *v.* Kelly, 2 Car. & K. 814; McWhirt's Case, 3 Grat. 594; 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 deliberately 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.

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 Chief J. Agnew, in Jones *v.* Com., 75 Penn. St. 403. Another ground for exception is, that as the defendant acted under legal advice (mistaken though it were) that his marriage was valid, and that as he therefore, according to his own view, was at the time of the conflict maintaining his own rights in his own house, the malice necessary to constitute murder in the first degree was not imputable to him.

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.

That cooling time is a question of temperament, see *infra*, §§ 480, 496.

[1] Parker *v.* State, 31 Tex. 132.

censed at an unnatural offence attempted on his son, and acts in hot blood, we have already incidentally seen.[1] 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 her paramour.[2]

persons under the rightful protection of the defendant.

§ 461. Persons laboring under a sense of wrong, public or 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 undertake to inflict violent punishment; and he is guilty of murder if he deliberately and coolly kill the person by whom he supposes himself aggrieved.[3] 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.[4]

Killing to redress a public wrong is murder.

So a supposed public grievance will not excuse a riot undertaken for its removal;[5] 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 pre-

[1] R. *v.* Fisher, 8 C. & P. 182. *Supra*, § 459.

[2] Lynch *v.* Com., 77 Penn. St. 205.

[3] See *supra*, § 399.

[4] State *v.* Wilson, 38 Conn. 126. See, also, Territory *v.* Drennan, 1 Montana, 41.

[5] *Supra*, §§ 397–399.

vented the participants from entertaining a deliberate design to take life.[1]

§ 462. A bare trespass on the land or other 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, unless killing were actually necessary to prevent the trespass, and unless the trespass was a serious invasion of the owner's rights.[2] On the other hand, if the object of the violence be to drive off the trespasser, or even to chastise him, and no blows likely to produce grievous bodily harm be inflicted, the offence, if death ensue, is but manslaughter.[3] So far as concerns trespasses on personal property it has been undoubtedly held that such trespass does not lower the degree of homicide in case the trespasser is killed by the owner in an attempt by the latter to recover possession of the property. But this cannot be the law when the owner, his right to reclaim his goods being resisted, kills in hot blood, or in honest belief that this is necessary to defend his rights. In such case the offence cannot, on principle, be more than manslaughter.[4] And he is justified in using all necessary force to prevent valuables, either his own or under his charge, from being taken from him by robbery.[5]

A bare trespass on property not an adequate provocation in cases of intentional killing.

§ 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.[6]

Exercise of a legal right no just provocation.

[1] See *supra*, § 388.

[2] R. *v.* Scully, 1 C. & P. 319; Langstaffe's Case, 1 Lew. 162; Com. *v.* Drew, 4 Mass. 391; State *v.* Buchanan, 1 Houst. C. C. 79; State *v.* Woodward, Ibid. 455; Davison *v.* People, 90 Ill. 221; State *v.* Morgan, 3 Iredell, 186; McDaniel *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, 500.

[3] Fost. 291; 1 Hale, 473; Hawk. c. 31, s. 34; Kel. 132; Halloway's Case, Cro. Car. 131; 1 Hawk. c. 31, s. 42. See 1 Hawk. P. C. by Curw. §§ 33–6; Com. *v.* Drew, 4 Mass. 391.

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.

[4] *Supra*, §§ 98 *et seq.* *Infra*, §§ 500, 501.

[5] *Infra*, §§ 500–501. See R. *v.* Wesley, 1 F. & F. 528; State *v.* Burwell, 63 N. C. 661.

[6] See State *v.* Craton, 6 Ired. 164; State *v.* Lawry, 4 Nev. 161; R. *v.* Longden, R. & R. C. C. 228.

§ 464. A land-owner has no right to plant spring-guns by which ordinary trespassers may be wounded, and if he does so, and death ensues, he is responsible for the consequences.[1] If such weapons be erected inconsiderately, the killing of a mere heedless trespasser on an open country is manslaughter; if the weapons be erected maliciously, the offence is murder.[2] But if the weapons be 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.[3] The distinction is this: the agency is one which a house-owner is entitled to use in such a way as to keep off burglars and other felons. But the fact that he is so entitled does not protect him from an indictment for nuisance in case the right be abused by placing the trap where travellers or even trespassers would be exposed to injury, nor from an indictment for homicide in case any such traveller or trespasser be killed.

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.[4] 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 the 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 person forcing his way into the house, is manslaughter, unless the

[1] *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.* Coombs, 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.

[2] Simpson *v.* State, 59 Ala. 1.

[3] See *infra*, § 507.

[4] See *infra*, §§ 506, 507.

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.[1]

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.[2]

When such killing is in self-defence it is excusable.

§ 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 gentler means fail, if he attempt to use violence at the outset and is slain, it will be manslaughter in the slayer, if there be no previous malice.[3] If the owner of the house in expelling kill in hot blood without necessity an intruder, this is manslaughter.[4]

Manslaughter to kill master of house expelling defendant with unnecessary violence.

§ 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.[5]

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.[6]

Where the parties are equal, a blow is sufficient provocation.

[1] *Infra*, § 500.

[2] 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 Ibid. 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.

[3] McCoy *v.* State, 3 Eng. (Ark.) 451; Hinton *v.* State, 24 Tex. 454; Lyon *v.* State, 22 Ga. 399.

[4] State *v.* Murphey, 61 Me. 56; *infra*, § 500.

[5] R. *v.* Longden, R. & R. C. C. 228.

[6] R. *v.* Thomas, 7 C. & P. 817; R. *v.*

§ 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 latter acting in the heat of blood upon that provocation, he 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 part of the party killing, and where the punishment is deliberate and cruel, constitute murder, if death ensue from the attack.[7]

Deliberate and cruel use of superior strength implies malice.

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; Hill *v.* State, 8 Tex. Ap. 142. *Supra*, § 455, and cases hereafter cited.

[1] *Supra*, § 457.

[2] Fost. 295; 1 Hale, 456; R. *v.* Ayes, R. & R. 166.

[3] Ibid.

[4] State *v.* Tooky, 2 Rice Dig. 104.

[5] Nichols *v.* Com., 11 Bush, 575.

[6] R. *v.* Lynch, 5 C. & P. 324.

[7] Keates's Case, Comb. 408; R. *v.*

§ 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, snatch up a deadly weapon and kill the other party with it, such killing will be only manslaughter.[1] But if a party, under color

Malice implied from concealed weapon.

Snow, 1 Leach, 151; 2 Lord Raym. 1498; Royley's Case, 12 Rep. 87; S. C., 1 Hale, 453; R. *v.* Lynch, 5 C. & P. 324; R. *v.* Shaw, 6 Ibid. 372; R. *v.* Thomas, 7 Ibid. 817. See also Fost. 294; Cro. Jac. 296; Godb. 182; R. *v.* Willoughby, 1 East, P. C. 288; McWhirt's Case, 3 Grat. 594; McDermott *v.* State, 80 Ind. 87; State *v.* Craton, 6 Ired. 164; State *v.* Hildreth, 9 Ibid. 429; State *v.* Hargett, 65 N. C. 669; State *v.* Chavis, 80 Ibid. 353; State *v.* Boon, 82 Ibid. 637; Nettles, *ex parte*, 58 Ala. 268; State *v.* Christian, 66 Mo. 138; Holland *v.* State, 12 Fla. 117; People *v.* Perdue, 49 Cal. 425; Smith *v.* State, 7 Tex. Ap. 414; Guffee *v.* State, 8 Ibid. 187, 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 solder, 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.

That an assault with a cane may be a provocation which may lower the degree, see R. *v.* Tranter, 1 Stra. 449; *supra*, § 403.

Cf. definition in § 203 of N. Y. Penal Code of 1882.

[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, Ibid. 148.

of fighting upon equal terms, use from the beginning of the contest a deadly weapon without the knowledge of the other party, and kill the other party with such weapon; or if at the beginning of the contest he prepare a deadly weapon, so as to have the power of using it in some part of the contest, and use it accordingly in the course of the combat, and kill the other party with the weapon; the killing in both these cases will be murder.[1]

Where the mortal blow is deliberately given after the deceased is helpless, offence is murder.

§ 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.[2]

Case is murder where the attack is sought by the party killing.

§ 476. The plea of provocation will not avail where it appears 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.[3]

[1] 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.

That this is not the case with the sudden use of a pen-knife, see Gatlin *v.* State, 5 Tex. Ap. 531. As to inferences from weapon see Whart. Cr. Ev. §§ 734, 764 *et seq.*

[2] R. *v.* Shaw, 6 C. & P. 372. As to burden of proof, see Whart. Cr. Ev. § 334.

[3] 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.* Stoffee, 15 Ibid. 47; Slaughter *v.* Com., 11 Leigh, 681; Vaidon *v.* Com., 12 Grat. 717; Bristow *v.* Com., 15 Grat. 634; Dock *v.* Com., 21 Ibid. 909; State *v.* Neeley, 20 Iowa, 108; State *v.* Clifford, 58 Miss. 477; State *v.* Johnston, 1 Ired. 354; State *v.* Lane, 4 Ibid. 113; State *v.* Tachanatah, 64 N. C. 614; State *v.* Matthews, 80 Ibid. 417; State *v.* Ferguson, 2 Hill S. C. 619; Lyon *v.* State, 22 Ga. 399; State *v.* Green, 37 Mo. 466; State *v.* Linney, 52 Ibid. 40; State *v.* Underwood, 57 Ibid. 40; State *v.* Christian, 66 Ibid. 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 Ibid. 642; King *v.* State, 13 Tex. Ap. 277. As to burden of proof, see Whart. Cr. Ev. § 334.

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 slay his adversary pursuant to a previously formed design, either general or special, to use his weapon in an emergency.[1] A party has in this way no right, even on the plea of self-defence, to execute private vengeance.[2]

Question of continuance of old grudge one of fact.

§ 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.[3] 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 the character of the parties.[4] 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, accept the fight where he might have avoided it by passing on, the provocation being sudden and unexpected, the jury may presume that the killing was not upon the old grudge, but that it was upon the insult given by stopping him on the way.[5] And after a reconciliation, the motive will be presumed to be the recent provocation, not the old grudge.[6]

[1] R. *v.* Thomas, 7 C. & P. 817; State *v.* Craton, 6 Ired. 164; Nettles, *ex parte*, 58 Ala. 268; Steph. Dig. C. L. art. 224 *et seq.*

[2] Ibid. *Infra*, §§ 485, 496. For a laxer view, see Wray, *ex parte*, 30 Miss. 673; Moore *v.* State, 36 Ibid. 137.

[3] *Supra*, §§ 114, 399; State *v.* Johnson, 1 Ired. 354; State *v.* Tilly, 3 Ibid. 424.

[4] *Supra*, § 114. See Whart. Cr. Ev. § 735; Murray *v.* Com., 79 Penn. St. 311; State *v.* Savage, 78 N. C. 520; State *v.* Barnwell, 80 Ibid. 466; Fitzpatrick *v.* State, 37 Ark. 238; Freeman *v.* State, 70 Ga. 736.

[5] Copeland *v.* State, 7 Humph. 479. See State *v.* Tachanatah, 64 N. C. 614; Cannon *v.* State, 57 Miss. 147; Pickens *v.* State, 61 Ibid. 52. As to old grudge, see Whart. Cr. Ev. § 784; Weller *v.* People, 30 Mich. 16. As to continuance of malice, see *supra*, § 114.

[6] State *v.* Barnwell, 80 N. C. 466.

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.[1] 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, determining if B. do so to shoot B. as soon as he draws, and B. draw, and A. immediately shoot and kill B., this is murder.[2] But if there had been a quarrel between A. and B. and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kill B., this is not murder; though if it appear that the reconciliation were but pretended or counterfeit, and that the hurt done were upon the score of the old malice, a conviction of murder will be sustained.[3]

Malicious killing in another's quarrel is murder; but in hot blood is manslaughter.

§ 478. When one person interferes in the quarrel of others, and kills one of the participants from malice, and not from negligence or passion, the party killing is guilty of murder Thus, if a master maliciously intending to kill another take his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him, and the servants, seeing their master engaged, kill the other, they would be guilty of manslaughter only, but the master of murder. If they take part coolly and knowingly in the killing, it would be murder in all.[4]

Hot blood extenuates

§ 479. A distinction may be taken between the interference of servants and friends, and that of a mere stranger, and there may be cases in which a jury would properly infer

[1] R. v. Smith, 8 C. & P. 160; 1 Hale, 451; State v. Lane, 4 Ired. 113; State v. Ferguson, 2 Hill S. C. 619; State v. Harris, 59 Mo. 550. See Mitchell v. Com., 33 Grat. 872.

[2] State v. Marten, 2 Ired. 101.

[3] *Supra*, § 114; 1 Hale, 451; Mason's Case, 1 Fost. 132.

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 pre-existing 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.

[4] 1 Hawk. P. C. c. 31, s. 55; State v. Roberts, 1 Hawks, 341; Thompson v. State, 25 Ala. 41; Frank v. State, 27 Ala. 38. See 1 Russ. on Cr. 590, 592. And see 12 Rep. 89. As to crimes collateral to a conspiracy, see *supra*, § 214.

hot blood in the interference of a friend or servant, when there could be no such inference as to the interference of a stranger. A stranger may interfere from pity or sense of fairness; a friend or servant, in addition to such motives, from affection or duty. At the same time, it has been properly observed that the nearer or more remote connection of the parties with each other seems to be more a matter of observation for the jury as to the probable force of the provocation, and the motive which induced the interference, than as furnishing any precise rule of law grounded on such a distinction.[1]

a killing in proportion to the closeness of the relationship of the party interfering.

Hot blood is naturally to be expected in the case of a friend taking the side of a friend who is apparently maltreated; and hence if a third person should take up the cause of a friend who has been worsted in a fight, and should kill that friend's antagonist, the killing would, it seems, be manslaughter, and this though the party assisted might have been guilty of murder if the killing had been by him;[2] and it is, at the most, manslaughter, for a brother who sees the slaying of his brother to kill in hot blood the slayer.[3]

Cooling time dependent on circumstances.

§ 480. Whether there has been cooling time is eminently a question of fact, varying with the particular case and with the condition of the party.[4] There are some provocations which, with persons of even temperament, lose their power in a few moments; while there are others which rankle in the breast for days and even weeks, producing temporary insanity. Men's temperaments, also, vary greatly as to the duration of hot blood; and it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal "reasonable man," but by that of the party to whom the malice is imputed. A man may be chargeable with negligence in not duly weighing circumstances which would have checked his

[1] *Supra*, § 460; *infra*, §§ 490, 494; 1 Russ. on Cr. 592; Irby v. State, 32 Ga. 496. See Branch v. State, 15 Tex. Ap. 96; Sterling v. State, Ibid. 248.

Under statute, as has already been seen, insulting words, addressed to a female relative, may be a provocation which, if acted on in hot blood, may reduce a homicide to manslaughter. Williams v. State, 3 Heisk. 376; People v. Turley, 50 Cal. 469; Eanes v. State, 10 Tex. Ap. 421. *Supra*, § 455.

[2] *Supra*, § 215; State v. Roberts, 1 Hawks, 351; R. v. Harrington, 10 Cox C. C. 370; Branch v. State, 15 Tex. Ap. 96.

[3] Guffee v. State, 8 Tex. Ap. 187.

[4] See, as to presumptions, *supra*, § 114. And see Small v. Com., 91 Penn. St. 304.

passion, or which, when his passion was aroused, would have caused it more speedily to subside. But he is not chargeable with malice, when he was acting wildly and in hot blood. Hence, whether there has been cooling time, so as to impute to the defendant malice, is to be decided, not by an absolute rule, but by the conditions of each case.[1]

Restraint or coercion is adequate provocation.

§ 481. It has been already shown that an illegal attempt to restrain a man's liberty, even under color of legal process, is such provocation as to reduce the offence to manslaughter. This holds where a man is injuriously restrained of his liberty, as where a creditor stood at the door of his debtor with a drawn sword, to prevent him from escaping while he sent for a bailiff to arrest him; or where a sergeant put a common soldier under arrest, who thereupon killed 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.[2] The same distinctions apply to all cases of illegal restraint.[3]

[1] *Supra*, §§ 114–5; Whart. on Hom. §§ 451 *et seq.*; 1 Hawk. c. 31, ss. 22, 29; 4 Black. Com. 191; 3 Inst. 51; 1 Bulst. 86; Ld. Morley's Case, 7 St. Tr. 421; Kel. 56; Cromp. 23; 1 Sid. 287; Oneby's Case, 2 Stra. 766; 2 Ld. Ray. 1485. See R. *v.* Taylor, 3 Burr. 2793; R. *v.* Kessal, 1 C. & P. 437; R. *v.* Lynch, 5 Ibid. 324; R. *v.* Hayward, 6 Ibid. 157; R. *v.* Beeson, 7 Ibid. 142; R. *v.* Fisher, 8 Ibid. 182; R. *v.* Eagle, 2 F. & F. 827; R. *v.* Selten, 11 Cox C. C. 674; McCann *v.* People, 6 Parker C. R. 629; People *v.* Sullivan, 3 Selden, 396; Com. *v.* Green, 1 Ashm. 289; Com. *v.* Lenox, 3 Brewst. 249; Kilpatrick *v.* Com., 31 Penn. St. 198; S. C., 3 Phil. R. 237; McWhirt's Case, 3 Grat. 594; Creek *v.* State, 24 Ind. 151; Moore, *ex parte*, 30 Ibid. 197; Murphy *v.* State, 31 Ibid. 511; People *v.* Mortimer, 48 Mich. 37; State *v.* Decklotts, 19 Iowa, 447; State *v.* Spangler, 40 Ibid. 365; State *v.* Jones, 20 Minn. 58; Gavin *v.* State, 30 Ga. 67; State *v.* McCants, 1 Speers, 384; State *v.* Jackson, 3 Jones N. C. 266; State *v.* Hill, 4 Dev. & B. 491; State *v.* Moore, 69 N. C. 267; Cates *v.* State, 50 Ala. 166; Field *v.* State, 52 Ibid. 405; Judge *v.* State, 58 Ibid. 405; Preston *v.* State, 25 Miss. 383; Gladden *v.* State, 12 Fla. 562; Underwood *v.* State, 25 Tex. Suppl. 748; Johnson *v.* State 30 Tex. 748; Mackey *v* State, 13 Tex. Ap. 360. See, as differing from text, State *v.* Sizemore, 7 Jones N. C. 206; State *v.* Moore, 69 Ibid. 267. As to burden of proof, see Whart. Cr. Ev. § 334. For an interesting collection of cases on this point, see Mr. Townsend's Modern State Trials, i. 151 *et seq.* As to cooling time in riots, see *supra*, § 390 *a*.

[2] Buckner's Case, Styl. 467; Witherr's Case, 1 East P. C. 233; R. *v.* Curwan, 1 Moody C. C. 132; R. *v.* Willoughby, 1 East P. C. 288.

[3] Goodman *v.* State, 4 Tex. Ap. 349.

Killing in duel is murder.

§ 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,[1] or had been threatened with dishonor.[2] 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.[3]

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 A. killed B., it was held that A. was guilty of murder; but the same conclusion would not follow if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him

[1] 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.*

[2] 1 Hale, 452. *Supra*, § 101; Thomas *v.* State, 61 Miss. 60.

[3] 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.

an opportunity of fighting.[1] On the other hand, where upon a sudden quarrel the parties fight upon the spot, or they presently fetch their weapons and go into a field and fight, and one of them is killed, it will be but manslaughter, because it may be inferred that the blood never cooled.[2] It is to be supposed, with regard to sudden encounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which the instinct of self-preservation has no inconsiderable share, the voice of reason is not heard; therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence.[3]

Seconds also responsible for murder.

§ 483. Not only the *principals*, but the *seconds*, in a deliberate duel, are guilty of homicide. And with regard to other persons who are present, the question is, did 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]

[1] 1 Hawk. P. C. c. 31, s. 22; 1 Hale, 453; R. *v.* Byron, 11 St. Tr. 1177; R. *v.* Walters, 12 Ibid. 113. Reference may also be made to Bromwich's Case, 1 Lev. 180; 1 Sid. 277; 7 St. Tr. 42. Bromwich was indicted for aiding and abetting Lord Morley in the murder of Hastings.

For a valuable collection of cases on this point see Mr. Townsend's Modern State Trials, i. 151 *et seq.* The English judges, though generally laying down the law with becoming precision, sometimes go beyond our American authorities in mawkish sympathy with the accused. Thus on the trial of Purefoy, for killing Colonel Roper in a duel, at Maidstone, in 1794, Baron Hotham thus charged the jury: "The oath by which I am bound obliges me to say that homicide, after due interval of consideration, amounts to murder. The laws of England, in their utmost lenity and allowance for human frailty, extend their compassion only to sudden and momentary frays; and then, if the blood has not had time to cool, or the reason to return, the result is termed manslaughter. Such is the law of the land, which undoubtedly the unfortunate gentleman at the bar has violated, though he has acted in conformity to the laws of honor. His whole demeanor in the duel, according to the witness whom you are most to believe, Colonel Stanwid, was that of perfect honor and perfect humanity. Such is the law, and such are the facts. If you cannot reconcile the latter to your conscience, you must return a verdict of guilty. But if the contrary, though the acquittal may trench on the rigid rules of law, yet the verdict will be lovely in the sight both of God and man." 1 Townsend's Modern St. Trials, 154.

[2] 1 Hale, 453; 1 Hawk. P. C. c. 31, s. 29; 3 Inst. 51. See State *v.* Underwood, 57 Mo. 40.

[3] Fost. 138, 296.

XIII. EXCUSE AND JUSTIFICATION.[2]

1. *Repulsion of Felonious Assault.*

Force of defence may be proportioned to force of attack.

§ 484. *Vim vi repellere licet* is a cardinal doctrine of the Roman law; and by the English common law, as accepted throughout the United States, this principle has been asserted with equal emphasis. I have a right to resist the application of force to myself or to those under my immediate charge, by force proportioned to the attack.[3] It is sometimes said, it is true, that only when the assailant threatened life can a defence involving the taking his life be sustained. But this is not true. A violent personal outrage may be repelled by any suitable means, no matter what the injury done to the assailant may be.[4] But the offence threatened must be

[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 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.

As to venue, see § 185 of N. Y. Penal Code, of 1882.

[2] As to burden of proof, see Whart. Crim. Ev. § 335.

[3] *Supra*, §§ 98–100, 140.

[4] Ibid. That this right exists to repel a felony is well established. 1 East P. C. 259, 271; R. *v.* Hewlett, 1

a *crime*. "Felony" has in our law, been used to express the distinction; but this is not sufficiently exact, because a private person is authorized to take life to stop a riot, and a riot, though likely to involve felonies in its development, is technically but a misdemeanor.[1] A mere assault, however, not directed at life or chastity, or other high right, cannot excuse homicide.[2] Hence if a deadly weapon be not used by the assailant, or other circumstances do not exist to indicate a felonious attempt, for the assailed to take life is at least manslaughter.[3] "The intent," as is said by Judge Washington,[4] "must be to commit a felony. *If it be only to commit a trespass, as to beat the party, it will not justify the killing of the aggressor.*"[5] If, however, such intended beating is of a character to imperil life, or to maim, or to deprive the assailed of some essential right, then the assailed is excused in taking life when necessary to repel the assault.[6] On the other hand, the killing of an assailant whose apparent design was to beat and not to commit a

F. & F. 91; U. S. *v.* Wiltberger, 3 Wash. C. C. 515; People *v.* Shorter, 4 Barb. 460; Shorter *v.* People, 2 Const. 193; Stewart *v.* State, 1 Ohio St. 66; Dill *v.* State, 25 Ala. 15; Oliver *v.* State, 17 Ibid. 15; Mattison *v.* State, 55 Ibid. 224; Smith *v.* State, 68 Ibid. 424; Kingen *v.* State, 45 Ind. 518; Pond *v.* People, 8 Mich. 150; People *v.* Doe, 1 Ibid. 451; State *v.* Burke, 30 Iowa, 331; Murphy *v.* People, 37 Ill. 447; State *v.* Savage, 78 N. C. 520; McPherson *v.* State, 22 Ga. 478; Green *v.* State, 28 Miss. 687; Staten *v.* State, 30 Ibid. 619; State *v.* Swift, 14 La. An. 827; Levells *v.* State, 32 Ark. 585; People *v.* Campbell, 30 Cal. 312; People *v.* Flanagan, 60 Ibid. 2; People *v.* Simons, Ibid. 72. And see cases cited *infra*, §§ 495 *et seq.*

[1] See Pond *v.* People, 8 Mich. 150; Com. *v.* Daley, 4 Penn. L. J. 150, quoted Wh. Hom. App.; 4 Bla. Com. 179.

[2] *Infra*, § 501; Com. *v.* Daley, Penn. L. J. 154; Com. *v.* Drum, 58 Penn. St. 9; Claxton *v.* State, 2 Humph. 181; State *v.* Benham, 23 Iowa, 154.

[3] That there may be circumstances in which a deadly weapon may be used in self-defence by a party who is only struck by the hand, see Davis *v.* People, 88 Ill. 350; Judge *v.* State, 58 Ala. 405; and see *supra*, § 441.

[4] U. S. *v.* Wiltberger, 3 Wash. C. C. 515.

[5] See, to same effect *infra*, § 500; Pierson *v.* State, 12 Ala. 149; Eiland *v.* State, 52 Ibid. 322; Field *v.* State, Ibid. 348; Judge *v.* State, 58 Ibid. 405; McPherson *v.* State, 22 Ga. 478; Floyd *v.* State, 30 Ibid. 91; Chase *v.* State, 46 Miss. 683; Stewart *v.* State, 1 Ohio St. 66; Kingen *v.* State, 45 Ind. 518; Burden *v.* People, 26 Mich. 162.

[6] *Supra*, § 98; *infra*, § 501; State *v.* Rhodes, 1 Houst. C. C. 476; State *v.* Benham, 23 Iowa, 154; State *v.* Burke, 30 Ibid. 331; Com. *v.* Drum, 58 Penn. St. 1; Kingen *v.* State, 45 Ind. 518; Young *v.* State, 11 Humph. 200; Williams *v.* State, 44 Ala. 41; Ayres *v.* State, 60 Miss. 709; State *v.* St. Geme, 31 La. An. 30. As to Texas statute, see Gilly *v.* State, 15 Tex. Ap. 287.

felony, or other violent injury, is not murder, and at the highest is manslaughter.[1] But the right is limited to the emergency, and does not continue when the assailed retreats to a place of safety, arms himself, and renews the conflict.[2]

As we have already seen, the defence must not be disproportionate to the attack; and the assailed becomes himself responsible if he wantonly use excessive force in repelling the assault.[3]

A conflict provoked by the defendant cannot be set up by him as a defence.

§ 485. If the defendant in any way challenged the fight, and went to it armed, he cannot afterwards maintain that in taking his assailant's life he acted in self-defence.[4] "A man has not," as is properly said by Breese, C. J.,[5] "the right to provoke a quarrel and take advantage of it, and then justify the homicide."[6] Self-defence may be resorted to in order to repel force, but not to inflict vengeance. "Non ad sumendam vindictam, sed ad propulsandam injuriam."[7] "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,[8] yet he cannot be the aggressor and then shield himself on the assumption

[1] Copeland *v.* State, 7 Humph. 479.

[2] Whart. on Hom. § 481.

[3] *Supra*, § 102; *infra*, § 498.

[4] *Supra*, § 476; *infra*, § 496; Fost. 277; R. *v.* Knock, 14 Cox C. C. 1; Com. *v.* Drum, 58 Penn. St. 9; Dock *v.* Com., 21 Grat. 912; Vaiden *v.* Com., 12 Ibid. 717; State *v.* Brittain, 89 N. C. 481; State *v.* Kinney, 108 Ill. 519; State *v.* Clifford, 58 Wis. 477; 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; Eiland *v.* State, 52 Ala. 322; Bain *v.* State, 70 Ibid. 4; Storey *v.* State, 71 Ibid. 331; Wills *v.* State, 73 Ibid. 363; Evans *v.* State, 44 Miss. 762; State *v.* Starr, 38 Mo. 270; State *v.* Linney, 52 Ibid. 40; State *v.* Hays, 23 Ibid. 287; State *v.* Hudson, 59 Ibid. 135; White *v.* Maxey, 64 Ibid. 552; Dawson *v.* State, 33 Tex. 491; People *v.* Stonecifer, 6 Cal. 407; People *v.* Westlake, 62 Ibid. 303; People *v.* Tamkin, Ibid. 468; see Holt *v.* State, 9 Tex. Ap. 571; Smith *v.* State, 15 Ibid. 338.

[5] Adams *v.* People, 47 Ill. 208.

[6] 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.

[7] See *supra*, §§ 96, 97.

[8] Selfridge's Case, Whart. Hom. App.; Myers *v.* State, 62 Ala. 599; De Arman *v.* State, 71 Ibid. 351; Sylvester *v.* State, 72 Ibid. 201.

that he was defending himself."[1] And an adulterer caught in the act by the husband is guilty at least of manslaughter, if, in repelling a murderous attack by the husband, he kill the husband.[2] But where the defendant, without an intent to take the deceased's life, provoked the quarrel, this, while it destroys the excuse of self-defence, does not, if the deceased's attack put the defendant's life in danger, militate against reducing the offence to manslaughter.[3]

Self-defence exists when the defendant though aggressor retreats, asking for peace.

§ 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.[4] 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.[5]

Retreat is necessary when practicable.

§ 486 *a*. In cases of personal conflict, it must appear, in order to establish excusable homicide in self-defence, that the party killing had retreated, either as far he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him.[6] 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

[1] Wagner, J., State *v.* Linney, 52 Mo. 40; S. P., Williams *v.* State, 3 Heisk. 376; and see R. *v.* Knock, 14 Cox C. C. 1; Cartwright *v.* State, 14 Tex. Ap. 486.

[2] Read *v.* State, 9 Tex. Ap. 317.

[3] Kinney *v.* People, 108 Ill. 519.

[4] 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; People *v.* Wong Ah Teak, 63 Cal. 486. See *supra*, §§ 95–102.

[5] Stoffer *v.* State, 15 Oh. St. 47; Valdon *v.* Com., 12 Grat. 717; Hittner *v.* State, 19 Ind. 48; Evans *v.* State, 33 Ga. 4; Tidwell *v.* State, 70 Ala. 33; Evans *v.* State, 44 Miss. 762; State *v.* Linney, 52 Mo. 40; People *v.* Stonecifer, 6 Cal. 407; State *v.* Conally, 3 Oregon, 69.

[6] 1 Hale, 481, 483; Stoffer *v.* State, 15 Ohio St. 47; Judge *v.* State, 58 Ala. 406; Ingram *v.* State, 67 Ibid. 67; Green *v.* State, 69 Ibid. 6; Bain *v.* State, 70 Ibid. 4; State *v.* Johnson, 76 Mo. 121; Parrish *v.* State, 14 Neb. 60; Gilleland *v.* State, 44 Tex. 356.

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 himself to great peril (*e. g.*, as in crossing a ditch), then he may at that spot 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 essential to self-defence would be to declare that there should be no self-defence where there are no "ditches" or "walls." The true view is, that a "wall" or "ditch" is to be presumed whenever retreat cannot be further continued without probable death, and when the only apparent means of escape is to 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.[1] Nor is

[1] *Supra*, § 100; Fost. 273; 1 Hawk. c. 29, s. 14; R. *v.* Smith, 8 C. & P. 160; 4 Black. Com. 185; Runyan *v.* State, 57 Ind. 80; State *v.* Tweedy, 5 Iowa, 433; State *v.* Thompson, 9 Ibid. 188; State *v.* Hill, 4 Dev. & Bat. 491; Oliver *v.* State, 17 Ala. 587; Storey *v.* State, 71 Ibid. 331; Dolan *v.* State, 41 Ark. 454.

That the assailed must retreat as far as the assault will permit, see Dock *v.* Com., 21 Grat. 909; Evans *v.* State, 33 Ga. 4; McPherson *v.* State, 22 Ibid. 478. See remarks of Thurman, J., in Stewart *v.* State, 1 Ohio St. 66.

In Kentucky the right of self-defence has been pushed still further. Phillips *v.* Com., 2 Duvall, 328; Carico *v.* Com., 7 Bush, 124; Bohannon *v.* Com., 8 Ibid. 481; Luby *v.* Com., 12 Ibid. 1; and see, to same effect, State *v.* Kennedy, 7 Nev. 374. These cases are criticized in Whart. on Hom. § 489.

Sir J. F. Stephen states the law to be that when the assailant assails with a deadly weapon, it is the duty of the assailed "to abstain *from the intentional infliction of death or grievous bodily harm* until he has retreated as far as he can with safety to himself." To this he appends as a note the following:—

"If this were not the law it would follow that any ruffian, who chose to assault a quiet person in the street, might impose upon him the legal duty of running away, even if he were the stronger man of the two. The passage of Hale appears to me to be applicable only to cases where deadly weapons are produced by way of bravado or intimidation—a case which, no doubt, often occurred when people habitually carried arms, and used them on very slight provocation. In such a case it might reasonably be regarded as the duty of the person assaulted to retreat rather than draw his own sword; but I cannot think that Hale meant to say that a man who, in such a case closed with his assailant and took his sword from him would be acting illegally, or that if, in doing so, the assailant were thrown down and accidentally killed by the fall, the person causing his death would be guilty of felony. The minuteness of the law contained in the authorities, on which this article is founded, is a curious relic of a time

retreat required from a party who at the time is standing on rights which can only be vindicated by maintenance even to the assailant's death.[1] But if, when the defendant is out of danger by retreat, he return and renew the attack, he can no longer set up self-defence ;[2] nor is a mere illusive retreat any defence.[3]

Prior malice of defendant does not abrogate defence.

