

A

TREATISE

OF

CRIMINAL LAW

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PREFACE.

THE duties in which I have been recently engaged, as counsel for the Department of State of the United States, have led me to give increased attention to those portions of the following pages which deal with offences against the United States distinctively, with offences against international law, and with conflicts of jurisdiction. I have felt myself obliged, also, in consequence of the great recent increase of adjudications in respect to statutory nuisances, and to violations of liquor laws, to re-write the chapters embracing the discussion of those topics. The other portions of the book have been subjected to numerous modifications, and the text of the whole has been revised. Upwards of forty-six hundred new citations have been distributed through the entire work, giving in many instances new aspects to positions previously taken, and in other instances modifying those positions. I trust that in this way the work accurately and exhaustively exhibits the law of which it treats down to the present day.

F. W.

WASHINGTON, MAY, 1885.

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

I. RELATIVE THEORIES.

§ 2. Is it the sole object of punishment to prevent the offender from the commission of future crimes? So has it been argued. Damages in civil actions, it is urged, are generally only compensatory for past injuries. This is enough by way of compensation, but it is not enough for prevention. The State is bound to take cognizance of the possible and contingent breach of law which is contained in the criminal will; the State must suppress the danger that is thus

That object of punishment is to prevent the offender from further offending.

encountered. By penal jurisprudence this suppression is properly to be worked. By this reasoning the imposition of punishment can be defended. By these tests the extent of punishment may be determined.

Yet in reply to this we cannot escape the following criticism: If the theory be correct, and be logically pursued, then punishment should precede and not follow crime.¹ The State must explore for guilty tendencies, and make a trial to consist in the psychological investigation of such tendencies. This contradicts one of the fundamental maxims of the English common law, by which, not a tendency to crime, but simply crime itself, can be made the subject of a criminal issue. And then, again, the object which the prevention theory sets before it, namely, the creation of right *motives*, belongs to the sphere of ethics, and not to law.² Undoubtedly, as will be seen, one of the objects of penal discipline, especially in the case of an inveterate offender, is to put him in a condition in which he cannot be guilty of future mischief. Often enough, in sentencing old convicts, do judges tell the prisoner that he is to be placed where for a time he can do no harm. It may be questioned whether, at least in some of these cases, the prevention idea has not a little too much consequence assigned to it; because so far as concerns most old convicts, imprisonment for a term usually makes them more hardened and more wary in the pursuit of crime when they are discharged. Prevention however may, in peculiar cases, be a proper point to be considered in moulding sentences. But prevention cannot be viewed either as forming the proper theoretical justification of judicial punishment, or as one of its invariable results.

§ 3. The right of self-defence has also been invoked as a justification of punishment.³ As the individual has a right to resort to self-defence, to prevent a wrong being inflicted on himself, so has the State. The individual has a right

That the object is public self-defence.

¹ See Berner, ed. of 1877, § 11.

² To this theory President Woolsey justly objects that "the cardinal doctrine, that the motives to be set before the criminal are simple pleasure and pain, and the end, prevention, by overlooking the ill-desert of wrong-doing, makes it and all similar systems im-

moral, and furnishes no measure of the amount of punishment, except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering." Woolsey's Political Science, § 112.

³ Trendelenburg, *Naturrecht*, etc., Berlin, 1876, § 56.

to repel an attack, and even to kill the assailant, it is argued, when his existence is imperilled, and so has the State; and as every crime threatens the existence of the State, by the State every crime may be punished. But to this there are two replies. The first is that there are many crimes which, so far from imperilling the State, strengthen it, being reasons why the State should be invested with increased power; and as the State is not imperilled by such crimes, on the theory now before us such crimes cannot be punished by the State. The second, and less technical objection, is that this theory confounds self-defence with retribution. Self-defence, as we will hereafter more fully see,¹ can ward off a threatened crime, but cannot be invoked to punish a crime that is consummated. It may be preventive, but it cannot be retributive. On this theory, therefore, while the State can seize and even destroy a person threatening a crime, it cannot punish a person by whom a crime has been committed.

§ 4. That the object of punishment is simply reformation of the offender was the theory of the humanitarian philosophers of whom Rosseau was the chief, whose eloquent declamation on this topic was one of the preludes of the French Revolution. The good can take care of themselves,—so reads this theory when stated in its baldest terms; it is the duty of the State to take care of and reform only those whom social prejudice is pleased to call the bad. Hence in inflicting punishment the safety of the injured is not to be considered, but simply the reformation of the injurer. Nor is this to be effected by fear; for fear, as an engine of government, is to be discarded. Fear, indeed, it is subtly argued, may produce increased cunning in the execution of crime, but cannot prevent crime from being undertaken. Relapsed convicts, it is declared, are most plenty in the land of hard laws. Crime can only be thoroughly repressed by a system of penalties which, from the benignity they breathe, serve rather to soften than to inflame those on whom they are imposed.

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

§ 5. Undoubtedly the reformation of the offender is one of the objects which a humane judge will have in view in the adjustment of his sentences; but it cannot be viewed as the primary object, or

¹ See *infra*, §§ 97 et seq.

as supplying the sole standard. The protection of the unoffending, if we reduce the question to a mere personal balance, is at least as important an object of humanitarian consideration as is the reform of the offender. And again, if we examine the theory critically we find we are reduced to this absurdity, that we can punish only when we can reform, and hence that the desperate and irreclaimable offender cannot be punished at all.¹

§ 6. Nor does this theory make any distinction as to crimes. While an incorrigible assassin is not to be punished at all, because he is incorrigible, a trespasser, who in sudden heat strikes another, but whose temper it may take twenty years to correct, would be kept in the house of reform for twenty years. Nor is this all. What kind of correction, as has been well asked, is to be applied?² Is it to be preventive, so as to make the supposed offender innocuous? Then we encounter the objections which, as we have just seen, are fatal to the preventive theory. Is it to be purely corrective? Then it is to be graduated by tests which we have no means of applying, and which depend upon the capacity of characters to whose secrets we cannot penetrate. To carry out such a system thoroughly the State must become a church, undertaking, within the bounds of a prison, to extirpate selfishness and implant moral principle. Aside from the objection that this transcends the functions of the State, it makes the State attempt to effect a moral end by immoral means. For it is immoral to punish except for the purpose of vindicating right against wrong.³

¹ See criticism in Lorimer's Inst. (1872), 246. The point in the text is well put by Lord Justice Fry in an article in the Nineteenth Century, reprinted in the Criminal Law Magazine for January, 1884. "Prisoner at the bar," he supposes a judge acting on the principle here criticized to say, "you are an incorrigible villain; this is the fourth burglary of which you have been convicted, and the second attempt at murder. It is plain that there is no hope of your reform, and therefore I discharge you."

² Woolsey's Political Science, § 107.

³ In this connection may be consid-

ered the following observations by the present author, printed in 4 South. L. R. 245 et seq. :—

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

"The next inquiry is as to the con-

§ 7. The barbarism of the old English system of punishment was defended on the ground that cruel and conspicuous penalties

stitutional power of a State to reform its citizens by force. In answering this question we may waive the provisions in our state as well as federal constitutions limiting convictions of crime to cases where bills have been lawfully found by grand juries, and where the offender has the right to meet before the petit jury the witnesses against him face to face. Aside from these restrictions, what power has a constitutional State to attempt to forcibly reform its adult citizens, unless as a mere subsidiary incident to penal justice? What power has it to make penal justice subordinate and auxiliary to ethics? Governments there have undoubtedly been which—sometimes on the paternal theory, sometimes because they were distrustful of the ordinary processes of law—have undertaken ethical reformation; but such governments have never been called constitutional. A prominent Russian officer, for instance, may require, in the opinion of his superiors, 'reformation,' and he may be sent to Siberia, or imprisoned in a fortress, in order to develop his better, and repress his worse, qualities. A group of leading French politicians may be banished or imprisoned as an incident to a *coup d'état*, in order to 'reform' their political views. A vigilance committee may undertake to 'reform' an obnoxious citizen by maltreating his person or destroying his property. We can conceive of such things in conditions of despotism or of anarchy; but we cannot conceive how, in a constitutional State, of which it is one of the fundamental sanctions that nothing is to be done by the government that can be properly executed by the voluntary moral power of the commu-

nity, the reformation of individuals should be attempted by force. Houses of refuge and other asylums, as well as schools for children, we rightfully have. But it is beyond the scope of a constitutional government to open compulsory houses of reform for adults, or to make moral reform by force a primary function of state.

"Supposing, however, we should hold that this is within the province of the State, the next question that would arise, in view of the fact that there must be discrimination, is, What persons are we to attempt to reform? To say, 'those convicted of crime,' is no answer, because this takes us back to the absolute theory that a person is to be punished because he is guilty, whereas the theory before us is that a person is to be punished because he is to be reformed. In a general sense, as all men are susceptible of reformation, all men, in this view, are to be punished. As this cannot be, we must, as has just been said, make a discrimination; and the interesting question for the advocates of the reformatory theory remains as to where the line is to be drawn. Now, in view of the fact that it is dogma after all that is the fountain of action, are not those who hold what we conceive to be pernicious dogmas the proper persons to be punished? If they should be reformed, would not the reformation of those who are influenced by them follow? Why should not the State, therefore, undertake the reformation, by means of fine, imprisonment, and the whipping-post, of those teaching pernicious opinions? We have examples enough of this in old times; and, supposing that this mode of education proved effective,—admitting for

That the object is to terrify others. are to be inflicted as means of terror. Nor was this peculiar to England. It was the basis of the whole secular jurisprudence of the Continent of Europe.

a moment that history shows us that heretics and other unsound teachers are really to be reformed in this way, —why not revive the same machinery? Here, for instance, is a bold political swaggerer teaching what we, on the eastern sea-board, hold to be highly immoral principles of inflation; why not catch him if he happen to be travelling among us, and put him in the stocks? and, if this does not reform him, why not apply severer treatment? Or, an eastern hard-money capitalist, crammed with Adam Smith and Ricardo, is travelling in the West, promulgating views which may be supposed by some of his audiences to bear hardly on the working classes; why not arrest him and subject him also to reformation?

"Another interesting question will arise as to the distribution of punishment, if susceptibility to reform, and not guilt, is to be the test. Indeed, the only proper course, if we are to formulate the proceeding under such a system, would be to collect a number of persons, proper subjects for reformation, in the court-house, and then, without regard to the crimes of which they are suspected, call testimony to determine what degree of punishment would be necessary to a reformation in each particular case. A person, for instance, of extreme sensitiveness to discipline, might be reformed by imprisonment of two or three weeks, if such imprisonment were accompanied by the application of æsthetic influences, and by expressions of endearment calculated to awaken dormant affections. Another person, more callous, more defiant, or less gushing, might require years of severe treat-

ment for his reformation. Now, it might happen, as has often been the case, that the sensitive and gushing defendant is a murderer; while one whose offence is limited to an assault and battery, committed in defence of his rights, may be the obdurate and intractable person, who declines to be reformed at anything less than a long term of years. The consequence would be that the murderer would be let off after a few weeks' detention, solaced by music and painting, or whatever else was likely to develop his moral tone, while ten or twenty years might be a light punishment to him guilty of the assault and battery.

"Another inquiry remains: What is to be done with the incorrigible offender? When the sole object of punishment is reformation, then, when there can be no reformation there can be no punishment. The Pomeroy boy (now a full-grown man), who was convicted in Massachusetts some few years ago of at least one cruel murder, has been pronounced by competent specialists to be so desperate a case that no hope of his reformation could be indulged; and if this be so, he should at once, on the reasoning now before us, be discharged. More than half of those on the trial lists of our criminal courts are marked as old convicts; and by recent statutes in almost all our States such old convicts, when reconvicted, are to have cumulative sentences, proportioned to the degree of their former conviction. Our penal system, therefore, goes on the hypothesis that the more incorrigible a man, by the record of his former convictions, appears to be, the longer should be his imprisonment when con-

Men were to be scared from crime, and therefore punishment was to be made as shocking and ghastly as possible.¹ To this was to be subordinated not only the humane instincts of the court, but the primary rights of the offender. Criminals were to be broken on the wheel before assembled multitudes, and their bones hung on gallows on the highway. Even now, in nations of imperfect civilization, this continues; and throughout Europe, in 1869, were disseminated photographs of the mangled heads, as they had been empaled on posts in Athens, of the assassins by whom certain English travellers had been massacred at Marathon. Crime in others, it was alleged, is best checked by exhibiting to the public the most horrible penalties inflicted on the criminal himself. Gradually in England, in the reduction of capital punishment and in the introduction of privacy in reference to capital execu-

tioned. The theory we hear contest is, that the more incorrigible he is the less he is to be punished. In other words, the criminal is to be punished severely for a first and comparatively light offence, and relieved in proportion to his obduracy and his persistency in crime."

¹ "The State, endeavoring to operate on the fears of mankind, organizes a method of absolutely repressing or of absolutely commanding certain classes of acts." Amos on Jurisprudence, 297, London, 1872. See, also, Maine's Ancient Law (ed. of 1870), 389. To the same effect speaks Seneca: "Nemo prudens punit quia peccatum est, sed ne peccetur." Seneca, de Ira, lib. i. cap. 16.

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

"I have read of a cruel Turk in

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

tions, has the coarse side of this theory been abandoned. In the United States it has had no foothold since the Revolution, though it was not without influence in instigating barbarous punishments in our early colonial days. And rightly has mere terrorism been rejected as one of the objects which the judge, in adjusting sentence, is to keep in view. For terroristic penalties, viewing them in their crude shape, undertake to punish the offender, not merely for what *he* has actually done in the past, but for what *others* may possibly do in the future. Terrorism, also, treats the offender not as a *person*, but as a *thing*; not as a responsible, self-determining being with rights common to all members of the same community, to whom justice is to be distinctively awarded as a matter between him and the State, but as a creature without any rights, on whom punishment is imposed so that others should be deterred from acts requiring punishment. The theory, therefore, is open to two fatal objections: (1) It violates the fundamental principle of all free communities—that the members of such communities have equal rights to life, liberty, and personal security. (2) It conflicts with that public sense of justice which is essential to the due execution of all penal laws. For this reason the terroristic system has failed even in producing the result which it sought. For terrorism, as such, has been shown to multiply rather than diminish brutal crime. No places are more prolific in crime than the sites of public executions. Inflicting public capital punishment on minor crimes has been found to generate bolder and more ferocious crimes which no capital punishment can suppress. Hence it is that terrorism has of late days ceased to be one of the elements in the measurement of judicial punishment.

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

¹ It is remarkable, in view of the importance of the question before us in the moulding and in the application of criminal law, that it has received such slight attention from English and American jurists. Beccaria—whose

§ 9. In another work,¹ the educational bearing of penal legislation is largely discussed, and it is there shown: (1) that the

treatise on Crimes was translated early in the present century, and who held that as the State rests on social contract it has the right to punish only so far as it has power given to it by such contract—took the ground that the object of punishment was simply preventive and deterrent; and what Beccaria taught it was natural that those who agreed with him in principle, and who were fascinated by the purity and dignity of his style, should adopt as if it were unquestionable. General prevention, it was argued, ought to be the chief end of punishment. General prevention was distinguished from particular prevention in this: that particular prevention has respect to the cause of the mischief, and general prevention to the whole community. This system is, therefore, virtually the terroristic theory of Feuerbach, which is discussed in the text; with this qualification—that pleasure, as well as pain, are to be used by the law-giver as inducements to avoidance of criminal acts. To this, as we will soon see more fully, applies with great force President Woolsey's criticism, that the preventive theory, "by overlooking the ill-desert of wrong-doing, makes it and all similar systems immoral, and furnishes no measure of the amount of punishment except the law-giver's subjective opinion in regard to the sufficiency of the amount of preventive suffering."

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

Mr. Livingston repeatedly gives his adhesion to the preventive theory.

"We have established it as a maxim," he tells us in his Report on the Penal Code (Livingston's Works, 1873, i. 26), that the object of punishment "is to prevent the commission of crime;" and again (Ibid. 31), "no punishments greater than are necessary to effect this work of prevention ought to be inflicted, and that those which produce it by uniting reformation with example are the best adapted to the end." Subsequently, however (Ibid. 83), he quotes with approval the preamble to the statute of the Legislature of Louisiana establishing the Code. This preamble contains, *inter alia*, the following:—

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

"First, as to the delinquent, so as by seclusion to deprive him of the present means, and, by habits of industry and temperance, of any future desire, to repeat the offence.

"Secondly, on the rest of the community, so as to deter them, by the example, from a like contravention of the laws."

The intermediate theory is maintained by Dr. Lieber, in his essay on Penal Law, published in Lieber's Miscellaneous Writings (1881), vol. ii. p. 471. The test proposed by this eminent writer is that punishment "must be just, according to the spirit of the age."

By Dr. Paley, in his Moral Philosophy, we are told that "the end of punishment is twofold—amendment and example." The same view is adopted by the great body of English commentators, with the following exceptions: Lord Auckland (Mr. Eden),

¹ 1 Whart. & St. Med. Jur. 147, 185, 188.

announcement of punishment as a consequent on crime is essential to just penal jurisprudence; (2) that such an announcement of punishment is futile unless it is followed up, as a rule, by infliction. Two great instrumentalities, it is alleged, are within the law-makers' control for the suppression of crime. The first is education, showing its moral and economical ill consequences. The second is to be found in penal laws; such laws to be humanely and justly devised, lucidly expressed, universally promulgated, and firmly executed. Each of these features is essential to enable these laws to be effective on the public at large. Men will not be deterred from crime by unjust or inhuman laws capriciously executed. And the appeal made by a right system of laws is not sensuous, simply agitating the passions, as is the case with the terroristic theory. For just laws, clearly expressed, faithfully disseminated, and firmly executed, address the reason of men. The offender is not, indeed, to be punished simply to make him an example to others, for this would be as objectionable as is the terrorism just condemned. But being justly punished, his case is

in his *Principles of Penal Law*, chapter ii., maintains the absolute theory. Mr. Bentham, as will be seen, substantially takes the same view. Mr. Lorimer, in his *Institutes*, page 346, rejects the reformatory theory as inadequate and delusive. Mr. Austin and Sir W. Hamilton follow the modified scheme of Kant, to be presently noticed.

Both the "example" and the "reform" theories were used with great effect by the defenders of Governor Eyre, when he was charged in England with permitting reckless and brutal vengeance to be inflicted on all persons suspected of complicity in the Jamaica negro outbreak of 1865. It will be recollected that after order was entirely restored, great cruelties were inflicted, with the apparent permission of the governor, on persons who had not borne arms, and who were not proved to have been actually concerned in the revolt. The subject became a matter of active controversy in England, and

Governor Eyre was defended by Mr. Carlyle, Mr. Ruskin, and others, on the ground that the object of punishment is to prevent crime and reform the community; and that only by atrocious punishment, in cases such as that of the late disorders in Jamaica, could the still more atrocious crime of a universal massacre of the white race be prevented. This position was reviewed with great ability by Cockburn, C. J., in his charge to the grand jury, which took the ground that punishment could only be meted out in retribution of crime duly established in a court of law. "Professor Huxley," says Mr. McCarthy, after narrating the procedure, "disposes once for all of that sort of argument by the quiet remark that he knew of no law authorizing virtuous persons to put to death less virtuous persons as such." McCarthy's *Own Times*, London, 1880, iv. 47. See discussion in 4th vol. of Froude's *Carlyle*.

made public that it may become an example. In other words, example is not the object of punishment, but punishment creates example. Of course we here assume the justice of the punishment, and in so doing we advance towards the absolute theories of penal discipline to be presently discussed. And this distinction it is essential for the judge to keep in mind. To sentence a man to a severe and conspicuous punishment, simply to make him an example to others, not only is open to the objections already noticed as applying to the terroristic scheme, but exhibits to the community an example of evil and not of good. But in imposing a sentence, it is one of the highest prerogatives of justice so to mould and explain it as to make it the means of the prevention of future crime, not merely in the offender himself, but in the community at large.