§ 486 *b*. As has been already seen, a party is not precluded from setting up the plea of self-defence by the proof of prior malice on his part to his assailant. A. has no right to kill B. because B. bears old malice to A., and the fact of such malice does not in any way diminish B.'s right to defend himself against A.[4] But if B. bearing such malice, attack A. with deadly weapons, and B. is driven to the wall by A. and then kills A., B. cannot set up self-defence.[5]

Attack cannot be anticipated when there

§ 487. It has been sometimes said that if A.'s life be made wretched by the reckless and desperate enmity of B., and if there be good reason to believe that B. is intending to assassinate A., A. is not obliged, forsaking his usual

when police was lax and brawls frequent, and when every gentleman wore arms, and was supposed to be familiar with the use of them." Steph. Dig. C. L. art. 200.

He proceeds to say in the text that "any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm." *Supra*, § 100.

[1] *Supra*, § 99 ; *infra*, § 502 ; Pfomer *v.* State, 4 Parker C. R. 558 ; Dock *v.* Com., 21 Grat. 909 ; State *v.* Thompson, 9 Iowa, 188 ; State *v.* Maloy, 44 Ibid. 104 ; State *v.* Mason, 89 N. C. 676 ; Aaron *v.* State, 31 Ga. 167 ; De Arman *v.* State, 71 Ala. 351 ; Sylvester *v.* State, 72 Ibid. 201 ; People *v.* Ye Park, 62 Cal. 204 ; Williams *v.* State, 14 Tex. Ap. 102. That a person in his dwelling-house need not retreat, see *infra*, § 502.

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. assaults B. so fiercely that going back would endanger 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.

[2] State *v.* Rhodes, 1 Houst. C. C. 476.

[3] Ibid. ; Hodges *v.* State, 15 Ga. 117, and cases cited *supra*, § 486.

[4] *Supra*, § 477 ; Pickens *v.* State, 61 Miss. 52.

[5] Ibid. State *v.* Hill, 4 Dev. & B. 491.

employments, to hide from B., but may arm himself, and on meeting B. shoot B. down without waiting to receive B.'s shot.[1] No doubt, supposing a community to be without an authoritative police government, and supposing B. to be a ruffian actually seeking A.'s life, whom no other process can be used to check, then A. is excused in taking this violent but only possible way of saving his own life, by sacrificing that of B. But it is otherwise where there is opportunity to invoke the interposition of the law.[2] A man who believes his life is in danger, but whose rights are not as yet attacked, ought, if he have access to a tribunal clothed with the ordinary powers of a justice of the peace, to apply to such tribunal to interpose. If he have ground enough to excuse him in killing the person from whom he believes himself in danger, he has ground enough to have that person bound over to keep the peace, or committed in default of bail. And wherever this process can be applied, the endangered party is not excused in taking the law into his own hands and proceeding to attack his expected assailant.[3] He cannot himself seize on his antagonist in advance of the attack he fears ; and if he wishes thus to anticipate the attack, he must resort to the law. Where the conflict can be avoided, the law must be relied on for redress.[4] When, however, a right is actually attacked, the person possessing the right is not bound to yield in order to appeal to the law. He is entitled to repel force by force.[5] Nor is he precluded from repelling an attack actually made by the fact that he had such prior notice of the attack that he might have called upon the public authorities to intervene. When the attack is actually made on him, he is entitled to repel it, no matter for how long

is an opportunity to restrain by law.

[1] See Bohannon *v.* Com., 8 Bush, 481.

[2] State *v.* Martin, 30 Wis. 216 ; State *v.* Shippey, 10 Minn. 223 ; Dyson *v.* State, 26 Miss. 362 ; Edwards *v.* State, 47 Ibid. 581. Compare distinctions taken *supra*, § 97 *a*.

[3] R. *v.* Howarth, 1 M. C. C. 207 ; R. *v.* Williams, Ibid. 387 ; R. *v.* Langdon, R. & R. 228 ; State *v.* Rutherford, 1 Hawks, 457 ; Com. *v.* Drum, 58 Penn. St. 1 ; Dock *v.* State, 21 Grat. 909 ; Stewart *v.* State, 1 Ohio St. R. 66 ; Balkum *v.* State, 40 Ala. 671 ; Cotton *v.* State, 31 Miss. 504 ; and see *supra*, §§ 399, 461.

That a person about to be assaulted with a deadly weapon can anticipate the blow, see Fortenberry *v.* State, 55 Miss. 403 ; State *v.* McDonald, 67 Mo. 13. Selfridge's case, *supra*.

[4] People *v.* Sullivan, 3 Selden, 396 ; State *v.* Downham, 1 Houst. C. C. 45 ; Shippey *v.* State, 10 Minn. 223. And see Com. *v.* Drum, 58 Penn. St. 1.

[5] *Supra*, § 97 ; Bang *v.* State, 60 Miss. 571 ; King *v.* State, 13 Tex. Ap. 277.

a time he may have anticipated it. If self-defence could only be resorted to in cases in which the attack is entirely unexpected, the right would cease to exist in the cases in which it is most important to society that it should be preserved. If I choose to become a sheep, so runs a pregnant German proverb, I will be devoured by the wolf.[1] The social wolf is the production of the social sheep.

Otherwise where there is no organized government.

§ 487 *a*. Of course the rule just stated, that an attack cannot be anticipated by a private person who could have recourse to the law for this purpose, presupposes that the law gives machinery by which, if my life is threatened, I can cause the arrest of my expected assailant. Suppose, however, the law gives no such machinery? Am I to be shot down without the means of prevention, by an assassin who will fire at me on sight? Am I to wait to receive the shot, in order to comply with the technical requisite that before I can fire an attempt must be made on my life? In a state of nature, where there is no law to which I can appeal to have such a ruffian restrained, I am entitled, in order to save my life, to take the law into my own hands; though I do this at my own risk. On this principle may be explained a remarkable case in California, where a party of persons were on an island belonging to the United States, engaged in gathering wild birds' eggs, and where another party attempted to land for the same purpose. It was held that if the first party resisted the landing by force, the second was justified in using force, and that if one of the occupants were killed in the encounter, this was excusable homicide.[2] But if there be any tribunal to which a party believing his life to be in danger may resort for protection, he must claim this protection; and for him to take the law in his own hands, and to kill a supposed assailant, unless under the honest belief of an actual attack, is murder.

§ 488. It is conceded on all sides that it is enough if the danger which the defendant seeks to avert is *apparently* imminent, irremediable, and actual.[3] But apparently as to whom? Here three

[1] Wer sich zum Schaaf macht, den frisst der Wolf. See, fully, *supra*, § 97.

[2] People *v.* Batchelder, 27 Cal. 69. See this doctrine illustrated in the Virginius Case, as detailed in Whart. on Hom. § 490; and see, also, *supra*, § 271.

[3] See Davidson *v.* People, 90 Ill. 221; People *v.* Ye Park, 62 Cal. 204; People *v.* Westlake, Ibid. 303.

theories meet us: The first is, that the stand-point is that of the jury.[1] No doubt, in a primary sense, this is correct. The jury must judge whether the danger was apparent, but it is absurd to say that it is necessary that the danger must have been such as to be apparent to themselves as they deliberate finally on the case. If this were true, an unloaded pistol would cease to be an apparent danger; for the jury, when they come to decide the case, know that the pistol was not loaded, and know that there was no real danger. Hence, what the jury have to decide, is not whether the danger is apparent to themselves, but whether it is apparent by some other standard. What, then, is the standard which the jury are thus to apply?

Whether the danger is apparent is to be determined from the defendant's stand-point.

The answer given by several of our courts to this question is, that if a "reasonable man" would have held that the danger was apparent, then the danger will be treated as apparent.[2] In other cases it is varied; it being said that when the danger is "reasonably apparent," then it is to be treated as apparent. We are, therefore, to infer that if a man of ordinary reason would consider an apparent

[1] To the effect that "apparent" imminent danger is enough if there be a "reasonable" and honest belief in its existence, see U. S. *v.* Wiltberger, 3 Wash. C. C. 515; People *v.* Austin, 1 Parker C. R. 154; Murray *v.* Com., 79 Penn. St. 311; Pistorius *v.* Com., 84 Ibid. 158; Abernethy *v.* State, 101 Ibid. 322; Darling *v.* Williams, 35 Ohio St. 58; Stoneman *v.* Com., 25 Grat. 887; State *v.* Abbott, 8 W. Va. 741; Stiles *v.* State, 57 Ga. 183; Heard *v.* State, 70 Ibid. 598; Wesley *v.* State, 37 Miss. 327; State *v.* Brown, 64 Mo. 367; Schnier *v.* People, 23 Ill. 17; Cahill *v.* State, 106 Ibid. 488; Roach *v.* People, 77 Ibid. 25; Creek *v.* State, 24 Ind. 151; West *v.* State, 59 Ibid. 113; Holloway *v.* Com., 11 Bush, 344; Oder *v.* Com., 80 Ky. 32; Williams *v.* Com., Ibid. 313; Lightfoot *v.* Com., Ibid. 516; Taylor *v.* State, 48 Ala. 180; Eiland *v.* State, 52 Ibid. 322; Wills *v.* State, 73 Ibid. 363; Fortenberry *v.* State, 55 Miss. 403; Kendrick *v.* State, Ibid. 436; People *v.* Williams, 32 Cal. 280; People *v.* Anderson, 44 Ibid. 65; State *v.* Bohan, 19 Kans. 28. See Hicks *v.* State, 51 Ind. 407; Teal *v.* State, 22 Ga. 75; Long *v.* State, 52 Miss. 23; Bang *v.* State, 60 Ibid. 571; State *v.* O'Connor, 31 Mo. 389; State *v.* Eaton, 75 Ibid. 586; State *v.* Johnson, 35 La. An. 968; Pharr *v.* State, 7 Tex. Ap. 472; May *v.* State, 6 Ibid. 191; Williams *v.* State, 14 Ibid. 102; Moore *v.* State, 15 Ibid. 2; Branch *v.* State, Ibid. 96; Smith *v.* State, Ibid. 338. As to burden of proof, see Whart. Cr. Ev. § 335. As to question in relation to insanity, see *supra*, § 39.

[2] See Odor *v.* Com., 80 Ky. 32; People *v.* Morine, 61 Cal. 364.

That aiming an unloaded gun may justify self-defence, when the defendant believes the gun to be loaded, see People *v.* Anderson, 44 Cal. 65; Bode *v.* State, 6 Tex. Ap. 424; and see R. *v.* Weston, 14 Cox C. C. 346.

though unreal danger to be imminent and real, then this is a good defence; but that to constitute a good defence it is necessary that the danger should have been such as to have been considered as imminent and real by a man of ordinary reason.[1]

Impracticable to take an ideal "reasonable man" as standard.

§ 489. But who is the "reasonable man" who is thus invoked as the standard by which the "apparent danger" is to be tested? What degree of "reason" is he to be supposed to have? If he be a man of peculiar coolness and shrewdness, then he has capacities which we rarely discover among persons fluttered by an attack in which life is assailed; and we are applying, therefore, a test about as inapplicable as would be that of the jury who deliberate on events after they have been interpreted by their results. Or, if we reject the idea of a man of peculiar reasoning and perceptive powers, the selection is one of pure caprice, the ideal reasonable man being an undefinable myth, leaving the particular case ungoverned by any fixed rule. And that this ideal reasonable man is an inadequate standard, is shown by a conclusive test. Suppose 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 be not admissible to *acquit, a fortiori*, it is inadmissible to *convict*.[2]

[1] As illustrating this view see State *v.* Bryson, 1 Winst. Law, pt. ii. 86. See, also, Davis *v.* People, 88 Ill. 350; Steinmeyer *v.* People, 95 Ibid. 383; Kennedy *v.* Com., 14 Bush, 340; Draper *v.* State, 4 Baxt. 246; Parker *v.* State, 55 Miss. 414; Kendrick *v.* State, Ibid. 436; State *v.* McKenna, 61 Ibid. 589; People *v.* Flahave, 58 Cal. 249. See Whart. on Hom. § 493.

[2] 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. Cr. Ev. § 69; and see Adams *v.* People, 47 Ill. 208; Schnier *v.* People, 23 Ibid. 17; State *v.* Middleham, 62 Iowa, 150; 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. Cr. Ev. § 757.

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.

§ 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

In Jordan *v.* Elliott, Supreme Ct. Penn. 1882, 12 Weekly Notes, 56, it was held that when duress was set up by a person of weak nerves, it would be made out, although the threats were not such as a person of strong character would have yielded to. It was also held that evidence might be received to show that the person subjected to the duress had heard that the person threatening was violent and desperate. See Whart. on Cont. § 147.

The penal codes of many of the 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 Maxims, tells us Lord Erskine relied on as of controlling importance, and which is adopted in a well known opinion of Baron Parke:[8] "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:[9] "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

[1] Morris *v.* Platt, 32 Conn. 75; Shorter *v.* People, 2 Comst. 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 Comst. 193, to be only declaratory of the common law.

[3] People *v.* Hurley, 8 Cal. 390; People *v.* Williams, 32 Ibid. 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.

[8] R. *v.* Thurborn, 1 Den. C. C. 388-9.

[9] R. *v.* Scully, 1 C. & P. 319.

Analogy from cases of interference in the conflicts of others.

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 right or wrong. If they were honest, and not negligently adopted, then

inadvertent departures, by the Pennsylvania courts. It was uniformly applied in all homicide cases by Judge King, a great master of criminal law.[1]

Following Judge King's lead, we find Judge Brewster, afterwards presiding in the same court, declaring[2] 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.[3]

In Massachusetts, if we are to judge from cases in which evidence of the deceased's ferocity and brutality was at one time rejected, the view here defended was at that time disapproved; 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.[4] And by a still more recent decision the cases excluding evidence of the deceased's character for ferocity have been overruled, therein virtually adopting the subjective test.[5]

Judge Thurman, in a capital case 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

[1] 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, quoted in Whart. Crim. Law, 7th ed. § 1027.

[2] Com. *v.* Carey, 2 Brewster, 401.

[3] Logue *v.* Com., 38 Penn. St. 265. See, also, Com. *v.* Seibert, quoted at large in Whart. on Hom. § 507.

[4] Com. *v.* Woodward, 102 Mass. 155. For the rule in Michigan, see Pond *v.* State, 8 Mich. 150.

[5] Com. *v.* Barnacle, 134 Mass. 216; *supra*, § 39.

A.'s offence is not higher than manslaughter.[1] And a similar analogy may be found in the rulings that in cheats by false pre-

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 State *v.* Cain, 20 W. Va. 679; Grainger *v.* State, 5 Yerger, 459; State *v.* Rippy, 2 Head. 217; State *v.* Williams, 3 Heisk. 376; Teal *v.* State, 22 Ga. 75; Green *v.* State, 69 Ala. 6; State *v.* Sloan, 47 Mo. 604; State *v.* Bryant, 55 Ibid. 75; Oliver *v.* State, 17 Ala. 587; Carroll *v.* State, 23 Ibid. 28; Noles *v.* State, 26 Ibid. 31; Wesley *v.* State, 37 Miss. 327; aff. in Evans *v.* State, 44 Ibid. 762; Gladden *v.* State, 12 Fla. 562; State *v.* Neeley, 20 Iowa, 108; Collins *v.* State, 32 Ibid. 36; Murphy *v.* State, 33 Ibid. 270; State *v.* Potter, 13 Kans. 414; People *v.* Los Angeles, 61 Cal. 188; Bode *v.* State, 6 Tex. Ap. 424; Sims *v.* State, 9 Ibid. 586. And see Stoneman *v.* Com., 25 Grat. 887. In divergence from the text, it was held in State *v.*

[1] Fost. 262; 1 Hawk. c. 31, § 44; and see *supra*, §§ 395 *et seq.*, 479; *infra*, § 494.

tences, the standard of credulity is to be determined by the prosecutor's own capacity and experience, not by those of an ideal reasonable man.[1]

On principle, the test is the defendant's honest belief.

§ 491. Viewing the law in this respect on principle, we are compelled to hold that the question of apparent necessity can only be determined from the defendant's standpoint.[2] Take the question, first, in its simpler relations. A. is assaulted by B. with what appears to be a loaded pistol in his hand. A. kills B., believing the pistol to be loaded, when it is not. This, it is agreed, may constitute a good case of self-defence. When we come to analyze A.'s belief, however, we find that it is an ordinary conclusion of inductive reasoning; a conclusion which is erroneous, because its minor premise is false. Putting this process in syllogistic form, it stands as follows:—

Whoever assaults me with a loaded pistol endangers my life.

B. assaults me with a loaded pistol, etc.

Supposing, however, we substitute for the subject of the major premise the term "Garroter,"—slightly varying the predicate, the process may be then thus stated:—

A garroter taking me by the throat is likely to do me great bodily harm.

B. is a garroter taking me by the throat, etc.

Now, in the first case, it is enough if I honestly, though erroneously, believe that B.'s pistol is loaded; and in the second case it is enough if I honestly, though erroneously, believe that B. is a garroter. In both cases the error of the conclusion is one of the apprehensive powers. I err in my apprehension; I do not see aright; or I have been misinformed; or I have not heard aright.

Shoultz, 25 Mo. 128, that evidence of defendant's peculiar nervousness was inadmissible. This, however, is overruled in State *v.* Keene, 50 Ibid. 257. As rejecting the distinction taken in the text, see State *v.* McGreer, 13 S. C. 464; Wesley *v.* State, 37 Miss. 327. See this question discussed in its relation to insanity, *supra*, § 38.

[1] *Infra*, § 1192.

[2] See State *v.* Peacock, 40 Ohio St. 333; Bode *v.* State, 6 Tex. Ap. 424. It should be remembered that if the assailed acts, in the confusion of a sudden and unexpected attack, wildly and desperately, the blame is in a large measure imputable to the assailant. The assailant acts with deliberation and with the weapons he has chosen for the purpose; the assailed acts without deliberation and with any weapons he can pick up. See further comments in note to *supra*, § 102.

But in each case the error for which I am to be put on trial is *my* error, not somebody else's error. It is no excuse to me, if I resort to self-defence, that some "reasonable" looker-on believes the pistol to be loaded, when I know that it is unloaded. So it is no excuse to me, if I shoot down a person suddenly hustling me, that some "reasonable" looker-on believes the supposed assailant to be a garroter, when I know him not to be a garroter. So if I, according to my own lights, conclude the pistol to be loaded, or the assailant to be a garroter, then I am to be acquitted of malice if I act upon this belief, though I cannot be acquitted of manslaughter if I arrive at this belief negligently. In other words, I cannot be convicted of murder, which involves a malicious intent, unless I have such a malicious intent; though I may be convicted of manslaughter if I have killed another by aiming at him a dangerous weapon without due consideration. Nor does it make any difference that my conclusion as to the imminency of the danger is not that which a cool observer of ordinary capacity would have reached. In the first place, we must remember that whoever puts me in a position of danger which so disturbs or flutters me that I act precipitately and convulsively, is liable for the consequences of such precipitate and convulsive action. In the second place, even supposing my intellect is so disordered as to be incapable of right reasoning, it is by this disordered and illogical intellect, and not by the intellects of saner and more logical observers, that I am to be judged.[1] To this effect may be cited the observations of one of the most vigorous of contemporaneous English commentators. "Partial insanity," says Sir J. F. Stephen, "may be evidence to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused. A man is tried for wounding with intent to murder. It is proved that he inflicted the wound under a delusion that he was breaking a jar. The intent to murder is disproved, and the prisoner must be acquitted; but if he would have no right to break the supposed jar, he might be convicted of an unlawful and malicious wounding."[2] So Berner, an authoritative German

[1] See *supra*, §§ 37, 488 *et seq.* That the defendant may testify to his belief, see State *v.* Harrington, 12 Nev. 125; Whart. Cr. Ev. § 431.

[2] Criminal Law of England, London, 1863, p. 92. The better conclusion would be, that as he (the defendant) used a dangerous weapon negligently, he would be liable as for negligent wounding. *Infra*, § 492.

jurist,[1] tells us, that "whether the defendant actually transcended the limits of self-defence can never be determined without reference 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."[2]

[1] Lehrbuch d. Straf. 1871, p. 147.

[2] 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. *Infra*, § 885.

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 Ibid. 205. See *supra*, §§ 87, 419; *infra*, § 649; and see, also, Spicer *v.* People, 11 Ill. App. 294.

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. *Supra*, § 87. See Clow *v.* Wright, Brayt. 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, 29 Ga. 593; 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, while the conflict raged, 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

§ 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

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.

The mere fact that the defendant did not at the time of the killing believe such killing was necessary does not divest him of the right to set up self-defence if the killing was not intended by him, but was incidental to his excusable defence of himself when assaulted. McDermott *v.* State, 89 Ind. 189.

Whether threats uttered before a fatal collision, not communicated to the defendant, are admissible, is discussed 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. This view is approached in Kinney *v.* State, 108 Ill. 519, where it is held that the defendant's belief in danger must be "well grounded;" which is tantamount to saying that if the defendant's reasoning be defective, he cannot set up his belief as a full defence. If this defectiveness be imputable to negligence, the distinction is the same as in the text.

In People *v.* Dann, S. C. Mich. 1884 (18 Rep. 529), Sherwood, C. J., giving the opinion of the court, said: "In such cases (of self-defence) courts cannot and will not undertake to pass upon the surroundings with very great nicety in determining just when, and at what particular stage of the affray, the defendant may be justified in using a deadly weapon in defending his person. Every case must be governed by its own particular circumstances, and they vary to such an extent, and depend so much upon appearances and incidents occurring at the moment of greatest danger, that he who encounters it must, to a very great extent, be left to determine for himself the means necessary to be used for his own pro-

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, killed another whom he supposes to be a burglar, acquitted on the ground that under the circumstances he acted under an innocent error of fact. But Foster[1] 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,[2] 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.

The same distinction is taken by Judge Bronson in the opinion last cited; and on this distinction rests the whole of Judge Bronson's argument,—an argument which, as we have seen, has been subsequently adopted by several American courts. With peculiar clearness is this brought out by Judge Campbell, of Michigan, in his opinion in Pond's case:[3] "The law," so he correctly states, "while it will not generally excuse mistakes of law (because every man is bound to know that), does not hold men responsible for a knowledge of facts, *unless their ignorance arises from fault or negligence.*"[4]

§ 493. "The belief that a person designs to kill me," says Ruffin, C. J.,[5] "will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or at least is in apparent situation so to do, and

Apparent attack, to be an excuse, must

tection, and, in reviewing the discretion used by him, no great amount of speculation and refinement as to probabilities can safely be indulged in by the court."

[1] Crown Law, p. 299. See this case discussed *supra*, § 38. To same effect, see Guice *v.* State, 60 Miss. 714.

[2] Shorter's Case, 2 Comst. 193.

[3] See *supra*, § 489; and see Darling *v.* Williams, 35 Oh. St. 58.

[4] See, also, other cases cited *supra*, § 343 *et seq.*

[5] State *v.* Scott, 4 Ired. 409.

have actually begun and must be violent.

thereby induces me to think that he intends to do it immediately."[1] "The situation spoken of," however, as is well observed by Chilton, C. J., when citing the above passage,[2] "is not that he (the deceased) has the means at hand of effecting a deadly purpose, but that by some act or demonstration he indicates, at the time of the killing, a present intention to carry out such purpose, thereby inducing a reasonable belief, on the part of the slayer, that it is necessary to deprive him of life in order to save his own." It is true that a person who insanely believes himself to be attacked, and strikes down the supposed assailant, is not responsible for murder. But if a man be sane, he is not justified in repelling by force an attack which is not at least apparently imminent.[3] And this is for two reasons. In the first place, if the attack be not apparently imminent, his duty is, as has been seen, to appeal to the law to arrest the supposed offender and to hold him to keep the peace.[4] In the second place, a person who undertakes to use a dangerous weapon, to repel an attack which is not at least apparently imminent, cannot relieve himself of the imputation of negligence. For he has used a dangerous weapon without due circumspection, and thus makes himself responsible for the consequences. As one negligently killing another, he is guilty of manslaughter.[5] A violent and perilous defence, also, can only be employed in cases where there is an apparently violent and perilous attack.[6] To sustain such a defence, however, the actual striking of a

[1] S. P. in R. *v.* Thurston, 1 Den. C. C. 387; U. S. *v.* Outerbridge, 5 Saw. C. C. 620; People *v.* Shorter, 2 Comst. 193; People *v.* McLeod, 1 Hill, N. Y. 420; People *v.* Lamb, 54 Barb. 342; Patterson *v.* People, 46 Ibid. 625; Com. *v.* Drum, 58 Penn. St. 9; Stoneman *v.* Com., 25 Grat. 887; Pond *v.* People, 8 Mich. 150; State *v.* Morgan, 3 Ired. 186; Stiles *v.* State, 57 Ga. 183; Lewis *v.* State, 51 Ala. 1; Rogers *v.* State, 62 Ibid. 170; De Arman *v.* State, 71 Ibid. 351; Sylvester *v.* State, 72 Ibid. 201; Evans *v.* State, 44 Miss. 762; Colton *v.* State, 31 Ibid. 504; Scott *v.* State, 56 Ibid. 287; State *v.* Hayes, 23 Mo. 287; Creek *v.* State, 24 Ind. 151; Farris *v.* Com., 14 Bush, 362; State *v.* Williams, 3 Heisk. 376; State *v.* Horne, 9 Kan. 119; Lander *v.* State, 12 Tex. 462; Gonzales *v.* State, 31 Ibid. 495; Hinton *v.* State, 24 Ibid. 454; Munden *v.* State, 37 Ibid. 353; Marnach *v.* State, 7 Tex. Ap. 269; Richardson *v.* State, Ibid. 486; People *v.* Campbell, 30 Cal. 212; People *v.* Herbert, 61 Ibid. 544; People *v.* Raten, 63 Ibid. 421.

[2] Harrison *v.* State, 24 Ala. 67.

[3] State *v.* Newcomb, 1 Houst. C. C. 66; State *v.* Vines, Ibid. 424.

[4] See *supra*, §§ 99, 487.

[5] Judge *v.* State, 58 Ala. 406; King *v.* State, 13 Tex. Ap. 277.

[6] *Supra*, § 102; *infra*, § 498; R. *v.*

blow is not necessary,[1] nor is it even requisite that the assailant be within striking distance,[2] if the attack be apparently imminent. But mere preparations of an expected assailant, not implying an imminent attack, will be no defence.[3]

Right extends to parent and child, husband and wife, master and servant.

§ 494. The right of self-defence, by the English common law, is extended to the relationships of parent and child, of husband and wife, and of master and servant. "Under this excuse of self-defence the principal civil and domestic relations are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each, respectively, are excused, the act of the relation being construed the same as the act of the party himself."[4] This defence, however, cannot be set up by a son assisting a father in a wanton assault.[5] Nor can it be extended so as to exonerate collateral relatives who undertake to punish assailants of such relatives.[6] It is important, also, to distinguish this right from that of the duty of interference to prevent a felony, to be hereafter considered. The duty of interfering to prevent a felony is, as we will see, not limited by the relationship of the party interfering to the party attacked, but depends on the fierceness of the attack and the probability that by such intervention alone could the felony be prevented.[7] The right to defend husband or wife, parent or child, master or servant (for to these relationships is the right limited), is conditioned, not by the extremity to which the person assisted is reduced, but by the resentment naturally felt at an attack on one whom the party intervening is bound by natural or social law to defend. The two defences may be sometimes blended. A parent, or wife, or master may be

Bull, 9 C. & P. 22; Com. *v.* Drew, 4 Mass. 391; People *v.* Shorter, 2 Comst. 193; State *v.* Zellers, 2 Halst. 220.

[1] State *v.* McDonald, 67 Mo. 13.

[2] Fortenberry *v.* State, 55 Miss. 403.

[3] Cartwright *v.* State, 14 Tex. Ap. 486.

[4] 4 Bl. Com. 186; 1 Hale P. C. 484. *Supra*, §§ 460, 478. Handcock *v.* Baker, 2 B. & P. 260; R. *v.* Harrington, 10 Cox C. C. 370 (parent and child); Patton *v.* People, 18 Mich. 314 (parent and child); State *v.* Brittain, 89 N. C. 482; Slater *v.* State, 30 Miss. 619 (husband and wife). As to attacks on those attempting chastity of wife or child, see *supra*, §§ 459, 460.

[5] Sharp *v.* State, 19 Ohio St. 387; Bristow's Case, 15 Grat. 624. *Supra*, § 476.

[6] Dyson *v.* State, 14 Tex. Ap. 454.

[7] *Infra*, §§ 495, 505. Com. *v.* Daley, 4 Penn. L. J. 153; State *v.* Westfall, 49 Iowa, 328; Irvy *v.* State, 32 Ga. 496. As to interfering to protect houses, see *infra*, § 505.

defended from an attack which would be in itself felonious. But when such relationships do not exist, there must be an apparent imminent fatal assault to justify the intervener in taking the assailant's life; whereas, when these relationships do exist, the intervener has the same right as would the person aided, as well as the palliation of hot blood to the same extent as has such person aided.[1]

Whether the same right extends to the relationship of brother to brother may be questioned. That it does has been asserted by a learned judge of West Virginia. "What one may lawfully do in defence of himself when threatened with death or great bodily harm," so it was said, "he may do in behalf of a brother; but if the brother was in fault in provoking the assault, that brother must retreat as far as he safely can, before his brother would be justified in taking the life of his assailant in his defence of the brother. But if the brother was so drunk as not to be mentally able to know his duty to retreat, or was physically unable to retreat, a brother is not bound to stand by and see him killed or suffer great bodily harm, because he does not under such circumstances retreat."[2]

Where from any cause the brother interfering was charged with the duty of protecting the brother assailed, then the interference of the former may be sustained. But unless there were such duty, the reasoning which sustains a brother's interference would sustain the interference of a cousin or a friend. A line must be somewhere drawn, unless society is to be resolved into an association for mutual assistance in fights; and the only line that is intelligible, and is consistent with the general analogies of the law, is that which makes the test that of duty to assist.[3] No undue burden is cast by the adoption of this distinction upon those who expose themselves in the effort to prevent a felony from being committed. Persons so intervening, as will be seen in the next section, are protected as far as is required by reason and justice. But this right is distinguishable from the right of self-defence. The right of self-defence justi-

[1] See *supra*, §§ 467, 484, 493; *infra*, §§ 501, 502, 505. Cooper's Case, Cro. Car. 544; Semayne's Case, 5 Co. 92; U. S. *v.* Wiltberger, 3 Wash. C. C. 515; Com. *v.* Riley, Thach. C. C. 471; Curtis *v.* Hubbard, 1 Hill (N. Y.), 336; S. C., 4 Ibid. 437; De Forest *v.* State, 21 Ind. 23; State *v.* Johnson, 75 N. C. 174; Cheek *v.* State, 35 Ind. 492; Waybright *v.* State, 56 Ibid. 123; People *v.* Lilly, 38 Mich. 270; Connaught *v.* State, 1 Wis. 165. See Branch *v.* State, 15 Tex. App. 96.

[2] Johnson, J., State *v.* Greer, 22 Va. 819; see Dyson *v.* State, *ut sup.*

[3] See *infra*, § 1563.

fies the anticipating a probable attack by counter-preparations; the right of prevention of felonies does not justify such counter-preparations. To confound the two, would be to authorize every man to go armed to prevent wrongs being done by any body else.[1]

2. *Prevention of Felony.*

Bonâ fide and non-negligent belief that a violent felony is in progress will excuse homicide in its resistance.

§ 495. A *bonâ fide* belief by the defendant that a violent felony is in the process of commission, which can only be arrested by the death of the supposed felon, makes the killing excusable homicide, though if such belief be negligently adopted by the defendant, then the killing is manslaughter.[2] Levett's case, which has been already discussed, rests on this principle.[3] Levett, under the erroneous but honest belief that A. was attempting a burglary, killed A. It was adjudged excusable homicide in Levett, though if it had appeared that Levett had been negligent in arriving at this conclusion it might have been manslaughter.[4] No doubt we frequently meet with expressions to the effect that to excuse homicide in such cases it must be shown that a felony was in fact about to be committed.[5] But such expressions are not to be strained to mean more than that a felony is *apparently* about to be committed. In what case can more be shown? Even supposing we see a known pickpocket seizing a purse, is it not possible that in such case, even at the last moment, the thief may hesitate? Can we, as to a future event, reach to anything more than a high probability? If so, we may correctly accept, in this as well as in the analogous case of self-defence, the position that if A., honestly and without negligence on his part, believe that B. is in the process of committing a violent felony which can only be arrested by B.'s death, A. is excused in killing B.[1]

[1] 1 East P. C. c. 5, s. 58, p. 290; Johnson's Case, 5 East, 660.

[2] As to burden of proof, see Whart. Crim. Ev. § 335. This has been sometimes explained by the fact that all felonies are capital at common law. But the rule still exists, though capital punishment is now abolished in all cases except those of murder and treason. The true reason is, that to prevent an atrocious wrong from being committed, bystanders are entitled to use all necessary force.

[3] See *supra*, §§ 38, 405, 427, 467.

[4] *Supra*, § 492.

[5] East P. C. p. 300; Adams *v.* Moore, 2 Selw. N. P. 934; Burns *v.* Erben, 40 N. Y. 463; Hawley *v.* Butler, 54 Barb. 490; Brooks *v.* Com., 61 Penn. St. 352; Mitchell *v.* State, 22 Ga. 211; State *v.* Morgan, 3 Ired. 186; State *v.* Roane, 2 Dev. 58; Staten *v.* State, 30 Miss. 619; Parker *v.* State, 31 Tex. 132.

Right cannot usually be exercised when there is an opportunity to secure the offender's arrest.

§ 496. We must repeat, however, that this principle cannot be extended so as to justify anticipating the attack in cases where there is an opportunity to secure the prevention of the offence in due course of law.[2] It is on this ground that we must refuse assent to a Georgia case, in which it was ruled excusable in A. to shoot in the morning B., who on the previous night had attempted to have carnal intercourse with A.'s wife.[3] No doubt had B.'s conduct in the morning amounted to a renewal of the attempt, showing that force was intended, then A. would have been excused. But as the evidence showed that B.'s offence in the morning consisted simply in taking his seat at the same breakfast table, at a public house, with the wife, there was no such evidence of the imminency of the danger as justified A. in having recourse to arms.[4] It is otherwise, however, when A. discovers B. entering the bedchamber of A.'s wife with the apparent intention of ravishing the latter.[5] And it is also otherwise when the appeal to the law would be ineffective.[6] Of course, hot blood could continue to exist, even after a day's delay, but this, which would sustain a conviction of manslaughter, is very different from a defence of excusable homicide, ending in an acquittal. And the question of duration of hot blood

[1] See Ruloff *v.* People, 45 N. Y. 213; People *v.* Payne, 8 Cal. 341; Payne *v.* Com., 1 Metc. (Ky.) 370; McPherson *v.* State, 22 Ga. 478. In Storey *v.* State, 71 Ala. 339, the court adopted the following from Whart. on Hom. § 539: "The rule (above stated) does not authorize the killing of persons attempting secret felonies not accompanied by force;" and see *supra*, § 435.

[2] *Supra*, §§ 97 *a*, 487.

[3] Biggs *v.* State, 29 Ga. 723. The Roman law is clear on this point: L. 5. pr. D. ad L. Aquil. (9. 2.) . . . . sin autem, quum posset apprehendere (furem), maluit occidere, magis est, ut iniuria fecisse videatur, ergo et Cornelia tenebitur. C. 18. de homicid. (5. 12.) . . . . quamvis vim vi repellere omnes leges et omnia iura permittant: quia tamen id debet fieri cum moderamine inculpatae tutelae, non ad sumendam vindictam, sed ad iniuriam propulsandum, non videtur idem sacerdos a pœna homicidii penitus excusari . . . .

[4] State *v.* Samuel, 3 Jones L. (N. C.) 74; State *v.* Neville, 6 Ibid. 432. See Parker *v.* State, 31 Texas, 132.

[5] Staten *v.* State, 30 Miss. 619; and see State *v.* Craton, 6 Ired. 164. *Infra*, § 499.

[6] *Supra*, §§ 97 *a*, 487 *a*.

is to be determined by the temperament of the party aggrieved. The sense of outrage may unseat reason for weeks; and, as long as such a condition lasts, the cool deliberation necessary to constitute murder in the first degree cannot be assumed.[1]

But this does not excuse pursuit and killing when danger is over.

§ 497. If the felonious attempt be abandoned and the offender escape, the killing of the offender without warrant, on a pursuit organized after such escape, is murder. In such case the supposed offender is guilty only of an attempt at felony—an attempt qualified and reduced by the fact of abandonment more or less voluntary.[2] The right of pursuit, heretofore touched upon, does not, therefore, apply to such case; and even if it did, it will not avail to defend a pursuer who has the opportunity of recourse to the law.[3] "A well-grounded belief," says Henderson, J., in a North Carolina case,[4] "that a known felony was about to be committed, will extenuate a homicide committed in prevention of the supposed crime—and this upon a principle of necessity;[5] but when that necessity ceases and the supposed felon flies, and thereby abandons his supposed design, a killing in pursuit, however well grounded the belief may be that he had intended to commit a felony, will not extenuate the offence of the prisoner." So in a subsequent case,[6] it was justly said by the same learned judge, that "the law authorizes the killing of one who is in the act of committing a forcible felony, and even one who *appears* to be in the act of doing so, for the purpose of *prevention*, not by way of punishment." This is of course consistent with the position that a person detected in an attempt to commit a felony may be arrested at once, for the purpose of being carried before a magistrate; and if arrested in the night time may be lawfully detained without a warrant until access to a magistrate may be had.[7]

But after a larceny is completed, it is manslaughter for a third person, acting without warrant, to kill the felon in order to prevent his escape.[8]

[1] *Supra*, § 480.
[2] See *supra*, § 484.
[3] See *supra*, §§ 410, 432, 434.
[4] State *v.* Rutherford, 1 Hawks, 457.
[5] See to this point Ruloff *v.* People, 45 N. Y. 213. See *supra*, § 102.
[6] State *v.* Roane, 2 Dev. 58.
[7] R. *v.* Hunt, 1 Moody C. C. 96. See *supra*, §§ 461, 487.
[8] *Supra*, § 410; Lacy *v.* State, 7 Tex. Ap. 403.

Nor an unnecessary killing.

§ 498. Nor is killing excusable if the crime resisted could be apparently prevented by less violent action.[1] Thus, if a party attempting a felony be not armed (either actually or apparently) with a deadly weapon, or does not possess (either actually or apparently) such superior strength and determination as to enable him to effect his purpose unless he be killed, then killing him by a deadly weapon is not excusable.[2]

Violent and flagrant offences may be thus resisted.

§ 499. It has already been seen that a person when assailed is excused if, under the honest and non-negligent belief that an assailant is about to kill him or inflict on him some grievous bodily hurt, he kill such assailant as the only way of preventing the immediate commission of the offence. It has been seen, also, that this same excuse applies to the prevention of any other forcible and atrocious attack on the rights of the assailed.[3] It certainly applies to attempts to commit a violent felony on a third person;[4] and although generally the right is limited to the prevention of such felonies, yet as riots are often productive of the most serious crimes, and as it is the duty of a private citizen to interfere for the suppression of riots, so if a riot can only be apparently suppressed by the taking of life, taking of life, even by a private citizen, will under such circumstances be excusable.[5] It would seem, however, that the right

[1] That this does not justify vindictive excessive counter-blows, see R. *v.* Blow, 14 Cox C. C. 1. *Supra*, § 484.
[2] R. *v.* Scully, 1 C. & P. 319; R. *v.* Howarth, 1 M. C. C. 207; R. *v.* Williams, Ibid. 387; R. *v.* Longden, R. & R. 228; McDaniel *v.* State, 8 Sm. & M. 401; State *v.* Roane, 2 Dev. 58; State *v.* Rutherford, 1 Hawks, 457. See R. *v.* Bull, 9 C. & P. 22; and see *supra*, §§ 102, 493.
[3] See *supra*, § 495; Minton *v.* Com., 79 Ky. 461; King *v.* State, 13 Tex. Ap. 377.
[4] *Supra*, § 495; Dill *v.* State, 25 Ala. 15. Thus the entrance by A. into the bed-room of B.'s wife with the apparent intention of ravishing the latter, is an attempt at felony excusing B. in killing A. Staten *v.* State, 30 Miss. 619. See *supra*, §§ 460, 494. In respect to rape, the Roman law is clear to this point. "D. Hadrianus rescripsit, eum, qui strupram sibi vel suis per vim inferentem occidit, dimittendum." L. I. § 4, ad leg. Corn. de sic. D. 48. 4. But there must be an actual assault. The belief that the deceased was attempting to seduce by administering drugs is no justification. People *v.* Cook, 39 Mich. 236.
[5] Res. *v.* Montgomery, 1 Yeates, 421. *Supra*, §§ 407, 428; *infra*, § 1555; Whart. Cr. Pl. & Pr. § 16; Phillips *v.* Trull, 11 Johns. 486; Pond *v.* People, 8 Mich. 150.

does not authorize the killing of persons attempting secret felonies, not accompanied with force.[1]

Trespass no excuse for killing trespasser.

§ 500. We have already seen[2] 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, A. at the time knowing that only a mere trespass was intended.[3] The same rule applies, *mutatis mutandis*, to the vindication of the right to personal property.[4] If the killing of the trespasser in either case take place in the passion and heat of blood, the killing is manslaughter, but unless it be in resisting robbery, it is not justifiable.[5] The reason is, that in the given cases of trespasses, the killing was unnecessary, the party killing knowing that only a trespass, or at the most a trivial larceny, was intended.[6]

Owner may resist to death violent removal of

§ 501. On the other hand, when the defendant was not himself the aggressor, but was defending his own property from an assailant, he has a right to use as much force as is necessary to prevent its forcible illegal removal, or his exclusion from its use.[7] It is true that when the wrong

[1] See R. *v.* Murphy, 2 C. & P. 20; State *v.* Vance, 17 Iowa, 144; Priester *v.* Augley, 5 Rich. (Law) 44; Fost. 274; 1 Hale P. C. 488; and see Pond *v.* People, 8 Mich. 150.

[2] *Supra*, § 462. That killing a person dressed up as a ghost is murder when the intrusion was a mere trespass, see R. *v.* Smith, 1 Russ. on Cr. 546.

[3] R. *v.* Archer, 1 F. & F. 351; Com. *v.* Drew, 4 Mass. 391; People *v.* Cole, 4 Parker C. R. 35; Davison *v.* People, 90 Ill. 221; People *v.* Horton, 4 Mich. 67; State *v.* Vance, 17 Iowa, 138; State *v.* Kennedy, 20 Ibid. 569; State *v.* Shippey, 10 Minn. 223; State *v.* Lambeth, 23 Miss. 322; State *v.* Morgan, 3 Ired. 186; State *v.* McDonald, 4 Jones (N. C.), 19; State *v.* Brandon, 8 Jones (N. C.), 463; Oliver *v.* State, 17 Ala. 588; Carroll *v.* State, 23 Ibid. 28; Noles *v.* State, 26 Ibid. 31; Harrison *v.* State, 24 Ibid. 67; Keener *v.* State, 18 Ga. 194; Monroe *v.* State, 5 Ibid. 95.

[4] R. *v.* Archer, 1 F. & F. 351.

[5] *Supra*, § 462; and see Claxton *v.* State, 2 Humph. 181.

[6] Com. *v.* Drew, 4 Mass. 391; State *v.* Zellers, 2 Halst. 220; Davison *v.* People, 90 Ill. 221.

[7] 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 Ibid. 434; State *v.* Hill, 69 Mo. 451; 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; Kendall *v.* State, 8 Tex. Ap. 569. But this is true only so far as concerns the old common law right of making houses

property, or attack upon his rights; but not attack on honor.

is slight, or can be otherwise prevented or redressed, a cool and deliberate killing of a trespasser is murder.[1] But 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.*

Person attacked in dwelling-house need not retreat.

§ 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 believe that he is in danger

"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; Morgan *v.* Durfee, 69 Mo. 469.

A bank messenger, for instance, having a package of bonds in his custody, has a right to take life to repel a robber, no matter where the attack on him is made. See *supra*, §§ 484 *et seq.*

In People *v.* Dann, Sup. Ct. Mich. 1884, 18 Rep. 529, the attempt was to seize wheat in the defendant's custody. The defendant, said the court, "had a right to defend this property, . . . and use so much force as was necessary for the purpose."

[1] U. S. *v.* Williams, 2 Cranch C. C. 439; Com. *v.* Drew, 4 Mass. 391; State *v.* McDonald, 4 Jones L. (N. C.), 19; State *v.* Morgan, 3 Ired. 186; Priester *v.* Augley, 5 Rich. (L.) 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; State *v.* Patterson, 45 Vt. 308; Com. *v.* Drew, 4 Mass. 391; State *v.* Zellers, 2 Halst. 220; State *v.* Horskin, 1 Houst. C. C. 116; State *v.* Dugan, Ibid. 563; Pond *v.* People, 8 Mich. 150; State *v.* Taylor, 82 N. C. 554; State *v.* Martin, 30 Wis. 216; Carroll *v.* State, 23 Ala. 28; Haynes *v.* State, 17 Ga. 483; see Com. *v.* Smith, as discussed in Jones *v.* Com., 75 Penn. St. 403.

of his life from the assault.[1] If he act under heat of passion, there being no sufficient cause, the offence is manslaughter.[2]

Attack on house may be resisted by taking life.

§ 503. An attack on a house or its inmates may be resisted by taking life. This may be when burglars threaten an entrance,[3] or when there is apparent ground to believe that a felonious assault is to be made on any of the inmates of the house, or when an attempt is made violently to enter the house in defiance of the owner's rights. (1) 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. (2) The same rule applies to a proposed felonious attack on any of the inmates of the house.[4] And where only so much force is used as is requisite to repel the attack on the residence of the assailed, he is not responsible if, from any undesigned circumstances, the attack prove fatal.[5] (3) Aside from these two grounds, which may be also regarded as included in the right of prevention of felonies, the occupant of a house has a right to resist, even to the death, the entrance of persons attempting to force themselves into it against his will, when no action less than killing is sufficient to defend the house from entrance; and even the killing of an officer of the law, known to be such, endeavoring thus to intrude, is not murder, but manslaughter.[6] A man's house, however humble, is his castle; and his castle he is entitled to protect against invasion. The rule is to be traced to old times when the peace of the body politic, as well as of individuals, depended upon the maintenance of the inviolability of houses as castles. And the rule continues to exist when there is an equal reason for the maintenance of the inviolability of houses as homes.[7]

§ 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 where there is no attempt to force a way in against the owner's prohibition.[2] In such case the offence is manslaughter.[3]

But this does not excuse killing of mere trespassers.

[1] State *v.* Middleham, 62 Iowa, 150.

[2] State *v.* Murphey, 61 Me. 56.

[3] See *supra*, § 495.

[4] People *v.* Lilly, 38 Mich. 270; Brownell *v.* People, Ibid. 732. See *supra*, §§ 489 *et seq.*

[5] Morgan *v.* Durfee, 68 Mo. 459.

[6] 1 Hale P. C. 458.

[7] See §§ 502, 504, and cases there cited; R. *v.* Sullivan, C. & M. 209; Corey *v.* People, 45 Barb. 262; State *v.* Zellers, 2 Halst. 220; State *v.* Taylor, 82 N. C. 554; Haynes *v.* State, 17 Ga. 465. As to officers, see *supra*, § 439.

[1] Patten *v.* People, 18 Mich. 314; see R. *v.* Meade, 1 Lew. 184.

[2] Ibid.; 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 ensued; 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

[3] State *v.* List, 1 Houst. C. C. 133. That resistance to an officer forcing an entrance to serve civil process is not indictable, see State *v.* Hooker, 17 Vt. 658. *Supra*, §§ 416 *et seq.*

In Lee *v.* Gansel, Cowp. 1, Lord Mansfield said that "the privilege of a *mansion* house . . . . is annexed to the house and door *for the protection of a man and his family*."

§ 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 of the building does not arise. If such a felony be 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]

Friends may unite in defence.

We must remember that there are three distinct relations in which the question now immediately 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 he 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] The third relation is that of the defence of the

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 C. R. 490. See *supra*, § 98.

But in California, in People *v.* Walsh, 43 Cal. 447, it was rightly held that the mere act of attempting from outside to open a window would not justify a person inside in shooting without giving warning.

[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

dwelling house, or mansion, as such, and to which, as we have seen, peculiar sanctity is assigned by the law.[1]

§ 506. But when an intruder is in the house, the owner cannot kill him simply for refusing to leave. A man has a right to order another to leave his house, but has no right even when such order is given to put him out by force till gentler means fail; and if the owner attempt to use violence in the outset and is slain, it will not be murder in the slayer if there be no previous malice.[2] So it will be at least manslaughter if the owner of the house kill a visitor who has come in peaceably, though forbidden, and who refuses to leave when ordered out, and whose expulsion is not necessary for the prevention of felony.[3] But if an intruder refuse to leave, when a request to leave is either given or is implied from resistance to

Right does not excuse killing intruder when in house.

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 lodged, with intent to commit a felony in it. R. *v.* Cooper, Cro. C. 544. See 1 East P. C. c. 5, s. 57, p. 289; Fost. 274; and Ford's Case, Kel. 51.

As parts of the dwelling-house are to be considered such out-houses as are kept for the use of the family. Thus in a Michigan case, elsewhere fully cited, it was ruled that a building thirty-six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also as a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence. A fence, it was properly said, is not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings. Pond *v.* People, 8 Mich. 150. See §§ 495, 499.

[1] *Supra*, § 503; *infra*, § 624. See as to right of inn-keepers and of railroad officers, *infra*, §§ 622–627. As to the right of officers to enter inns, see *supra*, § 439.

[2] Gregory *v.* Hill, 8 T. R. 299; R. *v.* Roxborough, 12 Cox C. C. 8; Greschia *v.* People, 53 Ill. 295; McCoy *v.* State, 3 Eng. (Ark.) 451; State *v.* Sloan, 47 Mo. 604. See *supra*, §§ 465–6. *Infra*, §§ 624 *et seq.*

[3] R. *v.* Sullivan, C. & M. 209; State *v.* Smith, 3 Dev. & Bat. 117; McCoy *v.* State, 3 Eng. (Ark.) 451. See, *supra*, §§ 465–6; 2 Addis. on Torts, 793; Meade's Case, 1 Lew. 187; Howell *v.* Jackson, 6 C. & P. 723. As to the right of expulsion, see *infra*, §§ 624 *et seq.*

his entrance, he may be ejected by the employment of as much force as is requisite for the purpose,[1] though the use of excessive force makes the party using it responsible in case of death for manslaughter.[2]

Killing by spring-guns, when necessary to exclude burglars, is excusable; when such guns are set *bonâ fide*, but negligently, it is manslaughter; when maliciously, murder.

§ 507. The use of spring-guns has been already incidentally noticed.[3] We may here repeat the general principle, that a man is not justified in using instruments of destruction (*e. g.*, spring-guns) for the defence of his property in any case in which he would not be justified in taking life if his house was actually assailed by a person with felonious intent. Such guns may be used in a house to protect valuables there stored;[4] but when they are negligently planted in a place where they may be reasonably expected to injure ordinary trespassers accustomed and likely to frequent such place, the killing of such a trespasser is manslaughter.[5] And where the intent is to kill any person entering, and no due notice is given, the

[1] Penns. *v.* Robertson, Addison, 246; State *v.* Dugan, 1 Houst. C. C. 563; Reins *v.* People, 30 Ill. 356. See Greschia *v.* People, 53 Ibid. 295; Lyon *v.* State, 22 Ga. 399; McCoy *v.* State, 3 Eng. (Ark.) 451; Hinton *v.* State, 24 Tex. 454.

[2] See *infra*, § 624; *supra*, §§ 465–6; *infra*, §§ 621 *et seq.*; Wild's Case, 2 Lew. 214; State *v.* Murphy, 61 Me. 56; State *v.* Lazarus, 1 Mill, 33. See State *v.* Harman, 78 N. C. 515, where it was held that a malicious and wanton homicide of a visitor who though forbidden had entered peaceably was murder. *Supra*, § 459.

[3] See *supra*, § 464.

[4] State *v.* Moore, 31 Conn. 479; Gray *v.* Combes, 7 J. J. Marsh. 478.

[5] Bird *v.* Holbrook, 4 Bing. 628; U. S. *v.* Gilliam, 11 Wash. L. Rep. 119; Cent. Law J., Sept. 7, 1883, 182; Johnson *v.* Patterson, 14 Conn. 1; State *v.* Moore, 31 Ibid. 479. See Whart. on Neg. § 347; Townsend *v.* Wathen, 1 East, 277. And see a striking article by Sydney Smith, in the Edinburgh Review, 1821, reprinted in his essays, Am. ed. p. 227.

In England it was originally held that the plaintiff, if he had *notice* of the spring-guns, could not recover for injury received by him. Ilott *v.* Wilkes, 3 B. & A. 304; Deane *v.* Clayton, 7 Taunt. 518. Statutes followed making culpable injury by spring-guns or man-traps a criminal offence. See, as to construction of statutes, Wootton *v.* Dawkins, 2 C. B. (N. S.) 412.

In Jordin *v.* Crump, 8 M. & W. 782, the rule is laid down that a person, passing with his dog through a wood, in which he knew dog spears are set, has no right of action against the owner of the wood for the death or injury to his dog, who, by reason of his own natural instinct, and against the will of his master, runs off the path against one of the dog-spears, and is killed or injured; because the setting of dog-spears was not in itself an illegal act, nor was it rendered so by the

offence is murder.[1] The fact that the party setting the gun was absent at the explosion is no defence.[2]

4. *Execution of the Laws.*

Killing under mandate of law justifiable.

§ 508. The execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country, is an act of necessity, where the law requires it.[3] But the act must be under the immediate precept of the law, or else it is not justifiable; and therefore, wantonly to kill the greatest of malefactors without specific warrant would be murder. And a subaltern can only justify killing another on the ground of orders from his superior in cases where the orders were lawful.[4] As we have seen, a warrant that is without authority is no defence; though it is otherwise when the defects are merely formal.[5]

5. *Superior Duty.*

And so may killing under superior duty.

§ 509. It has already been observed that there are cases in which a surgeon, when called upon to determine whether a critical operation is to be performed, may undertake such operation, though the prospects of success are slight, if the alternative be a certain miserable death, in the natural progress of the disease.[6] The same view may be accepted when the alternative is the sacrifice in childbed of the life of a mother or that of a child, and the life of the child is taken.[7] Once more, supposing that the safety of a city require that a house should be destroyed by gunpowder, and supposing there be no time to rescue all the inmates of the house, the killing of one of such inmates, under the circumstances, would be excusable.[8]

7 & 8 Geo. IV. c. 18. The cases are reviewed in able opinions by Sherman, J., in Johnston *v.* Patterson, 14 Conn. 1; and by Doe, J., in Aldrich *v.* Wright, 53 N. H. 398.

[1] Simpson *v.* State, 59 Ala. 1.

[2] *Supra*, § 218.

[3] *Supra*, §§ 94, 307, 401.

[4] U. S. *v.* Carr, 1 Woods, 480.

[5] *Supra*, § 401.

[6] *Supra*, §§ 95–6, 139, 144.

[7] Ibid.

[8] See *supra*, §§ 95–6, 139.

6. *Necessity.*

§ 510. The canon law, which lies at the basis of our jurisprudence in this respect, excuses the sacrifice of the life of one person, when actually necessary for the preservation of the life of another, and when the two are reduced to such extremities that one or the other must die,[1] . . . . quoniam necessitas legem non habet.[2] Si quis propter necessitatem famis, aut nuditatis furatus fuerit ciberia, vestem, vel pecus; poeniteat hebdomadas tres, et, si reddiderit, non cogatur ieiunare.[3] Quod non est licitum in lege, necessitas facit licitum. So an eminent French jurist:[4] En un mot, l'acte ne peut-être excusable que lorsque l'agent cède à l'instinct de sa propre conservation, lorsqu'il se trouve en présence d'un péril imminent, lorsqu'il s'agit de la vie. In the same view leading German jurists unite.[5]

Sacrifice of another's life excusable when necessary to save one's own.

But it should be remembered that necessity of this class must be strictly limited. Hence it has been held by the canon jurists that the right can only be exercised in extremity, and in subordination to those general rules of duty to which even such a necessity as that before us must be subordinate. Hence when the question is between an unborn infant's life and a mother's, the mother is to be preferred; and between a sailor and a passenger, supposing there are more than enough sailors for the purposes of navigation, the passenger, as will presently be seen, ought to be preferred. But no assent by the party sacrificed can be by itself a defence.[6]

How far culpability precludes this defence has been already discussed.[7]

§ 511. Upon the great authority of Lord Bacon it has been held that where two shipwrecked persons get on the same plank, and one of them finding it not able to save them both, thrusts the other from it, whereby he is drowned, it is excusable homicide.[8] Lord Hale, however, doubts this, on the

Self-preservation in shipwreck.

[1] Can. 11. Dist. i. de consecrat.
[2] Cap. 3. x. de furt. (5. 18.)
[3] Cap. 4. x. de reg. iur. (5. 41.)
[4] Rossi, Traité ii. p. 212.
[5] Berner, De impunitate propter summan necessitatem, etc. (1861); Geib, Lehrbuch, ii. 225; and an interesting compendium in Holtzendorf, ii. 180.
[6] But see Holmes's case, *infra*, § 511.
[7] *Supra*, § 96.
[8] 4 Black. Com. 186; Ruth. Inst. c. 16, pp. 187–190; Pufendorff's Law of Nature, 204; Herbert's Legal Maxims, 7.

ground that a man cannot ever excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life if he do not comply; and that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance.[1] On this Mr. East remarks, that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion,[2] there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity; though, in case the party might have recourse to other apparent means for his protection in his apparent necessity, his fears furnish no excuse for killing.[3]

[1] 1 Hale, c. 28, s. 26.
[2] 1 East P. C. c. 2, s. 15.
[3] Ibid. c. 5, s. 61.

In this country this topic has undergone the test of a judicial investigation, in a court and under circumstances peculiarly favorable to its careful consideration. In March, 1842, Alexander William Holmes was indicted, in the United States Circuit Court for the Eastern District of Pennsylvania, before Baldwin, J., for manslaughter. From the evidence it appeared that the ship William Brown left Liverpool on the 13th day of March, 1841, having on board sixty-five passengers and a crew composed of seventeen seamen, the whole number amounting to eighty-two, most of the passengers being Irish and Scotch emigrants. The voyage was very favorable until the evening of the 19th of April, at which time, while all were in their beds except the watch, consisting of seven persons, among whom was Alexander William Holmes, the prisoner, a Swede by birth, the vessel struck an iceberg, and immediately commenced leaking. The sails were shortened, and resort was had to the pumps. Upon examination it was found that the injury the vessel had received rendered her loss inevitable, and that the crew could only be saved, if saved at all, by taking refuge to the boats at once. The boats were immediately launched; in the long-boat were crowded thirty-two passengers, besides a portion of the crew, in all forty-two persons; in the jolly-boat were placed nine persons. The two boats pushed away from the ship, and the ropes by which they were attached to her were cut just before the ship went down. They remained together until the next morning, when they separated. During the first day the weather was moderate and the sea calm. From the moment the long-boat reached the water it was necessary to bail; she was leaky, and the plug was insecure and insufficient for the purpose. She was so loaded that the gunwale was but a few inches from the water. Towards evening the sea became rough, and at times washed over the sides of the boat. On the second night, not much more than twenty-four hours after the abandonment of the ship, the sea becoming more and more tempestuous, and the danger of destruction imminent, the defendant, together with the remaining sailors, proceed to throw overboard those passengers whose removal seemed necessary for the common safety. Relief shortly afterwards came, but great conflict of evidence ex-

XIV. INDICTMENT.

Under this head it is practicable to notice only such points of pleading as are peculiar to homicide. Other points of pleading are elsewhere discussed.[1]

isted as to whether the boat could have held out in its original crowded state even during that short period. The question, therefore, whether, with no prospect of aid, acting under the circumstances which surrounded the defendant at the time the act was committed, such necessity existed as would justify the homicide, was one of great doubt. But a new test was proposed by Judge Baldwin. Holding that in such an emergency there was no maritime skill required which would make the presence of a sailor of more value than that of a passenger, he maintained, with great power of argument, that in such case, it being the stipulated duty of the sailor to preserve the passenger's life at all hazards, if a necessity arose in which the life of one or the other must go, the life of the passenger must be preferred. If, on the other hand, the crew was necessary, in its full force, for the management of the vessel, the first reduction to be made ought to take place from the ranks of the passengers. But under any circumstances he insisted that the proper method of determining who was to be the first victim out of the particular class was by lot. The defendant, under the charge of the court, was convicted, but was sentenced to an imprisonment of light duration. U. S *v.* Holmes, 1 Wall. Jr. 1.

On this case Sir J. F. Stephen (Dig. C. L. art. 32) thus comments: "I doubt whether an English court would take this view. It would be odd to say that the two men on the raft were bound to toss up as to which should go." To this it may be added, that an agreement by all parties on board to abide by the lot would be no defence to an indictment for homicide, since A.'s consent that B. should kill him, even on a contingency, is no defence to such killing. (*Supra*, § 144.) Nor can it be understood why the indictment was for manslaughter. If the defence of necessity was made out, the case was one for an acquittal. If it was not made out, the case was common law murder, as there was a deliberate taking of life. See criticism in London Quarterly Law Rev. Jan. 1885, p. 57. In his opinion in the Mignonette case, Lord Coleridge concurs in this conclusion, and says that referring the matter to lot "can hardly be an authority satisfactory to a court of this country."

In R. *v.* Dudley and Stephens (Mignonette case, London, 1884), where the defendants were indicted for killing and eating a boy named Parker, who, with them, was in a state of starvation in a boat at sea, Baron Huddleston charged the grand jury as follows: "It is impossible to say that the act of Dudley and Stephens was an act of self-defence. Parker, at the bottom of the boat, was not endangering their lives by any act of his; the boat could hold them all, and the motive for killing him was not for the purpose of lightening the boat, but for the purpose of eating him, which they could do when dead, but not while living. What really imperiled their lives was not the presence of Parker, but the absence of food and drink. It could not be doubted for a moment that if Parker was possessed of a weapon of defence—say a revolver—he would have been perfectly justified in taking the life of the captain, who was on the point of killing him, which shows clearly that the act of the captain was unjustifiable. It may be said that the selection of the boy—as indeed Dudley seems to have said—was better, because his stake in society, having no children at all, was less than theirs; but if such reasoning is to be allowed for a moment, Cicero's test is that under such circumstances of emergency the man who is to be sacrificed is to be the man who would be the least likely to do benefit to the republic, in which case Parker, as a young man, might be likely to live longer, and be of more service to the republic than the others. Such reasoning must be always more ingenious than true. Nor can it be urged for a moment that the state of Parker's health, which is alleged to have been failing in consequence of his drinking the salt water, would justify it. No person is permitted, according to the law of this country, to accelerate the death of another. Besides, if once this doctrine of necessity is to be admitted, why was Parker selected rather than any of the other three? One would have imagined that his state of health and the misery in which he was at the time would have obtained for him more consideration at their hands. However, it is idle to lose one's self in speculations of this description. I am bound to tell you that if you are satisfied that the boy's death was caused or accelerated by the act of Dudley, or Dudley and Stephens, this is a case of deliberate homicide, neither justifiable nor excusable, and the crime is murder, and you, therefore, ought to find a true bill for murder against one or both of the prisoners."

There was no drawing of lots in this case; this having been proposed but rejected. This, however, was held by the court to make no difference in the case.

The jury found a special verdict of murder, subject to the opinion of the court in banc, by which the verdict was sustained; Lord Coleridge, giving the opinion of all the judges, saying: "It is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity; but the temptation to the act which existed here was not what the law has ever called necessity." 31 Alb. L. J. 38.

The prisoners were sentenced to be hung, but the punishment was commuted by the crown to imprisonment for six months. London Law Times, Nov. 15, 1884.

[1] See Whart. Cr. Pl. & Pr. §§ 90 *et seq.* For precedents, see Whart. Prec. 104 *et seq.*, tit. "HOMICIDE."

§ 512. The venue must aver jurisdiction in conformity with the statute law of the particular jurisdiction.[1] The conflict as to juris-

[1] Hawk. b. 2, c. 25; 1 Ch. C. L. 178; 3 Ibid. 732; 1 Stark. C. P. 5, 6; Com. *v.* Linton, 2 Va. Cas. 205; State *v.* Orrell, 1 Dev. 139; State *v.* Haney, 67 N. C. 467; State *v.* Toomer, 1 Chev. (S. C.) 106; Stoughton *v.* State, 13 Sm. & M. 255; Riggs *v.* State, 26 Miss. 51; Riley *v.* State, 9 Humph. 646; Nash *v.* State, 2 Greene, Iowa, 286; People *v.* Aro, 6 Cal. 207.

Venue must aver jurisdiction.

diction in cases where the mortal blow was struck in one State and the death occured in another has been already discussed.[1]

Deceased must be individuated.

§ 512 *a*. The deceased must be specified by name when known, though it is not necessary to aver him to be a "human being."[2] In what way names are to be pleaded is elsewhere examined.[3]

Averment of relationship between deceased and defendant when such is necessary to offence.

§ 513. If a constable, watchman, or other minister of justice be killed in the execution of his office, the special matter need not be stated, but the offender may be indicted generally for murder.[4] But where the case rests upon a neglect to provide sufficient food for the deceased, it must show that it was the duty of the prisoner to provide it.[5]

Variance as to intent to kill the particular individual killed.

§ 514. Where A. shoots into a crowd, intending to hurt or kill any one whom he may hit, and B. is killed, then A. may be indicted for the murder of B., and the indictment may aver such intent.[6] And where A., maliciously intending to kill B., shoots at and kills C., mistaking him for B., then A. may be indicted for the intentional murder of C. For if A. intend to kill C., under a false impression who C. is, then malice to C. (however mistaken it may be) is made out, supposing that the intent is malicious.[7] But if A. shoot at B. under circumstances in which it would have been excusable homicide to have killed B., then it is excusable homicide in A. by this act to kill (without negligence) C., supposing C. to be B.[8] Whether when A., intending to shoot B., shoots C. by a glance shot, without seeing him, A. is indictable for shooting C., is elsewhere considered.[9]

[1] *Supra*, § 292.

[2] Merrick *v.* State, 63 Ind. 327; Bohannon *v.* State, *infra*, § 516.

[3] Whart. Crim. Pl. & Pr. §§ 96 *et seq.*; Whart. Crim. Ev. §§ 94 *et seq.*; see Edmonds *v.* State, 34 Ark. 720; Edwards *v.* State, 70 Mo. 480.