II. ABSOLUTE THEORY.

§ 10. The absolute theory of punishment, on which we must therefore fall back, rests on the assumption that crime as crime must be punished; *punitur quia peccatum est*. But then comes the question, by whom? The State, as representing society at large, springs from a moral necessity. It is not a matter of choice whether we will live under government. Some government, some form of civil organization, we must have. And the State is not to be guided simply by expediency, or by the merely external purposes of society. It has an existence of its own to maintain, a conscience of its own to assert, moral principles to vindicate. Penal justice, therefore, is a distinctive prerogative of the State, to be exercised in the service and in the satisfaction of the duty of the State, and rests primarily on the moral rightfulness of the punishment inflicted. Penal discipline undoubtedly is expedient, both for the community and for the individual punished. But the jurisdiction is exercised, not because it is expedient, but because it is right.¹ Another step remains to be taken, which is this: Each *de facto* government is to be viewed as representing, for penal purposes, the State by which it is sanctioned. The State says, "Crime as crime is to be punished, and I consti-

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

¹ In this result, though by different processes of reasoning, concur Hooker, 17. *Infra*, § 13, note. Eco. Pol. book i., and Hegel, as ex-

tute each *de facto* government as my agent for this purpose." We have an interesting illustration of this tacit authorization in the recognition given by the Supreme Court of the United States, at the close of the late civil war, to the penal sentences of the Confederate courts. These courts were *de jure* nullities. Yet, nullities as they were, through their sentences thousands of convicted offenders were, when the war closed, confined in Southern prisons. To release them, writs of *habeas corpus* were taken out, and argued before the judges of the Supreme Court of the United States. But the reply to these applications was substantially that given above: Society, in its large sense, is invested with the right to punish crime; and each *de facto* government is the agent of society for this purpose. The penal sentences of such *de facto* governments, therefore, will not be disturbed.

§ 11. Relieving ourselves, therefore, of all *jure divino* questions as to the right of particular governments to execute penal justice, we reduce what is called the absolute theory of penal jurisprudence to the following propositions: (1) Crime as such must be punished by society; (2) Each *de facto* government must act as the agent of society for this purpose. Consequently each *de facto* government is bound to punish crime as crime. And every judge exercising penal jurisdiction is bound to do so as the vindicator of Right as such. Crime is primarily to be punished because it is a violation of moral law, and society is to punish crime because society is the divinely appointed vindicator of moral law.

§ 12. But is the absolute theory, as thus delineated, one which is to be nakedly administered? Are the objects which have heretofore been specified as *relative* to be entirely left out of sight? In reply to this, the following answer is to be made:—

While punishment is based on justice, it must be proportioned to guilt. If, however, we resolve guilt into its component elements, we find among them some of these very qualities to which the relative theories are distinctively applied. Thus, for instance, all of these theories rest more or less on the danger of crime to society; and punishment, in accordance with these theories, is to be graduated by the extent of this danger. But if, while accepting the absolute theory, we analyze guilt, we find that it becomes subjectively

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

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

be produced by a just construction of the reformatory theory, when it was found that all milder measures failed. The youthful culprit is sentenced to a more lenient punishment, under more generous influences, because his grade of guilt is light, and the very lightness of this grade calls for that mildness of sentence which the reformatory system in such case recommends.¹

¹ See vindications of absolute theory in Hartenstein, *Grundbegriffe d. eth. Wiss.* 260-274; Rothe, *Christ. Ethik*, iii. 874, 900. In our own literature the ablest exposition of this view will be found in President Woolsey's *Political Science*, §§ 100 *et seq.* It is also vindicated by Lord Justice Fry, in the article above quoted in the *Nineteenth Century*, reprinted in the *Crim. Law Mag.* (Jan. 1864), 16.

According to Kant (see Berner, ed. of 1877, § 18), judicial punishment cannot be employed as a means to obtain a collateral good, but must always be imposed on and made commensurate to a violation of law. A man, so he argues, is not to be treated as a thing, to be sacrificed to the policy of the State; from this he is protected by his inherent personality. He must be justly convicted of a crime before the State can punish him for the public benefit. Penal law is a categorical imperative. Punishment is inflicted, not because it is useful, but because it is demanded by reason. But he insists that social contract is the basis of punishment; and he forcibly illustrates this by saying that even if society, by the consent of all its members, should be on the point of dissolution, a murderer, sentenced to death, should first be executed, and that this would be right. As a rule he recommends retaliation; the like is to be punished by the like. This, however, is not to be literally carried out, as in the Mosaic system, an eye for an eye, a tooth for a tooth. The principle of equality is

to be substantially, not formally, applied. It has, however, been objected to Kant's theory that it is inconsistent with itself. In his view law is the emanation of the united will of the people, following in this the social contract theory of Rousseau. The security of individuals is, by this view, the object of the State. It is difficult to reconcile with this conception, that the State inflicts punishment, not primarily for the sake of the individual, but primarily for the sake of justice. But however inconsistent in this respect Kant may be, his example shows that it is possible for the absolute theory of punishment to be held by an adherent of the social contract hypothesis.

An analysis of Hegel's philosophy of punishability is found in the 9th edition of Berner's *Lehrbuch des Deutschen Strafrechtes*, Leipzig, 1877, a work which is one of the most popular and the most authoritative of recent German treatises on criminal law, and which adopts as its basis the Hegelian philosophy in this relation.

Punishment, according to Hegel (so writes Berner, § 21), is to be regarded as an agency to annihilate wrong in its effort to annihilate right. It is, therefore, the negation of a negation. This is tantamount to saying that punishment is retribution (*Vergeltung*).

But the punitive negation must be so applied as to do no more than cancel the prior criminal negation. The punishment must find its measure in the crime. As the right that has been impaired has a specific scope and

quality, so the punishment, to be a correspondent negation, must on its side have its quantitative and qualitative limitations.

The identity of crime and punishment, however, which is thus required, does not consist in a specific similarity. It is not requisite that the crime should be retaliated on the criminal. All that is asked is that the evil of the punishment should be proportioned in value (*nach dem Werthe*) to the evil of the crime.

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

Hegel's views may in this respect be criticized as speculative, but it must be remembered that they have been accepted and elaborated as the basis of penal law by some of the most practical of contemporary jurists. Bismarck is no idealist, yet we find Bismarck, in a speech in the Prussian *Herrenhaus*, in 1872, adopting the Hegelian theory of punishment, and illustrating it by the famous maxim which Meyer has taken as the motto of his late valuable treatise on criminal law: "Laws are like medicines; they are usually nothing more than the healing of one disease by another disease less, and more transient, than the first." Certainly Hegelianism, in adopting and sustaining philosophically the theory of a just retribution as the sole primary basis of punishment, exhibits a healthy contrast to the sentimentalism of humanitarian

philosophers who ignore the moral and retributive element in punishment, making its primary object to be the reform of the alleged criminal, and example to the community. To such theorists the final answer is, that until a man is proved to be guilty of a crime we have no right either forcibly to reform him or to punish him as an example to others; and that neither reformation nor example will be promoted by assigning to him, after he is convicted, a punishment disproportioned to his offence. At the same time, in the application of such punishment, reform and example are to be kept incidentally in view. Conviction and sentence are to be according to justice; but prison discipline is to be so applied as to make the punishment conduce as far as possible to the moral education of both criminal and community.

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

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

- (1) The evil of the punishment must exceed the advantage of the offence:
- (2) The severity must be increased as the certainty is diminished:
- (3) The greater the offence, the more severe may be the punishment adopted for the chance of its prevention:
- (4) Punishments may be varied with the sensibility of the offender:
- (5) "Real" punishments should be "apparent" for the sake of example:
- (6) The power of further injuring should be taken away or reduced:
- (7) Recompense to the injured party

should be kept in view. See summary in Montague on Punishment, i. 211 *et seq.*

According to President Woolsey, the retribution theory which he vindicates "assumes that moral evil has been committed by disobedience to rightful commands; that according to a propriety which commends itself to our moral nature it is fit and right that evil, physical or mental, suffering, or shame should be incurred by the wrong-doer, and that in all forms of government over moral beings there ought to be a power to decide how much evil ought to follow special kinds and instances of transgression. . . . Its province (that of the State) is confined to such actions as do harm to the State, or to interests which the State exists to protect. . . . Its object in punishing is not, in the first instance, to punish for the sake of punishing, because so much wrong demands so much physical suf-

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fering; but to punish—punishment being in the circumstances otherwise right—not directly for the ends of God's moral government, but for ends lying within and far within that sphere." Woolsey's Political Science, § 107.

Sir J. Stephen speaks thus to the same effect:—

"The infliction of punishment by law gives definite expression and a solemn ratification and justification of the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." 2 Hist. Cr. L. 81.

CHAPTER II.

DEFINITION AND ANALYSIS OF CRIME.

Crime is an act made punishable by law, § 14.

Immorality and indictability not convertible, § 14 a.

Distinction between public and private remedier, § 15.

English common law in force in the United States, § 15 a.

Want of English common law authorities does not preclude offence from being indictable at common law in the United States, § 16.

Disturbances of the public peace indictable at common law, § 17.

So of malicious mischief, § 18.

So of public scandal and indecency, § 19.

Offences exclusively religious not indictable, § 20.

Offences at common law are treasons, felonies, and misdemeanors, § 21.

Felonies are crimes subject to forfeiture, § 22.

"Infamy" is that which affixes a moral taint, § 22 a.

Misdemeanors include offences lower than felonies, § 23.

Police offences to be distinguished from criminal, § 23 a.

An act, when prohibited by statute, is indictable, though indictment is not given by statute, § 24.

Statutory provisions to be strictly followed, § 25.

New statutory penalties are cumulative with common law, § 26.

An offence may be divisible (1) by discharging aggravating incidents, (2) by diversity as to time, (3) by diversity as to place, (4) by diversity as to objects, (5) by diversity as to aspects, and (6) by diversity as to actors, § 27.

Merger is absorption of lesser offence in greater, § 27 a.

Penal statutes to be construed favorably to accused, § 28.

Retrospective statute inoperative, § 29.

And so as to *ex post facto* acts imposing severer penalty, § 30.

But procedure and rules of evidence may be retrospectively changed, § 31.

State may relieve from punishability by limitation or pardon, § 31 a.

Civil and criminal remedies may be concurrent, § 31 b.

§ 14. AN offence which may be the subject of criminal procedure has been defined to be an act committed or omitted in violation of public law, either forbidding or commanding it.¹ This definition, however, though adequate in those

Crime is an act made punishable by law.

¹ "A crime or misdemeanor (delict) is an act committed or omitted, in violation of a public law, either forbidding or commanding it." Stephen's

Com. iv. 89, note, adopted in Nasmith's Institutes, 63.

"A crime may be provisionally defined to be 'an act which the State

States in which there is no common law, fails in States in which there is recognized, as will presently be seen, a common law, which determines from the reason of the thing, that a particular act is an indictable offence. In such States the definition before us is a *petitio principii*, it being equivalent to saying, that an act is a crime because it is forbidden by law, and that it is forbidden by law because it is a crime. When we seek, however, for a test to determine, in States where the common law obtains, whether a particular offence, as to which there is no statute, or no prior ruling specifically applicable, is indictable, then we must go further than the definition above given, and hold that at common law a wrong which public policy requires to be prosecuted by the State is an indictable

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

Sir J. F. Stephen's definition is as follows: "The criminal law is that part of the law which relates to the definition and punishment of acts or omissions which are punished as being (1) attacks upon public order, internal or external; or (2) abuses or obstructions of public authority; or (3) acts injurious to the public in general; or (4) attacks upon the persons of individuals; or (5) attacks upon the property of individuals or rights connected with, and similar to, rights of property." 1 Hist. Crim. Law, 3. This, however, is too comprehensive. The last head, for instance, would include trespasses as well as larcenies.

"To the question, What is a 'criminal act?' the answer most generally applicable seems to be—a criminal act is one which in some way or other subjects the actor to punishment." Broom's Phil. of Law, § 162. To this is added (§ 164) that a "crime is constituted by an overt act done with a

guilty intent, or includes a guilty mind, knowledge, or possession, affecting or prejudicing the public." This is defective in not including offences which are criminal from want of intent, i. e., from negligent omission to perform a duty.

"As law is the necessary form in which right is embodied, crime, not indeed in its essence, but in its form, presupposes law, and must, therefore, be called an unlawful act." Hälschner, System, i. p. 19.

Mr. Livingston does not attempt a definition. "All contraventions of penal law," he tells us, "are denominated by the general term, offences. Some division was necessary to distinguish between those of a greater and others of a less degree of guilt. No scale could be found for this measure so proper as the injury done to society by any given act." That "offences," however, are not convertible with "injuries done to society" is plain, since there are many "injuries" done to society, which are not "offences," so far, at least, as to be subject to indictment. I have discussed this subject in greater detail in my Commentaries on American Law, Chapters I., II., and III.

offence.¹ The wrong, however, must be one which violates the general sanctions of the law, though it is not necessary that it should be prohibited specifically by prior statute, or prior judicial decision.²

§ 14 a. It has been often said that at common law indictability and immorality are convertible terms.³ So far, however, from this being the case, there are indictable acts which are not immoral, and immoral acts which are not indictable. Assaults of all kinds are indictable; but all assaults are not necessarily immoral. An assault in self-defence is the exercise of a right; and waiving this, as presenting a question of contingent indictability, there are many cases in which a man may be convicted of an assault which is in itself not immoral, as when he acts under a mistake of fact or of law. Honest belief, also, as we see elsewhere,⁴ that an action is right, while it purges the action from immorality, does not relieve it from indictability. The morality of an act depends upon its conscientiousness; and unless we recognize the rights of the individual conscience in this

Immorality and indictability not convertible.

¹ See *Com. v. McHale*, 97 Penn. St. 397.

² *Infra*, § 29. In Steph. Cr. Dig. art. 160, we have the following:—

"Acts deemed to be injurious to the public have, in some instances, been held to be misdemeanors, because it appeared to the court before which they were tried that there was an analogy between such acts and other acts which had been held to be misdemeanors, although such first-mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them," etc.

To this there is the following note:

"After quoting the judgment of Willes, J. (the colleague of Lord Mansfield), in *Millar v. Taylor*, 4 Burr. 2312, to the effect that 'justice, moral fitness, and public convenience, when applied to a new subject, make common law without precedent,' Pollock, C. B., said: 'I entirely agree with the spirit of this passage so far as it regards the repressing what is a public

evil, and preventing what would become a public mischief; but I think there is a wide difference between protecting the community against a new source of danger and creating a new right. I think the common law is quite competent to pronounce anything to be illegal which is manifestly against the public good; but I think the common law cannot create new rights,' etc. *Jeffreys v. Boosey*, 4 H. L. C. 936." In 3 Steph. Hist. Cr. L. 359, there is a protest against these views, it being said that "though the existence of the power as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it at the present day." But the preponderance of authority is against Sir J. F. Stephen's opinion in this respect. See Whart. Com. on Amer. Law, § 30.

³ See Lieber on Penal Law, 2 Lieber's Mis. Works, 471 *et seq.*

⁴ *Infra*, § 88.

respect, even as against the opinion of the majority, no ethical system could be constructed. On the other hand, there are numberless immoralities which the State does not and cannot undertake to punish.¹ We must, therefore, reject immorality as the condition of indictability, and fall back upon the public sense of right and public policy as already stated.² If we are required to supply a further test, we might say that public policy demands the indictability of all immoral acts of which punishment by law is the proper retribution. From this class are to be excluded immoralities which are not of enough consequence to be prosecuted, and immoralities which the public welfare requires should remain unprosecuted.

§ 15. The common law may be defined to be right reason, applicable to present issues, in analogy with prior rulings of the courts and opinions of authoritative jurists. In accordance with this view, and adopting the principle that crimes at common law, apart from statute, are offences which public policy manifestly requires to be prosecuted by the State, we may be able to give logical expression to the distinction between wrongs which can be redressed only by private suit, and wrongs the perpetrators of which may be proceeded against by public prosecution. That such a distinction exists in practice we have numerous instances. I may have a right to have the air about me pure; but this does not make it an indictable offence for a neighbor to invade this right by opening on his land a drain whose odors reach to no one but myself. I may exclude trespassers from my grounds; I may sue them for damages caused by their trespass; but I cannot, for the mere trespass, if there be no malicious hurt inflicted, prosecute them criminally. On the other hand, if the drain is such as to affect the community injuriously, or the trespass be conducted in such a way as to threaten the public peace, an indictment lies. The reason for this, if the above definition be correct, is that public policy in the first class of cases does not require the State to intervene, while in the second class

¹ See remarks of Bramwell, J., in *Cowan v. Milbourne*, L. R. 2 Ex. 236, and distinctions taken in 2 Steph. His. Cr. L. 75 *et seq.*

² Meyer, § 4, while concurring in the reasoning of the text, makes the

of cases it does so require. In other words, in all matters in which the peace, order, or health of the community is not concerned, a sound social economy requires that men should settle their differences by themselves, either by compromise or private suit, just as a sound social economy requires that they should conduct their own business and regulate their own families, provided that in so doing they do not threaten public peace, or disturb public comfort, or create public scandal. As to acts, however, threatening public peace, or disturbing public comfort, or creating public scandal, it is the duty of the State to intervene. We have abundant illustrations of this distinction in other departments of social science; the principle being that it is not within the province of the State to enforce duties purely private. A board of health, for instance, may properly forbid unwholesome food to be sold in a market, but it cannot properly forbid an individual from eating food that will probably make him sick. Public scandalous drunkenness, to take another illustration, is indictable at common law; but common drunkenness, which is not a public scandal, is not indictable. The same distinction applies to remedies. The State is only justified in intervening to protect interests that concern itself directly; and if wrongs be committed strictly private in their character, then these wrongs must be redressed by private suit. It may be said that a distinction of this kind, based on public policy, is one to be laid down, not by the courts, but by the legislature.¹ This is no doubt the case where there is a code which undertakes to cover the whole ground, so that no offence is indictable which is not made indictable by the code. It is otherwise, however, when offences are to be defined by the common law. In the latter case, there is a wide range of offences as to which the judges are obliged to apply the test of public policy. The banks of a canal, for instance, or the embankments of a railroad, are wantonly torn down by a marauder. The case is one of first impression in the courts, as no one has heretofore been prosecuted for doing this particular thing. Is the offence indictable as malicious mischief? It certainly would not be, where nobody but the owner is affected by the trespass, and where no specific malice to such owner is shown. Yet as it is, in consequence of the danger to the public if canals or railroads be subject

¹ See *infra*, § 29.

to depredations of this kind—i. e., on grounds of public policy—such an offence would be held indictable.¹ I may be standing by a river side, to take another illustration, and see a man drowning. I do not help him out, though I could readily do so; but as omissions to perform acts of charity cannot be made indictable without great disarrangement of industry, I am not indictable for this omission, immoral as it is. I am indictable, however, on the grounds of public policy, if, being charged, as a public officer, with the protection of persons bathing on the spot, or having undertaken specially to protect this particular person, I neglect to perform my duty.² This, however, concerns the subject matter of crime. So

¹ See *infra*, §§ 1065, *et seq.*

² *Infra*, §§ 130, 133.