[4] R. *v.* Mackally, 9 Co. Rep. 68; 1 Hale, 460; 12 Rep. 17; Boyd *v.* State, 17 Ga. 194; Wright *v.* State, 18 Ibid. 383.

[5] See R. *v.* Waters, 2 C. & K. 862; R. *v.* Goodwin, 1 Russ. C. & M. 563.

[6] *Supra*, § 319; R. *v.* Fretwell, L. & C. 443; 9 Cox C. C. 471.

[7] See *supra*, § 317; and, also, R. *v.* Holt, 7 C. & P. 519.

[8] *Supra*, §§ 317-20.

[9] *Supra*, §§ 107-111, 317.

"In the peace of God," etc., not a necessary averment.

§ 515. It is not necessary to allege that the party killed was "in the peace of God and of the said State" (or commonwealth), etc., though such words are commonly inserted.[1] The omission of the words is no ground for arrest of judgment.[2]

Deceased must have been living at time of blow.

§ 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. But an averment that the defendant was living at the time, or that he was a reasonable creature, is not necessary.[4]

"Feloniously" and "malice aforethought" necessary at common law.

§ 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*,[5] 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*, etc., or *killed* or *slew* the deceased, the conviction can only be for manslaughter.[6]

[1] 2 Hawk. P. C. c. 25, s. 73; 2 Hale, 186; 1 Ibid. 433. *Supra*, § 310.

[2] Com. *v.* Murphy, 11 Cush. 472; Dumas *v.* State, 63 Ga. 600. See R. *v.* Sawyer, R. & R. 294.

[3] *Supra*, § 309.

[4] Bohannon *v.* State 14 Tex. Ap. 271. *Supra*, § 512 *a*.

[5] 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; McElroy *v.* State, 14 Tex. Ap. 233; People *v.* Schmidt, 63 Cal. 28. 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; Maile *v.* Com., 9 Leigh, 661. In Iowa, the indictment, under the statute, must aver both assault and killing to be wilful, deliberate, 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 Ibid. 572. In Texas, "malice aforethought" is enough. Henrie *v.* State, 41 Tex. 573; Bohannon *v.* State, 14 Tex. Ap. 271. It is, however, essential. McElroy *v.* State, Ibid. 235. See Whart. Cr. Pl. & Pr. § 269. As to "wilful," see State *v.* Eaton, 75 Mo. 586.

[6] *Infra*, § 539; Whart. Prec. 7, 8; though see Anderson *v.* State, 5 Pike, 444; State *v.* Bradford, 33 La. An. 921. As to "strike" see § 530.

§ 518. Where the killing is alleged to have been caused by a battery, it is necessary to allege an assault.[1] In indictments for neglect, however, where no violence is alleged, the "assault" may be omitted.[2] But the term "assault" does not vitiate the indictment, though it should appear that the deceased consented to the injurious act being done.[3]

Allegation of "assault" necessary in violent homicides.

§ 519. The common law rule, in pleading the instrument of death, is, that where the instrument laid and the instrument proved are of the same nature and character, there is no variance; where they are of opposite nature and character, the contrary.[4] Thus evidence of a dagger will support the averment of a knife, though evidence of a knife will not support the averment of a pistol. But where the species of death would be different, as if the indictment

At common law general character of instrument of death must be correctly given.

[1] Lester *v.* State, 9 Mo. 666; Reed *v.* State, 8 Ind. 200.

[2] R. *v.* Plummer, 1 C. & K. 600; R. *v.* Crumpton, C. & M. 597; R. *v.* Hughes, 7 Cox C. C. 301; D. & B. 248; R. *v.* Friend, R. & R. 20.

[3] R. *v.* Ellis, 2 C. & K. 470.

[4] R. *v.* Martin, 5 C. & P. 128; R. *v.* Warman, 1 Den. C. C. 183; State *v.* Smith, 32 Me. 369; State *v.* Fox, 1 Dutch. 566; People *v.* Colt, 3 Hill N. Y. 432; Dukes *v.* State, 11 Ind. 557; West *v.* State, 48 Ibid. 483; State *v.* Smith, Phil. (N. C.) L. 340; Witt *v.* State, 6 Cold. 5; State *v.* Hoffman, 78 Mo. 256; Miller *v.* State, 25 Wis. 384.

Statutory provisions.—In many States the instrument of death need not be specified.

As to Pennsylvania, see Rev. Act, 1860, Pamph. p. 435. Goerson *v.* Com., 99 Penn. St. 388. And so in Louisiana, State *v.* Bartlay, 34 La. An. 147; and in Texas, Dwyer *v.* State, 12 Tex. Ap. 535; and in California. People *v.* Hong Ah Duck, 67 Cal. 387. As to New York statute to same effect, see People *v.* Colt, 3 Hill, 432.

Under the Massachusetts statute, an indictment which alleges that the death was caused by a wounding, an exposure, and a starving, is not bad for duplicity, nor for failure to allege that the wounding, exposure, and starving were mortal, or of a mortal nature; and may be sustained by proof of death by any of the specified means. Com. *v.* Macloon, 101 Mass. 1.

In Ohio a similar provision exists as to indictments for manslaughter. Act of May 6, 1869, § 7; Warren's Ohio Cr. L. p. 180.

That in Maine, the particular means need not be set out. See State *v.* Morrissey, 70 Me. 401.

In some jurisdictions, neither weapon nor wound need be described. Conners *v.* State, 45 N. J. L. 340; Graves *v.* State, Ibid. 347; Alexander *v.* State, 3 Heisk. 475; State *v.* McLane, 15 Nev. 345; State *v.* Bemis, 51 Mich. 422.

As to cumulation of instruments, see Whart. Cr. Pl. & Pr. § 158. As to pleading killing by burning produced by throwing a lighted lamp, see Mayes *v.* People, 106 Ill. 306.

allege a stabbing or shooting, and the evidence prove a poisoning or starving, the variance is fatal;[1] and the same if the indictment state a poisoning, and the evidence prove a starving. Thus, where an indictment stated that the defendant assaulted the deceased, and struck and beat him upon the head, and thereby gave him divers mortal blows and bruises of which he died, and it appeared in evidence that the death was by the deceased falling on the ground in consequence of a blow on the head received from the defendant; it was ruled that the cause of the death was not properly stated.[2] But if it be proved that the deceased was killed by any other instrument, as with a dagger, sword, staff, bill, or the like, capable of producing the same kind of death as the instrument stated in the indictment, the variance will not be material.[3] The same view is taken where one kind of shot is averred and another proved.[4] But where on an indictment for shooting with a pistol loaded with gunpowder and a bullet it appeared that there was no bullet in the room where the act was done, and no bullet in the wound; and it was proved that the wound might have been occasioned by the wadding of the pistol; Bolland, B., Park and Parke, JJ., held the indictment not proved.[5] The same principle was applied where an indictment charged that the defendant struck the deceased with a brick, and it appeared that he knocked the deceased down with his

[1] R. *v.* Briggs, 1 Mood. C. C. 318; R. *v.* Martin, 5 C. & P. 128. Where an indictment describes the instrument which caused the death by two names, it is sufficient if it be proved to be either. The prisoner was indicted for manslaughter, in causing the death of a female by negligently slinging a cask, which was described in the indictment as "a cask and puncheon;" and the indictment was objected to on the ground that it was so described; but Parke, J., held, that if it was either it was sufficient. Rigmardon's Case, 1 Lew. 180. See Whart. on Cr. Ev. § 91. An averment that the killing was "with a gun loaded with gunpowder and leaden balls, and held in the hand" of defendant, does not sufficiently declare the killing. Haney *v.* State, 34 Ark. 263. That proof of striking with a pistol will not sustain an averment of cutting with a knife, see Phillips *v.* State, 68 Ala. 469.

An indictment charging the death to have been occasioned by two co-operating causes, if the evidence fail to support one of the causes, is insufficient. R. *v.* Sanders, 7 C. & P. 277.

[2] R. *v.* Thompson, 1 Mood. C. C. 139.

[3] R. *v.* Mackally, 9 Co. 67 a; Gilb. Ev. 231; R. *v.* Briggs, 1 Mood. C. C. 318. See R. *v.* Culkin, 5 C. & P. 121; R. *v.* Grounsell, 7 Ibid. 788; R. *v.* Tye, R. & R. 345; R. *v.* Edwards, 6 C. & P. 401; R. *v.* Waters, 7 Ibid. 250.

[4] Goodwin *v.* State, 4 S. & M. 520.

[5] See R. *v.* Hughes, 5 C. & P. 126.

fist, and that the deceased fell upon a brick which caused his death.[1]

At common law, proof of *striking* with a gun will not sustain an averment of *shooting*.[2]

§ 520. As we have already seen, the evidence must show that the death was caused by the particular blow described and proved.[3] Thus in a case remarkable for the conflict of opinion among the assembled judges on other points, as well as for the public interest excited by the trial, all the judges concurred in the opinion, that where certain assaults were put in evidence, and relied on by the prosecution as being the cause of death, but where the clear surgical testimony was that the death was caused by a blow on the head, of which there was no evidence whatever, the defendants were entitled to an acquittal.[4]

Variance in this respect is fatal.

§ 521. When the deceased died by fright produced by an impending blow by an unknown weapon, this, under statute, may be charged as a death from assault by a weapon unknown.[5] When death is alleged to have been produced by the deceased being led by fright to self-injury, then the indictment must specify the apprehension of immediate violence, arising from the circumstances by which the deceased was surrounded; and it need not appear that there was no other way of escape; but it must be alleged that the step was taken to avoid the threatened danger.[6] But if the charge be that the prisoner "did compel and force" another person to do an act which caused the death of a third party, this allegation will require the evidence of personal efficient force applied to the

When death is alleged to have ensued from compulsion or fright, circumstances must be averred.

[1] R. v. Kelly, 1 Mood. C. C. 113. See R. v. Wrigley, 1 Lewin C. C. 127; R. v. Martin, 5 C. & P. 128; People v. Tannan, 4 Parker C. R. 514; Gibson v. Com., 2 Va. Cas. 111. See Edwards v. State, 25 Ark. 444. That it is not necessary to aver that the wound was not inflicted in a surgical operation, see Merrick v. State, 63 Ind. 327.

[2] Guedel v. People, 43 Ill. 226. See *infra*, § 530.

[3] See *supra*, §§ 153 *et seq.*; White v. Com., 9 Bush, 178; State v. Townsend, 1 Houst. C. C. 337.

[4] R. v. Bird, T. & M. 437; 1 Den. C. C. 94; 5 Cox C. C. 11; 15 Jur. 193. As to variance in this respect, see Whart. Cr. Ev. § 91.

[5] Cox v. People, 80 N. Y. 500. *Sed quaere.*

[6] *Supra*, § 164; R. v. Pitts, 1 C. & M. 284; R. v. Evans, 1 Russ. C. & M. 489; R. v. Waters, 6 C. & P. 328.

When the death was immediately from fright produced by the defendant's violence, the defendant is responsible. Ibid.

person in question. Thus where it was stated in the indictment that the prisoner "did compel and force" A. and B. to leave working at the windlass of a coal mine, by means of which the bucket fell on the head of the deceased, who was at the bottom of the mine, and killed him; and the evidence was that A. and B. were working at one handle of the windlass and the prisoner at the other, all their united strength being requisite to raise the loaded bucket, and that the prisoner let go his handle and went away, whereupon the others, being unable to hold the windlass alone, let go their hold, and so the bucket fell and killed the deceased; it was held that this evidence was not sufficient to support the indictment.[1]

§ 522. In accordance with the reasoning already given,[2] poison administered by an agent, or injuries done by an agent, under the defendant's direction, may be laid, under recent statutes, as administered by the defendant himself.[3]

Acts of agent or associate may be averred to be acts of principal.

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.[4] It is otherwise when there is a local statute assigning distinct penalties to the degrees.[5] But an averment that the defendant was principal cannot, at common law, be supported by proof that he was accessary before the fact.[6] An accessary before the fact, under the statutes making such principals, may be indicted as principal.[7]

[1] R. v. Lloyd, 1 C. & P. 301.

[2] *Supra*, § 161.

[3] R. v. Michael, 2 M. C. C. 120; 9 C. & P. 350; R. v. Spiller, 5 Ibid. 333. See *supra*, § 218, where the cases are given at large; and see Whart. Cr. Ev. § 102.

[4] *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 C. & K. 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.

[5] *Supra*, § 221.

[6] 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, 39 Miss. 613. See *supra*, § 208.

[7] Cathcart v. Com., 37 Penn. St. 108; Campbell v. Com., 84 Ibid. 187; Baxter v. People, 3 Gilman, 368; Dempsey v. People, 47 Ill. 323; Yoe v. People, 49 Ibid. 410; State v. Zeibart, 40 Iowa, 169; Jordan v. State, 56 Ga. 92. See *supra*, § 238.

Variance in description of poison not fatal.

§ 523. It may be generally stated that when one kind of poison is averred and another proved, the variance is not fatal.[1]

Scienter requisite in poisoning

§ 524. A special *scienter* in cases of poisoning is usual,[2] 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*.[3] 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 inferable.[4]

Unknown instrument need not be averred.

§ 525. If the instrument by which the homicide was committed be not known, it is enough for the indictment to aver such fact; and under the circumstances the want of specification will be excused on the same principles as allow the non-setting out of a stolen or forged paper, when such paper is lost or in the prisoner's possession.[5] There will be no variance if the indictment in this respect conforms to the

[1] 2 Hale P. C. 485; R. *v.* Tye, R. & R. 345; R. *v.* Culkin, 5 C. & P. 121; R. *v.* Waters, 7 Ibid. 250; R. *v.* Grounsell, Ibid. 788; R. *v.* Martin, 5 Ibid. 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.

[2] State *v.* Yarborough, 77 N. C. 524. *Contra*, State *v.* Slagle, 83 Ibid. 630. See forms in Whart. Prec. 125 *et seq.*

[3] Com. *v.* Earle, 1 Whart. R. 525.

[4] Com. *v.* Hersey, 2 Allen, 173.

In Fairlee *v.* People, 11 Ill. 1, it was held that to sustain an indictment against A. for designedly communicating an infectious disease to B. through C., it must be shown that the defendant was aware of the infectiousness of the disease and communicated it intentionally.

[5] Whart. Cr. Ev. § 93; Whart. Cr. Pl. & Pr. § 156; State *v.* Wood, 53 N. H. 484; Com. *v.* Webster, 5 Cush. 295; State *v.* Williams, 7 Jones L. (N. C.) 446; People *v.* Cronin, 34 Cal. 191; aff. in People *v.* Martin, 47 Ibid. 96; Walker *v.* State, 14 Tex. Ap. 609.

In State *v.* Burke, 54 N. H. 92, it was held sufficient to aver that the defendant, "in some way and manner, and by some means, instrument, and weapon, to the jurors unknown," killed and murdered the deceased. S. P., Com. *v.* Martin, 125 Mass. 394, where it was held that where an indictment charges the defendant in one count with killing by a certain weapon, and in another count with killing by means and instruments to the grand jurors unknown: and at the trial the killing by the defendant is proved beyond a reasonable doubt, and there is no evidence of the particular means of death, the jury may convict on the latter count.

information before the grand jury.[1] But the instrument must be either specifically defined, or the want of such specification must be excused by the averment that the instrument was unknown.[2]

When counts are inconsistent, verdict should be taken on good counts.

§ 526. In one count of an indictment for murder, the death was stated to be by a blow of a stick, and in another, by the throwing of a stone. The jury found the prisoners guilty of manslaughter generally, on both counts, and the judges held the conviction right, and that judgment could be given upon it; and it was said that these are not inconsistent statements of the modes of death, but that, if they had been so, no judgment could have been given on the verdict.[3] In this country, the practice is to take a verdict of guilty if either count is sustained by the evidence, no matter how inconsistently the instrument may be stated in other counts.[4] The proper course, no doubt, is to take the verdict on the count sustained by the evidence. Yet, in most jurisdictions,[5] after a general verdict of guilty, the counts containing the misdescription may be removed by *nolle prosequi*, and judgment entered on the good count.

Value need not be proved.

§ 527. The allegation of value of instrument is now immaterial, and need not be proved.[6] In England, where deodands are still recognized, it may be necessary to introduce it; though as this provision does not exist in this country the reason fails.[7]

Allegation of hand of defendant need not be made.

§ 528. Though the hand in which the instrument was held is set out in the old forms, it is now not necessary either to make or to prove the allegation.[8]

§ 529. The time need not be formally repeated: "then and there" carries the averment back to the original

[1] Cox *v.* People, 80 N. Y, 500, cited *supra*, §§ 167, 521; Edmonds *v.* State, 34 Ark. 720. See Olive *v.* State, 11 Neb. 1.

[2] Dry *v.* State, 14 Tex. Ap. 185.

[3] R. *v.* O'Brien, 2 C. & K. 115; 1 Den. C. C. 9.

[4] *Infra*, § 540; Lanergan *v.* People, 39 N. Y. 39; State *v.* Baker, 63 N. C. 276. See People *v.* Davis, 56 N. Y. 95. And as to varying the agency of defendant, R. *v.* O'Brien, *ut supra*; People *v.* Valencia, 43 Cal. 552. *Infra*, § 540.

[5] Whart. Cr. Pl. & Pr. § 907.

[6] 1 East P. C. s. 108, p. 341.

[7] Hale's Pleas of the Crown, by Messrs. Stokes & Ingersoll, i. 424.

[8] 2 Hawk. c. 23, ss. 76–84; 1 East P. C. 341; 1 Stark. Crim. Plead. (2d ed.) 92; 1 Russ. on Crimes (3d ed.) 558; Archb. Crim. Plead. (10th ed.) 407; Com. *v.* Costley, 118 Mass. 1; Coates *v.* State, 72 Ill. 303.

Averment of time need not be repeated.

date.[1] Even if the "then and there" be omitted, it would seem that the court will still give judgment on the indictment, if the grammatical construction be such as to apply the time at the outset to the subsequent allegations. But where two distinct periods have been averred, the statement "then and there" is not enough; one particular time should be averred.[2]

Word "struck" essential where there has been a blow.

§ 530. Wherever death is caused by a blow, it is essential to the indictment that it should allege that the defendant struck the deceased;[3] and this must also be proved; though in Virginia it has been ruled that where the instrument was a dagger, "stab, stick, and thrust" would be held equivalent to strike; and such is no doubt the general rule.[4] It is not necessary, however, as has been seen, to prove that the defendant struck the deceased with the particular instrument mentioned in the indictment; and therefore, although the indictment allege that the defendant did strike and thrust, proof of a striking which produced contused wounds only will maintain the indictment.[5]

"Firing" is not a sufficiently exact mode of averring "shooting;"[6] nor is "striking."[7]

"Strike" not necessary when poison or other modes of

§ 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.[8] "Strangulation" and "choking" have been held sufficient to indicate the mode of killing.[9]

[1] Whart. Cr. Pl. & Pr. §§ 120 *et seq.*, 134.

[2] See for authorities, Whart. Cr. Pl. & Pr. §§ 131–2.

An indictment against two which charges an injury done by one of them on one day, and another injury done by the other on another day, and that the death arose from both, is bad, when there is no averment that the one was present when the act was done by the other. R. *v.* Devett, 8 C. & P. 639.

[3] See 5 Co. 122 a; 2 Hale, 184; 2 Hawk. c. 23, s. 82; and see Haney *v.* State, 34 Ark. 263; Edmondson *v.* State, 41 Tex. 496.

[4] Gibson *v.* Com., 2 Va. Cas. 111.

[5] 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.

[6] Shepherd *v.* State, 54 Ind. 25.

[7] Guedel *v.* People, 43 Ill. 226.

[8] R. *v.* Webb, 2 Lew. 196; S. C., 1 M. & Rob. 405; R. *v.* Tye, R. & R. 345.

[9] Redd *v.* State, 69 Ala. 255.

death, not involving wounds, are used.

General description of place of wound sufficient.

§ 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.[1] It is now, however, generally conceded that "upon the body" is a sufficient averment of location,[2] though if the description be inconsistent, this may be bad on demurrer.[3] Nor is a variance which does not prejudice the defendant material.[4]

§ 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.

Term "wound" to be used in a popular sense.

When the term "wound" is used in an indictment for homicide (*i. e.*, in the clause, giving unto the deceased *one mortal wound*, etc.), the term is used in a popular sense, and is understood to include bruises,[5] etc.

Where, however, the indictment is under a statute making "wounding" specifically indictable, the construction varies with the terms of the statute. Under 7 Will. IV. and I. Vict., which makes it indictable to "stab, cut, or wound," etc., it was held by Lord Denman, C. J., and Park, J., in 1837, that a blow given with a hammer on the face, whereby the skin was broken internally but not externally, was a "wounding."[6] But in 1838, Coleridge, J., Bosanquet, J., and Coltman, J., held that a blow with a stone bottle, which did not break the skin, was *not* a wounding; and the court said, "to constitute a wound, that the skin should be broken,

[1] 2 Hale, 186; Archb. C. P. 384; Dias *v.* State, 7 Blackf. 20; Nelson *v.* State, 1 Tex. Ap. 41. See as to variance Bryon *v.* State, 19 Fla. 864.

[2] Sanchez *v.* People, 8 E. P. Smith, 22 N. Y. 147; Real *v.* People, 42 N. Y. 270; Whelchell *v.* State, 23 Ind. 89; Jones *v.* State, 35 Ibid. 122; Thompson *v.* State, 36 Tex. 326; State *v.* Sanders, 76 Mo. 35; State *v.* Yordi, 40 Kan. 221. 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.

[3] Dias *v.* State, 7 Blackf. 20.

[4] Bryan *v.* State, 19 Fla. 864.

[5] R. *v.* Warman, 2 C. & K. 195; 1 Den. C. C. 185; State *v.* Leonard, 22 Mo. 449.

[6] R. *v.* Smith, 8 C. & P. 173. See to same effect, R. *v.* Waltham, 3 Cox C. C. 442.

it must be the whole skin, and it is not sufficient to show a separation of the cuticle only."[1]

But under the statutes the injury must be inflicted by "some instrument, and not by the hands or teeth;" and hence biting off the joint of a finger, and biting off the end of the nose, have been held not "wounding" within the statutes.[2] And so of injuries inflicted by throwing oil of vitriol on the face.[3] But it is otherwise with an injury inflicted by a kick from a shoe.[4] A scratch, when there is no breaking of the skin, is no wound.[5] Nor is an internal dislocation.[6]

Exactness no longer necessary in description.

§ 534. It was formerly held to be necessary to insert a full description of the wound.[7] The present rule, however, is to require no such particularity.[8]

Where the death was occasioned by a bruise, a description of its dimensions is not necessary.[9]

Even of an incised wound, the dimensions need no longer be set forth.[10]

[1] R. *v.* McLoughlin, 8 C. & P. 635; S. P., R. *v.* Wood, 1 Mood. C. C. 278; 4 C. & P. 381. See R. *v.* Jones, 3 Cox C. C. 442; Moriarty *v.* Brooks, 6 C. & P. 684.

[2] Jennings's Case, 2 Lewin C. C. 130; R. *v.* Harris, 7 C. & P. 446; R. *v.* Stevens, Ibid.

[3] R. *v.* Murrow, 1 M. C. C. 456; Henshall's Case, 2 Lew. C. C. 135.

[4] R. *v.* Briggs, 1 M. C. C. 318.

[5] R. *v.* Beckett, 1 M. & Rob. 526; Moriarty *v.* Brooks, 6 C. & P. 684; 2 Whart. & St. Med. Jur. § 1137.

[6] Anon. cited Ewell on Malp. 316.

[7] 2 Hale, 185, 186; 2 Hawk. P. C. c. 23, ss. 80, 81; Trem. Ent. 10; Staundf. 78 *b*, 79 *a*; 4 Co. 40, 41; 5 Co. 120, 121 *b*, 122; Cro. Jac. 95; Stark. Cr. L. 375, 380.

[8] R. *v.* Tomlinson, 6 C. & P. 379; Turner's Case, 1 Lewin, 177; R. *v.* Mosley, 1 M. C. C. 97; Com. *v.* Woodward, 102 Mass. 155; West *v.* State, 48 Ind. 483; State *v.* Robertson, 30 La. An. Pt. I. 414; State *v.* Snell, 78 Mo. 240.

[9] State *v.* Owen, 1 Murph. 452. See State *v.* Moses, 2 Dev. 452, *contra*, afterwards corrected by statute.

Where an indictment merely alleged the giving of "one mortal bruise," and it was urged that the dimensions of the bruise ought to have been described, Mr. J. Parke said: "I am disposed to go further than the judges in Mosley's case, and to say that it is not necessary to describe the bruise at all, such rule being, in my judgment, most consistent with common sense." Turner's Case, 1 Lew. 177.

[10] State *v.* Conley, 39 Me. 78; Com. *v.* Chapman, 11 Cush. 422; Com *v.* Woodward, 102 Mass. 155; Dillon *v.* State, 9 Ind. 408; Jones *v.* State, 35 Ibid. 122; Stone *v.* People, 2 Scam. 326; Lazier *v.* Com., 10 Grat. 708; Smith *v.* State, 43 Tex. 643.

An indictment which states the death to have been caused by means of ravishing an infant, but omits to aver that a mortal wound or bruise was given, is defective. R. *v.* Lad, 1 Leach, 38; S. C., 1 C. & M. 345.

When two wounds are averred either may be proved.

§ 535. Where an indictment for murder charged the defendant with having shot the deceased in the head, breast, and side, giving to him one mortal wound, of which mortal wound he then and there instantly died, it was held, that if either of the wounds described proved mortal, the indictment would thereby be sustained;[1] and this results from the principle that proof of either mortal wound is sufficient. Thus, on the trial of an indictment for murder, charging the killing to have been effected by shooting the deceased in the head, it being proved that there were two bullet wounds, one in the head and the other in the body, either of which would produce death, the refusal of the court to charge, that "if the proof fails to show which wound it was that actually killed, the case is not made out according to the indictment," is not error.[2]

"Death" must be averred.

§ 536. The wound must be alleged to have been "mortal,"[3] and death therefrom must be distinctly averred.[4]

The averment of "languishing" is a matter of surplusage, and may be stricken out as such.[5]

[1] Hamby *v.* State, 36 Texas, 523. See *supra*, § 519; Whart. Cr. Ev. § 134.

[2] Real *v.* People, 42 N. Y. (3 Hand) 270.

[3] State *v.* Morgan, 85 N. C. 581.

[4] R. *v.* Lad, 1 Leach, 96; State *v.* Conley, 39 Me. 78; Shepherd *v.* State, 57 Ind. 25; State *v.* Blau, 69 Mo. 317. See Wood *v.* State, 92 Ind. 92.

[5] Penn *v.* Bell, Addison, 171, 175; State *v.* Conley, 39 Me. 78. See Whart. Crim. Ev. §§ 138 *et seq.*

The causal relation between wound and death must be stated. Waybright *v.* State, 56 Ind. 122. An indictment which charges that the prisoner did administer the poison to the deceased, who took and swallowed it, by means of which taking and swallowing the deceased became mortally sick, and "of the said mortal sickness died," is good, without also stating that the deceased died of the poisoning. R. *v.* Sandys, 1 C. & M. 345; 2 Moo. C. C. 227. It is enough to allege that the deceased died of the *wound*. It is not necessary to aver that he died of the stroke. State *v.* Conley, 39 Me. 78. Where an indictment charged a prisoner with having inflicted upon the deceased a mortal wound, of which mortal wound he did languish, and languishing did live, "on which said 20th day of June, in the year aforesaid, the said Richard O'Leary, in the county aforesaid, died," it was held, that it sufficiently charged that the deceased then died of the mortal wound inflicted by the prisoner. Lutz *v.* Com., 29 Penn. St. 441. But death after the "languishing" must be averred. State *v.* Sides, 64 Mo. 383.

An indictment stated that the mortal wound was inflicted on the 7th November, 1845, and that the deceased languished on until the 8th November in the year aforesaid, and then said: "On which 8th day of *May*, in the

§ 537. The death must appear to have been within a year and a day of the wound.[1] The date of the death, therefore, as well as that of the stroke, must distinctly appear,[2] and for this purpose "immediately" is insufficient.[3] Variance as to either, however, with the qualification just announced, is not fatal.[4] The averment that the defendant "killed" the deceased on a certain day implies that the latter died on such day,[5] and when such date is distinctly averred, it is then enough to say that the deceased "then and there" died.[6] It has been held, however, that this averment is insufficient when it appears that the blow and the death were at different places.[7]

Must have been within a year and a day.

"Instantly died" does not sufficiently aver time of death,[8] though it is otherwise when "then and there" are added.[9]

The general effect of the averment "then and there" is considered in another work.[10]

§ 538. The indictment at common law should also aver, in accordance with the facts, the place of the death of the deceased.[11]

Place must be averred.

year aforesaid, the deceased died." To this indictment the prisoner pleaded not guilty. It was held, that the insertion of May for November was a mistake, apparent on the face of the indictment, and would not exclude proof of the death subsequent to the 7th November, or be cause for arresting the judgment. Com. *v.* Ailstock, 3 Grat. 650. For a similar error see State *v.* Eaton, 75 Mo. 586.

The killing of deceased by defendant must distinctly appear. State *v.* Edwards, 70 Mo. 480.

An indictment against two defendants, which states the death to be the result of two different injuries inflicted by each of the defendants separately, on different days, is bad. R. *v.* Devitt, 8 C. & P. 639.

[1] See *supra*, § 312; State *v.* Orrell, 1 Dev. 139; People *v.* Aro, 6 Cal. 207; People *v.* Kelley, Ibid. 210; Edmonson *v.* State, 41 Tex. 496; Harding *v.* State, 4 Tex. Ap. 355.

[2] State *v.* Conley, 39 Me. 78; State *v.* Huff, 11 Nev. 17; Lester *v.* State, 9 Mo. 658; State *v.* Mayfield, 66 Ibid. 125, and cases cited to § 536. See Whart. Cr. Pl. & Pr. § 131. See, however, State *v.* Hobbs, 33 La. An. 226.

[3] Whart. Cr. Pl. & Pr. § 132; State *v.* Testerman, 68 Mo. 408.

[4] Whart. Cr. Pl. & Pr. § 139; State *v.* Haney, 67 N. Car. 467.

[5] State *v.* Ryan, 13 Minn. 371.

[6] State *v.* Haney, 67 N. Car. 467.

[7] Chapman *v.* People, 39 Mich. 357.

[8] R. *v.* Brownlow, 11 A. & E. 119; State *v.* Lakey, 65 Mo. 217.

[9] State *v.* Steeley, 65 Mo. 218. See Com. *v.* Ailstock, 3 Grat. 650; State *v.* Ward, 9 Mo. Ap. 587; S. C., 74 Mo. 253.

[10] Whart. Cr. Pl. & Pr. § 132. *Supra*, § 529.

[11] 2 Hawk. b. 2, c. 25, s. 36; 1 Ch. C. L. 178; 3 Ibid. 732; Com. *v.* Linton, 2 Va. Cases, 205; State *v.* Orrell, 1 Dev. 139; State *v.* Coleman, 17 S. C. 473. See this point discussed, *supra*,

Where the stroke was at one time and place, and the death at another time and place, the facts should be specially averred, specifying the day on which the party died, as well as that on which he was stricken; for until he died it was no murder.[1]

§ 539. Where the bill of indictment is found by the grand jury a true bill for manslaughter, and *ignoramus* as to murder, it is stated to have been the English course to strike out, in the presence of the grand jury, the words "maliciously" and "of malice aforethought," and "murder," and to leave only so much as makes the bill to be one for manslaughter;[2] and this appears to be the practice at the present time upon some of the circuits; but the usual course in this country is, unless the emergency of the case prevents it, to present a new bill to the grand jury for manslaughter. And in England a learned judge went so far as to say that this should be done where the grand jury have returned manslaughter upon a bill for murder, saying, he thought it the better course to prefer a new bill, although the usual course on the circuit had been to alter the bill for murder, on the finding of the grand jury.[3] The omission of the terms "malice aforethought" and "murder" makes the indictment incapable at common law of sustaining a conviction of murder.[4] If there are proper averments of killing, however, there can be a conviction of manslaughter under such an indictment.

Omission of terms "malice aforethought" and "murder" reduces the case to manslaughter.

§ 540. The joinder of counts, being common to indictments generally, is discussed at large in another work.[5] It is sufficient here to repeat that counts varying the statements of the mode of death are constantly sustained;[6] and that

Varying counts may be joined.

§ 292; People *v.* Cox, 9 Cal. 32; Riggs *v.* State, 26 Miss. 51.

[1] 1 East P. C. c. 5, s. 117, p. 347. See *supra*, § 292.

[2] 2 Hale, 162.

[3] 1 Turner's Case, 1 Lew. 176.

[4] R. *v.* Nicholson, 1 East P. C. 346; Com. *v.* Chapman, 11 Cush. 422; Com. *v.* Gibson, 2 Va. Cas. 70; Maile *v.* Com., 9 Leigh, 661. See, for other cases, *supra*, § 517. Under Wisconsin statute, see Chase *v.* State, 50 Wis. 510.

If a person be indicted as accessary after the fact to a murder, he may be convicted as accessary after the fact to manslaughter, if the offence of the principal turns out to be manslaughter. R. *v.* Greenacre, 8 C. & P. 35. Either assisting the party to conceal the death, or in any way enabling him to evade the pursuit of justice, will render a party, who knows the offence to have been committed, an accessary after the fact. Ibid.

[5] Whart. Cr. Pl. & Pr. § 297.

[6] *Supra*, § 525; Com. *v.* Webster. 5

an indictment for murder charging in one count A. as principal and B. as accessary before the fact, and in another count B. as principal and A. as accessary before the fact, charges but one offence, and such counts are not repugnant.[1]

XV. VERDICT.

Conviction or acquittal of manslaughter acquits of murder.