Several theories have been proposed in Germany as to the distinction between public and private wrongs. By Stahl a crime assails and defies the dominion and dignity of the State by positive assaults, which are by themselves under all circumstances (in *thesi*) a violation of law; while there is no such defiance in civil wrongs, since here we have exclusively to do with acts which are only unlawful (in *hypothesi*) under the given relations. On the other hand, Berner and Köstlin, representing the Hegelian School, include under crimes exclusively the conscious resistance of the general will by the individual will; under civil wrongs exclusively, acts whose perpetrators are unconscious of wrong. By Hälschner crimes consist of absolute wrongs, that is to say, wrongs as against the objective existing law; while civil wrongs are merely relative, that is to say, wrongs exclusively directed against the privileges of other persons. Geib, ii. 175. That there is any definable distinction is denied by Bekker, *Theorie*, s. 108; Geib, ii. 173; Merkel, *Abt. I.* p. 41; and Binding, *Normen*, s. 172 *et seq.* By the latter writer the view in the text is assailed elaborately.

Blackstone's distinction, that "civil injuries are private wrongs and concern individuals only, while crimes are public wrongs and affect the whole community," is objected to by Austin on the ground that many crimes are private wrongs, and many civil injuries affect the whole community. See *R. v. Paget*, 3 F. & F. 29; *R. v. Trafford*, 1 B. & Ad. 874; *Dobbins's Distillery v. U. S.*, 96 U. S. 395.

Mr. Austin, in his own definition, begs the question. "The difference," he says, "between crimes and civil injuries is not to be sought for in a supposed difference between their tendencies, but in the difference between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offence which is pursued at the discretion of the injured party or his representative is a civil injury. An offence which is pursued by the sovereign, or by the subordinates of the sovereign, or, as in England, in the name of the sovereign, is a crime." Austin's *Jur.* ed. 1863, ii. 72; ed. of 1869, 1092, adopted in Nasmith's *Inst.* 63. The defects of this distinction are pointed out in Whart. *Com. Am. Law*, §§ 56 *et seq.*

Sir H. Maine's explanation of the origin of the distinction leads to the definition in the text. A crime, he

far as concerns the form, the distinction is that criminal wrongs are punishable by the State, while for civil wrongs redress is obtained at the suit of the party injured.¹ A wrong, however, may be in one aspect civil, in another criminal.²

§ 15 a. The common law of England was adopted as a part of their own common law by such of the American colonies as were of English settlement, and is operative in the States embracing or peopled from such colonies.³ And, as is elsewhere seen, even in States where the common

English
common
law in force
in the
United
States.

tells us, in the original conception of the term, was an act "involving such high issues that the State, instead of leaving its cognizance to the civil tribunal or the religious court, directed a special law or privilege against the perpetrator." Maine's *Ancient Law*, 1870, 372.

¹ More indictability is not the test, since there are cases in which an indictment is prescribed merely as a civil remedy. *R. v. Paget*, 3 F. & F. 29; *Bancroft v. Mitchell*, L. R. 2 Q. B. 549.

² *Infra*, § 31 b.

³ See cases cited *infra*, §§ 17 *et seq.*; and see *State v. Rollins*, 8 N. H. 550; *State v. Briggs*, 1 Aikens, 226; *Com. v. Newell*, 7 Mass. 245; *Com. v. Chapman*, 13 Met. 68; *State v. Danforth*, 3 Conn. 112; *Loomis v. Edgerton*, 19 Wend. 419; *Kilpatrick v. People*, 5 Denio, 277; *Resp. v. Teischer*, 1 Dall. 335; *Com. v. Eckert*, 2 Browne (Penn.), 249; *Com. v. Taylor*, 5 Binn. 277; *Henderson's Case*, 8 Grat. 708; *Grisham v. State*, 2 Yerger, 589; *Smith v. People*, 25 Ill. 17; *State v. Huntley*, 3 Ired. 418; *State v. Twogood*, 7 Iowa, 252; *State v. Pulla*, 12 Minn. 164; *Blanchard, ex parte*, 9 Nev. 101; *Territory v. Ye Wan*, 2 Montana, 478.

The federal courts, as will be seen (*infra*, § 253), have been ruled to have no common law criminal jurisdiction. The New York Penal Code of 1882, provides that no acts or omissions shall

be deemed criminal, except as prescribed by the code, or by some statute not repealed, § 2. This appears to abolish the common law, but the common law is in a measure reinstated by a subsequent section, § 675, by which it is provided that "a person who wilfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this code, is guilty of a misdemeanor." Were it not that the word "wilfully" excludes negligences, this clause would be a reenactment of the common law.

In Ohio, it has been decided that the criminal side of the English common law is not in force. *Van Valkenburg v. State*, 11 Ohio, 404; *Smith v. State*, 12 Ohio St. 466. Such is the statutory rule in Indiana; *Hackney v. State*, 8 Ind. 494; *Marvin v. State*, 19 Ind. 181; *Jones v. State*, 59 Ind. 229; and to a limited extent in other States. See *Estes v. Carter*, 10 Iowa, 400; *Meyers, ex parte*, 44 Mo. 279. As to Pennsylvania and Florida, see *infra*, § 26. In Louisiana, the English common law has been established by statute. *State v. Davis*, 22 La. An. 77. The evolution of the common law in America is discussed in Whart. *Com. Am. Law*, §§ 24 *et seq.* How far the ecclesiastical or

law is by legislation declared not to be in force, it nevertheless remains in force for the purpose of interpreting legislative action.¹ We have a curious illustration of this in Texas, where it was at one time required that an offence should be "expressly defined" by statute. This was found to be impracticable; and now the common law is resorted to for a definition of statutory terms.²

§ 16. Certain points of difference, however, between the penal policy of England³ and that of the United States must be kept in mind, in determining how far the want of common law authority in one country is to weigh upon the courts of the other.⁴ There is a grade of offences, in the first place comprehending adultery, fornication, and lewdness in general, together with those misdemeanors connected more particularly with the conduct of the rites and observances of religion, which in England is cognizable chiefly in the ecclesiastical courts, but which with us is in many States punished by indictment at common law. In England, in the second place, from the earliest period of judicial history, statutes were from time to time passed which defined the limits and determined the punishment of almost every offence, as it in its turn attracted legislative action. Thus, in the English books, few cases are found of malicious mischief at common law; penalties more summary than the common law afforded being provided for the protection of each species of property as it became the object of investment. No case, for instance, is to be found of an indictment at common law for malicious injury done to locks or other improvements on navigable rivers; because, as soon as locks were introduced into England, and canals built, such offences, by the statute 1 Geo. II., st. 2, c. 19, were made felonious, and were subject to transportation.⁵ So, though elementary writers agree that the destruction of an infant *en ventre sa mere*

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

canon law of Christendom is here effective will be considered in other sections. *Infra*, §§ 20, 1717, 1741.

¹ Whart. Com. Am. Law, §§ 12, 201. See *infra*, §§ 29, 255.

² Bergen, *ex parte*, 14 Tex. Ap. 52. In *State v. Williams*, 34 La. An. 87, it was held that the court would give a common law definition to the words,

"crime against nature," see *infra*, § 579. To same effect, see *Wall v. State*, 23 Ind. 150.

³ Black. Com. 65 w; 1 Hawk. P. C. c. 5, s. 1; 1 East P. C. c. 1, s. 1; 1 Russell on Crimes, 46.

⁴ Grisham v. State, 2 Yerger, 589.

⁵ See *infra*, §§ 1066-7.

is indictable at common law,¹ no case is to be found in England where such is adjudged by the courts, the statute of 43 Geo. III. c. 58, making it a felony, being enacted about the time when the offence first required the action of the public authorities. The want of English precedents, in such cases, does not show that offences of such character were not cognizable at common law; it shows only that at an early period common law remedies gave way to statutes with provisions more specific and penalties more severe. Many offences, accordingly, which have been punished exclusively by statute in England, have been brought, in this country, within common law sanction, and have been considered misdemeanors. We cannot infer the non-indictability of such offences at common law because they are indictable in England only under statutes which we have not reenacted. The want of English common law authority, in many cases of this class, is attributable not to the non-indictability of the offences at common law,² but to the fact that statutes imposing severe penalties on the offence, and absorbing by their terms the common law, were passed before common law affirmations of the indictability of the offence were reported. As said by the Supreme Court of Vermont, in a case adopted afterwards in New York, "the English statutes were so ancient, and the punishment so severe, that they were of course resorted to, and the common law thus lost sight of, though the statutes were intended as a mere increase of its penalties."³

¹ Bracton, l. 3, c. 21; 3 Coke's Inst. 50; 1 Hawkins, 94; 1 Vesey, 98; 1 Russell on Crimes, 671. *Infra*, § 592.

² The comprehensiveness of the common law is illustrated in England by a series of cases, which, though much less numerous than those in this country, from the fact that the common law remedy has been there so much more nearly absorbed by statute, nevertheless shows that there is no public wrong which is not the subject of criminal action. Thus it has been held indictable unlawfully and injuriously to carry a child infected with the small-pox along the public streets; *R. v. Vantandillo*, 4 M. & Selw. 73; *R. v. Burnett*, 4 M. & Selw. 272; to show a monster for money; *Herring v. Walrond*, 2 Cha. Ca. 110; to put combustible materials on board a ship without giving notice of the contents; 1 Russell on Cr. 298; *William v. East India Com.*, 3 East, 192, 201; and to overwork children in a factory; 2 Twiss's Life of Eldon, 36.

³ *State v. Briggs*, 1 Aikens, 226; *Loomis v. Edgerton*, 19 Wendell, 419; *State v. Cawood*, 2 Stewart, 360. On this point see a comprehensive opinion of Shaw, C. J., in *Com. v. Chapman*, 13 Met. 68.

§ 17. It has been held by us, therefore, in application of the reasoning just stated, that whatever, in the first place, is provocative of public disturbance;¹ or, in the second place, consists of malicious injury to another's property in such a way as to provoke violent retaliation;² or, in the third place, constitutes a public scandal or indecency,³ is indictable in this country, although in England the offence is punishable now only by statute, or in the ecclesiastical courts.

(1) Acts, therefore, provocative of public disturbance are indictable, though there be no English precedent for the indictment. Hence it has been held indictable to drive a carriage through a crowded street in such a way as to endanger the lives of the passers-by;⁴ to disturb a congregation when at religious worship;⁵ to go about armed with dangerous and unusual weapons, to the terror of citizens;⁶ to raise a liberty-pole in the year 1794, as a notorious and riotous expression of ill-will to the government;⁷ to tear down forcibly and contemptuously an advertisement, set up by the commissioners, of a sale of land for county taxes;⁸ to agree to fight, though no fight takes place;⁹ to break into a house in the day or night time, and disturb its inhabitants;¹⁰ to violently disturb a town meeting, though the parties engaged were not sufficient in number to amount to riot;¹¹ to attempt to kidnap another;¹² and, in short, to do any act which may create a public disturbance, provided that such be the natural consequence of the act.

¹ See §§ 1553-1557.

² See, on this point, 7 Law Rep. N. S. 88, 89, and *infra*, § 1066.

³ See *infra*, §§ 1410 *et seq.*, 1432, 1446, 1468.

⁴ *United States v. Hart*, 1 Peters C. C. 390. See, generally, *infra*, §§ 1536 *et seq.*

⁵ *State v. Jasper*, 4 Dev. 323. *Infra*, §§ 20, 1556 a.

⁶ *State v. Huntley*, 3 Ired. 418; though see, *per contra*, *Simpson v. State*, 5 Yerg. 356, Peck, J., dissenting.

⁷ *Penns. v. Morrison*, Addi. R. 274.

See *Adams's Gallatin*, 123 *et seq.* See, however, *Allegheny v. Zimmerman*, 95 Penn. St. 287.

⁸ *Penns. v. Gillespie*, Addi. 267.

⁹ *State v. Hitchens*, 2 Harring. 527. *Infra*, § 1768.

¹⁰ *Com. v. Taylor*, 5 Binney, 277; *Hackett v. Com.*, 15 Penn. St. 95.

¹¹ *Com. v. Hoxey*, 16 Mass. 385. *Infra*, § 1556.

¹² *Infra*, § 590. *State v. Rollins*, 8 N. H. 550.

§ 18. (2) It has also been generally held in this country that acts of malicious mischief, when producing a wanton injury to another's property, so as to provoke violent retaliation, are indictable. Thus it has been held indictable to maliciously destroy a horse,¹ a cow,² a steer,³ or other beast, which may be the property of another;⁴ to be guilty of wanton cruelty to animals in general, when the essential ingredient of malice towards the owner is present,⁵ or the offence is a public scandal;⁶ to cast the carcass of an animal in a well in daily use;⁷ to maliciously poison chickens, or maliciously break windows;⁸ to mischievously set fire to a number of barrels of tar;⁹ to girdle or otherwise maliciously injure trees kept either for use or ornament,¹⁰ to administer deleterious substances;¹¹ to discharge a gun with the intention of annoying and injuring a sick person in the immediate vicinity;¹² to break into a room with violence for the same purpose;¹³ to go armed upon the porch of another man's house and from thence shoot and kill a dog of the owner of the house, lying in the yard, in the absence of the male members of the family, and

So of malicious mischief.

¹ *Infra*, §§ 1066 *et seq.* *Resp. v. Teischer*, 1 Dallas, 335; *State v. Council*, 1 Tenn. 305; though this case has since been denied; *Shell v. State*, 6 Humph. 283; *Taylor v. State*, 6 Humph. 285.

² *Com. v. Leach*, 1 Mass. 58; *People v. Smith*, 5 Cowen, 258.

³ *State v. Scott*, 2 Dev. & Bat. 35; *Whart. Prec.* 213.

⁴ *Infra*, §§ 1067 *et seq.* *Loomis v. Edgerton*, 19 Wendell, 419. See, particularly, *Kilpatrick v. People*, 5 Denio, 277; *Henderson's Case*, 8 Gratt. 708; though see *State v. Wheeler*, 3 Vt. 344; *Illies v. Knight*, 3 Tex. 312; and comments, *infra*, §§ 1068 *et seq.*

⁵ *State v. Briggs*, 1 Aikens, 226. See, for a general discussion of this question, 7 Law Rep. N. S. 89, 90.

⁶ *U. S. v. Logan*, 2 Cranch C. C. 259; *U. S. v. Jackson*, 4 Cranch C. C. 483.

⁷ *State v. Buckman*, 8 N. H. 203.

⁸ *Resp. v. Teischer*, 1 Dallas, 335. The better opinion now is, that, to make such an offence indictable, it must be done either secretly and in the night time; *Kilpatrick v. People*, 5 Denio, 277; or in such a way as to provoke a breach of peace. *State v. Phipps*, 10 Ired. 17.

⁹ *State v. Simpson*, 2 Hawks, 460.

¹⁰ *Com. v. Eckert*, 2 Browne, 249; *Loomis v. Edgerton*, 19 Wendell, 419; *per contra*, *Brown's Case*, 3 Greenleaf, 177; and see discussion, *infra*, §§ 1067 *et seq.*

¹¹ *Infra*, § 610. *Com. v. Stratton*, 114 Mass. 303; *People v. Blake*, 1 Wheeler's C. C. 490; see, however, at common law, *R. v. Hanson*, 2 C. & K. 912; 4 Cox C. C. 138; *R. v. Walkden*, 1 Cox C. C. 282; *R. v. Dilworth*, 2 M. & Rob. 531; *infra*, § 610.

¹² *Com. v. Wing*, 9 Pick. 1.

¹³ *Com. v. Taylor*, 5 Binney, 277.

to the terror and alarm of the females in the house;¹ though it is not an indictable offence to remove a stone from the boundary line between the premises of A. and B. with the intent to injure B.;² nor to shave and crop the hair from a mare's tail in a stable;³ nor to frequent a neighbor's house, and grossly abuse his family, if there be no assault.⁴

§ 19. (3) On the same reasoning it has been held to be indictable to do an act which is a great scandal or public insult to the community.⁵ Under this head it has been held indictable to cast a dead body into a river without the rites of Christian sepulture;⁶ to be guilty of eaves-dropping;⁷ to knowingly sell noxious food;⁸ to sell a wife;⁹ to disinter a dead body without proper authority;¹⁰ to give more than a single vote at an election;¹¹ to be guilty of individual offensive drunkenness;¹² or notorious lewdness,¹³ though on this point the better rule is that, to make the offence indictable, it must be such as to shock and insult, not an individual, but the community,¹⁴ to indulge publicly in profane swearing,¹⁵ or in loud and obscene language, so as to draw together a crowd in a thoroughfare,¹⁶ though the offence be not laid as a nuisance;¹⁷ and, in fine, to commit any act which

¹ Henderson's Case, 8 Grat. 708.

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

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

⁴ Com. v. Edwards, 1 Ashmead, 46.

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

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

⁷ State v. Williams, 2 Tenn. 108; Com. v. Lovett, 6 Penn. L. J. 226; State v. Pennington, 3 Mead, 119. See *Ibid.* 231; *infra*, § 1446.

⁸ State v. Smith, 3 Hawks, 378; State v. Norton, 2 Ired. 40; R. v. Sharpe, 7 Cox C. C. 214.

⁹ R. v. Delaval, 3 Burr. 1434.

¹⁰ Com. v. Cooley, 10 Pick. 37; R. v. Lynn, 2 T. R. 733; 2 Leach, 560.

Infra, § 1432 *a*. See R. v. Vann, 2

Denison C. C. 324; 8 Eng. Law and Eq. 596; R. v. Sharpe, 7 Cox C. C. 214; 40 Eng. Law and Eq. 581.

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

¹² Smith v. State, 1 Humph. R. 396.

¹³ State v. Moore, 1 Swan. 136;

Brooks v. State, 2 Yerg. 482; State v. Rose, 32 Mo. 560. *Infra*, § 1456.

¹⁴ *Infra*, § 1446. State v. Waller, 3 Murphey, 229.

¹⁵ *Infra*, §§ 1442-4; State v. Kirby, 1 Murphey, 254; State v. Ellar, 1 Dev. 267; State v. Graham, 3 Sneed, 134.

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

¹⁷ Barker v. Com., 19 Penn. St. 412; Bell v. State, 1 Swan, 42.

from its nature must scandalously affect the morals and health of the community.¹

§ 20. It has sometimes been said that Christianity is part of the common law of the land,² and from this it has been argued that the State is in some way bound to punish by indictment offences against Christianity. Christianity, undoubtedly, has affected the common law in the United States, in the following important particulars: (1) In most jurisdictions we have adopted the principles of the canon law in relation to matrimony and to succession. The rules which the English ecclesiastical courts imposed in this connection we have in a large measure accepted as binding us; and in several States we have recognized as indictable certain offences, such as adultery and fornication, which in England can only be prosecuted in the ecclesiastical courts.³ (2) We have also, adopting the ethical rules of Christianity, as distinguished from those of heathendom, made indictable breaches of domestic duty which were not criminally punishable by the old Roman law. (3) Witnesses, unless they have conscientious scruples, or believe another form of oath more binding, are sworn as a rule on the Christian Bible. But beyond this we have not gone. We make blasphemy of Christianity indictable; but this is because such blasphemy is productive of a breach of the public peace, and not because it is an offence against God. We treat a disturbance of Christian worship as indictable when such disturbance amounts to a private assault or to public disorder;⁴ but we give the same protection to non-Christian assemblies.⁵ And in no State does the government interfere to prosecute offences consisting of a denial of Christian dogma, or a rejection of Christian sanctions.⁶ Nor in any State is Christianity in such sense part of

Offences exclusively religious not indictable.

¹ Com. v. Sharpless, 2 Serg. & R. 91; R. v. State, 1 Baxter, 192. See *infra*, Resp. v. Teischer, 1 Dallas, 335; People § 1431, and cases there cited. v. Smith, 5 Cowen, 258.

² See *infra*, § 1556.

³ See Vidal v. Girard, 2 How. 127; People v. Ruggles, 8 Johns. R. 290; Updegraph v. Com., 11 S. & R. 394; State v. Chandler, 2 Harring. 553. See Pringle v. Napee, 14 Canada L. J. 219.

⁴ See *infra*, §§ 1717, 1741.

⁵ State v. Jasper, 4 Dev. 323; Holt Education v. Minor, 23 Ohio St. 211;

⁶ Donahoe v. Richards, 38 Me. 379. See Chapman v. Gillett, 2 Conn. 40; Lindenmuller v. People, 33 Barb. 548; Com. v. Jeandell, 2 Grant (Penn.) 506; Com. v. Dupuy, Bright. R. 44; People v. Porter, 2 Parker C. R. 14; Bloom v. Richards, 2 Ohio St. 387; Board of

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

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

¹ In an article by Dr. Spear, reprinted in the Albany Law Journal, vol. xiii. p. 366, we have the following:—

"Lord Campbell, in his Lives of the Chief Justices, explains the language as simply meaning that the law will not permit the essential principles of revealed religion to be ridiculed and reviled. The English commissioners on criminal law, in their sixth report (1841), express the opinion that the maxim does not 'supply any reason in favor of the rule that arguments may not be used against' Christianity, 'provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance.' Archbishop Whately, in his preface to his Elements of Rhetoric, says that he had 'never met with any one who could explain' to him the meaning of the maxim; yet he did not understand it as implying 'the illegality of arguing' against the established religion of England."

In R. v. Foote (and Ramsay), 48 L. T. N. S. 733; *infra*, §§ 1605, 1627, Lord Coleridge, C. J., said, in charging the jury:—

"Gentlemen, you have heard with truth that these things are, according to the old law, if the dicta of old judges, dicta often not necessary for the decisions, are to be taken as of absolute and unqualified authority—that these things, I say, are undoubtedly blasphemous libels, simply and

without more, because they question the truth of Christianity. But I repeat what I said on the former trial that, for reasons which I will presently explain, these dicta cannot be taken to be a true statement of the law, as the law is now. It is no longer true, in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land."

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

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

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

7. "The principle upon which blas-

§ 21. Offences at common law are divided into three heads; treasons, felonies, and misdemeanors. In England, under the head of treason were embraced, first, under the name of high treason, the compassing of the king's death, the comforting of the king's enemies, the counterfeiting of the privy seal, the forging of the king's coin, and the slaying of the chancellor, or either of the king's justices; and secondly, under the name of petit treason, such offences as were imputable in private life to the same principle of treachery and disloyalty as led, in the affairs of State, to the com-

Offences at common law are treasons, felonies, and misdemeanors.

phemy is punished would oblige a common law court to protect the worship and regard the sentiments of Mahometans or Hindoos, if their forms of religion were to be widely prevalent in a community over which it had jurisdiction. This protection, of course, could be given only to the extent that their rites and worship did not infringe upon the laws of natural morality and justice.

"8. Every code of morality is intimately connected with the system of religion from which it springs, and in which it finds a sanction. As every civil code in its formation and growth adopts the moral code of the people for which it furnishes rules of government, so the common law of England and the United States has absorbed, and is still absorbing into itself, the moral principles of Christianity. Hence the Christian system is the moral source of an undetermined but very large part of our common as well as of our statute law. In this sense Christianity has contributed enormously to the common law, and also to the Code of Justinian, and the legal systems of all Christendom.

"9. That portion of the common law which makes blasphemy, Sunday desecration, the disturbance of religious assemblies, indictable offences, seems naturally to fall into the class with

those laws which provide for the community protection against nuisances, whether physical or moral in their nature."

The following remarkable clause occurs in the treaty with Tripoli, approved by the President, and confirmed by the Senate of the United States, in 1797:—

"As the government of the United States of America is not in any sense founded on the Christian religion; as it has in itself no character of enmity against the laws, religion, or tranquillity of Mussulmen; and as the said States never have entered into any war or act of hostility against any Mahometan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries." Art. xi. treaty with Tripoli of Jan. 3, 1797, signed by Joel Barlow, consul-general, on part of the U. S.; U. S. Treaties, edition of 1873, page 838; viii. U. S. Statutes at Large (Foreign Treaties, Peters's ed.), 155; vi. Marten's Rec. de Traités, 298.

In State v. Brooksbank, 6 Ired. 73, it was held that Sabbath breaking is not an offence at common law. But this can only be good as to such "Sabbath breaking" as is not a nuisance.

passing the sovereign's death; comprising the slaying, by a wife, of her lord and husband, and by an ecclesiastic of his ordinary. In this country, however, petit treason as a distinct class of offences is no longer recognized, the crimes composing it having sunk into a place among homicides; and high treason, under the constitutions both of the Federal Union and of the several States, is limited to the levying war against the supreme authority, or adhering to its enemies, giving them aid and comfort.¹

§ 22. Felonies, in England, as distinguished from misdemeanors, comprised originally every species of crime which occasioned the forfeiture of lands and goods; but though this distinction, originally based on the supposed heinousness of the crime, is still nominally recognized, its continuance, while conducing to much technical difficulty, is productive of no good, and its abolition is only a question of time.² At common law, in addition to the crimes more strictly coming under the head of treason, the chief, if not the only felonies, were murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny. By statutes, however, running from the earliest period, new felonies were, from time to time, created; till finally, not only almost every heinous offence against person or property was included within the class, but it was held, that whenever judgment of life or member was affixed by statute, the offence to which it was attached became felonious by implication, though the word

Felonies include crimes subject to forfeiture.

¹ *Infra*, §§ 1782 *et seq.*

² "In modern English legislation, any affected demarcation of crimes by the sort of moral or social significance anciently implied in a felony as contrasted with a misdemeanor, is practically abandoned, though a memory of the distinction is preserved in certain judicial forms. The tendency of all modern legislation is to arrange crimes on no more logical or abstruse principle than that based on either the gravity of the punishment with which they are visited, or the dignity and constitution of the courts of justice in which they are investigated." Amos on Jurisprudence (London, 1872), 302. See, also, Stephen's Cr. L. 56, 57,

105-110; Lyford v. Farrar, 31 N. H. 314; Shay v. People, 22 N. Y. 317.

"There is no lawyer," says Mr. J. S. Mill, "who would undertake to tell what a felony is, otherwise than by enumerating the various kinds of offences which are so called."

"In consequence of the general statutory departure from the ancient English gradation of crimes and punishments, the word 'felony' has, for some purposes, in this State lost its ancient English signification, and acquired the meaning of a crime punishable by death or imprisonment in a state prison." State v. Felch, 58 N. H. 1.

felony was not used in the statute. In this country, until recently, the common-law classification obtained; the principal felonies being received as they originally existed, and their number increased as the exigencies of society prompted;¹ though in the federal courts non-capital offences have been held to be felonies only when made so by statute expressly or by implication.² In several of the States, all offences subject to death or imprisonment are made felonies; all others are misdemeanors.³ In some States the distinction is abolished absolutely. In most of the others it exists only so far as to make it requisite, in indictments for felonies, to use the term "feloniously;"⁴ and to give certain privileges as to challenges, as to joinder of counts, and as to seclusion of jury. But it is impossible not to be amazed at a system which made perjury a misdemeanor, and larceny a felony; which, while it made it a felony to steal five shillings, made it only a misdemeanor to conspire to rob a bank.

§ 22 a. The question as to what are "infamous crimes," is now of interest principally because of the clause in the federal constitution which provides that all crimes not infamous may be prosecuted by information. At common law, "infamy" was held to attach to all crimes, a conviction of which impressed such a moral taint on the perpetrator as was supposed to require his incapacitation as a witness, and the suppression of his political rights.⁵ Infamy, in this sense, includes treason, felony, and the *crimen falsi*; and a conspiracy to commit an infamous offence partakes of the character of the offence at which it is aimed. The meaning of the term "infamous offences" under the federal constitution is discussed in another work.⁶

§ 23. Misdemeanors comprise at common law all offences, lower than felonies, which may be the subject of indictment. They are

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

² U. S. v. Coppersmith, 1 Cr. Law Mag. 741; 2 Flip. 546.

³ See State v. Smith, 32 Me. 369; People v. Park, 41 N. Y. 21; Randall

v. Com., 24 Grat. 644; Weinzorplin v. State, 7 Blackf. 186; Nichols v. State, 35 Wis. 308; Ingram v. State, 71 Mo. 793.

⁴ See Whart. Cr. Pl. & Pr. § 261; and see Bruguier v. U. S., 1 Dak. T. 5.

⁵ See Whart. Cr. Ev. § 363.

⁶ Whart. Cr. Pl. & Pr. §§ 85 *et seq.* See U. S. v. Field, 16 Fed. Rep. 778, with note; 1 Am. Law Journ. 94.

Misdemeanors comprise offences lower than felonies.

Police offences to be distinguished from criminal.

divided into two classes: first, such as are *mala in se*, or penal at common law; and secondly, such as are *mala prohibita*, or penal by statute.

§ 23 a. In all jurisprudences a distinction more or less marked has been made between police wrongs and criminal wrongs.¹ The distinction is made to rest sometimes on the tribunal having jurisdiction of the wrong: wrongs peculiarly cognizable by police courts being called police wrongs; those peculiarly cognizable by criminal courts of record being called criminal wrongs. This line, however, is unsatisfactory, many prosecutions which are eminently of a police character involving large interests, and hence made subjects of prosecution in our highest courts. For similar reasons we must reject the distinction that *little* wrongs are police wrongs, and *great* wrongs are criminal wrongs; since there are many criminal wrongs (*e. g.*, small larcenies) which are little, and many police wrongs (*e. g.*, such as interfere with liberty of trade) which are great. Nor can we accept as entirely adequate the tests sometimes given, that police wrongs consist of threatened, and criminal wrongs of consummated injuries; or that police wrongs consist exclusively in disturbances of order, criminal wrongs in violations of justice. We may more properly hold, enlarging the last distinction, that by criminal wrongs the existence of the State is assailed; by police wrongs, only the administration of its economical structure: the first attack the fundamental institutes of society, the latter only its modes of operation: the first concern principle, the second concern procedure. It is true that the two classes melt undefinably into each other, as is the case with civil and criminal wrongs, and that an offence, which in one aspect is a police wrong, is a criminal wrong in another aspect.² But that there is a distinction in ethics there can be no question, the one case involving, the other not involving, a moral taint. Nor can we refuse to admit a distinction in law. Accessories in criminal offences, for instance, are involved in the guilt of principals; not so accessories in police offences.³ It is not in-

¹ As to the distinction in such cases, see *Oshkosh v. Schwartz*, 55 Wis. 483. That a police procedure is no bar to a criminal prosecution for the same offence, see *Whart. Cr. Pl. & Pr.* § 440.

² *Whart. Cr. Pl. & Pr.* §§ 306, 312, 440.

³ *Infra*, § 1529; *Com. v. Willard*, 22 Pick. 476. And so as to attempts, *infra*, § 177.

dictable, for instance, to buy spirituous liquors illegally sold;¹ nor is it indictable to contract to sell such liquor in the gross to a person who is to sell it illegally at retail;² nor is it indictable to attempt such offences.³ Police offences, we may further notice, have, in common with offences of omission, this characteristic—that they are usually breaches of affirmative and not of negative commands. The police law says: “You must do a particular thing.” The offender, either designedly or negligently, omits to do this thing. A criminal offence, on the other hand, is a breach of negative command: “Thou shalt not steal.” Police offences, also, as we have just seen, are usually not against the material and moral element in the law, but against its formal structure. It becomes, therefore, in most police prosecutions, a matter immaterial whether evil consequences flow from the defendant’s disobedience, and whether, if they do, they are imputable to the defendant. It may be made a police offence, for instance, for a man to permit ice to accumulate before his front door on a city street. If so, it is of no consequence whether an injury occurred thereby to individuals traversing the street, or whether the offender was cognizant of the violation of law. The same remarks are applied by a recent leading German jurist⁴ to a series of acts made penal by the German Code, such as the possession of unstamped and unverified scales and measures; and the storing of explosive compounds in places forbidden by law. Our own prosecutions of persons concerned in selling intoxicating liquors may be placed in the same category. We do not inquire whether any person was injured by the sale or exposure of the liquor. We do not inquire whether the person charged knew that the liquor was intoxicating. These questions are irrelevant. Certain acts are dangerous to the community, and these acts are unconditionally and absolutely forbidden, as the best way of preventing their deleterious results. Hence, in such cases we have simply to determine whether the acts in question conflict with the letter of the law.⁵

¹ *Ibid.*

² *Pulse v. State*, 5 Humph. 108.

³ *Infra*, § 177. *Hill v. State*, 53 Ga. 125.

⁴ Merkel, *Kriminalistische Abhandlungen*, i. p. 97.

⁵ See *Com. v. Wolf*, 3 S. & R. 48; 88, 89.

Specht v. Com., 8 Barr, 312, in which it was held that conscientious religious belief that another day was the Sabbath is no defence to an indictment for Sabbath breaking. For other cases, see *infra*, § 1431. And see, also, §§

We must at the same time remember that there are other offences beside those exclusively of a police character which are punishable, irrespective of the criminal intention of the offender. It is within the power of the legislature to say of particular acts that they are to be prohibited irrespective of the intention of the person by whom they are committed.¹

§ 24. Misdemeanors which are *mala prohibita*, and which become

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

penal by statute, may consist, not only of acts made specifically indictable, but of acts enjoined or forbidden by statute, though by such statute such omission or commission is not made the subject of indictment. If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding.² Thus, wherever a duty is imposed on a public officer, the neglect to perform it is a public offence, and as such is indictable.³ And the imposition by statute of a penalty (unless where it is imposed, as in tax and similar statutes, as a mere alternative) in itself implies a prohibition.⁴ It is otherwise, however, when a civil action is made by statute the specific remedy.⁵

§ 25. Wherever a statute creates an offence, and expressly provides a punishment, the statutory provisions must be followed strictly and exactly, and only the statutory penalty can be imposed.⁶

Statutory provisions as to punishment to be strictly followed.

§ 25. Wherever a statute creates an offence, and expressly provides a punishment, the statutory provisions must be followed strictly and exactly, and only the statutory penalty can be imposed.⁶

¹ See *infra*, § 88.

² 2 Hawk. c. 25, s. 4; *R. v. Davis*, Say. 163; and see *R. v. Gregory*, 2 N. & M. 478; 5 B. & Ad. 555; *R. v. Nott*, 2 Q. B. 768; *R. v. Sainsbury*, 4 T. R. 451; *R. v. Harris*, 4 T. R. 202; *State v. Fletcher*, 5 N. H. 257; *Com. v. Shattuck*, 4 Cush. 141; *People v. Bogart*, 3 Parker C. R. 143; *State v. Sanford* (N. J. 1883), 4 Crim. Law Mag. 221; *Keller v. State*, 11 Md. 525; *State v. Lenoir*, 4 Hawks, 194; *State v. Williams*, 12 Ired. 172; *State v. Thompson*, 2 Strobb. 12; *Tate v. State*, 5 Blackf. 73.

³ *Wilson v. Com.*, 10 S. & R. 273; *Gearhart v. Dixon*, 1 Barr, 224.

For proceedings against corporations see *infra*, § 91; *R. v. Great N. & E. Railway Co.*, 9 Q. B. 315; *Whart. Cr. Pl. & Pr.* §§ 220 *et seq.*; *People v. Corporation of Albany*, 11 Wend. 539.

⁴ *Bensley v. Bignold*, 5 B. & Ald. 235; *State v. Fletcher*, 5 N. H. 257.

⁵ See *U. S. v. Brown*, Deady, 566; *Keith v. Tuttle*, 28 Me. 326; *Woodward v. Squires*, 39 Iowa, 435.

⁶ *R. v. Wright*, 1 Burr. 543; *People v. Stevens*, 13 Wend. 341; *People v.*

§ 26. Where a statute attaches a police penalty to that which was an offence at common law, and where there is nothing in the statute to show that the statutory remedy is to be exclusive, either the remedy by statute or that at common law can be pursued. And if the statute specify a mode of proceeding different from that by indictment, then, if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has the option of proceeding either by indictment at common law, or by the mode pointed out by the statute.¹ Thus, where the charter of a turnpike road provided a particular penalty for not keeping the road in repair, negligence in this respect followed by injury was held indictable at common law.² But where

New statutory penalties are cumulative with common law.

Hislop, 77 N. Y. 331. *Infra*, §§ 28, 30.

¹ *R. v. Robinson*, 2 Burr. 799; *R. v. Wigg*, 2 Ld. Raym. 1163; 2 Salk. 460; *R. v. Dickenson*, 1 Saund. 135; *R. v. Balme*, 2 Cowp. 648; *R. v. Carlile*, 3 B. & Ald. 161; and see 2 Hale, 191; 1 Saund. 195, n. (4); *State v. Evans*, 7 Gill & J. 290; *Moore v. State*, 9 Yerger, 353. *Contra*, *State v. Borgher*, 71 Mo. 631. For other cases see *Whart. Cr. Pl. & Pr.* §§ 232-281.

² *Turnpike Road v. People*, 15 Wend. 267.

Where a statute prohibits an act which was before lawful, and enforces the prohibition with a penalty, and a succeeding statute (*R. v. Boyall*, 2 Burr. 832), or the same statute, in a subsequent substantive clause, describes a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law; or he may proceed in the manner pointed out by the statute, at his option; 2 Hale, 171; *R. v. Wright*, 1 Burr. 543; and see *R.*

v. Jones, 2 Str. 1146; *R. v. Harris*, 4 T. R. 202; *Whart. Cr. Pl. & Pr.* §§ 232, 281; but if the manner of proceeding for the penalty be contained in the same clause which prohibits the act, the mode of proceeding given by the statute must be pursued and no other; for the express mention of any other mode of proceeding impliedly excludes that of indictment. *R. v. Robinson*, 2 Burr. 799; *R. v. Buck*, 2 Str. 679.