§ 541. Where the jury convicts of manslaughter (or of murder in the second degree), the verdict, in order to be technically correct, should be, "Not guilty of murder, but guilty of manslaughter (or of murder in the second degree)." In Maryland this exactness is held to be essential.[2] But in most jurisdictions such nicety is not required.[3] And where the indictment includes murder, and is itself valid, either a conviction or acquittal of manslaughter, as has been seen, is an acquittal of murder. The same effect attends a conviction or acquittal of murder in the second degree, on an indictment for murder at common law.[4]

§ 542. On an indictment for murder the jury may find a verdict of manslaughter or of murder in the second degree,[5] but not in

Cush. 295; Hunter *v.* State, 40 N. J. L. 495; State *v.* Baker, 63 N. C. 276; Dill *v.* State, 1 Tex. App. 278. That this right is not affected by the division of murder into degrees, see Cox *v.* People, 19 Hun, 430; 80 N. Y. 500.

[1] Whart. Cr. Pl. & Pr. §§ 290–97; State *v.* Hamlin, 47 Conn. 95; Hawley *v.* Com., 75 Va. 847; People *v.* Valencia, 43 Cal. 552.

[2] State *v.* Flannigan, 6 Md. 166; Weighurst *v.* State, 7 Ibid. 445.

[3] See Whart. Cr. Pl. & Pr. §§ 465, 757 *et seq.*

[4] See fully cases cited in Whart. Cr. Pl. & Pr. §§ 465, 742; Com. *v.* Herty, 109 Mass. 348; People *v.* Knapp, 26 Mich. 112; State *v.* Lessing, 16 Minn. 80, 187; DeArman *v.* State, 71 Ala. 351; Sylvester *v.* State, 72 Ibid. 201; but see State *v.* McCord, 8 Kans. 232; Green *v.* State, 38 Ark. 221. In Missouri a statute has been passed modifying this rule; but this statute is unconstitutional as to all offences committed before its passage. Kring *v.* Missouri, 107 U. S. 221, cited *supra*, § 30.

[5] 2 Hale, 246; Fost. 329; State *v.* Dearborn, 54 Me. 442; State *v.* Burt, 25 Vt. 373; McNevins *v.* People, 61 Barb. 307; Keefe *v.* People, 40 N. Y. 348; State *v.* Flannigan, 6 Md. 167; Davis *v.* State, 39 Ibid. 355; Com. *v.* Livingston, 14 Grat. 592; Wroe *v.* State, 20 Ohio St. 460; Barnett *v.* People, 54 Ill. 325; Gordon *v.* State, 3 Iowa, 410; State *v.* Lessing, 16 Minn. 80; State *v.* Martin, 30 Wis. 216; Jordan *v.* State, 22 Ga. 545; Bell *v.* State, 48 Ala. 685; Hurt *v.* State, 25 Miss. 378; Watson *v.* State, 5 Mo. 497; State *v.* Sloan, 47 Ibid. 604; State *v.* McCord, 8 Kans. 232; People *v.* Gilmore, 4 Cal. 376; and see other cases cited Whart. Cr. Ev. § 145. As sustaining murder in the second degree, see State *v.* Dowd, 19 Conn. 388; Johnson *v.* State, 17 Ala. 618; State *v.* Smith, 53 Mo. 139; McPherson *v.* State, 29 Ark. 225. See other cases cited Whart. Cr. Ev. § 144.

Jury may convict of minor degree.

some jurisdictions, of the misdemeanor 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]

Verdict must specify degree.

§ 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]

Under murder, in Kentucky, defendant cannot be convicted of wilfully striking. Conner *v.* Com., 13 Bush, 714.

[2] State *v.* Smith, 53 Mo. 139.

[3] Whart. Cr. Pl. & Pr. § 755; Mickey *v.* Com., 9 Bush, 593. *Supra*, § 236.

[4] Kennedy *v.* People, 39 N. Y. 245; S. P. Territory *v.* Romine, 2 New Mexico, 114; Territory *v.* Yarberry, Ibid. 391.

[5] State *v.* Verrill, 54 Me. 408; State *v.* Cleveland, 58 Me. 564; Williams *v.* State, 75 Ibid. 402; 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 Ohio 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 Ibid. 98; Hagan *v.* State, 10 Ibid. 459; State *v.* Moran, 7 Clarke (Iowa), 236; State *v.* Redman, 17 Ibid. 329 (see, however, State *v.* Weese, 53 Ibid. 92); Tully *v.* People, 6 Mich. 273; Hogan *v.* State, 30 Wis. 437; State *v.* Reddick, 7 Kans. 143; State *v.* Huber, 8 Ibid. 447 (by statute); McPherson *v.* State, 9 Yerg. 279; Johnson *v.* State, 17 Ala. 618; Hall *v.* State, 40 Ibid. 698; Robertson *v.* State, 42 Ibid. 509 (by statute); Levison *v.* State, 54 Ibid. 520 (a case of poisoning); Storey *v.* State, 71 Ibid. 331; Kendall *v.* State, 65 Ibid. 492; McGee *v.* State, 8 Mo. 495; State *v.* Upton, 20 Ibid. 397; People *v.* Campbell, 40 Cal. 129; Isbell *v.* State, 31 Tex. 138; Dubose *v.* State, 13 Tex. Ap. 418; State *v.* Rover, 10 Nev. 388. As to Georgia, see McGuffie *v.* State, 17 Ga. 497; Washington *v.* State, 36 Ibid. 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, is good without specifying the facts which make 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

In Missouri it is only necessary, by statute, to specify the degree when a minor offence is found.[1] In Georgia, a verdict of "guilty of manslaughter" is regarded as a verdict of guilty of voluntary manslaughter, the highest grade of that offence by statute.[2]

In some States, where the indictment is specifically for murder in the first degree, then a verdict of guilty "in manner and form as indicted," is for the first degree.[3]

As we have seen,[4] a common law indictment for murder will sustain a verdict of murder in the first degree.

No verdict for assault.

§ 544. At common law—for the reason that in such case the defendant would be convicted of a misdemeanor on a trial in which he, from the form of the indictment, would be deprived of privileges to which on indictments for mere

need be specially found. State *v.* Brannon, 45 Mo. 329.

See, further, as to verdicts, Kannon *v.* State, 10 Lea, 386; State *v.* Potter, 16 Kans. 30; State *v.* Bowen, Ibid. 475; Ford *v.* State, 34 Ark. 649; Wooldridge *v.* State, 13 Tex. Ap. 443; Walker *v.* State, Ibid. 618.

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 which fits equally to murder in the second degree, then a general verdict of guilty carries only the second degree. Johnson *v.* Com., 24 Penn St. 386. But now the verdict, by statute, must state the degree. Lane *v.* Com., 59 Ibid. 371.

In Indiana, where there are no common law crimes, it is held that the indictment must specially designate the grade under the statute; and hence a general verdict of guilty under an indictment for the first degree convicts of the first degree. Kennedy *v.* State, 6 Ind. 485. See Fahnestock *v.* State, 23 Ibid. 231; Snyder *v.* State, 59 Ibid. 105.

In State *v.* Buzzell, 58 N. H. 257, which was an indictment against an alleged accessary before the fact to a murder, the jury returned a verdict of guilty, without finding whether the defendant was accessary to murder in the first or second degree. The principal had been convicted of murder in the first degree, which appeared by the record. It was ruled that the verdict was equivalent to guilty of being accessary to murder in the first degree.

In Garvey *v.* People, 6 Col. 559, it was held that a plea of guilty goes to the lowest degree.

In some States not only the degree but the punishment must be specified. *Infra*, § 547.

[1] State *v.* Brannon, 45 Mo. 329. That in a verdict for "manslaughter *in the second* degree," the italicized words can be discharged as surplusage, see Traub *v.* State, 56 Miss. 153.

[2] Welch *v.* State, 50 Ga. 128.

[3] State *v.* Hooker, 17 Vt. 658; Com. *v.* Earl, 1 Whart. 531; White *v.* Com., 6 Binn. 179; State *v.* Weese, 53 Iowa, 92; State *v.* Jennings, 24 Kan. 642.

[4] *Supra*, § 393.

misdemeanors he is entitled, there can be no conviction for an assault under an indictment for murder.[1] In what respect this rule has been varied by statute or otherwise, has been discussed elsewhere.[2]

Excusable homicide acquits.

§ 545. Where the jury find the homicide is excusable, the practice in this country is not to find so specially, but to acquit.[3]

Accessary to second degree.

§ 546. A person may be legally convicted as accessary before the fact of murder in the second degree.[4]

Designation of punishment.

§ 547. In several States, it is incumbent on the jury to designate the punishment to be inflicted. In such case the statute must be followed in the verdict.[5]

[1] See Whart. Cr. Pl. & Pr. 9th ed. § 249.

[2] Whart. Cr. Pl. & Pr. § 742; Whart. Crim. Ev. § 132.

That such convictions can now be had both in England and this country, see R. *v.* Birch, 7 Den. C. C. 185; Com. *v.* Drum, 19 Pick. 479; People *v.* McDonnell, 92 N. Y. 657; Scott *v.* State, 60 Miss. 268; State *v.* O'Kane, 23 Kan. 244; Peterson *v.* State, 12 Tex. Ap. 650. The distinctions are more fully given in Whart. Cr. Pl. & Pr. 9th ed. § 249.

[3] See *supra*, § 308.

[4] Jones *v.* State, 13 Tex. 168. As to accessary to manslaughter see *supra*, § 232.

[5] Walston *v.* State, 54 Ga. § 242; Green *v.* State, 55 Miss. 454. See Whart. Cr. Pl. & Pr. §§ 736 *et seq.*

See, as to specification of punishment, Buster *v.* State, 42 Tex. 315 People *v.* Welch, 49 Cal. 67.

CHAPTER II.

RAPE.

DEFINITION.

§ 550. RAPE is the act of a man having unlawful carnal knowledge of a woman without her conscious and voluntary permission.[1] How

[1] See Steph. Dig. Cr. L. c. xxix.; Whitaker *v.* State, 30 Wis. 518.

far, if such permission be given, the fact that it was obtained by fraud or through the woman's ignorance affects the case, is hereafter discussed.[1] "Forcibly," is frequently introduced as essential to the offence;[2] but it is not (except so far as force is an ordinary incident of the act of coition) requisite in those cases in which acquiencesce is caused by fraud or stupefaction.[3] But "forcibly" must be alleged in the indictment; though in the cases just referred to the allegation is satisfied by mere proof of penetration.[4] The intent to use force, however, in case fraud or stupefaction should fail, is essential to the offence.[5]

Intent to use force necessary.

I. DEFENDANT'S CAPACITY TO COMMIT OFFENCE.

§ 551. At common law a boy under fourteen is irrebuttably presumed to be incapable of committing a rape,[6] though in several States in this country this presumption is held to be rebuttable.[7] Whether a boy under fourteen is indictable at common law for an assault with intent to ravish, has been disputed. The affirmative has been

Under fourteen, boy presumed to be incapable of offence.

[1] *Infra*, § 559.

[2] 1 East P. C. 434; 4 Bl. Com. 210; 1 Russ. on Crimes, 676–7; Bradley *v.* State, 32 Ark. 704.

[3] See *infra*, § 563; Pomeroy *v.* State, 94 Ind. 96.

[4] *Infra*, § 573. See Com. *v.* Fogerty, 8 Gray, 489; State *v.* Johnson 69 N. C. 55; Jones *v.* State, 10 Tex. Ap. 552.

[5] *Infra*, § 563; R. *v.* Lloyd, 7 C. & P. 318; R. *v.* Stanton, 1 C. & K. 415; R. *v.* Case, 1 Den. C. C. 580; 4 Cox C. C. 220; R. *v.* Wright, 4 F. & F. 967; Com. *v.* Merrill, 14 Gray, 415; Smith *v.* State, 12 Ohio St. 466; State *v.* Hagerman, 47 Iowa, 151; State *v.* Erickson, 45 Wis. 86; Taylor *v.* State, 50 Ga. 79; McNair *v.* State, 53 Ala. 453; Dawson *v.* State, 29 Ark. 116; Bradley *v.* State, 32 Ibid. 704; Hull *v.* State, 22 Wis. 580. For other cases see *infra*, § 563.

[6] 1 Hale, 631; Lewis C. L. 558; R. *v.* Eldershaw, 3 C. & P. 396; R. *v.* Groombridge, 7 Ibid. 582; R. *v.* Philips, 8 Ibid. 736; R. *v.* Jordan, 9 Ibid. 118; R. *v.* Brimilow, Ibid. 366; State *v.* Sam, Winston (N. C.). 300; State *v.* Pugh, 7 Jones (N. C.), 61; Stephen *v.* State, 11 Ga. 225. See *supra*, § 69.

[7] People *v.* Randolph, 2 Parker C. R. 174; People *v.* Croucher, 2 Wheeler, C. C. 42; Williams *v.* State, 14 Ohio R. 222; Smith *v.* State, 12 Ohio St. 466; Hiltabiddle *v.* State, 35 Ibid. 52; Wagoner *v.* State, 5 Lea, 352.

The section in the Code of Criminal Procedure (74 O. L. 349, § 31), dispensing with proof of emission, has no relation to capacity; and hence it does not so enlarge the meaning of the statutory provision in relation to rape (74 O. L. 245, § 9) as to include persons not theretofore amenable to that provision. If it appear, on the trial of one charged with rape, that he is a boy under fourteen years of age, the burden is on the State to prove capacity to commit the crime. Hiltabiddle *v.* State, 35 Ohio St. 52. See criticism in 10 Weekly Bulletin, 222.

maintained in Massachusetts ;[1] and in other States it has been held that while there is a presumption of incapacity, this presumption may be overcome by counter proof.[2] But the prevalent opinion is that in such cases the presumption of incapacity is irrebuttable.[3]

But whatever may be the limits of the defendant's capacity as a direct agent, it is clear that when concerned with others he may, when otherwise penally responsible, be convicted as principal in the second degree ;[4] or of a simple assault, even on evidence of rape.[5]

Impotency is a defence.

§ 552. Impotency is a sufficient defence to an indictment for the consummated offence, though not for an assault with intent.[6] The subject of impotency is fully considered in another work.[7]

Husband may be indicted as accessary.

§ 553. Though a husband cannot be convicted of the offence,[8] he may be tried as the accessary of another therein, and the wife is a competent witness against both to prove the violence.[9]

All assistants are principals in second degree.

§ 553 *a*. All concerned as assistants may be convicted as principals in the second degree ; though only the actual perpetrator can be charged as principal in the first degree.[10] A woman assisting may be charged as principal in the second degree.[11]

II. IN WHAT CARNAL KNOWLEDGE CONSISTS.

§ 554. "A very considerable doubt," remarks Mr. East, "having arisen as to what shall be considered sufficient evidence of the

[1] Com. *v.* Green, 2 Pick. 380.

[2] People *v.* Randolph, 2 Park. C. R. 174.

[3] R. *v.* Eldershaw, 3 C. & P. 396; R. *v.* Groombridge, 7 Ibid. 582; R. *v.* Philips, 8 Ibid. 736; R. *v.* Jordan, 9 Ibid. 118; R. *v.* Brimilow, Ibid. 366; State *v.* Sam, Winston N. C. 300; State *v.* Pugh, 7 Jones N. C. 61; State *v.* Handy, 4 Harring. 566; and see *supra*, § 69. Whether absolute legal incapacity bars an indictment for an attempt is considered elsewhere. *Supra*, §§ 183–4.

[4] R. *v.* Phillips, 8 C. & P. 736; 1 Russ. Cr. 676 *et seq.*

[5] R. *v.* Eldershaw, *supra;* State *v.* Pugh, *supra.*

[6] See *supra*, § 184; Nugent *v.* State, 18 Ala. 521.

[7] 3 Whart. & St. Med. Jur. §§ 202 *et seq.*, 615.

[8] See on this point remarks of Sir J. Hannen, in S. *v.* A., 39 L. T. (N. S.) 128.

[9] 1 Hale, 629; Lord Audley's Case, 12 Mod. 340, 454; 1 St. Trials, 387; 1 Stra. 633.

[10] *Infra*, § 569; Kessler *v.* Com., 12 Bush, 18. See State *v.* Comstock, 46 Iowa, 265.

[11] State *v.* Jones, 83 N. C. 605.

actual commisison of this offence, it is necessary to enter into an inquiry which would otherwise be offensive to decency. Considering the nature of the crime, that it is a brutal and violent attack upon the honor and chastity of the weaker sex, it seems more natural and consonant to those sentiments of laudable indignation which induced our ancient lawgivers to rank this offence among felonies, if all further inquiry were unnecessary after satisfactory proof of the violence having been perpetrated by actual penetration of the unhappy sufferer's body. The quick sense of honor, the pride of virtue, which nature, to render the sex amiable, hath implanted in the female heart, as Mr. Justice Foster has expressed himself, is already violated past redemption, and the injurious consequences to society are in every respect complete. Upon what principle and for what rational purpose any further investigation came to be supposed necessary, the books which record the dicta to that effect do not furnish a trace." The doubts, however, that existed in England have been put to rest by the 9 Geo. IV. c. 31, making the least penetration enough. In this country the proof of emission seems rarely to have been required; and, aside from statute, the prevalent opinion here is that as the essence of the crime is the violence done to the person and feelings of the woman, which is completed by penetration without emission, it will be sufficient to prove penetration no matter how slight.[1] In Ohio proof of emission was once but is no longer required.[2] In New York, by statute, penetration alone is made sufficient to support conviction, without emission.

Penetration must be proved, but not emission.

§ 555. But while the slightest penetration is sufficient, there must be proof beyond resonable doubt of *some*,[3] though the proof

[1] See State *v.* Shields, 45 Conn. 256; Powers *v.* Sullivan, Addis. 143; Comstock *v.* State, 14 Neb. 205. See State *v.* Le Blanc, 1 Treadw. 354; 3 Brev. 339.

[2] William *v.* State, 14 Ohio, 222; Blackburn *v.* State, 22 Ohio St. 102, in which latter case the court questioned the former ruling. See State *v.* Hargrave, 65 N. C. 466, holding this to be necessary, which proof is now dispensed with both in Ohio and North Carolina by statute. *Supra*, § 551.

When, on an indictment for fornication and bastardy, the witness testified, "He forced me; he worked himself under me, and in that way forced me; I did not give my consent;" upon a demurrer to this evidence, it was held that it was not such as would merge the offence charged in the crime of rape, but that the defendant might be legally convicted of fornication. Com. *v.* Parr, 5 W. & S. 345.

[3] R. *v.* Russen, 1 East P. C. 438; R. *v.* Allen, 9 C. & P. 31; R. *v.* Jordan,

of this may be inferred from circumstances aside from the statement of the party injured.[1] It must be shown, to adopt the phraseology of Tindal, C. J., and afterwards of Williams, J., that the private parts of the male entered at least to some extent in those of the female.[2] At one time it was even thought that there must be proof that the hymen was ruptured,[3] though this is no longer considered necessary.[4] The law may now indeed be considered as settled that while the rupturing of the hymen is not indispensable to a conviction, there must be proof of some degree of entrance of the male organ "within the labia of the pudendum;"[5] and the practice seems to be, to judge from the cases just cited, not to permit a conviction in those cases in which it is alleged violence was done, without medical proof of the fact, whenever such proof is attainable.

Ibid. 118; Penn. *v.* Sullivan, Add. 143; Stout *v.* Com., 11 S. & R. 177; Com. *v.* Thomas, 1 Va. Cas. 307; State *v.* Leblanc, 3 Brev. 339; 1 Treadw. 354; Waller *v.* State, 40 Ala. 325; Davis *v.* State, 43 Tex. 189; Thompson *v.* State, Ibid. 583; Ward *v.* State, 12 Tex. Ap. 174. See 3 Whart. & St. Med. Jur. §§ 593 *et seq.*

[1] See R. *v.* Lines, 1 C. & K. 393; State *v.* Hodges, Phill. (N. C.) L. 231 (overruling State *v.* Gray, 8 Jones, 170); Brauer *v.* State, 25 Wis. 413; State *v.* Tarr, 28 Iowa, 397. Very questionable is the ruling on this point in the remarkable case of Com. *v.* Beale, Phila. Q. S. Nov. 1854, reported more fully in 3 Whart. & St. Med. Jur. §§ 245, 596, 612, and also in the 8th edition of the present work, § 555.

Mere proof by the prosecutrix of resistance and then of unconsciousness on the part of the prosecutrix (there being no other evidence) is not enough to sustain a conviction. Wesley *v.* State, 65 Ga. 731.

In Connecticut a conviction has been sustained on the uncorroborated testimony as to penetration of a young child. State *v.* Lattin, 29 Conn. 389. See R. *v.* Reardon, 4 F. & F. 76; People *v.* Tyler, 36 Cal. 522.

It was formerly thought that if the female conceived, this was evidence of consent which negatived rape. This notion, however, has long since been exploded. 1 Hale, 631; 1 Hawkins, c. 41, s. 8; State *v.* Knapp, 45 N. H. 148. On the other hand, in this country, it has been expressly held that an introduction of an averment that the prosecutrix was gotten with child does not vitiate the indictment. U. S. *v.* Dickinson, Hempst. C. C. 1. This case was tried before the territorial court of Arkansas, in 1820. An extraordinary feature of the case is, that the defendant was sentenced to be castrated. He was pardoned, however, and the sentence consequently was never executed.

[2] R. *v.* Allen, 9 C. & P. 31; R. *v.* Jordan, Ibid. 118.

[3] R. *v.* Gammon, 5 C. & P. 321. See 3 Whart. & St. Med. Jur. §§ 249, 593.

[4] R. *v.* Hughes, 9 C. & P. 752. See R. *v.* McRue, 8 Ibid. 641.

[5] R. *v.* Lines, 1 C. & K. 393; R. *v.* Jordan, 9 C. & P. 118. See 3 Whart. & St. Med. Jur. §§ 249, 593 *et seq.*; Stephen *v.* State, 11 Ga. 225.

It seems but right, both in order to rectify mistakes and to supply the information necessary to convict, that the prosecutrix should be advised of this at once, so that she can take necessary steps to secure such an examination in due time. If this test be generally insisted upon, there is no danger of any conviction failing because of non-compliance with it; and on the other hand many mistaken prosecutions will be stopped at the outset.[1]

III. IN WHAT WANT OF WILL CONSISTS.

§ 556. The term "against her will" was used in the old statutes convertibly with "without her consent;"[2] and it may now be received as settled law that rape is proved when carnal intercourse is effected with a woman without her consent, although no positive resistance of the will can be shown.[3] Such being the law, the cases will be now considered specifically.

"Against her will" is equivalent to "without her consent."

[1] See 3 Whart. & St. Med. Jur. §§ 233 *et seq.*, 593 *et seq.*; *infra*, § 565.

[2] That the jury must be satisfied beyond reasonable doubt that there was no consent, see Com. *v.* McDonald, 110 Mass. 405; Brown *v.* People, 36 Mich. 203; State *v.* Burgdorf, 53 Mo. 65; People *v.* Brown, 47 Cal. 447.

[3] R. *v.* Fletcher, Bell C. C. 63; 8 Cox C. C. 131; R. *v.* Camplin, *infra*, § 562; State *v.* Shields, 45 Conn. 256, and see an able exposition of the law to this effect by Judge Gray in Com. *v.* Burke, 105 Mass. 376, and cases cited *infra*, § 855. See, also, R. *v.* Jones, 4 L. T. N. S. 154; as to robbery, § 855; 1 Hawk. c. 41; and on the general question of consent, *supra*, §§ 141 *et seq.* That the woman subsequently agreed to receive compensation for the injury is no defence. State *v.* Hammond, 77 Mo. 157.

Kelly, C. B., in 1873, on a crown case reserved, said: "I think that when a child submits to an act of this kind in ignorance, the offence is similar to that perpetrated by a man who has connection with a woman while asleep. If that were not an assault, our law would be very defective. *In such a case, consent is out of the question, for a woman whilst asleep is in such a state that she cannot consent, and the act of connection with her under the circumstances is quite sufficient to constitute an assault. There are many cases which show that having connection with a woman whilst asleep, or by a power which induces the woman to suppose that it is her husband, amounts to an assault.*" R. *v.* Lock, 27 L. T. N. S. 661. According to another report (L. R. 2 C. C. R. 10), the language of the Chief Baron was: "It is much like the case of an act done to a person while asleep. And although I do not say that connection with a woman in that state would be rape, it would be an assault." And see particularly *infra*, § 577; § 278 of the N. Y. Penal Code of 1882, includes cases of this class.

§ 557. Consent, however reluctant, if free, negatives rape;[1] but where the woman is insensible through fright, or where she ceases resistance under fear of death or other great harm (such fear being gauged by her own capacity) the consummated act is rape.[2] Thus where a father by his ferocity establishes "a reign of terror" in his family, and under this power his daughter remains passive while he has carnal intercourse with her, this intercourse, effected by terror, and without consent, is rape.[3] Nor is it necessary that there should be force enough to create "reasonable apprehension of death."[4] But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance of all resistance.[5]

Acquiescence through fear is not consent.

It is admissible for the prosecution under this head to give evidence of the defendant's bodily strength, and of the prosecutrix's bodily weakness,[6] but not that the prosecutrix knew of the defendant's bad character.[7]

[1] *Infra*, § 577; People *v.* Dohring, 59 N. Y. 374; State *v.* Burgdorf, 53 Mo. 65. See People *v.* Morrison, 1 Parker C. R. 626; Anderson *v.* State, 41 Wis. 430; State *v.* Murphy, 6 Ala. 765; Oleson *v.* State, 11 Neb. 276; Charles *v.* State, 6 Eng. (Ark.) 389; Anshicks *v.* State, 6 Tex. Ap. 524.

[2] See *supra*, §§ 41 *et seq.*; Dalt. c. 105, 607; 1 Hawk. P. C. c. 41; 3 Whart. & St. Med. Jur. § 606; R. *v.* Rudland, 4 F. & F. 967; State *v.* Ruth, 21 Kans. 138; Pleasant *v.* State, 8 Eng. (3 Ark.) 360; Wyatt *v.* State, 2 Swan (Tenn.), 394; Lewis *v.* State, 30 Ala. 54; Sharp *v.* State, 15 Tex. Ap. 173. Whether resistance ceased because it was useless and dangerous, or because the prosecutrix ultimately consented, is for the jury to decide; and in the last case to acquit of the *rape*. R. *v.* Hallett, 9 C. & P. 748; Turner *v.* People, 33 Mich. 363; Wright *v.* State, 4 Humph. 194. See *supra*, §§ 140 *et seq.*; *infra*, § 576.

[3] R. *v.* Jones, L. R. 2 C. C. 10; 4 L. T. N. S. 154. See, also, R. *v.* Woodhurst, 12 Cox C. C. 443; Sharp *v.* State, *ut sup.*

[4] Walter *v.* State, 40 Ala. 325. But see Terr. *v.* Potter, 1 Ariz. 421.

[5] *Supra*, § 550; R. *v.* Wright, 4 F. & F. 967; Strang *v.* People, 24 Mich. 1.

"It is submitted that the true rule must be, that where the man is led from the conduct of the woman to believe that he is not committing a crime known to the law, the act of connection cannot under such circumstances amount to a rape. In order to constitute rape there must, it would appear, be an intent to have connection with the woman notwithstanding her resistance. In a case of R. *v.* Urry, tried at Lincoln Spring Assizes, 1873, the above passage was approved of by Denman, J. See, also, case cited where Parke, B., says that the guilt of the accused must depend upon the circumstances as they appear to him." Roscoe's Cr. Ev. ed. of 1878, p. 648.

[6] State *v.* Knapp, 45 N. H. 148.

[7] State *v.* Porter, 57 Iowa, 691.

While the degree of resistance is an incident by which consent can be determined, it is not in law necessary to show that the woman opposed all the resistance in her power, if her resistance was honest, and was the utmost, according to her lights, that she could offer.[1]

§ 558. The consent of a female of such tender years as to be unconscious of the nature of the act, or even her aiding the prisoner in the attempt, is no defence;[2] and in a case before the Court of Criminal Appeal, it was held rape by Lord Campbell, C. J., and all the judges, where a man had carnal knowledge of a girl of thirteen, of imbecile mind, and the jury found that it was by force, and without her consent, she being incapable of giving consent, but it was not found to be against her will.[3] In Virginia and Louisiana the rule is applied to girls under twelve,[4] and in New Jersey to girls under ten years.[5] The statutory offence of sexual knowledge of children is hereafter discussed.[6]

Nor is acquiescence of infant.

§ 559. As to how far acquiescence produced by surprise or fraud will be a defence has been the subject of some fluctuation of opinion in the English courts. At one time it was ruled that it was not an assault with an intent to commit a rape for a medical man, under the pretence of administering an injection, to induce a woman to kneel down with her face on the bed, and then to attempt sexual connection with her by sur-

Question of acquiescence through fraud.

[1] R. *v.* Rudland, 4 F. & F. 495; Com. *v.* McDonald, 110 Mass. 405; Crockett *v.* State, 49 Ga. 185. See Jenkins *v.* State, 1 Tex. Ap. 346; that rape implies force in the man and resistance in the woman, see Mills *v.* State, 52 Ind. 187; *Cf.* People *v.* Dohring, 59 N. Y. 374.

[2] R. *v.* Martin, 9 C. & P. 213; 2 Moody, 123; R. *v.* Johnson, L. & C. 632; 10 Cox C. C. 114; see on the same topic, R. *v.* Read, 1 Den. C. C. 377; 2 C. & K. 957; *Cf.* Hays *v.* People, 1 Hill N. Y. 351; Smith *v.* State, 12 Ohio St. 466; O'Meara *v.* State, 17 Ibid. 515; Moore *v.* State, Ibid. 521; State *v.* Handy, 4 Harring. 566; Davenport *v.* Com., 1 Leigh, 588; Lawrence *v.* Com., 30 Grat. 345; State *v.* Dancy, 83 N. C. 608; State *v.* Cross, 12 Iowa, 66; People *v.* McDonald, 9 Mich. 150; Stephen *v.* State, 11 Ga. 225; Dawson *v.* State, 29 Ark. 116. As to carnal knowledge of children, see *infra*, § 576.

[3] R. *v.* Fletcher, 8 Cox C. C. 131. So also State *v.* Tarr, 28 Iowa, 397; S. P., Stephen *v.* State, 11 Ga. 225.

[4] Lawrence *v.* Com., 30 Grat. 845; State *v.* Tilman, 30 La. An. pt. ii. 249. Ignorance by defendant that a girl had not reached the statutory age is, on statutory prosecutions for abusing a female child, no defence. *Supra*, § 88.

[5] Cliver *v.* State, 45 N. J. L. 46. See Terr. *v.* Potter, 1 Ariz. 421.

[6] *Infra*, § 578.

prise, there being nothing to show an intent to use force; but it was said that it would have been rape had the defendant intended to have connection with the prosecutrix by force, and had succeeded.[1] It was afterwards held that, when connection with a girl is obtained by inducing her to believe she is at the time submitting to medical treatment, such consent is no defence to an indictment for an assault;[2] nor to an indictment for a rape.[3] But it must be a clear case of ignorance and innocence in the prosecutrix to justify a conviction of rape when connection was obtained by the defendant by such process with her acquiescence,[4] and a conviction of rape cannot be sustained where there is proof of consent given by a weak-minded woman after a mock marriage.[5] The test is, did the woman voluntarily consent, not to something else (*e. g.*, medical treatment), but to sexual intercourse. If she did, this is a defence, no matter how much she was imposed upon.[6] The effect of artificial stupefaction will be considered under another head. That an unconscious submission during sleep is rape is now settled.[7]

And acquiescence through mental disorder.

§ 560. In respect, also, to unconsciousness through mental disease, must again be invoked the position, that in cases of rape, "without her consent" is to be treated as convertible with "against her will."[8] From this it follows that carnal intercourse with a woman incapable, from mental disease (whether that disease be idiocy or mania), of giving

[1] R. *v.* Stanton, 1 C. & K. 415. See to same effect R. *v.* Flattery, 13 Cox C. C. 388; Don Moran *v.* People, 25 Mich. 356; Pomeroy *v.* People, 94 Ind. 96. See cases cited *infra*, § 563.

[2] R. *v.* Case, 4 Cox C. C. 220; 1 Den. C. C. 580; 1 Eng. L. & Eq. 544.

[3] R. *v.* Flattery, 13 Cox C. C. 388; 36 L. T. (N. S.) 32; L. R. 2 Q. B. D. 410.

In R. *v.* Flattery, the defendant kept a stall in a public market, and professed to give medical and surgical advice. He obtained possession of a girl's person by pretending that he was going to perform a surgical operation to cure her of her illness. She was nineteen years old, and made a feeble resistance, and only acquiesced under the belief that the prisoner was treating her medically, and performing a surgical operation. The court held that there was no consent to the act of sexual intercourse, and that the prisoner was guilty of the crime of rape.

[4] Walter *v.* People, 50 Barb. 144.

[5] Bloodworth *v.* State, 6 Baxt. 614.

[6] Ibid.; State *v.* Riggs, 1 Houst. C. C. 120; State *v.* Burgdorff, 53 Mo. 65; Nair *v.* State, 53 Ala. 453; Clark *v.* State, 30 Tex. 448.

[7] R. *v.* Mayers, 12 Cox C. C. 311; 3 Whart. & St. Med. Jur. §§ 242, 593 *et seq.* See *infra*, § 562. See § 278 of N. Y. Penal Code of 1882, which includes cases of submission through stupor or weakness of mind.