In Pennsylvania it is provided that "in all cases where a remedy is provided, or a duty enjoined, or anything directed to be done by any act or acts of assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect." Act of 21st of March, 1806, sect. xiii.; 4 Smith's Laws, 332; *Whart. Cr. Pl. & Pr.* § 232. It has been held by the courts, in conformity with this act, that wherever a mode of procedure is attached to a specific

the statute prescribes a penalty which in its terms is exclusive, then no subsequent penalty can be imposed.¹

§ 27. Questions frequently arise whether a particular offence is divisible; in other words, whether it is susceptible of being divided into two or more offences, each to be open to a separate prosecution. The first line of cases of this class we have to notice is where one offence is an ingredient in another, as assault in assault and battery, manslaughter in murder, and larceny in burglary. Several of such concentric layers may successively exist. Thus we may take the case of an assault, enveloped by a battery, and this by manslaughter, and this by murder. Add the blow to the assault, and it becomes assault and battery. Add a killing to the assault and battery, and it becomes manslaughter. Add malice aforethought to manslaughter, and it becomes murder. Or, to take the converse, strip from murder the malice aforethought, and it becomes manslaughter. Strip from manslaughter the death of the party assaulted, and the offence becomes assault and battery. Negative the battery, and the case is one of assault. Now this rejecting of successive aggravations is a function open to juries in all cases where there is presented to them one offence in which another is

offence by any act of assembly, the common law remedy is abrogated, and the indictment and sentence must pursue the act. It was even held, that where an act of assembly gave a penalty to the party injured by the extorsive and corrupt conduct of a magistrate, which penalty was to be recovered in a civil suit, the offence ceased to be indictable at common law. But it seems that the act in question only applies when a specific method of procedure is directed by act of assembly; for when a new penalty is attached to a common law offence, then the indictment may still be at common law, though in case of conviction no other than the statutory punishment can be inflicted. Thus, when an act of Assembly provided a new punishment for murder, it was held, that though by so doing the Act of 21st of March, 1806, prevented any other than the statutory punishment from being imposed, yet the indictment would still lie at common law, and that it was not necessary for it to conclude contrary to the act. *Com. v. Evans*, 13 Serg. & Rawle, 426. The statutes, also, against obstructing navigable rivers; *White v. Com.*, 6 Binney, 179; and establishing a board of health, armed with plenary powers, to protect the health of the city of Philadelphia; *Com. v. Church*, 1 Barr, 105; leave unimpaired the remedy of the common law for such nuisances. *Com. v. Van Sickle*, Brightly R. 69; *Whart. Cr. Pl. & Pr.* § 232.

¹ *Whart. Cr. Pl. & Pr.* § 455 a.

inclosed. The jury may acquit of murder and convict of manslaughter; or, as the practice is, convict of manslaughter which operates as an acquittal of murder.¹ Or the jury, on the same prosecution, may convict of the assault, and thereby acquit of the manslaughter and the murder. No question has ever been made as to this right on the part of the jury;² and it is settled by a great preponderance of authority that a conviction of the minor offence, on an indictment which would have sustained a conviction of the major, is an acquittal of the major.³ It has, however, been much contested whether the prosecution, by dropping the major offence, when such offence is a felony, can proceed for the minor offence. At common law it has frequently been held, that if on trial a misdemeanor (*e. g.*, assault) turns out to be a felony (*e. g.*, robbery), then, on the ground that the misdemeanor is extinguished by being merged in the felony, the defendant must be acquitted of the felony.⁴ A more rational doctrine, however, has been established by statutes, and in some jurisdictions by common law, to the effect that the prosecution may in such cases waive the felony, and prosecute only for the constituent misdemeanor, supposing the misdemeanor be proved.⁵

¹ See *Whart. Cr. Pl. & Pr.* § 465.

² That under an indictment for murder there can be a conviction of manslaughter, see *infra*, § 542; that under burglary, inclosing larceny, there can be a conviction of larceny, see *infra*, § 819; that under robbery there can be a conviction of larceny, see *infra*, § 858; that under felonious assault there can be a conviction of assault, see *infra*, §§ 576, 641 a; that under adultery there can be a conviction of fornication, see *infra*, § 1737. Whether there can be a conviction of a minor offence on an indictment for rape, see *infra*, § 576.

³ See *Whart. Cr. Pl. & Pr.* § 464.

⁴ *Ibid.* *Infra*, §§ 576, 641 a, 1344.

⁵ In *Whart. Cr. Pl. & Pr.* the topic in the text is discussed under the following heads: When one unlawful

act operates on separate objects, conviction as to one object does not extinguish prosecution as to the other; *e. g.*, when two persons are simultaneously killed, § 468; otherwise as to two batteries at one blow, § 469; so when several articles are simultaneously stolen, § 470; when one act has two distinct indictable aspects, if the defendant could have been convicted of either under the first indictment, he cannot be convicted of the two successively, § 471; so in liquor cases, § 472; severance of identity by place, § 473; severance of identity by time, § 474; but continuous maintenance of nuisances can be successively indicted, § 475; conviction of assault no bar (after death of assaulted party) to indictment for murder, § 476.

As to merger, see *infra*, § 27 a.

No matter how long a time an offence may take in its perpetration, it continues but one offence. An explosive package, for instance, may be sent from Maine to California, and may take weeks in the transit, but the transmission is a single act. Difficult questions, indeed, may arise, to be hereafter noticed,¹ when gas or liquor is tapped by a pipe through which there is a continuous passage for days. But whatever may be the conclusion as to such cases, it is settled that nuisances, when distinct impulses are given at intermittent successive times, may be the object of successive prosecutions.² The distinction is this: when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.³

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

An offence, also, is capable of division by being directed to a plurality of objects. It has been said, indeed, that to strike A. and B. at one blow is but one offence.⁵ But though this may be sustained in cases in which there was no intention to strike more than one blow, it is otherwise when two homicides, of distinct grades, are consummated by one act, or when there is an intention to kill two persons.⁶ And so the stealing simultaneously of the goods of two persons is divisible.⁷

An offence may have several aspects: *e. g.*, it may be a larceny, or it may be an official embezzlement. If an offence of this class can be described in its several phases in one indictment, then, as a rule, it is not divisible; if it can-

¹ *Infra*, § 931. Whart. Cr. Pl. & Pr. § 474.

² *Ibid.* § 475.

³ See *Crepps v. Jordan*, 2 Cowp. 640; 1 Smith L. C. 711 (8th Eng. ed.), where Lord Mansfield said: "It would be unreasonable to suppose that the legislature intended that if a tailor sewed on the Lord's day, every stitch should be a separate offence." On the other hand, where a statute imposed a penalty on a person who should "profanely curse or swear," it was held

that there could be a cumulative penalty for one conviction for several oaths on one day. *R. v. Scott*, 4 R. & S. 368. And several convictions have been sustained for selling several pieces of bad meat at one stall on the same day. *Hartley, in re*, 31 L. J. M. C. 232; *Beal, ex parte*, L. R. 3 Q. B. 382.

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

⁵ Whart. Cr. Pl. & Pr. § 469.

⁶ *Ibid.* §§ 254, 468.

⁷ Whart. Cr. Pl. & Pr. §§ 252, 470.

not be so described, then it may be indicted in either aspect. There are cases, however, to be elsewhere discussed,¹ in which the State, by selecting one of these aspects to prosecute is precluded from afterwards prosecuting the other.

An offence, in the last place, may have several actors, who may be jointly indicted, but as to whom verdict and judgment are to be several.² Any one of these, as a rule, may be acquitted or convicted independently of the others; though, in cases of conspiracy and riot, one party alone cannot be convicted unless, in conspiracy, there is at least one co-conspirator to unite in constituting the offence, or, in riot, at least two co-rioters.³

§ 27 a. Merger is said to exist when a lesser offence is absorbed in a greater, but in criminal practice the only cases in which such absorption is claimed to be operative is when a misdemeanor is an ingredient of a felony, in which case the older authorities maintain that the trial must be exclusively for the felony, and that the defendant cannot, under an indictment for felony, be convicted of misdemeanor.⁴ The reason alleged for this is that in those days the incidents of a trial for felony were so different from those of a trial for misdemeanor that it was not right to invest the prosecution with the power of interchanging them at its caprice. A party charged with felony, for instance, was not entitled to counsel, and his right of challenge, and his right to a copy of the indictment, were restricted. If there were no merger, —if, on the one side, the defendant, on proof of the felony on an indictment for misdemeanor, could be convicted of the misdemeanor charged; or, if, on the other side, on disproof of the felony on an indictment for the felony he could be convicted of the constituent misdemeanor, this would do away with the distinction between felonies and misdemeanors, as above stated. This distinction, however, the courts could not do away with, and the only way to avoid this was to preserve the line of demarcation between felonies and misdemeanors intact. This they did by determining (1) that there could be no conviction of a misdemeanor on an indictment for a felony, for this would be to deprive the defendant of privileges to

¹ Whart. Cr. Pl. & Pr. § 471.

² *Ibid.* §§ 306-312.

³ *Ibid.* §§ 305, 306-312.

⁴ See Whart. Cr. Pl. & Pr. § 464. *Infra*, §§ 395, 576, 641 a, 1343.

which he would be entitled if the indictment was for a misdemeanor ; and (2) that if the offence charged was a misdemeanor, and the offence proved turned out to be a felony, then there must be an acquittal, which would not bar an indictment for felony, on the trial of which the defendant would be put under due restrictions as to counsel and other privileges. As will be hereafter seen,¹ since the abolition of these distinctions between felony and misdemeanor, the doctrine of merger, above stated, has no reasonable basis on which to rest. The consequence is that a defendant charged with an assault is no longer, as a rule, held to be entitled to an acquittal because the assault is part of a felony ; while by statute, if not by judicial construction, there are now no jurisdictions in which a defendant, on an indictment for felony, cannot be acquitted of the felony, and convicted of the constituent misdemeanor, if duly pleaded. If, however, there is no constituent misdemeanor duly pleaded, then the defendant, if acquitted of the felony, cannot be convicted of a misdemeanor proved on the trial but not averred in the indictment.

§ 28. The proposition that penal statutes are to be strictly construed is to be applied not to the merely *remedial*, but only to the restrictive and punitive clauses in penal statutes. A statute operates to enlarge or to restrain liberty : when the former, it is to be largely construed ; when the latter, cautiously and strictly. This is a maxim of the Roman law, which, though foreign to the notion of the old English common law, that crime is to be avenged in kind and in full measure, was at an early period adopted by English jurists.² In construing such statutes, however, we are to look for their reasonable sense, and if this is clearly ascertained it must be applied,

¹ *Infra*, §§ 576, 641 a, 1343.

² L. 42, D. de poen. (48. 19.) Interpretatione legum poenae molliendae sunt potius, quam asperandae. L. 155, § 2. D. de reg. iur. (50. 17.) In poenalibus causis benignius interpretandum est. cap. 49. de reg. iur. in VI. (5. 13.) In poenis benignior est interpretatio facienda. See, also, 1 Bl. Com. 86, 87; Bac. Abr. Stat. i. 7, 9; Andrews v. U. S. 2 Story, 202; U. S. v. Ragsdale,

Hempst. 497; Com. v. Martin, 17 Mass. 359; Carpenter v. People, 8 Barbour, 603; Warner v. Com., 1 Barr, 154; Bucher v. Com., 103 Penn. St. 529; State v. Stephenson, 2 Bailey, 334; State v. Jaeger, 63 Mo. 403; Randolph v. State, 9 Texas, 521.

Contra under New York Penal Code of 1882; under California Code; People v. Soto, 49 Cal. 67; and in Kentucky. Com. v. Davis, 12 Bush, 240.

though a narrower sense is possible.¹ The courts are, on the one hand, to refuse to "extend the punishment to cases which are not clearly embraced" in the statutes; on the other hand, to refuse "by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope."² At the same time, in matters of reasonable doubt, this doubt is to tell in favor of liberty and life.³

§ 29. A law cannot impose a penalty on acts committed before its enactment.⁴ When a punishment is inflicted at common law, then the case is brought within the principle just stated by the assumption that the case obviously falls within a general category to which the law attaches indictability. It may be said, for instance, "All malicious mischief is indictable. This offence (although enumerated in no statute, and never in the concrete the subject of prior adjudication) is malicious

Retrospective statutes inoperative.

¹ U. S. v. Jones, 3 W. C. C. R. 209; U. S. v. Brewster, 7 Peters, 164; U. S. v. Staats, 8 How. U. S. 41; Cummings v. Missouri, 4 Wall. 277; U. S. v. Hartwell, 6 Wall. 395; State v. Smith, 32 Me. 369; Com. v. Houghton, 8 Mass. 107; Com. v. Whitmarsh, 4 Pick. 233; Stone v. State, Spencer, 401; Hodgman v. People, 4 Denio, 235; People v. Mather, 4 Wend. 229; People v. Hennessey, 15 Wend. 147; Ream v. Com., 3 S. & R. 207; Com. v. King, 1 Whart. 448; State v. Fearson, 2 Md. 310; Angel v. Com., 2 Va. Cas. 228; Thomas v. Com., 2 Leigh, 741; State v. Girken, 1 Ired. 121; State v. Keith, 63 N. C. 140; State v. Taylor, 2 McCord, 498. This qualification is common to all systems of jurisprudence. Thus the Roman law:—

L. 6, § 1. D. de verb. signif. (50. 16.) Verbum: ex legibus, sic accipiendum est, tam ex legum sententia quam ex verbis. L. 3. D. de l. Pomp. de parrie. (48. 9.) Sed sciendum est, lege Pompeia de consobrinis comprehendere, sed non etiam eos pariter complecti, qui pari proprioque gradu sunt. Sed et novercae et sponsae personae

omissae sunt, sententia tamen legis continentur. L. 1. § 13. D. ad SC. Turpill. (48. 16.) . . . verum hunc, qui hoc ministerio usus est ad mandandam accusationem, non ex verbis, sed ex sententia Senatus-consulti puniri, Papinianus respondit. Quintilian. Declam. 331.

² Sedgwick on Stat. Law, 282, approved in Attorney-Gen. v. Sillem, 2 H. & C. 531, 548. See a full exposition of this view in 1 Cr. Law Mag. 3.

³ U. S. v. Morris, 14 Pet. 464; U. S. v. Wiltberger, 5 Wheat. 76; U. S. v. Sheldon, 2 Wheat. 119; U. S. v. Clayton, 2 Dill. 219; Hawkins v. People, 106 Ill. 628.

⁴ Quoties de delicto queareitur, placuit, non eam poenam subire quem debere, quam conditio eius admittit eo tempore, quo sententia de eo fertur, sed eam, quam sustineret, si eo tempore esset sententiam passus, quum deliquisset. L. 7. C. de legg. (1. 14.) L. 65. C. de decur. (10. 31.) Nov. 22. c. 1. cap. 2. 13. X. de constit. (1. 2.) can. 3. Can. 32. qu. 4. This is prescribed in the constitution of the U. S., Art. I. § 9, cl. 3. Art. I. § 10, cl. 1.

mischief. Therefore this offence is indictable." Strike out "malicious mischief" and insert "nuisance," and the same conclusion is reached. It is no reply to this reasoning that we have, by this process, judge-made law, which is *ex post facto*.¹ Supposing the minor premise be correct, the objection just stated could not prevail without being equally destructive to most prosecutions for offences prohibited by statute under a *nomen generalissimum*. In most of our statutes, for instance, neither murder, burglary, nor assault is so described as to leave nothing remaining to the court by way of explanation or application. At the same time, if the offence charged is not one which by ordinary and natural construction falls within a prohibited class, it is far better that the criminal should escape, than that by a forced and unnatural construction the offence should be held indictable. So far as concerns statutes, the rule is rigorously applied, and is fortified by the constitutional provision that no statute shall have an *ex post facto* operation. And this clause has been interpreted as meaning that no person is to be subjected by statute either to a penalty for an act which at the time of its commission was not the object of prosecution, or to a penalty higher than was attached to such act at the time of its commission.²

§ 30. While acts imposing severer penalties cannot be applied retrospectively, doubtful questions as to what is a severer penalty are to be determined in favor of the accused;³ but, as a general rule, changes in a punishment subsequent to the commission of an offence, not consisting in a lessening of the prior penalty or some severable portion thereof,

¹ See *supra*, §§ 14, 15 a; *infra*, § 255. Fletcher v. Peck, 6 Cranch U. S. 167.

² Const. U. S. art. 1, §§ 9, 10; 2 This is adopted in 1 Kent Com. 409. Story on Const. § 1345; Cooley's Const. Lim. 266 *et seq.*; Chin a On, *in re*, 18 Fed. Rep. 506; Com. v. Phillips, 11 Pick. 28; Com. v. Lewis, 6 Binn. 266; Com. v. Reigart, 14 S. & R. 216; Myers v. Com., 2 Watts & S. 60; Perry v. Com., 3 Grat. 632; Rand v. Com., 9 Grat. 738; State v. Hays, 52 Mo. 578; Garvey v. People, 6 Col. 559.

According to Chief Justice Marshall, an *ex post facto* law is one "which renders an act punishable in a manner not punishable when it was committed." 65 N. C. 311.) On the other hand, in

"There has been great diversity of opinion as to what in this connection constitutes mitigation. In Texas, it has been held not to 'mitigate' the punishment where for the death penalty was substituted the infliction of stripes, and this upon the ground of the peculiarly degrading character of the latter method of punishment. Horber v. State, 7 Tex. 69. (In this case, however, the defendant was allowed to take his choice, and so in State v. Kent,

have no application to such offence.¹ It is otherwise with statutes mitigating the prior penalty, which statutes are not unconstitutional in respect to acts committed prior to their passage.²

South Carolina, where the punishment, death, was before final judgment changed to fine, whipping, and imprisonment, the new law was applied in passing sentence. State v. Williams, 2 Rich. 418. In Indiana, the law in force punished perjury by whipping, not exceeding one hundred stripes. In a certain case, before trial, the punishment was changed to imprisonment in the penitentiary, not exceeding seven years; Strong v. State, 1 Blackf. 193; and the last act was held applicable and not obnoxious to constitutional objections." Sherwood, J., State v. Willis, 66 Mo. 131.

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

... It is enough, in my opinion, that it changes the punishment in any manner, except by dispensing with divisible portions of it.' This line of decision, which has become settled law in New York (Shepherd v. People, 25 N. Y. 406; Ratzky v. People, 29 N. Y. 124; Kuckler v. People, 5 Park. Cr. Rep. 212), I regard as enunciating the better doctrine, since it is easily understood, and the twofold test which it furnishes readily applied, namely: Has a change been effected in the prescribed punishment? If there has,

65 N. C. 311.) On the other hand, in and such change has not been brought about by a mere remission of some separable portion thereof, then the law professing to effect such change must be held, so far as concerns antecedent transactions, constitutionally inapplicable." Sherwood, J., *ut supra*. See Simco v. State, 8 Tex. Ap. 406.

² See Com. v. Wyman, 12 Cush. 237, and cases cited *infra*; Cooley's Const. Lim. 267; Whart. Com. Am. Law, § 473.

In Yeaton v. United States, 5 Cranch, 281, it is said: "It has long been settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced, nor punishment be inflicted, for violations of the law committed while it was in force." S. P., Smith v. State, 45 Md. 49; Com. v. Cain, 14 Bush, 525; Hirschburg v. People, 6 Col. 145.

In Cummings v. Missouri, 4 Wall. 277, a State statute excluding clergymen from the right of exercising their profession if unable to take a test oath, and in Garland, *ex parte*, 4 Wall. 333, a federal statute, making a test oath a condition of admission to practise in the federal courts, were held unconstitutional in part as being *ex post facto*.

While the statutory increase of a fine is void when *ex post facto* (Wilson v. State, 64 Ill. 542), it is held otherwise with the substitution of imprisonment for pillory and fine (Clarke v. State, 23 Miss. 261, *sed quare*), and the substitution of imprisonment and whipping for death. State v. Williams, 2 Rich. L. 418. See 5 Crim. Law Mag. 325.