[8] *Supra*, § 556.

consent, is rape.[1] But the question as to whether the mental disease is such as to incapacitate the patient from assenting, is one to be examined with great care. There are many persons laboring under mitigated insanity who are capable of making contracts, but who, in a modified degree, are responsible for crime.[2] For a man knowingly to have criminal intercouse with a woman of intellect thus impaired is no doubt peculiarly wrongful; yet if she be capable of consenting, and does consent, it is not rape. And *a fortiori* is

[1] As to idiocy see this affirmed in R. *v.* Pressy, 10 Cox C. C. 635; R. *v.* Fletcher, 8 Ibid. 134; R. *v.* Barrett, 12 Ibid. 498; L. R. 2 C. C. 81; Stephen *v.* State, 11 Ga. 225; State *v.* Tarr, 28 Iowa, 397; State *v.* Crow, 10 West L. J. 501; 3 Whart. & St. Med. Jur. §§ 599 *et seq.*; as to mania, R. *v.* Charles, 13 Shaw's J. P. 746; as to stupefaction, *infra*, § 562; R. *v.* Ryan, 2 Cox C. C. 115.

In R. *v.* Barrett, 12 Cox C. C. 314; L. R. 2 C. C. 81, Kelly, C. B., said: "I am of opinion that the prisoner, in point of law, was guilty of the crime of rape in this case. I entirely concur in the definition of the crime of rape, as given by Willes, J., in his direction to the jury, 'that if the jury were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty.' In this case the poor creature was not capable of giving her consent. As to the cases of Reg. *v.* Fletcher, I cannot see the distinction between them in principle."

Blackburn, J.: "I am of the same opinion. I agree with the decision in the first case of Reg. *v.* Fletcher, and think that the correct rule was laid down in that case. I do not think that the court, in the second case of Reg. *v.* Fletcher, intended to differ from the decision in the first case of Reg. *v.* Fletcher. In all these cases the question is whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent or exercising any judgment upon the matter, or, in other words, is there sufficient evidence of such an extent of idiocy or want of capacity. In the first case of Reg. *v.* Fletcher (8 Cox C. C. 134), and also in the present case, there was evidence of such an extent of idiocy in the girl as to lead the jury to believe that she was incapable of giving assent, and that therefore the connection was without her consent. In the second case of Reg. *v.* Fletcher (L. R. 1 C. C. 39), the evidence of that was much less strong, and the point reserved for the court was whether the case ought to have been left to the jury at all, there being no evidence except the fact of connection and the imbecile state of the girl; and all that the court said was, that some evidence of its being against her will and without her consent ought to be given in these cases, and that there was not in that case the sort of testimony on which a judge would be justified in leaving it to a jury to find a verdict. Upon the authority of the decision in the former case of Reg. *v.* Fletcher, it is enough to say in this case that the evidence here was that the connection was without the girl's consent."

[2] See 1 Whart. & St. Med. Jur. §§ 50, 122, 242.

this the case when the man has no knowledge that the woman's intellect is disturbed. Hence, in such cases, if there be consent, a prosecution for rape cannot be sustained.[1]

Acquiescence by married woman mistaking defendant for her husband is no defence.

§ 561. In England, having carnal knowledge of a woman under circumstances which induce her to suppose it is her husband has been held by a majority of the judges not to amount to a rape; but several of the majority intimated that, should the point again occur, they would direct the jury to find a special verdict.[2] In two subsequent cases, where the defendants were indicted for rapes under similar circumstances, Gurney and Alderson, BB., directed an acquittal for the rape, but held that the defendants might be convicted of the assault, under the stat. 7 Wm. IV. & 1 Vict. c. 85, s. 11; and the judges afterwards held, that upon such conviction hard labor might be added to the sentence of imprisonment.[3]

In 1854, in a case where the finding was that the defendant got into bed with a married woman and had criminal connection, she being awake and believing him to be her husband, but where at the same time it was found the intention on his part was not to consummate the act by force in case of discovery, but if detected to desist, it was held by Jervis, C. J., Coleridge, J., Alderson, J., Martin, B., and Crowder, J., in a case reserved, that this was not rape.[4]

In 1878, a conviction was sustained by the English Court of Criminal Appeal in a case where the act was partially completed with a married woman, she at the time being asleep, and not consenting, or giving the defendant any reason to believe she consented, and the connection being found by the jury to be against her will.[5]

[1] Crosswell *v.* People, 13 Mich. 426; Baldwin *v.* State, 15 Tex. Ap. 276; a case where the disease set up was occasional epileptic fits which had not produced intermediate insanity. See R. *v.* Fletcher, L. R. 1 C. C. 39; State *v.* Atherton, 50 Iowa, 189; Bloodworth *v.* State, 6 Baxt. 614; State *v.* Crow, 10 West. L. J. 501.

[2] R. *v.* Jackson, R. & R. 487.

[3] R. *v.* Saunders, 8 C. & P. 265, and R. *v.* Williams, Ibid. 286.

[4] R. *v.* Clark, 29 Eng. L. & Eq. 542; Dears. C. C. 397; 6 Cox C. C. 412; S. P., R. *v.* Sweenie, 8 Ibid. 223; R. *v.* Barrow, L. R. 1 C. C. 156; 11 Cox C. C. 191.

[5] R. *v.* Young, 38 L. T. (N. S.) 540; S. C., 14 Cox C. C. 114, Lord Coleridge, C. J., Mellor and Lush, JJ., Cleasby, B., and Lopes, J., assenting.

In this case, Huddleston, B., reported as follows: "The evidence proved that the prosecutrix, a married woman, being partially under the influence of drink on the 2d Feb. 1878, went to bed in her lodgings in the Seven Dials with her youngest child about nine o'clock; her husband with another child came home about midnight.

"About four o'clock in the morning, when all four were asleep, the prisoner entered the room, the door not having been locked, got into bed, in which were the prosecutrix, her husband, and the two children, and proceeded to have connection with the prosecutrix, 'she being at the time asleep. When she awoke, at first the prosecutrix thought that it was her husband, but on hearing the prisoner speak she looked round, and seeing her husband by her side, she immediately flung the prisoner off her, and called out to her husband.

"The prisoner ran away, but before he could make his escape he was secured by a police-constable. None of the parties had ever seen the prisoner before.

"*In answer to questions put by me the jury found that the prosecutrix did not consent before, after, or at the time of the prisoner's having connection with her, that it was against her will, and that the conduct of the prosecutrix did not lead the prisoner to the belief that she did consent.*

"I put the last question to the jury in consequence of what fell from Denman, J., in R. *v.* Flattery, 2 Q. B. Div. 410–414; 13 Cox C. C. 388.

"Upon these findings I directed a verdict of guilty, but reserved the question as to whether the conviction was right, the Court of Criminal Appeal in R. *v.* Flattery having expressed a desire that the case of R. *v.* Barrow (L. Rep. 1 C. C. R. 156; 28 L. J. M. C. 20; 11 Cox C. C. 191) should be reconsidered."

Lord Coleridge, C. J., said: "We are all of opinion that the addition made by the learned baron to the statement of this case puts an end to any doubt as to the case, under the circumstances, being clearly one of rape."

The rest of the court concurred.

It may be, however, that this case may be distinguished from R. *v.* Barrow, by the fact that in R. *v.* Young the connection was at least partially had when the woman was asleep, and when she could not have given assent. See R. *v.* Mayers, 12 Cox C. C. 311.

In 1858, in the High Court of Justiciary in Scotland, it was held (two judges dissenting) not to be rape, when the carnal intercourse was effected by the same fraud, there being nothing in the fact to show whether or no the defendant intended to use force.[1]

In Virginia, in a case where the evidence was that the defendant, not intending to have carnal knowledge of a white woman by force, but intending to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, using no other force, it was held that this was not an attempt to ravish within the meaning of the statute.[2] In New York it was determined that when the offence was consummated before the prosecutrix, a married woman, found out that the defendant was not her husband, the rape was complete.[3] And so it is said to have

[1] R. *v.* Sweenie, 8 Cox C. C. 223.

[2] Com. *v.* Fields, 4 Leigh, 648. It would be otherwise if the intent was to use force. Carter *v.* State, 35 Ga. 263.

[3] People *v.* Metcalf, 1 Wheel. C. C. 378. See Walter *v.* People, 50 Barb. 144.

been determined in an anonymous case before Thompson, C. J., in Albany, at a court of oyer and terminer.[1] So in an early case, it seemed to be assumed in Connecticut that a stealthy connection with a woman, under the impression on her part that it was her husband, was rape.[2] A contrary view, however, is taken by the Supreme Courts of Tennessee,[3] Alabama,[4] and North Carolina.[5]

In Ireland, in 1884, in a crown case reserved before all the judges, it was held to be rape where the woman assented to the act under the impression that the defendant was her husband.[6] And it seems most consistent with rulings as to consent in other cases, to hold that consent is not a defence when it was to something essentially different from the act proposed.[7] We have already seen that consent is no defence when what the woman agreed to was a medical operation and not sexual intercourse;[8] and the same reasoning obtains when what the woman agreed to was legitimate sexual intercourse with her husband, and not adulterous sexual intercourse with a stranger.[9] But to make out the offence of rape, the defendant must have intended to ravish, by force, or by inducing consent under the belief that he was her husband.

[1] Anon., 1 Wheel. C. C. 381.

[2] State *v.* Shephard, 7 Conn. 54.

[3] Wyatt *v.* State, 2 Swan, 394.

[4] Lewis *v.* State, 30 Ala. 54.

[5] State *v.* Brooks, 76 N. C. 1, resting in part on the overruled case of R. *v.* Barrow, L. R. 1 C. C. 156.

[6] R. *v.* Dee, reported in 31 Alb. L. J. 43; Lond. L. T. Jan. 24, 1885.

[7] *Supra*, § 150.

[8] *Supra*, § 559.

[9] This is put by Paine, C. B., in R. *v.* Dee, as follows: "What the woman consented to was not adultery, but marital intercourse. The act was not a crime in law. It would not subject her to a divorce. Were adultery criminally punishable by our law, she would not be guilty. It is hardly necessary to point out (but to avoid any misapprehension I desire to do so) that what took place was not a consent in fact, voidable by reason of his fraud, but something which never was a consent *ad hoc*." Lawson, J., said: "The question is, what must be the nature of the consent? In my opinion it must be consent to the prisoner having connection with her, and if either of these elements be wanting, it is not consent. Thus in Flattery's case, where she consented to the performance of a surgical operation, and under pretence of performing it the prisoner had connection with her, it was held clearly that she never consented to the sexual connection; the case was one of rape. So if she consents to her husband having connection with her, and the act is done, not by her husband but by another man personating the husband, there is no consent to the prisoner having connection with her, and it is rape. The general principles of the law as to the consent apply to this case. To constitute consent there must be the free exercise of the will of a conscious agent, and therefore if the connection be with an idiot incapable of giving consent, or with a woman in a state of unconsciousness, it is rape. In like manner, if the consent be extorted by duress or threats of violence, it is not consent."

§ 562. In England, in a crown case reserved, it was proved that the prisoner made the prosecutrix drunk, and that when she was in a state of insensibility took advantage of it, and violated her. The jury convicted the prisoner, and found that the prisoner gave her the liquor for the purpose of exciting her, and then having sexual intercourse with her, and not with the intention of rendering her insensible. The judges held that the prisoner was properly convicted of rape.[1]

And so of acquiescence obtained by artificial stupefaction.

A conviction was sustained in Massachusetts, in 1870, in a case in which the evidence went simply to the fact that the prosecutrix was at the time of the act unconscious through intoxication, though there was no allegation that she was made so by the defendant.[2] On the other hand, in New York, where such intoxication was proved, but where there was no evidence that the original intent was to use force, it was held that rape was not made out under the particular statute.[3] To rape, it is essential, we should remember, that the act should be intended to be done with force and without

[1] *Supra*, § 559; R. *v.* Camplin, 1 C. & K. 746; S. C., 1 Den. C. C. 90. In a letter to Mr. Denison, by Mr. Baron Parke (1 Den. C. C. Add. p. 1), that learned judge, in commenting on Camplin's case, says: "Of the judges who were in favor of the conviction several thought that the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether that state is caused by the man or not —the accused knowing at that time she was in that state." And Tindal, C. J., and Parke, B., remarked, that in Stat. West. 2, c. 34, the offence of rape is described to be ravishing a woman "when she did not consent, and not ravishing *against her will*." But all the ten judges agreed that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that by an unlawful act, and where also the prisoner must have known that the act was against her consent at the last moment she was capable of exercising her will, because he had attempted to procure her consent, and failed, the offence of rape was committed. See, also, comments on this case in R. *v.* Page, 2 Cox C. C. 133.

[2] Com. *v.* Burke, 105 Mass. 376. See State *v.* Stoyell, 54 Me. 24. In Com. *v.* Bakeman, 131 Mass. 577, on evidence of this character the defendant was convicted of adultery.

[3] People *v.* Quin, 50 Barb. 128. In this case, although Judge Johnson, who gave the opinion of the Supreme Court, threw out doubts as to the soundness of the ruling in R. *v.* Camplin, the decision was put on the single ground that the legislature having made carnal knowledge of an intoxicated woman an independent offence, it must be so treated by the courts.

the woman's consent.[1] In all cases of alleged unconsciousness, however, we should keep in mind the old caution: *Non omnes dormiunt qui clausos et conniventes habent oculos.* It is at the same time clear, as we have seen, that connection secured when a woman is *bonâ fide* asleep, and known to be such by the defendant, is rape.[2] *Force* is incident to the physical character of the act; *against the will* (or *without consent*) must be inferred from all the circumstances of the case, to secure a conviction.[3]

Acquiescence after act no defence.

§ 562 *a*. Acquiescence after penetration is held to be no defence;[4] nor, *a fortiori*, is acquiescence after the act is consummated.[5]

How far fraud is equivalent to force.

§ 563. It has been ruled, in cases where acquiescence was obtained by fraud, that the offence, though an assault, is not rape, if the consent was to illegal sexual intercourse;[6] though it is otherwise when the consent was to something else.[7] But when the consent was to something

[1] *Supra*, § 550. For cases of conviction for rape committed on a woman under the influence of ether, see State *v.* Green, 3 Whart. & St. Med. Jour., 4th ed., § 597; Com. *v.* Beale, Ibid. §§ 245 *et seq.*, 596, 612.

[2] R. *v.* Mayers, 12 Cox. C. C. 311; R. *v.* Young, *supra*, § 561.

[3] Carter *v.* State, 35 Ga. 263, cited *infra*, § 576. See R. *v.* Cockburn, 3 Cox C. C. 543; Com. *v.* McDonald, 110 Mass. 455; People *v.* Bransby, 32 N. Y. 525; and cases cited *supra*, § 550.

In an interesting pamphlet by Dr. Stephen Rogers on chloroform (N. Y. Harper & Bros. 1877), it is argued with much force that for the purposes of attack chloroform cannot be effectively used. See 3 Whart. & St. Med. Jur. § 594.

In Com. *v.* Beale, *ut supra*, the rightness of the verdict was much doubted at the time, and shortly afterwards, after a careful reëxamination, and on the express ground of the doubts entertained, a pardon was granted by Governor Pollock.

[4] See *infra*, § 577; *supra*, §§ 557, 561; and see Whittaker *v.* State, 50 Wis. 518, where "submission" is distinguished from "consent."

[5] See *supra*, §§ 146 *et seq.*; Brown *v.* People, 36 Mich. 203; Whittaker *v.* State, 50 Wis. 518.

[6] *Supra*, § 550, 559; R. *v.* Case, 4 Cox C. C. 220; 1 Den. C. C. 580; R. *v.* Lock, 27 L. T. (N. S.) 661; S. C., L. R. 2 C. C. R. 12; R. *v.* Williams, 8 C. & P. 286; R. *v.* Jackson, R. & R. 487; R. *v.* Barrow, L. R. 1 C. C. R. 156; Walter *v.* People, 50 Barb. 144; Don Moran *v.* People, 23 Mich. 356; Pomeroy *v.* People, 94 Ind. 96; Com. *v.* Fields, 4 Leigh, 648; Stephen *v.* State, 11 Ga. 225; Pleasant *v.* State, 3 Ark. 360; Clark *v.* State, 30 Tex. 448; and other cases cited *supra*, §§ 146, 550, 559.

Quære whether in England this qualification is now to be insisted on. R. *v.* Flattery, *ut supra*; R. *v.* Young, *ut supra*.

[7] *Supra*, § 559.

else, *e. g.*, to medical treatment from a physician, then such consent is not a defence.[1]

Prior unchastity of prosecutrix no defence.

§ 564. The fact of the woman being a common strumpet, or the mistress of the defendant, is no bar, though such fact undoubtedly would prejudice her testimony, and is relevant for the defence as one of the circumstances from which assent may be inferred.[2]

To what extent evidence impeaching the prosecutrix's character may be received will be presently considered.

Testimony of prosecutrix should be corroborated.

§ 565. The party aggrieved is always competent as a witness for the prosecution,[3] and in a case of an indictment against B., a husband, for assisting another man in ravishing B.'s wife, she was admitted as a witness against the husband.[4] If the witness be of good character; if she presently discovered the offence, and made search for the offender; if the party accused fled for it, these and the like are concurring circumstances, which give greater probability to her evidence.[5] But, on the other side, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry, these and the like circumstances justify strong, but not conclusive, inferences that her testimony is false.[6] Under ordinary circumstances it is the duty of the woman injured in this way, or of her friends, to obtain prompt medical advice; and the omission to do so, in cases of alleged rape, is a fact which subjects the prosecution to discredit.[7] The *corpus delicti* includes violence done to the woman; and if this could be shown by proof aside from her testimony, and such proof be not produced, a conviction ought not to be per-

[1] *Supra*, § 559.

[2] *Infra*, § 568; 1 Hale, 629; Arch. by Jerv. 453; R. *v.* Barker, 3 C. & P. 589; Higgins *v.* People, 1 Hun, 307; Pratt *v.* State, 19 Oh. St. 277. See Pleasant *v.* State, 8 Eng. (3 Ark.), 360; Pleasant *v.* State, 15 Ark. 624; Wright *v.* State, 4 Humph. 194, and cases cited *infra*, § 568.

[3] Whart. Cr. Ev. §§ 393, 394.

[4] Lord Audley's Case, Hutt. 116; 1 State Tr. 387; 1 Stra. 633; 1 Hale, 629; 12 Mod. 340, 354.

[5] See Chambers *v.* People, 105 Ill. 430; Egler *v.* State, 71 Ind. 49.

[6] 4 Black. Com. 213; 3 Whart. & St. Med. Jur. §§ 593 *et seq.*

[7] People *v.* Hulse, 3 Hill (N. Y.) 309; State *v.* Hagerman, 47 Iowa, 151; *supra*, § 555.

mitted to stand. Such is the general rule at common law.[1] It is true that convictions have been sustained when resting exclusively on the testimony of a young child,[2] and of a woman who, at the time of the alleged act, was under the influence of ether ;[3] but these are dangerous precedents ; and when corroborative testimony can be procured, its non-production should tell seriously against the prosecution.[4]

§ 566. In prosecutions for rape, when the party injured is a witness, it is admissible to prove that she made complaint of the injury while it was recent ;[5] but the particulars of her complaint

[1] 1 Hale, 628, 631 ; 1 Hawk. c. 41, s. 2 ; R. *v.* Gammon, 5 C. & P. 321. Thus where the prosecutrix did not disclose the offence till interrogated, and continued her intercourse with defendant after the act, this was held to preclude conviction. Whitney *v.* State, 35 Ind. 503 ; see 4 Black. Com. 213 ; Cro. Car. 485.

In Iowa there can by statute be no conviction on the sole testimony of the prosecutrix. State *v.* McLaughlin, 44 Iowa, 82. And in California the Supreme Court has held that no rape case should ever go to the jury on the sole testimony of the prosecutrix, unsustained by facts and circumstances, without the court warning them of the danger of conviction on such testimony. People *v.* Benson, 6 Cal. 221 ; People *v.* Hamilton, 46 Ibid. 540 ; People *v.* Ardaga, 51 Ibid. 371. But credibility in such cases is for a jury. Boddie *v.* State, 52 Ala. 395.

[2] State *v.* Lattin, 29 Conn. 389. See 1 Russ. on Cr. by Greaves, 695.

[3] Com. *v.* Beale, *supra*, § 555 ; 3 Whart. & St. Med. Jur. §§ 245, 596 ; State *v.* Green, Ibid. § 597.

[4] *Supra*, § 555 ; and see Barney *v.* People, 22 Ill. 160.

Berner (9th ed. p. 430) remarks, that although rape involves a brutal oblivion of human rights, and a fearful destiny to the injured woman, there are sometimes palliating circumstances to be kept in mind. The offence is usually committed under the influence of stimulants ; temptation and crime are coincident ; and the reports of prison inspectors tell us that with men convicted of rape the criminal intent is far less persistent and obdurate than it is with fashionable seducers, whose profession it is to betray female innocence, whose desires are focalized to this object, which they continuously pursue. We are not, so we must conclude, to punish rape the less, but seduction the more.

[5] Whart. Cr. Ev. § 273 ; R. *v.* Brazier, 1 East P. C. 444 ; R. *v.* Clarke, 2 Stark. 241 ; R. *v.* Guttridge, 9 C. & P. 471 ; R. *v.* Megson, 9 Ibid. 420 ; R. *v.* Walker, 2 M. & Rob. 212 ; R. *v.* Osborne, C. & M. 622 ; R. *v.* Mercer, 6 Jurist, 243 ; R. *v.* Wood, 14 Cox C. C. 46 ; State *v.* Niles, 47 Vt. 82 ; People *v.* Croucher, 2 Wheel. C. C. 42 ; People *v.* McGee, 1 Denio, 19 ; Baccio *v.* People, 41 N. Y. 265 ; Johnson *v.* State, 17 Ohio, 593 ; Laughlin *v.* State, 18 Ibid. 99 ; Burt *v.* State, 23 Ohio St. 394 ; Stephen *v.* State, 11 Ga. 225 ; McMath *v.* State, 55 Ga. 303 ; Hogan *v.* State, 46 Miss. 274 ; Lacy *v.* State, 45 Ala. 80 ; Nugent *v.* State, 18 Ibid. 521 ; State *v.* Jones, 61 Mo. 232 ; Olesen *v.* State, 11 Neb. 276. That the witness proving the complaint may be

have been held not to be evidence,[1] except to corroborate her testimony when attacked.[2] And in any view, such statements cannot be received as independent evidence to show who committed the offence. They are admitted simply as part of the proof of the *corpus delicti*,[3] and in this view

May be corroborated by her own statements.

asked whether the prosecutrix named the offender, but not what name she gave, see R. *v.* Osborne, C. & M. 622 ; R. *v.* Alexander, 2 Craw. & Dix, 126 ; R. *v.* McLean, Ibid. 350 ; People *v.* McGee, 1 Denio, 19. See Whart. Cr. Ev. § 492.

[1] Ibid. ; State *v.* Knapp, 45 N. H. 148 ; State *v.* Ivins, 36 N. J. L. 233 ; State *v.* Jones, 61 Mo. 232 ; Pefferling *v.* State, 40 Texas, 486 ; State *v.* Gruso, 28 La. An. 952.

[2] Pleasant *v.* State, 15 Ark. 624 ; *contra*, Phillips *v.* State, 9 Humph. 246, where greater latitude is allowed. In State *v.* De Wolf, 8 Conn. 93, after an attempt to discredit her story on cross-examination, it was held admissible, as part of the evidence in chief, to corroborate her by proving she told the story in the same way, after the event ; S. P., State *v.* Laxton, 78 N. C. 564 ; and see Conkey *v.* People, 5 Parker C. R. 31, where the rule was extended, under peculiar circumstances, to the *husband's* declarations.

In State *v.* Kinney, 44 Conn. 153, State *v.* De Wolf was affirmed. See, also, State *v.* Byrne, 47 Conn. 465. In Ohio and Michigan the prosecution is permitted to give the details of what the prosecutrix said immediately after the event. McCombs *v.* State, 8 Oh. St. 643 ; Johnson *v.* State, 17 Ibid. 593 ; Burt *v.* State, 23 Ibid. 394 ; Brown *v.* People, 36 Mich. 203. In R. *v.* Walker, 2 M. & R. 212, Parke, B., said :—

"The sense of the thing certainly is that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and all that she said ; but for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct to her, leaving the counsel of the latter to bring before the jury the particulars of the complaint by cross-examination."

In Roscoe's Cr. Ev. p. 26, the following distinction is made :—

"It thus appears that these cases are unanimous, that where the person who makes the complaint is called as a witness, and is competent, the fact that the complaint was made, and the bare nature of it, may be given in evidence. Where the person who makes the complaint is not called as a witness, or, on being called, is found to be incompetent, the decisions are somewhat conflicting. On the one hand, it has been sought in this case to introduce the whole statement ; on the other, attempts have been made to exclude, under these circumstances, all evidence about the statement whatever. Both contentions have some countenance of authority, but it is conceived that neither is strictly accurate ; the true rule being, as is submitted, to admit evidence of the *fact* of complaint in all cases, and in no case to

[3] R. *v.* Megson, 9 C. & P. 420.

the reply, as well as the statement, when the two cannot be severed, is received.[1]

Delay, when accounted for, does not exclude such statements,[2] though when unaccounted for it throws suspicion on the case of the prosecution.[3] The prosecutrix may be cross-examined as to whether she had made any statements after the alleged assault.[4]

admit anything more. The evidence, when restricted to this extent, is not hearsay, but, in the strictest sense, original evidence; when, however, these limits are exceeded, it becomes hearsay in a very objectionable form. There is every reason, therefore, why it should be admitted to the extent indicated, and none why it should be admitted any further." See People *v.* Graham, 21 Cal. 261; and see Whart. Cr. Ev. § 492.

In R. *v.* Wood, 14 Cox C. C. 46, the particulars of the complaint were received.

[1] R. *v.* Eyre, 2 F. & F. 579.

[2] State *v.* Knapp, 45 N. H. 149; State *v.* Niles, 47 Vt. 82. See State *v.* Marshall, Phill. (N. C.) 49; State *v.* Peter, 8 Jones N. C. 19.

In several American jurisdictions it has been said that "the substance of what the prosecutrix said," or the "declarations" made by her immediately after the offence was committed, may be given in evidence, in the first instance, to corroborate her testimony. State *v.* De Wolf, 8 Conn. 93; McCombs *v.* State, 8 Ohio St. 643; Laughlin *v.* State, 18 Ohio, 99; State *v.* Peter, 14 La. An. 521; Phillips *v.* State, 9 Humph. 246.

Where the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which was blood; but neither the mistress nor the washerwoman was under recognizances to give evidence, nor were their names on the back of the indictment, but they were at the assizes attending as witnesses for the prisoner; the judge directed that both the mistress and the washerwoman should be called by the counsel for the prosecution, but said that he should allow the counsel for the prosecution every latitude in their examination. R. *v.* Stroner, 1 C. & K. 650.

Where, on an indictment for rape, the judge trying the case admitted evidence of the declarations of the injured party immediately after the event, though she herself had not been brought as a witness, being at the time incapable of testifying, such admission was held error by the Supreme Court of New York. People *v.* McGee, 1 Denio, 19 (see Com. *v.* Gallagher, 4 Penn. L. J. 511); and such is the general rule. R. *v.* Nicholas, 2 C. & K. 246; 2 Cox C. C. 139; R. *v.* Guttridge, 9 C. & P. 471; People *v.* Graham, 21 Cal. 261. See State *v.* Emigh, 18 Iowa, 122. Hence when the prosecutrix is incapable of testifying on account of her immature age, her statements made in the defendant's absence, in answer to questions put to her by her parents,

[3] Higgins *v.* People, 58 N. Y. 377; State *v.* Peter, 8 Jones N. C. 19; Topolanck *v.* State, 40 Tex. 160.

[4] Maillet *v.* People, 42 Mich. 262.

§ 567. Since such evidence is admissible merely as corroboration, it cannot be used to patch out the case of the prosecution by supplying new facts.[1] Thus on a trial for rape, which came before the Virginia Court of Appeals, the main question was as to the identity of the prisoner. The female was examined, and although she swore positively that the prisoner was the person who committed the outrage upon her, she declined to give a description of him as at the time of the outrage. The Commonwealth then introduced a witness to prove the particulars of the description of the person who committed the outrage, given by the prosecutrix to the witness on the morning after the rape was committed. This, for the reason just given, was properly held inadmissible.[2]

Such evidence is to be confined to corroboration.

§ 568. Whether in a prosecution for rape, the prosecutrix can be compelled to answer as to prior sexual relations with other persons than the defendant has been the subject of conflicting rulings. In England, and in several of our own courts, the conclusion is that while such questions may be asked, answers to them will not be compelled,[3] and in Massachusetts it has been held that in such cases proof of the prosecutrix having had prior connection with others than the defendant is inadmissible.[4] On the other hand, in New York and other States the prosecutrix will be compelled to answer questions as to such acts of illicit intercourse with others than the defendant.[5] As to whether,

Prosecutrix may be impeached by proof of bad character, and in some States, by proof of immoral acts.

immediately after the alleged act, are not admissible as independent evidence of the crime. Weldon *v.* State, 32 Ind. 81.

[1] Scott *v.* State, 48 Ala. 420; State *v.* Shettleworth, 18 Minn. 208.

[2] Brogy *v.* Com., 10 Grat. 722.

The admissibility of such declarations is not affected by the fact that on a prior occasion a rape had been committed by the defendant on the prosecutrix. Strang *v.* People, 24 Mich. 1.

[3] R. *v.* Clarke, 2 Stark. R. 241; R. *v.* Hodson, R. & R. 211; aff. in R. *v.* Holmes, 12 Cox C. C. 137; L. R., 1 C. C. 334; R. *v.* Clay, 5 Cox C. C. 146; State *v.* Knapp, 45 N. H. 148; Com. *v.* Reagan, 105 Mass. 593; McCombs *v.* State, 8 Ohio St. 643; McDermott *v.* State, 13 Ibid. 332; Wilson *v.* State, 16 Ind. 392; State *v.* White, 35 Mo. 500; Pleasant *v.* State, 15 Ark. 624; Dorsey *v.* State, 1 Tex. Ap. 33; People *v.* Benson, 6 Cal. 221; People *v.* Hamilton, 46 Ibid. 540. See Com. *v.* Kendall, 113 Mass. 210, and see Whart. Crim. Ev. § 473.

[4] Com. *v.* Harris, 131 Mass. 336.

[5] State *v.* Johnson, 28 Vt. 512; State *v.* Reed, 39 Ibid. 417; People *v.* Abbott, 19 Wend. 192 (though see People *v.* Jackson, 3 Parker C. R. 391, and see

upon denying such intercourse, she can be contradicted, there is also a difference of opinion.[1] The real question in such cases is, is it material to the issue whether the prosecutrix had previously such illicit intercourse. That it is no defence to an indictment for rape that the prosecutrix was a woman of loose character there can be no question; and if the fact of a forcible connection against the prosecutrix's will be established, her prior looseness would have nothing to do with the issue. On the other hand, when the issue is consent on part of the prosecutrix, her prior history as to chastity is logically material, and if so she should be compelled to answer such questions, and be exposed to contradiction should she answer the questions in the negative.[2] In any view, evidence may be received as to the woman's prior connection with the defendant, which is regarded as material to the question of consent,[3] and she may be compelled to answer questions as to such connection.[4] And aside from the woman's testimony, the defendant has a right to prove assent by any circumstances from which assent can be inferred; and among these circumstances is the fact that the prosecutrix was a woman of loose character, in the habit of receiving the embraces of men promiscuously.[5] It has also been held that to show her loose character, her reputation for chastity may be attacked,[1] though this reputation must have been acquired *before* the act on trial.[2] It is therefore relevant to prove that the prosecutrix was a woman of drunken, dissipated habits,[3] and that she was in the habit of receiving men at her dwelling-house for the purpose of promiscuous intercourse.[4]

question left open in Woods *v.* People, 55 N. Y. 515); Brennan *v.* People, 7 Hun (14 N. Y. Supr. Ct.), 171; State *v.* Murray, 63 N. C. 31; overruling State *v.* Jefferson, 6 Ired. 305; Rogers *v.* People, 34 Mich. 345.

In Shirwin *v.* People, 69 Ill. 55, it was held admissible for the defendant to prove that the prosecutrix, prior to the alleged rape, had carnal intercourse with other men, the case resting mainly on the testimony of her medical attendant that her person showed marks of recent sexual intercourse, she swearing that she was unconscious at the time of the alleged rape.

[1] As holding her answers to be final, see R. *v.* Cockcroft, 11 Cox C. C. 410; R. *v.* Holmes, 12 Ibid. 137; L. R., 1 C. C. 334; overruling R. *v.* Robins, 2 M. & R. 512; People *v.* Jackson, 3 Parker C. R. 391. As permitting such contradiction, see Brennan *v.* People, 7 Hun, 171; Strang *v.* People, 24 Mich. 1; People *v.* Benson, 6 Cal. 221; and see R. *v.* Robins, 2 M. & R. 512, overruled by R. *v.* Holmes, *supra*.

[2] See *supra*, § 484. That prior friendly relations between the parties may be proved, see Hall *v.* People, 47 Mich. 636.

[3] R. *v.* Martin, 6 C. & P. 562, adopted by Kelly, C. B., in R. *v.* Holmes, *supra*; R. *v.* Clarke, 4 Starkie N. P. 241.

[4] Ibid.; People *v.* Abbott, 19 Wend. 192; State *v.* Forshner, 43 N. H. 89; State *v.* Knapp, 45 Ibid. 148; State *v.* Jefferson, 6 Ired. 305; Pleasant *v.* State, 15 Ark. 624; People *v.* Benson, 6 Cal. 221.