In Kring v. Missouri, 107 U. S. 221, the plaintiff in error had been convicted in Missouri of murder in the first degree. He had been previously con-

Hence, where the punishments are capable of actual measurement, a milder recent statute in force at the time of trial, supersedes, so far as concerns the penalty, a prior statute under which the offence was committed.¹ Should it happen that between a severer statute, during whose operation an offence was committed, and a milder statute, which was in operation at the time of the trial, a third statute was intermediately in force, milder than either, the last-named statute is not to be taken into consideration, the dominant statute being that which was in force at the time of the trial.² But where after the commission of an offence a statute is passed assigning an increased penalty to second offences of a particular type, and then a second offence of such type is committed, the increased penalty may be inflicted on the second offence.³

victed of murder in the second degree, but this conviction had been set aside on his motion. At the time of the commission of the homicide a conviction of murder in the second degree operated in Missouri as an acquittal of murder in the first degree. This, before the second trial, had been altered by statute. It was held by the Supreme Court of the United States that the statute was unconstitutional so far as concerned the plaintiff in error in the issue then pending.

When an offence ceases to be indictable by a statute of limitations, indictability is not revived by a repeal of the statute. *Garrison v. People*, 87 Ill. 96; *State v. Moore*, 43 N. J. L. 203, reversing S. C., 42 N. J. L. 208. See *People v. Martin*, 1 Park. C. R. 187.

¹ In *Veal v. State*, 8 Tex. Ap. 474, it was held that in such case the defendant might elect to be punished under the older statute.

² Geib, ii. p. 46. That a law increasing costs may be *ex post facto*, see *Caldwell v. State*, 55 Ala. 133.

³ *State v. Woods*, 68 Mo. 409; *Plumbly v. Com.*, 2 Mete. 413; *People v. Butler*, 3 Cow. 347; *People v. Wood*, 53 N. Y. 511; *People v. Raymond*, 96 N.

Y. 38; *Rand's Case*, 9 Orat. 738; *Ross, in re*, 2 Pick. 165; *Gutierrez, ex parte*, 45 Cal. 429. The question may be agitated whether a new statute inflicting a punishment only in some respects milder than that under which the offence was committed (as where the maximum of punishment is lower than under the old law, but the minimum is higher) repeals, as to the offence, the old statute. The answer is given that the earlier statute is, in such case, to be exclusively applied, as otherwise the judge would be left to pick out of two statutes the parts he deemed applicable, and virtually to frame a new law. See *Turner v. State*, 40 Ala. 21. But when the second statute repeals the former, the defendant cannot be punished at all. *Com. v. McDonough*, 13 Allen, 581; *Hartung v. People*, 22 N. Y. 95; 26 N. Y. 167; 28 N. Y. 400; *State v. McDonald*, 20 Min. 136.

But "Where the re-enactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, the new act or amendment is a mere continuation of the former act, and is not in a proper sense a repeal."

§ 31. A statute, however, subsequent to an offence, may change the mode by which it is to be prosecuted, provided the punishment attached to the offence is not thereby increased, or the defendant's rights materially impaired.¹

The privilege, also, of merely technical objections may be intermediately withdrawn.² The law as to venue may be, therefore, retrospectively changed,³ and so as to the mode of challenging jurors,⁴ provided no substantial injustice is inflicted.⁵ The rules of evidence, as is elsewhere seen,⁶ may be intermediately changed, provided that the effect is not to materially impair the defendant's rights.⁷ Hence a statute enlarging the competency of witnesses acts retrospectively in criminal cases,⁸ and so of a statute making certain facts *prima facie* proof;⁹ and of a statute making it the duty of the defendant, in liquor cases, to prove a license.¹⁰ But a statute making certain evidence conclusive proof of guilt is in any

Maxwell, J., State v. Wish, 15 Neb. 448, citing *Wright v. Oakley*, 5 Met. 406; *State v. McCall*, 9 Neb. 203.

When there is no express repeal, we have high authority to the effect that the severer portions of the old statute only are to be considered (as to an offence committed under that statute) as abrogated by the later statute, leaving the relatively milder conditions of the old statute in force. *Halschner, System*, i. p. 43; *Berner*, pp. 53, 54; *Geib*, ii. 47. And, generally, a statute assigning a milder punishment is not *ex post facto*. *Com. v. Wyman*, 12 Cush. 237; *Veal v. State*, 8 Tex. Ap. 474; *Perez v. State*, *id.* 610, and cases cited above. And in any view the repeal of a statute creating an offence abates a prosecution pending in error after conviction. *Smith v. State*, 45 Ind. 49.

¹ *Calder v. Bull*, 3 Dall. 386; *State v. Corson*, 59 Me. 137; *Com. v. Hall*, 97 Mass. 570; *Koch's Case*, 5 Rawle, 338; *State v. Manning*, 14 Tex. 402; *Cooley's Const. Lim.* 266; *Whart. Com. Am. Law*, § 473.

² *Com. v. Hall*, 97 Mass. 570.

³ *Whart. Cr. Pl. & Pr.* § 602; *Gut v. State*, 9 Wall. 35.

⁴ *Stokes v. People*, 53 N. Y. 164; *Dowling v. State*, 13 Miss. 664.

⁵ *Murphy, in re*, 1 Woolw. 141; *State v. Doherty*, 60 Me. 501.

⁶ *Whart. Com. Am. Law*, §§ 474, 494.

⁷ See *Seip v. Storch*, 52 Penn. St. 210; *Journeay v. Gibson*, 56 Penn. St. 57; *Richter v. Cummings*, 60 Penn. St. 441. In *Calder v. Bull*, 3 Dall. 386-390, Judge Chase held that the constitutional limitation makes inoperative every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence. See *Yeaton v. U. S.*, 5 Cranch, 281; *Whitehurst v. State*, 43 Ind. 473.

⁸ *Hopt v. Utah*, 110 U. S. 711; *Sutton v. Fox*, 55 Wis. 531; *Whart. Crim. Ev.* § 360 a.

⁹ *Com. v. Wallace*, 7 Gray, 222; *State v. Thomas*, 47 Conn. 546; though see *State v. Beswick*, 13 R. I. 211; *People v. Lyon*, 27 Hun, 180.

¹⁰ *Com. v. Kelly*, 10 Cush. 69.

view unconstitutional,¹ and it has so been held, also, so far as concerns antecedent cases, of a statute doing away with the necessity of corroborating an accomplice.²

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

§ 31 b. As is elsewhere seen,⁴ the English rule is that the policy of the law precludes a person from seeking civil redress for a felonious injury to himself, if he has failed in his duty in endeavoring to bring the felon to justice. Whether this rule holds in this country has been much doubted;⁵ and neither here nor in England has it been held to apply to misdemeanors.⁶ In any view, the institution of a civil suit for redress for an injury is no bar to a criminal prosecution for the same offence, though in adjusting sentence in the criminal prosecution, the courts take into consideration payments made or amends rendered by the defendant in the civil proceedings.⁷ A prosecution for nuisance, for instance, as an offence against the public, may proceed concurrently with a suit by an individual for special damage incurred by the nuisance, supposing such special damage to have been sustained;⁸ and a civil suit and a criminal prosecution

¹ Whart. Com. Am. Law, §§ 494, 596; see 5 Crim. Law Mag. 325.

² State v. Bond, 4 Jones, L. (N. C.) 9.

³ Whart. Cr. Pl. & Pr. §§ 316, 500.

⁴ Whart. Cr. Pl. & Pr. § 453. But see Wells v. Abraham, L. R. 7 Q. B. 554.

⁵ See Nowlan v. Griffin, 68 Me. 235, and authorities there cited.

⁶ Ibid. Fissionington v. Hutchinson, 15 L. T. (N. S.) 390. But see Keir v. Leeman, 9 Q. B. 395.

⁷ People v. Stevens, 13 Wend. 341; and other cases cited, Whart. Cr. Pl. & Pr. § 454.

⁸ Jones v. Clay, 1 B. & P. 191; Benjamin v. Storr, L. R. 9 C. P. 400; U. S.

for the same assault and battery, may also proceed concurrently.¹ The same distinction has been applied *mutatis mutandis*, in cases of perjury.² The courts, however, by granting continuances, and ultimately shaping judgment, will endeavor to prevent an undue cumulation of process from working injustice.³ Nor will a civil suit be permitted to proceed when it is in any way tainted by an understanding that a criminal prosecution shall be compounded or stifled.⁴

v. New Bedford Bridge, 1 Woodb. & M. 401; Portland v. Richardson, 54 Me. 46; Abbott v. Mills, 3 Vt. 521; Francis v. Schoellkopf, 53 N. Y. 152.

¹ *Infra*, § 618; Jones v. Clay, 1 B. & P. 191.

² *Infra*, § 1324.

³ *Infra*, § 618. See R. v. Willmer, 15 Q. B. 625; Dudley Bank Co. v. Spittle, 1 Johns. & H. 14; Peddell v. Rutter, 8 C. & P. 337.

⁴ Whart. on Cont. §§ 483 *et seq.* As instances in which the cumula-

tion of civil and criminal procedures for the same wrong has been sanctioned, see Wellock v. Constantine, 2 H. & C. 146; State v. Boyle, 30 Me. 475; Drake v. Lowell, 13 Metc. 292; Gordon v. Hostetter, 37 N. Y. 99; Foster v. Com., 8 W. & S. 77; State v. Stein, 1 Rich. 189; Martin v. Martin, 25 Ala. 201; Wheatley v. Thorne, 23 Miss. 62; and see Lezynsky, *in re*, 16 Blatch. 9, and other cases cited Whart. Cr. Pl. & Pr. § 453.

CHAPTER III.

FITNESS OF OFFENDER TO COMMIT OFFENCE.

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1. PERSONS NON COMPOTES MENTIS.

§ 32. BOTH the legal and the psychological relations of persons

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

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

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

Old English rulings on insanity no longer authoritative.

Irresponsibility to be determined by exclusion rather than by inclusion.

¹ Whart. & St. Med. Jur. (4th ed.) vol. i. §§ 108 et seq.

To responsibility (imputability) there are, we must remember, two constituents: (1) capacity of intellectual discrimination; and (2) freedom of will. If there be either incapacity to distinguish between right and wrong as to the particular act, or delusion as to the act, or inability to do or refrain from doing the act, then there is no responsibility. The difficulty is practical. No matter what may be our speculative views as to the existence of conscience, or of freedom of action, we are obliged, when we determine responsibility, to affirm both.¹ The practical tests of capacity will be considered in the following sections.

Intellect and freedom of will necessary to responsibility.

1. Incapacity to distinguish between Right and Wrong.

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

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

¹ The controversy which divides theologians as well as metaphysicians as to the freedom of the will is not involved in the discussion in the text. It may be possible that, from a speculative point of vision, all acts are necessitated. With this, however, jurisprudence, which is a practical science, has nothing to do. There have been indeed leading jurists, such as Feuerbach, who have adopted the principle of necessity as a basis, and have invoked the fear of punishment as a counterweight to the temptation to crime; and Mr. Bain, as is elsewhere shown, has accepted the same view. See Whart. & St. Med. Jur. §§ 188, 540. But this, as is well said by a leading German author (Meyer, § 25), takes not only from jurisprudence, but from life, its moral dignity, making the former a mere marshalling of mechanisms, and the latter, a mere mechanism of necessities.

A series of interesting papers on insanity will be found in the proceedings of the New York Med. Legal Soc., N. Y. 1872.

² 1 Inst. 247; Bac. Abr. Idiot; Co. Litt. 247 a; 1 Russell on Cr., by Greaves, 13; 1 Hawk. c. 1, s. 3; 4 Bla. Com. 24; Collinson on Lunacy, 573; 673 (n); R. v. Oxford, 9 C. & P. 525; Burrow's Case, 1 Lewin, 238; R. v. Goode, 7 Ad. & El. 536; 67 Hans. Par. Deb. 728; Bowler's Case, Hadfield's Case, Ibid. 480; 27 How. St. Tr. 1282; R. v. Barton, 3 Cox C. C. 275; R. v. Offord, 5 C. & P. 168; R. v. Higginson, 1 C. & K. 129; R. v. Stokes, 3 C. & K. 185; R. v. Layton, 4 Cox C. C. 149; R. v. Vaughan, 1 Cox C. C. 80; U. S. v. Shults, 6 McLean, 121; Com. v. Rogers, 7 Met. 500; 7 Bost. L. R. 449; State v. Richards, 39 Conn. 591; Freeman v.

§ 35. To this effect is the answer of the fifteen judges of England to the questions propounded to them by the House of Lords in June, 1843. "The jury," they said, "ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."¹

In this country, whatever may have been the hesitancy as to the enunciation of other propositions to be hereafter stated, there has been none as to this. There has scarcely been a case where the defence of insanity has been taken, in which the jury have not been told that if the defendant was unable "to distinguish right from wrong," or to discern "that he was doing a wrong act," or was "incapable of knowing what he was about," or was "deprived of his understanding and memory," or was "incompetent mentally to know what is wrong as distinguished from what is right," he is irresponsible.² And it has been further properly held that when idiocy

People, 4 Denio, 9; Flanagan v. People, 52 N. Y. 467; People v. Sprague, 2 Parker C. R. 43; People v. Moett, 23 Hun, 60; People v. O'Connell, 62 How. N. Y. Pr. 436; State v. Spencer, 1 Zab. (21 N. J. L.) 196; Com. v. Mosler, 4 Barr, 264; Com. v. Farkin, 3 Penn. L. J. 480; Brown v. Com., 78 Penn. St. 122; State v. Gardiner, Wright's Ohio R. 392; Vance v. Com., 2 Va. C. 132; Dejarnette v. Com., 75 Va. 867; McAllister v. State, 17 Ala. 434; People v. Ferris, 55 Cal. 588; Dove v. State, 3 Heisk. 348; Stuart v. People, 1 Baxter, 178; State v. Redemeier, 8 Mo. Ap. 1; S. C., 71 Mo. 173; Hart v. State, 14 Neb. 572; Clark v. State, 8 Tex. Ap. 350; Pettigrew v. State, 12 Tex. Ap. 225.

¹ 1 Car. & Kir. 134; 8 Scott N. R. 595. See R. v. Layton, 4 Cox C. C. 149;

R. v. Barton, 3 Cox C. C. 275; 1 Bennett & Heard Lead. Cases, 942; R. v. Davies, 1 F. & F. 69; R. v. Watson, R. v. Edmunds, cited 1 Whart. & St. Med. Jur. § 166; State v. Huting, 21 Mo. 464.

² See, more particularly, U. S. v. Shultz, 6 McLean C. C. R. 121; U. S. v. Clarke, 2 Cranch C. C. R. 158; State v. Lawrence, 57 Me. 574; Com. v. Rogers, 7 Met. 500; Com. v. Heath, 11 Gray, 303; Freeman v. People, 4 Denio, 9; People v. Pine, 2 Barbour, 566; Willis v. People, 32 N. Y. 715; People v. Sprague, 2 Parker C. R. 43; Com. v. Mosler, 4 Barr, 264; Com. v. Farkin, 3 Penn. L. J. 480; Vance v. Com., 2 Virg. C. 132; Choice v. State, 31 Ga. 424; Anderson v. State, 42 Ga. 9 (1871); McAllister v. State, 17 Ala. 434; State v. Huting, 21 Mo. 464;

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

The New York Penal Code of 1882 provides as follows:—

"A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason as either, 1, not to know the nature and quality of the act he was doing; or 2, not to know that the act was wrong." It will be observed that this is an affirmation of the doctrine of the English judges above given.

§ 36. "Wrong," in the sense in which the term is here used, means moral wrong. A man may want the capacity to distinguish between the various shades of illegality which the law assigns to a particular act. This is no defence.

"Wrong" means moral wrong.

State v. Erb, 74 Mo. 190; State v. Katosky, 74 Mo. 247; People v. Coffmann, 24 Cal. 230.

It is in England that the right and wrong test is applied with the most exclusive rigor; and it is in England that attempts at its formal expansion have been most stoutly resisted. See 1 Whart. & St. Med. Jur. § 119. Yet, in deciding what is the amount of evidence necessary to prove incapacity to determine between right and wrong, the English judges have practically let in constructions almost as indulgent as those which have led American courts to expand the formal definition of insanity. Thus a married woman having killed her husband immediately after an apparent recovery from a disease (the result of childbirth) which caused a great loss of blood, and exhausted the vessels of the brain, and thus weakened its power, and so tended to produce insane delusions of the senses, which, while suffering under such disease, she complained of, and which, by her own account, had been renewed at the time of the act of homicide (although they were not such as

would lead to it); these facts were held by Erle, J., to be evidence from which a jury might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it. R. v. Law, 2 F. & F. 836. So where a married woman, fondly attached to her children, and apparently most happy in her family, had poisoned two of them with some evidence of deliberation and design, it was left to the jury by Wightman, J., as circumstances from which insanity could be inferred, that it appeared that there was insanity in her family; and that her demeanor before and after the act, although not wholly irrational, was strangely erratic and excited; and that from recent antecedents, and the presence of certain exciting causes of insanity, and her own account of her sensations, the medical men were of opinion that she was laboring under actual cerebral disease, and that she was in a paroxysm of insanity at the time of the act. R. v. Vyse, 3 F. & F. 247.

¹ State v. Richardson, 39 Conn. 591.

If, however, he was "laboring under such a defect of reason from disease of the mind as *not to know the nature and quality of the act he was doing*, or if he did know it, that he did not know he was doing wrong," he is held to be irresponsible on the ground of insanity.¹ And whatever we may think of the second of these alternatives, the first (that in italics) is broad enough to sustain a verdict of insanity in all cases in which the defendant's mental condition was such as to preclude him from having knowledge of the nature and character of the act.²

2. Insane Delusion.

§ 37. The answer of the English judges on the special topic of delusion is as follows: "The answer must of course depend on the nature of the delusion: but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example: if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." To the same effect speaks Chief Justice Shaw:³ "Monomania may operate as an excuse for a criminal act," when "the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."⁴

¹ See Sir J. F. Stephen's testimony before House of Commons, quoted in Whart. on Hom. § 573.

³ Com. v. Rogers, 7 Met. 500.

⁴ That this covers Hadfield's Case, see 2 Steph. Hist. Cr. Law, 160.

² See 2 Steph. Hist. Cr. Law, 166.

§ 38. So far as the law thus stated goes it has been recognized as authoritative in this country.¹ Even where there is no pretence of insanity, it has been held that if a man though in no danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defence;² and though this proposition is too broadly stated, as is remarked by Bronson, J., when commenting on it in a later case in New York,³ and should be qualified so as to make it necessary that there should be facts and circumstances existing which would lead the jury to believe that the defendant had reasonable ground (in proportion to his own lights) for his belief, yet with this qualification it is now generally received.⁴ And, indeed, after the general though tardy acquiescence in Selfridge's Case, where the same view was taken as early as 1805 by Chief Justice Parker, of Massachusetts, and after the almost literal incorporation of the leading distinctions of this case into the Revised Statutes of New York, as well as into the judicial system of most of the States, the point must be considered as finally at rest. Perhaps the doctrine, as laid down originally in Selfridge's Case, would have met with a much earlier acquiescence had not the supposed political bias of the court in that extraordi-

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

¹ The supposed contradictions of the authorities on this point have arisen from an attempt to reduce into an inflexible code opinions which, while relatively true in their particular connection, were not meant for general application. Thus, for instance, when a defendant in whom there is no pretence of mania or homicidal insanity claims to be exempt from punishment on the ground of incapacity to distinguish right from wrong, the court very properly tells the jury that the question for them to determine is, whether he labors under such incapacity or not. The error has been to seize such an expression as this as an arbitrary elementary dogma, and to insist on its application to all other cases. Or, take the converse, and suppose the defence is merely homicidal insanity. In such a case it would be proper to tell the jury that unless they believe the homicidal impulse to have been uncontrollable, they must convict; and yet nothing would be more unjust than to make this proposition, true in itself, a general rule to bear on such cases as idiocy. It is by confining the decisions of the courts to the particular state of facts from which they have been elicited that we can extract from the mass of apparently conflicting *dicta* the propositions given in the text.