[5] R. *v.* Martin, 6 C. & P. 562; Hall *v.* People, 47 Mich. 636; but see Richie *v.* State, 58 Ind. 355.

V. PLEADING.[5]

§ 569. *Two* defendants may be joined as principals in rape;[6] and an indictment has been sustained, which in one count charges G. as principal in the first degree, and W. as present, aiding and abetting, and in another count charges W. as principal in the first degree, and G. as aiding and abetting.[7]

Two defendants may be joined as principals.

[1] R. *v.* Barker, 3 C. & P. 589; R. *v.* Hodgson, R. & R. 211; State *v.* Forshner, 43 N. H. 89; State *v.* Knapp, 45 Ibid. 148; Com. *v.* Kendall, 113 Mass. 210; People *v.* Abbot, 19 Wend. 192; Woods *v.* People, 55 N. Y. 515 (but see People *v.* Jackson, 3 Parker C. R. 391); McCombs *v.* State, 8 Ohio St. 643; McDermott *v.* State, 13 Ibid. 332; Pratt *v.* State, 19 Ibid. 277; State *v.* Jefferson, 6 Ired. 305; State *v.* Henry, 5 Jones (N. C.), 65; State *v.* Daniel, 87 N. C. 507; Camp *v.* State, 3 Kelly, 417; Sherwin *v.* People, 69 Ill. 56; Pleasant *v.* State, 15 Ark. 624. This course was taken in R. *v.* St. Leonards, London (London Law Times, May 24, 31, 1844), where this defence was unsuccessfully, as a matter of fact, set up by Lord St. Leonards to an indictment for assault with an intent to commit a rape.

[2] State *v.* Forshner, *supra*.

[3] Brennan *v.* People, 7 Hun, 171.

[4] Woods *v.* People, *ut supra*.

That for the purpose of identification prior sexual assaults by defendant may be put in evidence for the prosecution, see State *v.* Walters, 45 Iowa, 389; and see Whart. Cr. Ev. § 47.

The prosecution may of course introduce rebutting evidence to sustain the prosecutrix's character for chastity. People *v.* Tyler, 36 Cal. 522; McCain *v.* State, 57 Ga. 390; and see Turney *v.* State, 8 S. & M. 104, where this was permitted as evidence in chief.

That the prosecutrix's husband's declarations are inadmissible to impeach her, see McCombs *v.* State, 8 Ohio St. 643; and so as to evidence of the bad character of her parents, State *v.* Anderson, 19 Mo. 241.

As has been already seen, the inference arising from a long silence on the part of the prosecutrix is a presumption not of law, but of fact, to be passed on by the jury. *Supra*, § 566; Whart. Cr. Ev. §§ 376–384.

It has been ruled that the prosecutrix may be asked whether the accused, prior to the act, had not made improper propositions to her. People *v.* Manahan, 32 Cal. 68; R. *v.* Reardon, 4 F. & F. 76.

[5] See Whart. Prec. 186 *et seq.*, 253 *et seq.*, for Forms.

[6] R. *v.* Burgess, 1 Russ. on Cr. 687; Strang *v.* People, 24 Mich. 1. See R. *v.* Crisham, 1 C. & M. 187; Kessler *v.* Com., 12 Bush, 18.

[7] R. *v.* Gray, 7 C. & P. 164. See Folke's Case, 1 Mood. C. C. 354.

§ 570. It is the practice to join a count for an assault with an intent to commit the rape with a count for rape itself.[1] and a general verdict of guilty carries the greater offence.[2] But the allegation of an assault is usually made in the count for rape.

Rape may be joined with assault.

§ 571. The allegation of "assault" is said to be unnecessary;[3] but without it there cannot be a conviction for the assault. When it is inserted, there may be, under the present practice, a conviction of the assault.[4]

Allegation of "assault" not necessary.

§ 572. *Age* need not be averred, either in respect to the woman,[5] nor to the man, so as to exclude impuberty,[6] unless, in the former case, the proceeding be on a statute relative to abuse of female children under a specified age.[7] Hence, as will be seen, in the statutory offence of abusing infant children, age is an essential averment,[8] though it is not necessary in an indictment for rape, under such a statute, to aver age.[9] When improperly used, the limitation may be rejected as surplusage.[10] Nor, when there is a statute fixing a specific penalty on the abuse of a woman under a certain age, is it necessary, in an indictment for rape, to aver that the woman was above that age.[11]

Age need not be averred.

[1] Whart. Pl. & Pr. §§ 285-90; Harman *v.* Com., 12 S. & R. 69; Burk *v.* State, 2 Har. & John. 426; State *v.* Coleman, 5 Porter, 32; State *v.* Montague, 2 McCord, 257; State *v.* Gaffney, Rice, 431; Steph. *v.* State, 11 Ga. 225; People *v.* Taylor, 36 Cal. 253.

A count charging that the prisoner, a slave, "with force and arms, in the county aforesaid, in and upon one A. (then and there being a free white woman) feloniously did make an assault, and her, the said A., then and there feloniously did attempt to ravish and carnally know, by force and against her will, and in said attempt did forcibly choke and throw down the said A.," is not bad for duplicity or uncertainty. Green *v.* State, 23 Miss. 509. Whart. Cr. Pl. & Pr. § 907.

[2] Cook *v.* State, 4 Zabr. (N. J.) 845.

[3] R. *v.* Allen, 2 Moody, 179; 9 C. & P. 521; O'Connell *v.* State, 6 Minn. 279.

[4] *Infra*, § 575.

[5] Whart. Prec. 186; State *v.* Storkey, 63 N. C. 7; State *v.* Jackson, 76 Ibid. 209; State v. Staton, 88 Ibid. 654.

[6] Com. *v.* Scannal, 11 Cush. 547; Com. *v.* Sugland, 4 Gray, 7; People *v.* Ah Yek, 29 Cal. 575; Wood *v.* State, 12 Tex. Ap. 174; Cornelius *v.* State, 13 Ibid. 349; Whart. Prec. 186.

[7] State *v.* Erickson, 45 Wis. 86.

[8] Whart. Prec. 187, 190. *Infra*, § 578.

[9] Com. *v.* Sugland, 4 Gray, 7.

[10] *Infra*, § 598; Mobley *v.* State, 46 Miss. 501.

[11] State *v.* Gaul, 50 Conn. 579. See Com. *v.* Sugland, *supra*.

§ 573. The words, "ravish,"[1] and "forcibly and against the will,"[2] have been held necessary in the indictment; though in Pennsylvania it was held that the omission of the latter words was not fatal when it was charged that the defendant "feloniously did ravish and carnally know her;"[3] and it would seem that "ravish" implies force.[4] *Unlawfully* may be dispensed with.[5]

"Ravish" and "forcibly" are essential.

§ 574. *Sex* need not be specifically averred.[6] Thus, in a case where an indictment for a rape charged that the defendant, "with force and arms, etc., the said Mary Ann Taylor, etc. etc., then and there violently and against her will, feloniously did ravish and carnally know," the court will infer that Mary Ann Taylor was a female.[7]

Sex need not be averred.

An indictment for rape need not allege that the female was not the wife of the defendant.[8] Without such averment, however, there can be no conviction under the count for adultery or fornication.[9]

[1] Gougleman *v.* People, 3 Parker C. R. 15; Christian *v.* Com., 23 Grat. 954; Davis *v.* State, 42 Tex. 226. See, however, under Missouri statute, State *v.* Meinhart, 73 Mo. 562.

[2] Whart. Cr. Pl. & Pr. § 263; State *v.* Jim, 1 Dev. 142. See Elschlep *v.* State, 11 Tex. Ap. 301; Cornelius *v.* State, 13 Ibid. 349. Under the laws of Maine, the act necessary to constitute the crime of rape must be done "by force," and these words, or something equally significant, cannot be dispensed with in an indictment. The word "violently" does not fulfil the demands of the statute. State *v.* Blake, 39 Me. (4 Heath), 322. Otherwise as to carnal knowledge of child. State *v.* Black, 63 Me. 210. For Georgia practice, see McMath *v.* State, 55 Ga. 303. As to Texas, see Williams *v.* State, 1 Tex. Ap. 90; Gutierrez *v.* State, 44 Tex. 587. In State *v.* Williams, 33 La. An. 335, it was held that "violently" could be substituted for "forcibly." "Did rape" is not equivalent to "ravish." Hewitt *v.* State, 15 Tex. Ap. 80.

[3] Harman *v.* Com., 12 S. & R. 69. See Com. *v.* Bennett, 2 Va. Ca. 235; Whart. Cr. Pl. & Pr. § 261.

[4] Com. *v.* Fogerty, 8 Gray, 489; S. P., State *v.* Johnson, 67 N. C. 55.

[5] Weinzorpflin *v.* State, 7 Blackf. 186. See Whart. Cr. Pl. & Pr. § 269.

[6] See Com. *v.* Sullivan, 6 Gray, 477; State *v.* Hammond, 77 Mo. 157; Greer *v.* State, 50 Ind. 267; Anderson *v.* State, 34 Ark. 257; Tillson *v.* State, 29 Kan. 452.

[7] State *v.* Farmer, 4 Iredell, 224; S. P., State *v.* Hussey, 7 Iowa, 409. See Taylor *v.* Com., 20 Grat. 825.

[8] Com. *v.* Scannal, 11 Cush. 547; Com. *v.* Fogerty, 8 Gray, 489; People *v.* Estrada, 53 Cal. 600. Under the Ohio statute, which prescribes a severer penalty for rape on daughter or sister than for other cases of rape, it is held to be necessary, in an indictment for rape of the second class, to aver that the woman was not the daughter or sister of the accused. Howard *v.* State, 11 Ohio St. 328; see *infra*, § 1749.

[9] Com. *v.* Murphy, 2 Allen, 163.

May be conviction of minor offence.

§ 575. How far the defendant may be convicted of minor offences in a count for rape, is elsewhere considered.[1] At common law, in consequence of the differences between felonies and misdemeanors as to both procedure and punishment, there could be no conviction of assault on an indictment for rape;[2] but this rule is no longer sustainable on principle in jurisdictions in which the distinction between felonies and misdemeanors has ceased to exist, and in many jurisdictions is abolished by statute.[3] And the general practice now is to sustain a verdict for assault on such an indictment.[4]

VI. ASSAULT WITH INTENT TO RAVISH.[5]

Assault may be sustained when rape is not consummated.

§ 576. A conviction on an indictment for assault with intent to ravish will be sustained when there was an assault with intent to ravish, but the offence was not consummated,[6] though at common law, if it should appear that the offence was rape, the defendant is entitled to be acquitted of the assault.[7] If there be an assault without an intent to

[1] Whart. Cr. Pl. & Pr. § 249. *Infra*, § 641 *a*; R. *v.* Dawson, 3 Stark 62; Com. *v.* Fischblatt, 4 Met. 355; State *v.* Perkins, 82 N. C. 681. Under the Michigan and Iowa statutes there can be convictions of assault State *v.* Pennell, 56 Iowa, 29; State *v.* Jay, 57 Ibid. 164; Hall *v.* People, 47 Mich. 636. That in Massachusetts a defendant may be convicted of incest on an indictment for rape, see Com. *v.* Goodhue, 2 Met. 93. Such, however, is not the view generally accepted. *Infra*, § 1751. See State *v.* Thomas, 53 Iowa, 214. But there can be no conviction, under the Wisconsin statute, of fornication on an indictment for rape. State *v.* Shear, 51 Wis. 460; and so in Georgia, Speer *v.* State, 60 Ga. 381.

[2] Com. *v.* Roby, 12 Pick. 496; Braddee *v.* Com., 6 Watts, 530.

[3] Com. *v.* Drum, 19 Pick. 479; Com. *v.* Dean, 109 Mass. 349; Stewart *v.* State, 5 Ohio, 241; Richie *v.* State, 58 Ind. 355; Richardson *v.* State, 54 Ala. 158. See People *v.* Jackson, 3 Hill, 92; State *v.* Johnson, 1 Vroom, 185. *Supra*, § 27.

[4] Ibid.; R. *v.* Allen, 9 C. & P. 521; R. *v.* Guthrie, L. R. 1 C. C. 241. *Infra*, § 255.

[5] As to joinder of counts see Whart. Cr. Pl. & Pr. §§ 245, 287, 293. As to conviction of minor offence, see Ibid. § 742.

[6] R. *v.* Stanton, 1 C. & K. 415; R. *v.* Case, 1 Den. C. C. 580; 4 Cox C. C. 220; Hays *v.* People, 1 Hill, 351. See *infra*, § 612; and see Com. *v.* Thompson, 116 Mass. 346; State *v.* Vadnais, 21 Minn. 382.

[7] See Com. *v.* Parr, 5 W. & S. 345; State *v.* Durham, 62 Ga. 558; *contra*, State *v.* Shepard, 7 Conn. 54. The reasons given are (1) merger, a doctrine which cannot be maintained in jurisdictions in which there is no longer any distinction between felonies and misdemeanors; and (2) variance, the offences being so utterly different that

ravish by force, then it has been held that a conviction for assault with intent to ravish cannot be sustained.[1] In such case, however, if the indictment contain the allegation, there can be a conviction for an assault with intent to have an improper connection;[2] or in any view, there may be a conviction for assault.[3] The *form* of the indictment is elsewhere considered.[4]

Force to be inferred from circumstances.

§ 576 *a*. *Touching* is not necessary to sustain such an indictment.[5] The intent to use force, however, may be inferred from the circumstances.[6] Thus, in a case where, when the prosecutrix awoke, she found the defendant in bed with her, holding her by the wrist, and he escaped when she called on the family for help, it was held that he might be convicted of an assault with intent to commit a rape.[7] But unless it

there can be no conviction of one on an indictment for the other, unless where the former is contained in the latter. Hence, while there may be a conviction of the minor on an indictment for the major, there can be no conviction on proof establishing the major on an indictment for the minor. The answer to the last point is that while the prosecution cannot try for one offence on indictment charging another, it can elect to prosecute for a minor offence, by discharging aggravating incidents. See *infra*, §§ 641 *a*, 1344; *supra*, § 27; Whart. Cr. Pl. & Pr. § 464. And see DeGroat *v.* People, 39 Mich. 124. As to merger of carnal knowledge of infant in rape, see State *v.* Woolaver, 77 Mo. 103; State *v.* Ellis, 74 Ibid. 385.

[1] R. *v.* Stanton, 1 C. & K. 415; R. *v.* Case, *ut supra*; R. *v.* Lloyd, 7 C. & P. 318; Com. *v.* Merrill, 14 Gray, 415; Smith *v.* State, 12 Ohio St. 466; Hull *v.* State, 22 Wis. 580; Garrison *v.* People, 6 Neb. 274; State *v.* Priestly, 74 Mo. 24. See Preisker *v.* People, 47 Ill. 382, and cases cited *infra*, § 576 *a*.

[2] Whart. Cr. Pl. & Pr. § 247; R. *v.* Stanton, 1 C. & K. 415; R. *v.* Saunders, 8 C. & P. 265; R. *v.* Williams, Ibid. 286; R. *v.* Case, 1 Den. C. C. 580; 4 Cox C. C. 220; 1 Eng. Law & Eq. 544; Newell *v.* Whitcher, 53 Vt. 589. *Infra*, § 603.

[3] See R. *v.* Dungey, 4 F. & F. 99. *Infra*, § 641 *a*.

[4] *Infra*, § 644. See People *v.* Girr, 53 Cal. 629.

[5] Hays *v.* People, 1 Hill, 351.

[6] See State *v.* Mitchell, 89 N. C. 521; Ware *v.* State, 67 Ga. 348; Walker *v.* State, 68 Ibid. 832; House *v.* State, 9 Tex. Ap. 53; Peterson *v.* State, 14 Ibid. 162.

[7] Carter *v.* State, 35 Ga. 263. See State *v.* Neely, 74 N. C. 425, where it was held that an intent to use force might be inferred from an apparently violent pursuit, which, however, was overruled in State *v.* Massey, 86 Ibid. 658. As sustaining State *v.* Massey, see Saddler *v.* State, 12 Tex. Ap. 194; Sanford *v.* State, Ibid. 196. See Whart. Cr. Ev. 9th ed. § 734.

A prisoner may be convicted of an assault with intent to commit a rape, without the testimony of the party injured. People *v.* Bates, 1 Parker C. R. 27. *Supra*, § 555.

An indictment charging an assault and an "attempt to ravish," etc., has been held insufficient to support a

appear that the intent was to ravish by force, the defendant must be acquitted of the aggravated offence.[1] It has been said that there can be no conviction of assault in such case if the object was to obtain the woman's consent.[2] But an attack does not cease to be an assault because its object is to obtain consent to something after the assault.[3]

Administering drugs with intent to inflame the passions has been held in this country to be an assault,[4] though in England otherwise at common law.[5]

The complaints of the party injured, made after the assault, are inadmissible, unless part of the *res gestae*.[6]

Assent bars prosecution if knowingly given by person capable of assenting.

§ 577. The question of consent of the party injured as a defence has been already discussed in its general bearings,[7] and it will be sufficient now to state the conclusions already reached, blended with the decisions of the courts on the particular issue now before us. *Volenti non fit injuria* is the maxim generally applicable; but in this relation with qualifications which will now be detailed.

(*a*) In rape itself, of which an essential element is the want of consent of the woman, proof of consent necessarily, as has been seen, destroys one of the conditions of the offence. Hence, there

charge of an assault with intent to commit rape. State *v.* Ross, 25 Mo. (4 Jones) 426. See People *v.* O'Neil, 48 Cal. 257. As to indictment, see further Green *v.* State, 50 Ind. 267; Joice *v.* State, 53 Ga. 50.

That an attempt to ravish is indictable though the attempt was abandoned on resistance, see *supra*, § 187; Lewis *v.* State, 35 Ala. 380.

[1] R. *v.* Stanton, 1 C. & K. 415; R. *v.* Lloyd, 7 C. & P. 318; Com. *v.* Merrill, 14 Gray, 415; Smith *v.* State, 12 Ohio St. 466; State *v.* Priestly, 74 Mo. 24; Hull *v.* State, 22 Wis. 580; Garrison *v.* People, 6 Neb. 274; State *v.* Massey, 86 N. C. 658; State *v.* Donovan, 61 Iowa, 369; House *v.* State, 9 Tex. Ap. 53, 567; Irving *v.* State, Ibid. 66.

[2] R. *v.* Cockburn, 3 Cox C. C. 543.

[3] *Infra*, § 577.

In Com. *v.* Shaw, 134 Mass. 221, it was held that it was no defence to an indictment for an assault with intent to ravish a child, that the child was put in a position in which a rape was impossible. See *supra*, § 185.

[4] Com. *v.* Stratton, 114 Mass. 303. See People *v.* Carmichael, 5 Mich. 10.

[5] See *infra*, § 610.

[6] Weal *v.* State, 8 Tex. Ap. 474; *supra*, § 566; and in Hornbeck *v.* State, 35 Oh. St. 277, where the woman was an imbecile, and could not be examined as a witness, but made certain declarations shortly after the commission of the offence, it was held that such declarations could not by themselves prove the commission of the offence.

[7] *Supra*, § 146.

can be no assault with intent to commit a rape in cases where consent, by a person capable of consenting, is given.[1]

(*b*) In the statutory crime of sexual abuse of a child under ten years, non-consent is not an essential element, and hence consent is no defence to an indictment for this offence.[2] And at common law, to an indictment for rape of a child of such tender years as to be incapable of consenting, consent, or even assistance, is no defence.[3] But a child of over seven years is not to be arbitrarily ruled to be incapable of consent.[4]

(*c*) An indictment for assault with intent to ravish may be sustained, when the object of the assault was incapable of assent. And this applies to cases where such incapacity arises from extreme infancy,[5] or from idiocy or mania,[6] or from intoxication, whether by alcoholic liquor or by opiates.[7] With young girls it is for the jury to consider whether the supposed assent was not the result of fear, or, in cases of assault, of confusion.[8]

(*d*) It seems, also, that consent is no defence to assault if the act is perpetrated with unnecessary violence,[9] or if the woman does not know that what is proposed to her is the sexual act;[10] as in the case of the patient who supposed that the act was one simply of

[1] R. *v.* Martin, 9 C. & P. 215; 2 Moody, C. C. 123; R. *v.* Johnston, L. & C. 632; 10 Cox C. C. 114; R. *v.* Wollaston, 12 Ibid. 180; People *v.* Bransby, 32 N. Y. 528; State *v.* Picket, 11 Nev. 255; Richardson *v.* State, 54 Ala. 158. *Supra*, § 188.

[2] R. *v.* Beale, 10 Cox C. C. 157; L. R. 1 C. C. 10; R. *v.* Connelly, 26 Up. Can. Q. B. 323; Cliver *v.* State, 45 N. J. L. 46. *Supra*, §§ 146–188, 562. Ignorance by the defendant that the prosecutrix was under the statutory age is no defence. *Supra*, § 88. Under Stat. 33 & 34 Vict. consent of a person under thirteen to an indecent assault is no defence. *Supra*, § 578.

[3] Hays *v.* People, 1 Hill (N. Y.) 351; O'Meara *v.* State, 17 Ohio St. 515; Stephen *v.* State, 11 Ga. 225; State *v.* Johnston, 76 N. C. 209; but see, as qualifying this, R. *v.* Read, 1 Den. C. C. 377; 3 Cox C. C. 266; R. *v.* Cockburn, 3 Ibid. 543; People *v.* McDonald, 9 Mich. 150; and R. *v.* Martin, R. *v.* Johnston, *supra*, as to children not positively incapable of assent.

[4] R. *v.* Read, *ut supra*; R. *v.* Roadley, 14 Cox C. C. 463; 45 L. T. (N. S.) 515.

[5] *Supra*, § 562; and see, particularly, R. *v.* Lock, L. R. 2 C. C. 10; State *v.* Johnston, 76 N. C. 209; though see State *v.* Pickett, 11 Nev. 255.

[6] *Supra*, § 560. See R. *v.* Connelly, 26 Up. Can. Q. B. 323, where Hagarty, J., argues that mere animal consent in such case defeats prosecution.

[7] *Supra*, §§ 150, 562.

[8] R. *v.* Day, 9 C. & P. 722; R. *v.* McGavaran, 6 Cox C. C. 64; R. *v.* Fick, 16 Up. Can. C. P. 379.

[9] *Infra*, § 636.

[10] *Supra*, §§ 559, 561. See State *v.* Brooks, 76 N. C. 1, where it was held that an attempt to induce a woman to

medical treatment.[1] In such cases there can be a conviction for the *assault;* but there can be no conviction of the *assault with intent to ravish*, if there were intelligent submission, unless the jury believe that the intent was to use force if persuasion failed.[2]

(*e*) If the defendant intended to use force to the end, and the woman, who for a time resisted, ultimately assented, the defendant may be convicted of an assault with intent to commit a rape, or of an attempt.[3]

(*f*) And so, also, where the defendant, before consummating his purpose, was driven or frightened off.[4]

VII. CARNAL KNOWLEDGE OF CHILDREN.

§ 578. By statutes in England and this country, the carnal knowledge, even with consent, of children, is made, with varying limits, a statutory offence. At common law the following positions may be laid down:—

This a statutory offence.

(1) When the child is incapable of consenting, or when the consent is to something else than sexual intercourse, the offence is rape.[5]

(2) When the child intelligently consents, this is a misdemeanor at common law, when not so by statute; while by statute in some jurisdictions it is a felony.[6]

consent to sexual intercourse, under the belief that the defendant was her husband, was not an assault with intent to commit a rape But see *supra*, § 561.

[1] R. *v.* Case, 4 Cox C. C. 220; 1 Den. C. C. 580; R. *v.* Flattery, 13 Cox C. C. 388; R. *v.* Stanton, 1 C. & K. 415. *Supra*, § 559.

[2] Ibid. *Supra*, § 550; Walter *v.* People, 50 Barb. 144; Com. *v.* Fields, 4 Leigh, 648; Pleasant *v.* State, 8 Eng. (3 Ark.) 360; Clark *v.* State, 30 Tex. 448. As to fraud, see R. *v.* Bennett, 4 F. & F. 1105.

[3] *Supra*, §§ 141, 181, 188; State *v.* Hartigan, 32 Vt. 607; People *v.* Bransby, 32 N. Y. 525; State *v.* Cross, 12 Iowa, 66; Joice *v.* State, 53 Ga. 50; State *v.* Montgomery, 63 Mo. 296; see R. *v.* Hallett, 9 C. & P. 748, and cases cited *supra*, § 187.

[4] See *supra*, §§ 141, 181, 188; State *v.* Elick, 7 Jones N. C. 68; Lewis *v.* State, 35 Ala. 380. See R. *v.* Wright, 4 F. & F. 967.

[5] *Supra*, § 558.

[6] Com. *v.* Bennett, 2 Va. Ca. 235; Lawrence *v.* Com. 30 Grat. 845 (where it was also held that under the Virginia statute, making consent no defence with girls under twelve, mistake as to the girl's age was no defence; *supra*, § 88); State *v.* Tilman, 30 La. An. Pt. ii. 1249; Stephen *v.* State, 11 Ga. 225 (holding that not only infancy, but feeble mindedness makes consent inoperative); Cliver *v.* State, 45 N. J. L. 46, where the limit is ten years; Territory *v.* Potter, 1 Ariz. 421. See as to consent of infants, *supra*, § 558.

In many jurisdictions the question of consent is settled by the adoption of statutes providing that carnally knowing a female under the age of (ten), or carnally knowing a woman over that age *against her will*, shall be, etc. As has been already seen,[1] where a severer penalty is assigned in cases where the person ravished is under a certain age, the indictment, in order to sustain the severer penalty, must specify the age.[2] Without such specification, however, the conviction can be for the offence of rape,[3] and, as has been seen, the limitations as to age may be rejected as surplusage,[4] and so may terms which, though descriptive of rape (*e. g.*, "force," "against the will," etc.), are not necessary ingredients of the statutory offence.[5]

"Carnal knowledge," under the statute is to be construed in the same sense as the same words are construed in reference to rape. The male organ must be introduced to some extent within the lips of the female, though the slightest degree of penetration will be sufficient.[6]

[1] *Supra*, § 572.

[2] State *v.* Worden, 46 Conn. 349, and cases cited in next note.

[3] R. *v.* Wedge, 5 C. & P. 298; R. *v.* Martin, 9 Ibid. 215; R. *v.* Nichols, 10 Cox C. C. 476; R. *v.* Dicken, 14 Ibid. 8; Com. *v.* Sugland, 4 Gray, 7; State *v.* Gaul, 50 Conn. 579; O'Meara *v.* State, 17 Ohio St. 515; State *v.* Storkey, 63 N. C. 7; State *v.* Jackson, 76 Ibid. 209; State *v.* Staton, 88 Ibid. 654; Vasser *v.* State, 55 Ala. 264.

[4] *Supra*, § 572; Mobley *v.* State, 46 Miss. 501.

[5] State *v.* Black, 63 Me. 210; McComas *v.* State, 11 Mo. 116; State *v.* Jaeger, 66 Ibid. 173. That it is enough to aver "did have carnal knowledge of," etc., see People *v.* Mills, 17 Cal. 276.

[6] R. *v.* Lines, 1 C. & K. 393; Brauer *v.* State, 25 Wis. 413, and other cases cited *supra*, § 555. That mistake as to the girl's age is no defence has been already seen, *supra*, § 88. The statutory limitations as to age of consent, have also been previously noticed *supra*, § 558.

CHAPTER III.

SODOMY.

In sodomy proof of penetration is required, § 579. | Consent is no defence; but accomplice alone not sufficient to convict, § 580.

§ 579. SODOMY consists in sexual connection with any brute animal, or in sexual connection, *per anum*, by a man, with any man or woman. Penetration of the body is essential to the offence,[1] and so, according to a preponderance of authority is emission.[2] The act committed in a child's mouth is not enough.[3] The term "sodomy" has been held to be a sufficient description of the offence,[4] and so of the "infamous crime against nature."[5]

In sodomy proof of penetration required.

§ 580. Consent is no defence;[6] but the evidence of a party consenting to the act is not sufficient to procure a conviction without confirmation; it being held that such party is an accomplice, upon whose unsupported testimony a conviction would not be sustained.[7] In any view, consent cannot be regarded as given by a child who, by reason of infancy, is incapable of understanding the nature of the act.[8]

Consent no defence; but accomplice alone not sufficient to convict.

[1] Steph. Dig. C. L. art. 168; 2 Russ. on Crimes, 698; R. *v.* Jacobs, R. & R. 331. See R. *v.* Jellyman, 8 C. & P. 604. In Iowa, it has been ruled not to be indictable at common law. Estes *v.* Carter, 10 Iowa, 400. It is now indictable in Texas by statute. Bergen, *ex parte*, 14 Tex. Ap. 52. As to prior law, see Frazier *v.* State, 39 Tex. 390.

[2] Stafford's Case, 12 Co. Rep. 37; see, however, 3 Inst. 59, 1 Hale P. C. 629; and see *contra*, Com. *v.* Thomas, 1 Va. Ca. 307.

[3] Ibid. See generally 1 Hale, 669; 2 Inst. 58, 59; 1 Hawk. P. C. 4; Com. *v.* Thomas, 1 Va. Ca. 307.

[4] State *v.* Williams, 34 La. An. 87; Bergen, *ex parte*, *ut sup.*

[5] People *v.* Williams, 59 Cal. 397; State *v.* Williams, 34 La. An. 87; see *supra*, § 15 *a*.

[6] R. *v.* Jellyman, 8 C. & P. 604; R. *v.* Allen, 1 Den. C. C. 364; 2 C. & K. 869; 3 Cox C. C. 270.

[7] 2 Russ. on Crimes, 6th Am. ed. 698. As to corroboration, see Com. *v.* Snow, 111 Mass. 411.

[8] See R. *v.* Lock, *supra*, §§ 556, 577.

Where an adult and a boy of twelve years of age commit an unnatural offence, the adult, being the pathic, may be convicted. R. *v.* Allen, 1 Den. C. C. 364; T. & M. 55; 2 C. & K. 869; 3 Cox C. C. 270.

The allegation "had a venereal affair," is not essential. Lambertson *v.* People, 5 Parker C. R. 200.

It is said in Texas not to be enough to charge the offence in general terms. The acts constituting the offence should be charged. State *v.* Campbell, 29 Texas, 44.

An indictment was held bad in England for uncertainty which charged that the two defendants being persons of wicked and unnatural dispositions, did in an open and a public place unlawfully meet together, with the intent of committing with each other, openly, lewdly, and indecently in that public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly, and indecently did commit with the other, in the sight and view of divers of the liege subjects, in the said public place there passing, divers such practices as aforesaid. R. *v.* Rowed, 2 G. & D. 518; 3 Q. B. 180; 6 Jur. 396. See Davis *v.* State, 3 H. & J. 154.

[1] See R. *v.* Lock, L. R. 2 C. C. 12; 12 Cox C. C. 244; R. *v.* Eaton, 8 C. & P. 417; R. *v.* Hickman, 1 Mood. C. C. 34; R. *v.* Rowed, *ut supra;* People *v.* Williams, 59 Cal. 397.

[2] See *supra*, §§ 173 *et seq.*

Attempts to commit the offence, and assaults with intent,[1] are indictable at common law.[2]

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.
May be conviction of lesser offence, § 584.

§ 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 some of the United States, the offence has been extended, so as to cover all malicious disabling injuries to the person.[3]

Mayhem is inflicting wound diminishing capacity for self-defence.

[1] For indictments in mayhem, see Whart. Prec. 192 *et seq.*

[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 Black. Com. 121; 4 Ibid. 205; State *v.* Danforth, 3 Conn. 112; Foster *v.* People, 50 N. Y. 598; Godfrey *v.* People, 63 Ibid. 207; Scott *v.* Com., 6 S. & R. 224; Riflemaker *v.* State, 25 Oh. St. 395; Com. *v.* Hawkins, 11 Bush. 603; State *v.* Vowels, 4 Oreg. 324; Bohannon *v.* State, 21 Mo. 490; State *v.* Brown, 60 Ibid. 141; Eskridge *v.* State, 25 Ala. 30. The distinction between the English and the New York statute is given in Tully *v.* People, 67 N. Y. 15. By § 209 of the N. Y. Penal Code of 1882, the offence includes all kinds of mutilation, and § 207 prohibits self mutilation.

To constitute a mayhem, under the North Carolina statute, by biting off an ear, it is not necessary that the whole ear should be bitten off. It is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. State *v.* Girkin, 1 Iredell, 121. In an indictment for cutting off an ear in that State, it need not be alleged whether it was the right or the left ear. State *v.* Green, 7 Ibid. 39. In an indictment under the same statute, an intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. State *v.* Girkin, 1 Ibid. 121. It is not necessary in such case to prove malice aforethought, or a preconceived intention to commit the mayhem. Ibid.

The putting out an eye is a mayhem at common law. Chick *v.* State, 7 Humph. 161; Com. *v.* Reed, 3 Amer. Law Jour. 140. And an indictment under the 55th section of the Tennessee Penal Code, for putting out an eye, must aver that the party was thereby "maimed." Chick *v.* State, 7 Humph. 161.

The biting off a small portion of the ear, which does not disfigure the person, and could only be discovered on close inspection or examination, when attention is directed to it, is not mayhem under the statute of Alabama. State *v.* Abram, 10 Ala. 928; and so substantially in Louisiana. State *v.* Harrison, 30 La. An. Pt. II. 1329.

[1] State *v.* Simmons, 3 Ala. 497; State *v.* Girkin, 1 Ired. 121.

[2] State *v.* Danforth, 3 Conn. 112; State *v.* Evans, 1 Hayw. 281; State *v.* Crawford, 2 Dev. 425. In New York, however, lying in wait, or some other act showing premeditation, must be proved. Godfrey *v.* People, 63 N. Y. 207.

[3] State *v.* Skidmore, 87 N. C. 509.

[4] See Foster *v.* People, 50 N. Y. 598; Godfrey *v.* People, 63 Ibid. 207; S. C., 5 Hun, 369; Burke *v.* People, 4 Ibid. 481; Molette *v.* State, 49 Ala. 18; Slattery *v.* State, 41 Tex. 619.

In indictments for attempt, the particular part of the body aimed at need not be specified. Ridenour *v.* State, 38 Ohio St. 292. See *supra*, § 192; Clark's Case, 6 Grat. 675.

[5] *Supra*, § 142.

§ 582. Where maiming is proved to have been done, the inference from facts indicating design is that the act was done on purpose, and with an intent to maim;[1] and no sudden rencontre shall be deemed sufficient to excuse the party maiming, unless it be done in necessary self-defence against some great bodily harm attempted by the person maimed, and where there are no other means of preventing it;[2] which facts must be shown by the defence.[3] And under the statutes, while a specific intent to inflict the particular injury must be shown, the duration of this intent is not material, if such antecedent specific intent be proved.[4] Consent of the party injured is no defence to an indictment for mayhem.[5]

Intent to be inferred from facts.

§ 583. All mayhems in England are felony, because anciently the offender had judgment of the loss of the same member which he had occasioned to the sufferer; but now the only judgment which remains at common law is of fine and imprisonment; from whence the offence seems to have been considered more in the nature of an aggravated trespass. Lord Coke

Offence is felony.

accordingly classes it as an offence "under felonies deserving death, and above all other inferior offences."[1]

May be conviction of lesser offence.

§ 584. On an indictment for mayhem, there may be a conviction of any lesser offence (*e. g.*, assault and battery), which the indictment includes.[2]

[1] Co. Litt. 127; 1 Hawk. c. 44, s. 3; 2 Hawk. c. 23, s. 18; 4 Blac. Com. 205, 206.

That mayhem is punishable under the federal crimes act, see U. S. *v.* Scroggins, Hempt. 478.

The technical offence of mayhem has never, in Massachusetts, been considered a felony, either by statute or at common law. Com. *v.* Newell, 7 Mass. 244. The words "felonious assaulter," in the statute, do not make it felony. Ibid.; State *v.* Danforth, 3 Conn. 112.

In Georgia, mayhem is said not to be felony at common law, except when by castration. Adams *v.* Barratt, 5 Georgia, 404.

In Pennsylvania, the practice is to charge it as a felony. Com. *v.* Reed, 3 Amer. Law Jour. 140; Whart. Prec. 162. See Scott *v.* Com., 6 S. & R. 224; and see Whart. Cr. Pl. & Pr. § 260.

To same effect see Canada *v.* Com., 22 Grat. 899; State *v.* Thompson, 30 Mo. 470; State *v.* Brown, 60 Ibid. 141.

As to New York practice see Foster *v.* People, 50 N. Y. 598. The indictment in New York must aver premeditated design. Tully *v.* People, 67 N. Y. 15.

[2] Com. *v.* Blaney, 133 Mass. 571. *Infra*, § 640.

CHAPTER V.

ABDUCTION AND KIDNAPPING.

Indictment must conform to statutory conditions.

§ 586. At common law the abduction of a woman, either by force or fraud, for the purpose of defilement has been held not to be indictable as an abduction;[1] but when involving force, it is indictable as an assault, and in any view it may be indictable as an attempt to ravish or to have illicit connection. Under the statute of 3 Hen. VII. cap. 3,[2] from which several of the American statutes of abduction are taken, and which in some States is said to be part of the common law, the indictment

[1] State *v.* Sullivan, 85 N. C. 506, where it is said that the statement in 2 Archfold C. P. 301, that abduction is so indictable is unsustained by 1 East P. C. 458; 1 Russ. on Cr. 569, which are the authorities cited.

[2] That whereas women, as well maidens as widows and wives, having substances, some in goods movable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, have been oftentimes taken by misdoers contrary to their will, and afterwards married to such misdoers, or to others by their consent, or defiled:" "That whatsoever person or persons shall take any woman so against her will, unlawfully, that is to say maid, widow, or wife, such taking and the procuring and abetting to the same, and also receiving wittingly the same woman, so taken against her will, shall be felony; and that such misdoers, takers, and procurers to the same, and receivers knowing the said offence in form aforesaid, shall be reputed and judged as principal felons; and upon conviction thereof shall be sentenced to undergo a confinement in the penitentiary not less than two nor more than ten years; provided always that this act shall not extend to any person taking any woman, only claiming her as his ward or bond-woman." 3 H. 7, cap. 2; 1 Hale, 660. As to seduction, see *infra*, § 1756.

That under the English statute there may be a conviction of detention, on proof of non-return of a child, coupled with evasive answers, see R. *v.* Johnson, 50 L. T. N. S. 759.

must allege that the taking was for lucre, in order to show which, it must be proved that the woman had substance, either real or personal, or was heir apparent; and it must be further alleged and proved that she was taken against her will, and afterwards married to the misdoer, or to some other by his assent, or that she was defiled, that is, carnally known; because no other case is within the preamble of the statute, to which the enacting clause clearly refers, for it does not say that "whatsoever person or persons shall take any woman against her will," but, "whatsoever person or persons shall take any woman *so* against her will."[1] If the "defiling" were by force it is no defence that the abduction was by fraud.[2]

The statute of 4 & 5 Phil. & M. c. 8, makes it indictable "to take and convey away," etc., "any maid or woman child unmarried, being under the age of sixteen years, out or from the possession, custody, and governance, and against the will of the father of such maid or woman child," etc. This was reënacted and modified by stat. 24 & 25 Vict. c. 100.[3] It has been held that it is abduction, under the English statutes, for A. to persuade B. to permit C. to go away by falsely pretending that he (A.) had a place for C.[4] It is no defence that the elopement took place at the girl's request, she having been seduced by the defendant.[5] A temporary enticement of the girl from the father's house for the purpose of illicit intercourse is within the statute.[6] But when two girls run away together, neither abducts the other.[7]

[1] Davis's Criminal Law, 137; 1 Hale, 660.

It need not be alleged or shown that the taking was with an intention to marry or defile her, for the words of the statute do not require such an intent, nor does the want of it in any way lessen the injury. 1 Hawk. c. 16, ss. 4, 5, 6; 1 East P. C. 453. As to Indiana statute, see Lyons *v.* State, 52 Ind. 426; Osborn *v.* State, 52 Ibid. 526.

[2] Beyer *v.* People, 86 N. Y. 369; Schnicker *v.* People, 88 Ibid. 192.

[3] See *infra*, § 1756, for examination in detail.

[4] R. *v.* Hopkins, C. & M. 254. *Infra*, § 1756.

[5] R. *v.* Biswell, 2 Cox C. C. 259.

[6] R. *v.* Timmins, Bell, 276. *Aliter*, when the girl paid the man a visit of only a few hours, he not knowing whether she had a home or parents. R. *v.* Hibbert, L. R. 1 C. C. 144. But see R. *v.* Baillie, 8 Cox C. C. 238. As to who has charge of the girl under the Iowa statute, see State *v.* Ruhl, 8 Iowa, 447, cited *infra*, §§ 1756, 1761. That *bonâ fide* ignorance as to the girl's age is no defence, see R. *v.* Prince, L. R. 2 C. C. 154. *Supra*, § 88.

[7] R. *v.* Meadows, 1 C. & K. 399; explained in R. *v.* Kipps, 4 Cox C. C. 168.

The statutory offences of seduction and of "enticing" for purpose of prostitution will be hereafter further considered.[1]

Woman in such case may be a witness.

§ 587. A woman thus taken against her will and married may be a witness against the offender, if the force were continued upon her till the marriage; because then he is no husband *de jure*, or of right, and she may herself prove such continuing force. It has been doubted whether, in cases in which the actual marriage is good by the consent of the inveigled woman, obtained after her forcible abduction, her evidence should be allowed. But the opinion appears to have prevailed, that it should even then be admitted; because otherwise the offender would be permitted to take advantage of his own wrong; and the very act of marriage, which is a principal ingredient of his crime, would, by a forced construction of the law, be made use of to stop the mouth of the most material witness against him.[2] There can be no doubt of her competency, where the marriage was against her will at the time, notwithstanding her subsequent assent. For if she were a competent witness at any time after the crime committed, no subsequent assent can incapacitate her, much less can any mere lapse of time; though these circumstances may affect the credit of her testimony.[3]

Indictment must be in county of offence.

§ 588. If a woman be forcibly taken in one county, and afterwards go voluntarily into another county, and be there married or defiled with her own consent, it has been argued that the captor is not indictable in either; for the offence, which consists in the forcible taking and subsequent marriage or defilement, is not complete in either. But if the force is continued upon her at all in the county into which she was so taken, the offender, so it is said, may be indicted there, although the actual marriage or defilement afterwards took place with her own consent.[4]

Original actors are all principals.

§ 589. Though not only the misdoers themselves, but the procurers and any who wittingly receive the woman so taken against her will, are made principals by this statute, yet he who only receives the offender himself is but an ac-

[1] *Infra*, § 1756.

[2] 4 Bl. Com. 209; East P. C. 454. See Whart. Cr. Ev. § 394.

[3] East P. C. 454. *Infra*, § 1710.

[4] 1 Hawk. c. 16, s. 11; 1 East P. C. 453; 1 Russ. on Cr. 716. But see *supra*, § 288.

cessary after the fact. And those who are only privy to the marriage, and not to the forcible taking, she consenting thereto (which must be inferred where the woman is under no constraint at the time of the marriage), are not within the statute.[1] It is no excuse that the man who marries her was not the author of the original force.[2]

Kidnapping and "inveiglement" specifically indictable.

§ 590. Kidnapping, which is seizure and removal for the purpose of transportation, enslavement, or involuntary service, has been held to be an offence at common law,[3] and is punished by fine and imprisonment.[4] As kidnapping is to be considered the procuring the intoxication of a sailor and his surreptitious removal to a ship, even though the destiny of the ship be not to another State or country.[5]

Consent is no defence to the indictment when not given voluntarily and intelligently by a person of sufficient age to exercise an intelligent and free choice.[6] And under the New York statute consent will be no defence when fraudulently obtained.[7]

Statutes exist in several jurisdictions making the abduction of children indictable. Under these statutes it has been held that

[1] 1 Hawk. c. 16, ss. 9, 10; 1 East P. C. 452-53.

[2] Hawk. c. 16, ss. 7, 8; 1 East P. C. 454. *Infra*, § 1710.

[3] State *v.* Rollins, 8 N. H. 550; People *v.* Ebner, 23 Cal. 158; 1 East P. C. 430. See Com. *v.* Westervelt, 11 Phila. 561.

[4] 4 Bl. Com. 219.

Where a person having in his custody a mulatto boy, six years of age, who had been placed with him by the overseers of the poor of a town, sold him to a person residing in another State, with the intention that he should be carried into that State, and held in servitude until he arrived at the age of twenty-one years, and he carried the boy into another town and delivered him there, it was held that he was guilty of kidnapping. Moody *v.* People, 20 Ill. 315. See State *v.* Whaley, 2 Harring. 538; and for statutory cases see Com. *v.* Blodgett, 12 Metc. 56 (*supra*, § 411); Com. *v.* Nickerson, 5 Allen, 518; Hamilton *v.* Com., 3 Pen. & W. (Penn.) 142; Thomas *v.* Com., 2 Leigh, 741.

The requisites in an indictment would seem to be, an averment of an assault, and the carrying away, or transporting the party injured, from his own country into another, unlawfully and against his will. Click *v.* State, 3 Texas, 282. It is not sufficient to charge the defendant with kidnapping generally; the indictment should state specifically the facts and circumstances which constitute the offence. Ibid.

[5] Hadden *v.* People, 25 N. Y. 372; People *v.* Chu Quong, 15 Cal. 332.

By the New York Penal Code of 1882, kidnapping, in § 211, includes wilful confining of another against his will without authority of law.

[6] *Supra*, §§ 146, 150. Hadden *v.* People, *ut supra*. Com. *v.* Davenport, 1 Leigh, 588.

[7] Schnicker *v.* People, 88 N. Y. 192.

neither transportation to a foreign country,[1] nor actual violence and force[2] need be proved. When by a decree of divorce a child is given to the mother's custody, it is abduction under the statute for the father to carry the child away from such custody.[3]

Under a federal statute the "inveiglement" of children for the purpose of involuntary service in the United States is made specifically indictable,[4] nor is consent by such child a defence.[5]

Inveiglement as an element of seduction will be hereafter considered.[6]

False imprisonment necessarily involved.

§ 591. False imprisonment, which is an unlawful physical restriction of corporal liberty, and which will be hereafter discussed in its relations to assault,[7] is to be viewed, also, in its relations to abduction. There can be no abduction without false imprisonment, under which term is included all corporal detention by force.[8] The force, however, need not be tactual. It is enough if, by fear of a greater evil, the party coerced submit to the detention.[9] It is false imprisonment, also, to unlawfully prevent a traveller from proceeding on his errand on a public road, even though he is not precluded from going back.[10] Excessive discipline, also, may be a false imprisonment, as where a father confined a son in a damp, dark cellar.[11] Arrest and detention, also, by an officer, real or pretended, acting without authority, constitute false imprisonment.[12] An unlawful imprisonment in itself involves an assault.[13]

[1] State *v.* Rollins, 8 N. H. 550; People *v.* Chu Quong, 15 Cal. 332.

[2] Com. *v.* Nickerson, 5 Allen, 518; Moody *v.* People, 20 Ill. 315; Redfield *v.* State, 24 Tex. 133.

[3] State *v.* Farrar, 41 N. H. 53.

[4] U. S. *v.* Aucarola, 17 Blatch. C. C. 423.

[5] Ibid. *Supra*, § 146.

[6] *Infra*, § 1765.

[7] *Infra*, § 609.

[8] R. *v.* Webb, 1 W. Bl. 19; State *v.* Rollins, 8 N. H. 550; Jones *v.* Com., 1 Rob. Va. 748; Smith *v.* State, 7 Humph. 43; State *v.* Lunsford, 81 N. C. 528; State *v.* Dineen, 10 Minn. 407; State *v.* Edge, 1 Strob. 91; State *v.* Guest, 6 Ala. 778; Barber *v.* State, 13 Fla. 675; Harkins *v.* State, 6 Tex. Ap. 452. See *infra*, § 613. That the place of detention has jurisdiction, see Lavina *v.* State, 63 Ga. 513.

[9] Ibid. That an arrest need not be by tactual force, see Whart. Cr. Pl. & Pr. § 3; Johnson *v.* Tompkins, Bald. 601; Herring *v.* State, 3 Tex. Ap. 108.

That unavoidable delay in taking bail is not false imprisonment, see Cargill *v.* State, 8 Ibid. 431.

[10] Bloomer *v.* State, 3 Sneed, 66; Smith *v.* State, 7 Humph. 43; Harkins *v.* State, 6 Tex. Ap. 452.

[11] Fletcher *v.* People, 52 Ill. 395.

[12] Francisco *v.* State, 24 N. J. L. (4 Zab.) 30; Vanderpool *v.* State, 34 Ark. 174.

[13] *Infra*, § 609.

CHAPTER VI.

ABORTION.

§ 592. At common law the destruction of an infant unborn is a misdemeanor, supposing the child to have been born dead,[1] though if the child die subsequently to birth from wounds received in the womb, it is 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 under a general devise as a "child;"[8] and may obtain an injunction

Abortion an offence at common law.

[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 3 Whart. & St. Med. Jur. 84–107; and Elwell's Med. Jur. § 243, etc.

[2] R. *v.* Senior, 1 Mood. C. C. 346; 3 Inst. 50. See *supra*, § 445.

[3] R. *v.* Trilloe, 2 Mood. C. C. 260; 1 C. & M. 650.

[4] Com. *v.* Bangs, 9 Mass. 387; Com. *v.* Jackson, 15 Gray, 187; 3 Whart. & St. Med. Jur. §§ 84 *et seq.*, §§ 861 *et seq.*; Guy's Med. Juris. tit. Abortion; 1 Beck, 172, 192; Lewis C. L. 10. See 1 Russ. on Cr. 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. 673; Thellusson *v.* Woodford, 4 Ibid. 340.

[8] Fearne, 429.

to stay waste.[1] That the destruction of an infant before quickening is a misdemeanor at common law, has been held in Pennsylvania and North Carolina.[2] A contrary view, at common law, has been expressed in Massachusetts,[3] in New Jersey,[4] in Iowa,[5] in Kentucky,[6] and in Missouri.[7] The questions that arise when the child, wounded before birth, dies after birth, have been already distinctively considered.[8] The common law offence, it should be added, is in several jurisdictions absorbed in or modified by statute.[9]

[1] 2 Vernon, 710.

[2] Com. *v.* Demain, etc., 6 Penn. Law Jour. 29; Brightly, 441; Mills *v.* Com., 13 Penn. St. 631; Lewis C. L. 13; State *v.* Slagle, 83 N. C. 630.

The weight of medical authority is that quickening is a mere circumstance in the physiological history of the fœtus, 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.

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 child is quickened." R. *v.* Wycherly, 8 C. & P. 265. This view modifies the common law authorities against the indictabilty of the offence.

That "quickness" means activity perceptible to the mother, see R. *v.* Phillips, 3 Camp. 73, 76; Com. *v.* Reid, 8 Phila. 385, Paxson, J.

[3] 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 Ibid. 187.

[4] State *v.* Cooper, 2 Zab. 57.

[5] 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.*

[6] Mitchell *v.* Com., 78 Ky. 704.

[7] State *v.* Emerick, 13 Mo. Ap. 493.

[8] *Supra*, § 445.

[9] 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; People *v.* Davis, 56 N. Y. 95; Moody *v.* State, 22 Ohio St. 110; Harrington *v.* State, 35 Ohio St. 78; Robinson *v.* State, 8 Ibid. 132.

In New York, where one statute makes it a misdemeanor to administer drugs, etc., 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, ex-

§ 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 rather as a victim than an accomplice,[2] though if she encourage the attempt

Woman a witness for the prosecution.

cept 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 Revised Statutes, § 134, the attempt to produce abortion by drugs or instruments is indictable, though no abortion ensues, and the woman survives. 1 Bright. Purd. 341.

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 Whart. Prec. tit. Abortion.

In Com. *v.* Leigh, 15 Phila. 376, it was held that the sale of instruments to prevent conception is not indictable at common law; but this may be questioned.

"Causing," under the statute, is satisfied if the noxious injurious drug was supplied knowingly by the prisoner, though he was not present at the time it was taken. R. *v.* Wilson, 37 Eng. Law and Eq. 605; Dears. & B. C. C. 127; 7 Cox C. C. 190; R. *v.* Farrow, Dears & B. C. C. 164; 40 Eng. Law & Eq. 550. See Davis *v.* People, 56 N. Y. 95; Weed *v.* People, Ibid. 628.

It is necessary to prove that the thing supplied is "noxious." The supplying "an innoxious" drug, whatever may be the intent of the persons supplying it, is not an offence against the statute. R. *v.* Isaacs, L. & C. 220; 9 Cox C. C. 228. But see *infra*, §§ 596, 1831. Noxiousness may be inferred from the effects. R. *v.* Hollis, 12 Cox C. C. 463.

It is not necessary that the intention of employing a noxious drug should exist in the mind of any other person than the person supplying it. R. *v.* Hillman, L. & C. 343; 9 Cox C. C. 386.

Pregnancy ceases after the child has come forth from the womb of the mother, though still attached by the umbilical cord. Com. *v.* Brown, 14 Gray, 419.

The instrument or drug when unknown need not be described. State *v.* Wood, 53 N. H. 484; State *v.* Vawter, 7 Blackf. 592. See Whart. Cr. Pl. & Pr. § 156.

[1] Whart. Cr. Ev. § 440; Com. *v.* Wood. 11 Gray, 86. See State *v.* Briggs, 9 R. I. 361; People *v.* Josselyn, 39 Cal. 393.

[2] Com. *v.* Boynton, 116 Mass. 343; Dunn *v.* People, 29 N. Y. 523; State *v.* Hyer, 39 N. J. L. 598; Rafferty *v.* People, 72 Ill. 37.

this may tend to weaken the moral effect of her evidence.[1] It is not admissible to cross-examine her, when a witness, as to illicit intercourse with third parties.[2] A wife, on this charge, may be examined against her husband.[3] Unless made in anticipation of death, subsequently occurring, the woman's dying declarations are inadmissible.[4]

§ 594. Consent of the woman, to apply a rule already fully illustrated,[5] is no defence.[6]

Consent no defence.

§ 595. It is a defence that the destruction of the child's life was necessary to save that of the mother.[7]

Necessity a defence.

§ 596. Whether if the child were dead at the time of the attempt at the abortion, the offence is indictable, depends in part on the construction of the statutes. We have already seen that it is no defence to an indictment for an attempt that the object in view did not exist, if such object were apparently within reach. This position applies peculiarly to attempts to produce miscarriage, since in such cases we have, in addition to the intended injury to the supposed child, the real injury to the mother. Hence it has been held that an attempt to produce miscarriage is indictable, though the woman was not pregnant at the time.[8] Nor is it essential that the agency used should be shown to have been likely to be efficient in the production of the illegal result.[9]

Non-pregnancy no defence to indictment for attempt, nor is ineffectiveness of means.

[1] Watson *v.* State, 9 Tex. Ap. 237. See Fraser *v.* People, 54 Barb. 306; People *v.* Josselyn, 39 Cal. 393; Whart. Cr. Ev. § 441.

[2] Com. *v.* Wood, 11 Gray, 86.

[3] State *v.* Dyer, 59 Me. 303.

[4] Whart. Cr. Ev. § 288.

[5] *Supra*, §§ 142–3–4.

[6] Crichton *v.* People, 6 Parker C. R. 363; see Smith *v.* State, 33 Me. 48.

[7] See *supra*, §§ 95, 510. As to indictment averring exception in such case, see *infra*, § 597.

[8] R. *v.* Goodhall, 2 Cox C. C. 40; 1 Den. C. C. 187; S. C. under name of R. *v.* Goodchild, 2 C. & K. 293; State *v.* Howard, 32 Vt. 380. See Com. *v.* Wood, 11 Gray, 86; Com. *v.* Taylor, 132 Mass. 261; Wilson *v.* State, 2 Ohio St. 319; State *v.* Fitzgerald, 49 Iowa, 260. See State *v.* Slagle, 82 N. C. 653; *supra*, §§ 185–6.

[9] *Supra*, § 182; *infra*, § 1831. See People *v.* Van Deleer, 53 Cal. 147. As to the meaning of "noxious thing" in English statutes see R. *v.* Isaacs, L. & C. 220; 9 Cox C. C. 228; R. *v.* Perry, 2 Ibid. 223; R. *v.* Cramp, L. R. 5 Q. B. D. 309; 14 Cox C. C. 401, where it was held that though an innoxious drug was not within the statute, yet it was not necessary that the drug should be noxious if taken in small quantities. See R. *v.* Titley, Ibid. 500. Under the New Jersey statute a drug must be noxious, but its effectiveness to produce miscar-

Indictment must be special.

§ 597. The indictment must conform to the statute limiting the offence.[1] It is enough if the offence is described with substantial accuracy.[2]

Evidence inferential.

§ 598. The evidence of the offence is usually drawn from the circumstances of the case;[3] and eminently so when the person on whom the offence was perpetrated was an accomplice, or is dead.[4] It has consequently been held

riage need not be shown. State *v.* Gedicke, 43 N. J. L. 86. See *supra*, §§ 182, 592; Com. *v.* W., 3 Pitts. 462.

[1] U. S. *v.* May, 2 McArthur, 512; Com. *v.* Snow, 116 Mass. 47; Com. *v.* Brown, 121 Ibid. 69; Beasley *v.* People, 89 Ill. 571; State *v.* Owens, 22 Minn. 238; State *v.* McIntyre, 19 Ibid. 93; Willey *v.* State, 52 Ind. 246; State *v.* Sherwood, 75 Ibid. 15; Davis *v.* State, 4 Tex. Ap. 237; Dougherty *v.* People, 1 Col. 514. Under New York statute see Davis *v.* People, 2 Th. & C. 212; Mongeon *v.* People, 54 N. Y. 613, and other cases cited § 592, note. Under Wisconsin statute see State *v.* Dickinson, 41 Wis. 299. That indictment need not negative exceptions of statute see State *v.* Rupe, 41 Tex. 33. See *contra* as to *necessity*, State *v.* Stokes, 54 Vt. 179; State *v.* Meek, 70 Mo. 355; Bassett *v.* State, 41 Ind. 303; see Willey *v.* State, 52 Ind. 246; Beasley *v.* People, *ut supra*; State *v.* Hollenbeck, 36 Iowa, 112. That it need not specify what the "drug" was, see Com. *v.* Morrison, 16 Gray, 224; Watson *v.* State, 9 Tex. Ap. 237; State *v.* Vawter, 7 Blackf. 592; State *v.* Van Houten, 37 Mo. 357.

An indictment under the Gen. Sts. c. 165, § 9, which alleged that A. B., at a time and place named, "with force and arms, did unlawfully use a certain instrument, a more particular description of which is to said jurors unknown, by then and there forcing and thrusting said instrument into the body and womb of one C. D., being then and there pregnant with child, with the intent of him, said A. B., thereby then and there to procure the miscarriage of the said C. D.," was sustained in Com. *v.* Brown, 121 Mass. 81.

In Eckhardt *v.* People, 83 N. Y. 462; S. C., 22 Hun, 525, under a statute making it indictable to administer medicine to a "pregnant woman," with intent to produce miscarriage, an indictment averring the offence to have been committed, on a "woman with child," was held sufficient.

When the statutory words are "cause *and* procure," the indictment must couple both. State *v.* Drake, 30 N. J. L. (1 Vroom) 422. Several instrumentalities (*i. e.*, drug and instrument) may be averred in one count. Com. *v.* Brown, 14 Gray, 419; People *v.* Davis, 56 N. Y. 95; or in separate counts which are not repugnant; Tabler *v.* State, 34 Ohio St. 127.

When the statute does not include "quickness," it need not be averred or proved. Wilson *v.* State, 2 Ohio St. 319; *supra*, § 592. Nor is it any defence that the child was at the time dead. State *v.* Howard, cited *supra*, § 596.

[2] Baker *v.* People, 105 Ill. 452; see Com. *v.* Corkin, 136 Mass. 429.

[3] Com. *v.* Blair, 126 Mass. 40; Com. *v.* Adams, 127 Ibid. 15; see State *v.* Howard, 32 Vt. 380; Bradford *v.* People, 20 Hun, 309; Earll *v.* People, 99 Ill. 123.

[4] Com. *v.* Brown, 121 Mass. 81; see R. *v.* Hollis, 12 Cox C. C. 463.

admissible to prove that the defendant had in his possession instruments which he admitted were suitable for the purpose, and that the body of the woman operated on showed the effects of such instruments.[1] There must be a causal relation established between the act charged and the miscarriage.[2] The character of the house where the offence was committed may be shown in order to throw light on the intent,[3] and so may the defendant's solicitation or profession of this kind of business.[4]

On an indictment under a statute for administering medicine to procure abortion, it is admissible to prove that ergot, a drug shown to have been administered to the deceased, was popularly supposed to produce abortion, the object being to prove intent.[5]

All parties concerned are indictable.

§ 599. All parties concerned in the offence are responsible, whatever may be the part they take, subject to the distinction heretofore laid down in respect to principals. Hence a person who receives a woman into his house for the purpose of having an abortion performed on her, and who procures a physician for the operation, is indictable for the offence as principal, if it be a misdemeanor; or, if it be a felony, and the common law distinctions obtain, as accessary before the fact, supposing he rendered no immediate aid in th operation.[6]

[1] R. *v.* Hollis, *ut sup.*; Com. *v.* Brown, *ut sup.*; Com. *v.* Blair. 123 Mass. 242; S. C. 126 Ibid. 40; see Com. *v.* Corkin, 136 Ibid. 429.

[2] Slattery *v.* People, 76 Ill. 217.

[3] Hays *v.* State, 40 Md. 633.

[4] Com. *v.* Holmes, 103 Mass. 440; Weed *v.* People, 56 N. Y. 628.

[5] Carter *v.* State, 2 Ind. 617.

[6] Com. *v.* Adams, 127 Mass. 15; see R. *v.* Hollis, 12 Cox C. C. 463.

CHAPTER VII.

CONCEALING DEATH OF BASTARD CHILD.

Concealment to be inferentially shown, § 600.
Indictment must conform to statute, § 601.
Persons aiding may be principals, § 602.

§ 600. UNDER English and American statutes, imposing severe penalties on concealing the death of a bastard child, the question of concealment is one of fact, to be determined by the jury, under the guidance of the court, from all the circumstances of the case.[1] Communication under promise of secrecy to one person does not negative concealment.[2] But the endeavor to conceal must be as a rule secret,[3] and the woman herself must be a *particeps*.[4]

Concealment to be inferentially shown.

The *corpus delicti*, in such case, which involves the intent and endeavor to conceal the death of the child, its bastardy, and the mother's guilty agency, must be substantively proved by the prosecution.[5] It must appear that the child was born alive, and that its death was concealed;[6] but the age of the fœtus is immaterial, if

[1] R. *v.* Cornwall, R. & R. 336; R. *v.* Coxhead, 1 C. & K. 623; R. *v.* Higley, 4 C. & P. 366; R. *v.* Opie, 8 Cox C. C. 332; R. *v.* Berriman, 6 Ibid. 388; R. *v.* Sleep, 9 Ibid. 559. The statute of 21 Jac. I. c. 27, which made the concealment absolute proof of murder, was modified by 43 Geo. III. c. 58, by which the same rules of evidence were held to obtain in this as in other criminal cases. It was provided that in such prosecutions the defendant might be convicted of the misdemeanor of concealing. In New York by § 296 of the Penal Code of 1882, the offence is made a misdemeanor and includes all persons concerned.

[2] State *v.* Hill, 58 N. H. 475.

[3] R. *v.* May, 10 Cox C. C. 448; R. *v.* George, 11 Ibid. 41; R. *v.* Brown, L. R. 1 C. C. 244; Boyd *v.* Bird, 27 Ind. 429.

[4] R. *v.* Bate, 11 Cox C. C. 686. See R. *v.* Higley, 4 C. & P. 366.

[5] R. *v.* Douglas, 1 Mood. C. C. 480; R. *v.* Williams, 11 Cox C. C. 684; R. *v.* Turner, 8 C. & P. 755; R. *v.* Clarke, 4 F. & F. 1040; R. *v.* Morris, 2 Cox C. C. 489; Douglass *v.* Com., 8 Watts, 535.

[6] State *v.* Kirby, 57 Me. 30; State *v.* Conover (N. J.), 4 Crim. Law Mag. 233; State *v.* McKee, Add. 1; Com. *v.* Clark, 2 Ashm. 105; State *v.* Joiner, 4 Hawks. 350; State *v.* Love, 1 Bay, 167. But *aliter* under earlier English statute; R. *v.* Cornwell, R. & R. 336. See R. *v.* Berriman, 6 Cox C. C. 388; R. *v.* Hewitt, 4 F. & F. 1101.

it were capable of being born alive.[1] Concealment, as has been seen, means general, but not absolute, secrecy.[2]

§ 601. The indictment need not state the time of death,[3] though the death must appear.[4] It is sufficient if it conform to the statute.[5] But it must be special as to the facts,[6] and must aver the concealing or secreting, as the statute may require.[7] But the mode of concealing need not be specified.[8] Exceptions in the body of the statute must be negatived, but this is not required when they are matter of defence and are not part of the enacting clause.[9]

Indictment must conform to statute.

§ 602. When the statute is so framed as to make the mother necessarily, in case of concealment, principal in the first degree, those actually aiding her in the concealment may be charged as principals in the second degree.[10]

Persons aiding may be principals in second degree.

[1] R. *v.* Sleep, 9 Cox C. C. 559. In R. *v.* Colmer, Ibid. 506, it was held by Martin, B., that an embryo without the capacity of life was under the statute; but this cannot be sustained.

[2] State *v.* Hill, 58 N. H. 475.

Where a statute, such as that of 9 Geo. IV., specifies "secret burying or otherwise disposing of the dead body," hiding by the woman under her bolster has been held a sufficient concealing. R. *v.* Perry, 6 Cox C. C. 531 (C. C. P.). See R. *v.* Farnham, 1 Ibid. 349, Patteson, J.

[3] R. *v.* Coxhead, 1 C. & K. 623.

[4] Ibid.; Perkin's Case, 1 Lew. 41.

[5] Ibid. See Boyles *v.* Com., 2 S. & R. 40.

[6] Foster *v.* Com., 12 Bush, 373.

[7] Douglass *v.* Com., 8 Watts, 535. In Foster *v.* Com., 12 Bush, 373, it was held that "secrete" was not enough, being a mere conclusion of law.

[8] Boyles *v.* Com., 2 S. & R. 40.

[9] Whart. Cr. Pl. & Pr. § 238; State *v.* Rupe, 41 Tex. 33, cited *supra*, § 597.

A special verdict must aver the fact of bastardy. "Concealment" is not enough. Boyles *v.* Com., 2 S. & R. 40, Tilghman, C. J.

[10] R. *v.* Douglass, 7 C. & P. 644; State *v.* Sprague, 4 R. I. 257, cited *supra*, § 211 *a*.