² *Infra*, § 489; Grainger v. State, 5 Yerger, 459.

³ See citation *infra*, § 489, note.

⁴ See *infra*, § 488, *et seq.*; Whart. on Hom. § 490; Cunningham v. State, 56 Miss. 269.

nary trial, and the remarkable laxity shown in the framing of the bill of indictment and in the adjustment of bail, led to a deep-seated professional prejudice, which reached even such parts of the charge as were sound. With these cases may be classed that of *Levet*,¹ who was in bed and asleep in his house when his maid-servant, who had hired A., the deceased, to help her to do her work, thought as she was going to let A. out about midnight, that she heard thieves breaking open the door, upon which she ran up stairs to the defendant, her master, and informed him thereof. Suddenly aroused, he sprang from his bed, and ran down stairs with his sword drawn, the deceased hiding herself in the buttery lest she should be discovered. The defendant's wife, observing some person there, and not knowing her, but conceiving her to be a thief, cried out, "Here are they who would undo us;" and the defendant, in the paroxysm of the moment, dashed into the buttery, thrust his sword at the deceased and killed her.² The defendant was acquitted under the express instructions of the court, and the case has remained unquestioned for two hundred years, and in New York and Pennsylvania in particular, after very careful examination, has been solemnly reaffirmed.³ It is true that it has been held inadmissible to prove that the defendant was of weak intellect, particularly nervous, and inclined to fright.⁴ But if such nervous debility amounts to insanity, it is certainly a defence; and whether the proof reaches this point the question is for the jury, under the direction of the court, to decide.⁵

§ 39. In none of the cases which have just been noticed is the actual existence of danger an essential ingredient, and certainly, as the intentions of an assailant are incapable of positive ascertainment, such a danger can never be absolutely shown to exist. It is true that in cases to be hereafter noticed,⁶ *dicta* have been thrown out to the effect that the danger must be such as to alarm a reasonable man; but whenever the requisite state of facts has been presented, courts have not hesitated to say that the danger must be estimated, not by the jury's stand-

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

² See, for a fuller discussion of this case, *infra*, §§ 467, 495.

³ See cases cited *infra*, §§ 488 *et seq.*, note.

⁴ *Patterson v. People*, 46 Barb. 625; *State v. Shultz*, 25 Mo. 128.

⁵ Whart. Cr. Ev. § 68.

⁶ *Infra*, § 488.

ard, but by that of the defendant himself. Thus, an enlightened and learned judge in Pennsylvania, one who would be among the last to weaken any of the sanctions of human life, directed the jury to take into consideration "the relative characters, as individuals," of the deceased and the defendant, and, in determining whether the danger really was imminent or not, to inquire "whether the deceased was bold, strong, and of a violent and vindictive character, and the defendant much weaker, and of a timid disposition."¹ And though it may not be admissible to prove, by way of defence, that the deceased was of a barbarous and vindictive nature and character, unless this tend to explain the defendant's conduct under an apparently sudden and deadly attack,² yet threats uttered by the deceased, and expressions of hostile feeling of which the defendant was advised, may always be received as explaining the excited condition of the defendant's mind.³

§ 40. The principle which may be inferred from the cases is, that if by an insane delusion, or *depravation* of the reasoning faculty, the defendant insanely believes, either that an imagined evil is so intolerable as to make life-taking necessary or justifiable in order to avert it, or that while the evil is of a lesser grade, life-taking is an appropriate and just way of getting rid of it, he is entitled to such a verdict as will transfer him from the category of sane or insane criminals.⁴ But the delusion must be *mental not moral*.⁵

Delusion must be mental.

¹ *Infra*, § 491; Whart. Cr. Ev. §§ 69, 757. See *Com. v. Barnacle*, 134 Mass. 216, and cases cited *infra*, § 489.

² Whart. Cr. Ev. § 69.

³ *Com. v. Wilson*, 1 Gray, 337. See *infra*, § 489; Whart. Cr. Ev. § 757.

⁴ See *Wesley v. State*, 37 Miss. 327, where the position in the text is controverted at large.

⁵ *R. v. Burton*, 3 F. & F. 772; *R. v. Townley*, 3 F. & F. 839; *Willis v. People*, 5 Parker, C. R. 621.

That an insane delusion, as to the value or nature of human life, will have this effect, even though the party himself knows when committing the act that he is doing wrong, and is violating the laws of the land, is illus-

trated by Lord Erskine, in a well-known case: "Let me suppose," he said, "the character of an insane delusion consisted in the belief that some given person was any brute animal, or an inanimate being (and such cases have existed), and that upon the trial of such a lunatic for murder, you, being on your oaths, were convinced, upon the uncontradicted evidence of one hundred persons, that he believed the man he had destroyed to have been a potter's vessel; that it was quite impossible to doubt that fact, although to other intents and purposes he was sane—answering, reasoning, acting as men, not in any manner tainted with insanity, converse and reason and

§ 41. Partial insanity, however, is no defence, when the crime was not its immediate product. If the defendant was sane as to the crime, but insane on other topics, the insanity in the latter respect will not save him.¹ The crime must have been the result of a delusion. A de-

Partial insanity no defence as to crime not its product.

conduct themselves. Suppose, further, that he believed the man whom he destroyed, but whom he destroyed as a potter's vessel, to be the property of another, and that he had malice against such supposed person, and that he meant to injure him, knowing the act he was doing to be malicious and injurious; and that, in short, he had full knowledge of all principles of good and evil; yet would it be possible to convict such a person of murder, if, from the influence of the disease, he was ignorant of the relation in which he stood to the man he had destroyed, and was utterly unconscious that he had struck at the life of a human being?" Winslow on Plea of Insanity, 6.

Again, in a case which has more than once occurred within the walls of a lunatic asylum, a man fancies himself to be the Grand Lama or Alexander the Great, and supposes that his neighbor is brought before him for an invasion of his sovereignty, and he cuts off his head or throttles him. He knows he is doing wrong; perhaps, from a sense of guilt, he conceals the body; he may have a clear perception of the legal consequences of his act. In such a case, however, criminal responsibility, in the full sense of the term, does not exist. It was in conformity with this view, in a case where it was proved

that the defendant had taken the life of another under the notion that he was set about with a conspiracy to subject him to imprisonment and death, that Lord Lyndhurst told the jury that they might "acquit the prisoner on the ground of insanity, if he did not know, when he committed the act, what the effect of it was with reference to the crime of murder." What, therefore, he in fact decided was, that a man who, under an insane delusion, shoots another, is irresponsible when the act is the product of the delusion. Such, indeed, on general reasoning, must be held to be the law in this country, and such will it be held to be when any particular case arises which requires its application. *Ibid.*

In England this view has been recognized in several cases, notwithstanding the reluctance of the courts in that country to enlarge the boundaries of insane irresponsibility. Thus on the trial of Hadfield, who could distinguish between right and wrong, but who was under a delusion that it was his duty to offer himself as a sacrifice for his fellow-men, and that his shortest way of doing so was to kill the king, which he knew to be morally wrong, Lord Kenyon, on these facts being made out, advised a withdrawal of the prosecution. The same course

¹ *State v. Lawrence*, 57 Mo. 574; *Sindram v. People*, 88 N. Y. 196; *Com. v. Mosler*, 4 Barr. 264; *State v. Geddis*, 42 Iowa, 264; *State v. Mewherter*, 46 Iowa, 88; *Boswell v. State*, 63 Ala. 307; *State v. Huting*, 21 Mo. 464; *State v. Simms*, 71 Mo. 538; *Bovard v. State*, 30 Miss. 600; *State v. Gut*, 13 Minn. 341; *Hawe v. State*, 11 Neb. 537. Sir J. F. Stephen, *Cr. Law*, art. 27, takes the same ground.

lusion, therefore, that arises, not from an irrepressible and absolute chimera, but from imperfect information or imperfect reasoning which care and diligence could correct, does not excuse crime committed under its influence. It is consequently admissible for the prosecution to show that the delusion was the result of logical processes which though prejudiced were not abnormal.¹ But it does not follow from this that an insane delusion on a matter not directly at issue may not be part of a chain of evidence from which general insanity may be inferred.²

§ 42. Nor should it be forgotten that a delusion, to be a defence to an indictment for crime, must be non-negligent. When there is reason sufficient to correct a delusion, then a person continuing to nourish it, when there is opportunity given him for such correction, is responsible for the consequences.³

Delusion to exculpate must be non-negligent.

was followed by Chief Justice Tindal in *McNaughten's Case*, when, on a trial for shooting at Mr. Drummond, the private secretary of Sir Robert Peel, a similar delusion was proved. See, also, *R. v. Brixey*, and *R. v. Touchett*, cited in 1 Bennet & Heard's *Lead. Cases*, 99. It has also been held that on an indictment for maliciously setting fire to a building, in order to justify a jury in acquitting a prisoner on the ground of insanity, "they must believe that he did not know right from wrong; but if they find that the prisoner, when he did the act, was in such a state of mind that he was not conscious that the effect of it would be to injure any other person, this will amount to a general verdict of not guilty." *R. v. Davies*, 1 F. & F. 69—Crompton.

In the ecclesiastical courts, the existence of delusions or hallucination on material points has frequently been held to so far constitute insanity as to *pro tanto* destroy testamentary capacity. *Dew v. Clark*, 1 Addams Ecl.

R. 279; *Frere v. Peacocke*, 1 Robertson, 442; 1 Whart. & St. Med. Jur. §§ 34-60.

In this country, the legitimacy of such a defence in criminal cases has been in several instances specifically recognized. *U. S. v. Holmes*, 1 Chiff. 98; *Com. v. Rogers*, 7 Met. 500; *People v. Pine*, 2 Barbour, 566; *State v. Windsor*, 5 Harr. 512; *Com. v. Freth*, 3 Phil. Rep. 105; *Roberts v. State*, 3 Ga. 310; 1 Whart. & St. Med. Jur. § 134.

¹ *State v. Pike*, 49 N. H. 399.

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

² See 2 Steph. Hist. Cr. Law, 162.

³ See this argued at large, 1 Whart. & St. Med. Jur. § 137; and see *infra*, § 492.

3. Irresistible Impulse.

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

(a) "Irrepressible impulse" is not "moral insanity," supposing "moral insanity" to consist of insanity of the moral system, coexisting with mental sanity. "Moral insanity," as thus defined, has no support, as will hereafter be seen,¹ either in psychology or law.

(b) Nor is "irresistible impulse" convertible with passionate propensity or jealousy, no matter how strong, in persons not insane.²

§ 44. In other words, the "irresistible impulse" of the lunatic, which confers irresponsibility, is essentially distinct from the passion, however violent, of the sane, which does not confer irresponsibility.³ And when it is shown

¹ See this discussed in Whart. & St. Med. Jur. § 137.

² State v. Pike, 49 N. H. 399; Freeman v. People, 4 Denio, 5; Guetig v. State, 66 Ind. 94; State v. Strickley, 41 Iowa, 232. See 1 Whart. & St. Med. Jur. 144.

³ It should be remembered that passion is made irresistible by withdrawing from it the checks by which it can be resisted. The first and most important of these checks is conscience. The second is fear. If conscience be torpid, and if the law of the land say that the irresistible impulse of a sane person is a defence, then criminal impulses would be irresistible simply because they would be without resistance. We may notice this in the case of young children, who, when not deterred from wrong acts by conscience, are deterred by fear of punishment. Nor does this characteristic belong only to children or to persons of low grade of intelligence. It was frequently said of Napoleon I. and of General Jackson, that each knew when he could with impunity give way to

bursts of apparently irresistible rage; but that each knew when this rage was to be controlled. The cases are not infrequent in which men, presuming on the cowardice or feebleness of their intended victim, rush into violence which they would readily have restrained had they known that they would have received blow for blow. *Wer sich zum Schaf macht, is a German proverb, den frisst der Wolf*; or, as we may paraphrase it, government, by becoming a sheep, creates the social wolf. The State which declares that no irrepressible passion shall be punished evokes the irrepressible passion it exempts.

We should remember, also, that there is no means of determining what constitutes "irresistibility." In a case mentioned by Sir Henry Holland, of a patient who deplored to him an irresistible impulse to kill Mr. Canning, the catastrophe was avoided, so Sir H. Holland seems to think, by advising Mr. Canning to keep out of the way. If, however, the patient, instead of availing himself of his physician's aid

that a party charged with crime committed the crime under an insane irresistible impulse, then he is entitled to a verdict of insanity.¹

in this way, had sought it in another, and said, "I have this morbid desire; I cannot resist it; have me shut up;" this would have been at least equally effective in causing the impulse to miscarry. If a man has reason enough to deplore a criminal desire, and power enough to take steps to prevent its gratification, the law holds him responsible if he does not take such steps. This is recognized in those familiar cases in which it is held that where a man whose passions are aroused kills an assailant, the act is not excusable unless it appears that the accused had no means of retreat. If the "monomaniac" can retreat from his "monomania," it ceases to supply him with a defence.

But while "irresistible impulse," the mind being sane, is no defence to crime, yet violent passion is to be taken into account as a mitigating element, and the peculiar temperament of the offender is to be gauged for the purpose of estimating whether the provocation was such as to create hot blood, and whether there was adequate cooling time. A sane person may, from epilepsy, or from prior insanity, or from nervous or physical derangements, or from hereditary taint, be peculiarly susceptible to excitement; and as the law treats assaults committed in hot blood as of a lower grade than those committed deliberately, this excitability may properly be considered in determining whether the blood at the time was hot. That psychologically this varies with temperament is well known. The ordinary signs of passion (acceleration of arterial pulse,

congestive flushings, increased activity of secretions and excretions) are different with different patients. Hence epileptic, nervous, and cerebral diseases, and hereditary tendency, may be put in evidence to lower the grade of the offence, though they do not amount to insanity. In so doing we but follow the authorities, which declare that drunkenness, though no defence to crime, may be used to show that an assault was not deliberate. 1 Whart. & St. Med. Jur. § 144. See Com. v. Rogers, 7 Met. 500. *Infra*, §§ 47, 388.

Sir J. F. Stephen, in his work on English Criminal Law, p. 91, states the questions to be, "in popular language—*Was it his act? Could he help it? Did he know it was wrong?*" He goes on further to say: "It would be absurd to deny the possibility that such (irresistible) impulses may occur, or the fact that they have occurred, and have been acted on. Instances are also given in which the impulse was felt and was resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse in question was irresistible as well as unresisted. *If it were irresistible, the person accused is entitled to be acquitted, because the act was not voluntary and was not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all.*"

In Sir J. F. Stephen's Digest, art. 27, it is stated that a person is irresponsible when prevented (c) from controlling his own conduct, unless the absence of the power of control has

¹ R. v. Oxford, 9 C. & P. 545-6.

§ 45. In the enunciation of this conclusion there should be the strictest caution, and in the application of it the most jealous scru-

been produced by his own default. To this we have as a clue:—

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

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

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

Chief Justice Gibson, of the Supreme Court of Pennsylvania, sitting in 1846, with two of his associates in a court of oyer and terminer, after repudiating the doctrine that partial insanity excuses anything but its direct results, and sliding, in reference to such cases, into the "right and wrong" test, proceeded to charge the jury as follows: "But there is a *moral or homicidal* insanity, consisting of an irresistible inclination to kill or to commit some other particular offence." The charge in this case was oral, reported *memoriter* by the present writer, and but hastily revised by the judge himself, which may account for the want of literal exactness in some of its expressions. "There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived,

is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, *though aware of the heinous nature of the act*. The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature." *Com. v. Mosler*, 4 Barr, 266. This was reaffirmed in *Coyle v. Com.*, 100 Penn. St. 573. To the same effect, see *People v. Sprague*, 2 Park. C. R. 43; and rulings by Judge Ellis Lewis, cited in *Lewis Cr. Law*, 404; by Judge Edmunds (2 Am. Jour. of Ins.); by Judge Whiting (*Freeman's Trial—Pamph.*); and by the Supreme Court of Georgia (*Roberts v. State*, 3 Georgia, 310).

In 1862, the text with the cases given in it was cited with approval by the Supreme Court of Kentucky; and while irresistible impulse, as a distinct line of defence, was recognized, it was held that, to sustain it, "it must be known to exist in such violence as to

tiny. And in connection with it, it is always important to keep in mind the impressive language of Lord Brougham, when discussing the question before the House of Lords: "With respect to the point of a person being an accountable being, that was an accountable being to the law of the land, a great confusion had pervaded the minds of some persons whom he was indisposed to call reasoners, who considered accountability in its moral sense as mixing itself up with the only kind of accountableness with which they, as human legislators, had to do, or of which they could take cognizance. He could conceive of the case of a human being of a weakly constituted mind, who might by long brooding over real or fancied wrongs work up so perverted a feeling of hatred against an individual that danger might occur. He might not be deluded as to the actual existence of injuries he had received, but he might grievously and grossly exaggerate them, and they might so operate upon a weakly framed mind and intellect as to produce crime. He could conceive that the Maker of that man, in his infinite mercy, having regard to the object of his creation, might deem him not an object for punishment. But that man was accountable to human tribunals in a totally different sense. . . . He could conceive a person whom the Deity might not deem accountable but who might be perfectly accountable to human laws."

The conclusion we must reach, therefore, is, that an irresistible

render it impossible for the party to do otherwise than yield to its promptings." *Scott v. Com.*, 4 Metcalf, 227. See, also, *Smith v. Com.*, 1 Duvall, 224; *Kriel v. Com.*, 5 Bush, 362; *Hopps v. People*, 31 Ill. 385. To the same effect is the judgment of the Court of Common Pleas of Philadelphia, in 1868, *Com. v. Haskell*, 2 Brewster, 491 (see also *Com. v. Freeth*, 5 Clark, Pa. L. J. R. 455); of the Supreme Court of Indiana, in 1869; *Stevens v. State*, 31 Ind. 485 (see *Bradley v. State*, 31 Ind. 492); of Iowa, in 1868, *State v. Felter*, 25 Iowa, 67; of Illinois, in 1866, *Hopps v. People*, 31 Ill. 385; and of the Supreme Court of the United States, in 1872, *Life Ins. Co. v. Terry*, 15 Wal. 580. The doctrine, however, was em-

phatically repudiated in North Carolina, in 1861. *State v. Brandon*, 8 Jones, 463.

In conformity with the text may be cited a case in which Judge Story decided that a young woman, who in a violent impulse in puerperal fever threw her child overboard, though at the time perfectly conscious of the enormity of the act, was entitled to an acquittal. *U. S. v. Hewson*, 7 Bost. Law Rep. 361.

¹ Hans. Par. Deb. lxxvii. 728. In the speech as reported by Hansard, Lord Brougham bases the distinction in the text on the Preventive theory of punishability, heretofore discussed. This, however, is not essential to the validity of his conclusion.

homicidal impulse in an insane person is a good defence, though such insane person was able to distinguish between right and wrong. With a sane person, however, it is not a defence, as the law makes all sane persons responsible for their impulses.¹ But mere intellec-

¹ See, as substantiating this conclusion, *Flanagan v. People*, 52 N. Y. 467; *People v. Coleman*, 1 N. Y. Cr. Rep. 1; *Walker v. People*, 88 N. Y. 81; *State v. Spencer* (1 Zab.), 21 N. J. L. 196; *Brown v. Com.*, 78 Penn. St. 122; *Coyle v. Com.*, 100 Penn. St. 593; *Dejarnette v. Com.*, 75 Va. 869; *State v. Stickley*, 41 Iowa, 232; *State v. Mewherter*, 46 Iowa, 85; *Wright v. People*, 4 Neb. 407; *Hart v. State*, 14 Neb. 572; *Cunningham v. State*, 56 Miss. 269; *People v. McDonell*, 47 Cal. 134; *People v. Horn*, 62 Cal. 120; and authorities cited under next section. *Cf. Com. v. Taylor*, 41 Leg. Int. 488.

In *Blackburn v. State*, 23 Ohio St. 165 (decided in 1872), the proper questions to be submitted to the jury were declared to be: "Was the accused a free agent in forming the purpose to kill? Was he at the time capable of judging whether that act was right or wrong? And did he know at the time that it was an offence against the laws of God and man?"

The statement on this point of Cockburn C. J., given in the Appendix to the Report of the Committee of the House of Commons on the Homicide Amendment Bill, is of peculiar importance. It should be remembered that in the United States the question comes to us disembarassed by the rulings of the House of Lords, which in England can only be modified by legislative authority:—

"As the law, as expounded by the judges in the House of Lords, now stands, it is only when mental disease produces incapacity to distinguish between right and wrong that immunity from the penal consequences of crime is admitted. The present bill intro-

duces a new element, the absence of the power of self-control.

"I concur most cordially in the proposed alteration of the law, having been always strongly of opinion, that, as the pathology of insanity abundantly establishes, *there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse, the power of self-control, when destroyed or suspended by mental disease, becomes, I think, an essential element of responsibility.* But while it would be desirable to establish the law on this basis, it certainly is not desirable so to establish it as to homicide, while in the closely cognate case of the offence doing grievous bodily harm, a different law would obtain. For this strange anomaly would arise: if the grievous bodily harm ended in death, there would be one test of insanity as created by this bill; if it did not, there would be another and a different one as established by the general law. This comes from the law relating to homicide being dealt with by itself, instead of being treated as part of the entire department of the law to which it belongs." An error of punctuation probably exists in the passage in italics, which is here copied accurately from the printed report. The sense, however, is in accordance with the position in the text: that *the knowledge that an act is wrong does not prevent an irresistible impulse from being a defence, when the actor is at the time insane.* See, also, *Willis v. People*, 5 Parker, C. R. 620; and also *Andrew's Case*, 1 Whart. & St. Med. Jur., § 162.

"No act is a crime if the person who

tual power to plan and premeditate, does not constitute sanity.¹ There may be such power, and yet, from an incapacity to form a right view of the relations of the act, the party may be insane.²

As insane persons, in the sense just stated, may be mentioned, persons afflicted with idiocy or amentia, the former being congenital, the latter consisting of a loss of mental power;³ and mania.⁴

4. "Moral Insanity."

§ 46. "Moral insanity," in its distinctive technical sense, is a supposed insanity of the moral system coexisting with mental sanity.⁵ It is therefore to be distinguished from "insane irresistible impulse," which has just been noticed, in two respects: (1) "Irresistible impulse" is only a valid defence when the party offering it is mentally deranged, while in "moral insanity," by its very terms, the patient is always mentally sane; and (2) "Irresistible impulse" is a special propensity impelling to a particular bad act, while in "moral insanity" he is impelled to all sorts of badness. It is enough for the present to say that, as is abundantly shown elsewhere,⁶ the position that "moral insanity," as thus defined, exists, is now almost without a defender among specialists in mental diseases. That it is repudiated by the courts of England and of the United States there is an almost unbroken current of authority to show. Carefully and conscientiously has the defence, by a vast number of independent courts, been scanned; and in almost every instance the conclusion is that the theory on which it rests is without support either in jurisprudence or psychology.⁷

does it is, at the time when it is done, prevented either by defective mental power, or by any disease affecting his mind, from controlling his own conduct, unless the absence of the power of control has been caused by his own default." 1 Steph. Hist. Cr. L. 168.

¹ *Bennett v. State* (Wis.), 4 Cr. Law Mag. 378.

² 1 Whart. & St. Med. J., §§ 531-537.

³ *R. v. Shaw*, L. R. 1 C. C. 145; *R. v. Southey*, 4 F. & F. 864; *Vance v. Com.*, 2 Va. Ca., 132; *McAllister v. State*, 17 Ala. 434.

⁴ *U. S. v. Hewson*, 7 Bost. L. R. 361.

⁵ See 28 Alb. L. J. 40. I have discussed this question in a note to *Guiteau's Case*, 10 Fed. Rep. 161 *et seq.*

⁶ 1 Whart. & St. Med. J. §§ 531-537.

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

Shortly after *Townley's Case*, on a trial for murder, before Erie, J., the

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

§ 47. The old common law authorities took the ground that sanity and insanity are states as clearly and absolutely distinguishable as are coverture and non-coverture; and that men are either wholly sane, so as to be wholly responsible, or wholly insane, so as to be wholly irresponsible. This principle, however, is now abandoned

Mental
disturb-
ance ad-
missible to
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malice.

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

As American authorities may be cited *U. S. v. Schults*, 6 McLean, 121; *U. S. v. Holmes*, 1 Clifford, 98; *U. S. v. Guiteau*, 1 Mackey, 498; 10 Fed. Rep. 161; *State v. Lawrence*, 57 Me. 574; *Com. v. Rogers*, 7 Met. 500; *Com. v. Heath*, 11 Gray, 303; *State v. Richards*, 39 Conn. 591; *Freeman v. People*, 4 Denio, 9; *Shorter v. People*, 2 Comst. 193; *McFarland's Case*, 8 Abbott Prac. Cas. N. S. 57; *Flanagan v. People*, 52 N. Y. 467; *State v. Spencer*, 21 N. J. L. (1 Zab.) 196; *State v. Windsor*, 5 Harring. 512; *Vance v. Com.*, 2 Va. Cases, 132; *State v. Brandon*, 8 Jones, 463; *Boswell v. State*, 63 Ala. 307; *State v. Gardiner*, Wright, 392; *Farrer v. State*, 2 Ohio St. R. 54; *Finley v. State*, 38 Mich. 482; *People v. Coff-*

man, 24 Cal. 230; *People v. M'Donell*, 47 Cal. 134; *State v. Coleman*, 20 S. C. 392; *Choice v. State*, 31 Ga. 424; *Spann v. State*, 47 Ga. 553. These cases, though in various terms, unite substantially in declaring, as the proposition is stated by an able jurist, Judge Thurman (*Farrer v. State*, 2 Ohio St. 54), "that there is no authority for holding that mere moral insanity, as it is sometimes called, exonerates from responsibility."

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

A partial exception is to be found in some eccentric opinions delivered in the Court of Appeals of Kentucky; opinions, however, which do not appear to have been sustained by a majority of the court in which they were pronounced. *Smith v. Com.*, 1 Duvall, 224; *St. Louis Mut. Ins. Co. v. Graves*, 6 Bush, 268. See 1 Whart. & St. Med. Jur. §§ 175-8, where these cases are

as based on a psychological untruth. There are many degrees both of sanity and insanity; and the two states approach each other in

discussed. As exhibiting a view diverging from the text, see *Anderson v. State*, 43 Conn. 514.

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

First, as to the consistency of this doctrine with the safety of the community, which is an incidental object of penal law.

In the mediæval jurisprudence, the clergy were exempted from the operation of the secular law. Great evils resulted from this; the authority of the civil arm was weakened, and the clergy themselves were demoralized. But for this position, monstrous as it was, there was some faint excuse at the time it was introduced. The clergy, it was said, were good men, and they were subject to ecclesiastical discipline, which was prompt, exhaustive, and severe. But the proposition now is to exempt from the operation of penal law a class of men whose plea for this distinction is that they are eminently bad, and that there is no other discipline to which they can be subjected. If they are mentally insane—if they are destitute of reason—then there is good ground for penal irresponsibility. But if they are not mentally insane—if they are possessed of reason—if their only plea is their excessive badness—then this badness will be intensified, and rendered all the more turbulent and desperate, by the very intellectual sanity which it is conceded that the actors possess, and which will readily instruct them that they are privileged by the State to commit irresponsibly any villainy they may plan. If they were destitute of reason, their irresponsibility would be a less grievance. They would be like the savage

to whom powder is given, but who does not know how to contrive means for using it to destroy others. But being possessed of reason, they are able to use their irresponsibility as an immunity for every crime. And what is to be done with them? Confinement in a lunatic asylum, is the answer. But such confinement is difficult: (1) from the skill with which parties as intelligent as the morally insane are conceded to be can create counter-proof, and can, when there is an object for it, suppress or conceal passion; (2) from the expense and trouble which would attend the incarceration of so large a number of fractious patients as is here supposed; (3) from the absence of tests to determine when the imprisonment, if ever, is to be brought to a close; and (4) from the inability to discipline them, which is involved in the hypothesis of their non-responsibility, for if they cannot be punished in prison, they cannot be punished in an asylum. But can such persons be justly, on this hypothesis, incarcerated? How does incarceration differ from imprisonment? And what is imprisonment but punishment? And what would such punishment be but penal discipline imposed compulsorily by the law? The difference between such penal discipline, and that which the law now applies on conviction of a crime, is simply, that in the first case the offender is tried for being generally bad; in the second, he is tried for a specific bad act. But he cannot be tried for being generally bad unless he is responsible. We are therefore reduced to the dilemma either of allowing such persons to roam at large, or of confining them, which assumes their responsibility.

Again, it is the duty of the State to

imperceptible gradations, melting into each other, to adopt an illustration borrowed by Lord Penzance from Burke, as day melts into night.¹ There may, therefore, be phases of mind which cannot

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

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

¹ "We use no mere metaphor when we say that the intellect passes through innumerable gradations from the full glow of noonday to the depth of midnight. He who attempts to place a limit to the twilight on either side, attempting to fix a limit at which reason either suddenly ceases or suddenly begins, is in the quandary of those who put to the stoical philosophers the question what constitutes a heap of corn, and what a bald head, and who were brought at last to confess that a single grain made a heap of corn, and pulling out a single hair made a bald head." Ideler, *Gericht. Psychol.* pp. 45-51.

be positively spoken of as either sane or insane. Are persons in one of these phases to be acquitted of crime? If so, they would constitute a class not only dangerous but uncontrollable; for they would not be sane enough to be convicted as felons, and yet would not be insane enough to be confined as lunatics. Are they to be convicted, when charged with offences involving malice and premeditation? At this justice would revolt, for at the time of the commission of the guilty act the defendant, as it could readily be shown, was not in a condition of mind coolly to premeditate, or accurately to contemplate, a malicious design. Under such circumstances the better course is to find the defendant guilty of the offence in a diminished grade, when the law establishes such grade; or when it does not, to inflict on him modified punishment.¹ Nor is this view inconsistent with the analogies of the law. Such considerations (*i. e.*, those of the defendant's mental constitution) are invoked whenever we have to determine whether a party assailed acted *bond fide* when resorting to violent measures of self-defence. So do we gauge responsibility in cases of sleep-drunkenness; so do we estimate the conduct of persons when roused by any great political or religious excitement;² and so do we hold in cases of intoxication, when called upon to measure deliberation and intent.³ If, in cases where homicide has been committed during an excitement which the defendant's peculiar psychical state has abnormally protracted and intensified, a verdict of murder in the second degree, or of manslaughter, be given in accordance with these views, a result is reached which not only harmonizes with sound principle, but is far more consistent with the public idea of justice than would be a verdict either of not guilty, or of murder in the first degree.⁴ Sir J. F. Stephen lends his authority to the same view. "Partial insanity," he says, "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

¹ See 1 Whart. & St. Med. Jur. §§ 126, 181, 200.

² *Infra*, §§ 388, 389, 491; 1 Whart. & St. Med. Jur. § 181.

³ See *Roberts v. People*, 19 Mich. 401. *Infra*, §§ 388-9, 491.

⁴ See, as illustrating this, *McGregor's Case*, 23 Am. Jour. Ins. 549.

prisoner must be acquitted; but if he would have had no right to break the supposed jar, he might be convicted of an unlawful and malicious wounding,"¹ or, in case of the death of the party so wounded, the defendant might be found guilty of manslaughter,² on the ground of negligent homicide.

It is true, that whether a man is responsible can be answered only by yes or no. But while on the general question of amenability for crime there can be no grades of responsibility, it is otherwise when we view the question objectively, as involving responsibility for crimes of which there are several grades. A man may have capacity, for instance, to be responsible for manslaughter, but not to be responsible for murder; for he may have capacity enough for a blind, passionate killing, but not for a killing that is deliberate and intelligent. In this sense we may hold that there may be modified guilt. Responsibility itself is capable of no modifications. But certain phases of guilt require higher capacity than do other phases of guilt.³ And there may be properly a verdict of murder in the second degree in cases where there was an intent to kill, and yet, from mental disturbance, this intent was not specific.⁴

¹ Stephen's Cr. Law (1863), p. 92.

² In *Jones v. Com.*, 75 Penn. St. 403, Agnew, C. J., said: "Want of intelligence is not the only defect to moderate the degree of offence; but with intelligence there may be an absence of power to determine properly the true nature and character of the act, its effects upon the subject, and the true responsibility of the actor: a power necessary to control the impulses of the mind, and prevent the execution of the thought which possesses it. In other words, it is the absence of that self-determining power which in a sane mind renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses. When this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influences, it cannot be said truthfully that the mind is fully conscious of its own purposes, and

deliberates or premeditates in the sense of the act describing murder in the first degree. We must, however, distinguish this defective frame of mind from that wickedness of heart which drives the murderer on to the commission of his crime, reckless of consequences. Evil passions often seem to tear up reason by the root, and urge on to murder with heedless rage. But they are the outpourings of a wicked nature, not of an unsound or disabled mind."

³ See Meyer, § 25. Berner, § 125, says, "die Verfechter der verminderten Zurechnungsfähigkeit wollen Richtiges in unrichtigerform."

⁴ *Jones v. Com.*, *ut sup.*; *Green v. Com.*, 83 Penn. St. 75 (*infra*, §§ 380, 455); *Pistorius v. Com.*, 84 Penn. St. 488; *Willis v. Com.*, 32 Grat. 928. In Indiana the doctrine of the text is not accepted; but the same result is reached by authorizing the defendant to

6. Intoxication.

§ 48. *Settled insanity, produced by intoxication, affects responsibility in the same way as insanity produced by any other cause.*¹ If a man who, laboring under *delirium tremens*, kills another, be made responsible, there is

Persons under insanity produced by intoxication may be irresponsible.

scarcely any species of insanity which on like principles would not be subjected to the severest penalties of criminal law. A man laboring under this species of delirium may be as utterly insane as a man laboring under any other kind of delirium. The only ground for assigning a higher degree of responsibility in cases of *delirium tremens* is the fact that in the latter case the delirious person has subjected himself voluntarily to this calamity. But to this the answer is threefold: (1) That *delirium tremens* is not the intended result of drink in the same way that drunkenness is; (2) That there is no possibility that *delirium tremens* will be voluntarily generated in order to afford a cloak for a particular crime; (3) That so far as original cause is concerned, *delirium tremens* is not peculiar in being the offspring of indiscretion or guilt, for such is the case with many other kinds of insanity. These points scarcely need to be expanded. The fact is, *delirium tremens* runs the same course with almost every other species of insanity known in the criminal courts. It is the result, like many other manias, of prior vicious indulgences; but it differs from intoxication in being shunned, rather than courted by the patient, and in being incapable of voluntary assumption for the purpose of covering guilt. Hence the conclusion above given has been repeatedly affirmed.² And expressly to this point is a case where Judge

put "his mental condition" in evidence for the purpose of explaining his intent. *Sage v. State*, 89 Ind. 141.

¹ See, on this topic, Whart. & St. Med. Jur. 4th ed. § 204; article by Mr. Lawson in Am. Law Reg. Ap. 1884, pp. 217 *et seq.*

² 1 Hale, 32; 4 Black. Com. 26; R. v. Thomas, 7 C. & P. 817; R. v. Meakin, 7 C. & P. 237; *Reunie's Case*, 1 Lew. C. C. 76; R. v. Davis, 14 Cox C. C. 563; U. S. v. Drew, 5 Mason, 28; U. S. v. Forbes, Crabbe R. 558; U. S. v.

Clarke, 2 Cranch C. C. 158; *Flanigan v. People*, 86 N. Y. 554; *Com. v. Green*, 1 Ashm. 289; *State v. Dillahun*, 3 Harring. 551; *Roberts v. People*, 19 Mich. 401; *Macconnehey v. State*, 5 Ohio St. 77; *Boswell v. Com.*, 20 Grat. 860; *Smith v. Com.*, 1 Duvall, 224; *Bales v. State*, 3 W. Va. 685; *Bailey v. State*, 26 Ind. 422; *Cluck v. State*, 40 Ind. 263; *Fisher v. State*, 64 Ind. 435; *Bennett v. State*, Mart. & Yerg. 133; *Cornwell v. State*, Ibid. 147; *Beasley v. State*, 50 Ala. 149; *Carter*

Curtis, of the United States Supreme Court, told the jury "that if the defendant was so far insane as not to know the nature of the act, nor whether it was wrong or not, he is not punishable, although such *delirium tremens* is produced by the voluntary use of intoxicating liquors."¹ Drunkenness, also, when so complete as to stupefy, may be a defence to a prosecution for any offence with the commission of which stupefaction is inconsistent.² And permanent insanity produced by drunkenness stands on the same footing as permanent insanity of any other type.³

§ 49. *Temporary insanity, produced immediately by intoxication, does not destroy responsibility, where the patient, when sane and responsible, made himself voluntarily intoxicated.*⁴ It may, as we will presently see, lower the grade of guilt in cases in which the defendant did not previously make himself drunk with the crime in view. But it does not, when voluntary, and when not amounting to insanity as above stated, destroy responsibility. This conclusion is sustained not only by reason but by policy. There could rarely be a conviction for homicide if drunkenness avoided responsibility.⁵ Few violent crimes would probably be attempted without resorting to liquor

v. State, 12 Tex. 500; Erwin v. State, 10 Tex. Ap. 700; Schlenker v. State, 9 Neb. 241; and see Stuart v. State, 57 Tenn. 178, where the right and wrong test was applied. Cf. People v. Cummins, 47 Mich. 334.

¹ U. S. v. McGlue, 1 Curtis C. C. 1.

When *delirium tremens* is set up as a defence, the prisoner must show that he was under a delirium at the time the act was perpetrated, there being no presumption of its existence from antecedent fits from which he has recovered. State v. Sewell, 3 Jones Law (N. C.), 245. See, as to presumption of continuance of insanity, Whart. Cr. Ev. § 730.

Where it is shown that the defendant's mind has been so far destroyed by long-continued habits of drunkenness as to render him mentally incompetent for the intelligent commission

of crime, this mental incapacity is held a sufficient defence. Bailey v. State, 26 Ind. 422; Cluck v. State, 40 Ind. 263. As to "dipsomania," see Whart. & St. Med. Jur. § 639; State v. Pike, 49 N. H. 399; People v. Blake, cited *infra*, § 53.

² *Infra*, § 54.

³ State v. Robinson, 20 W. Va. 713.

⁴ That when the defendant was made drunk by the artifice of another he is to be treated as if *pro tanto* insane, see Bartholomew v. People, 104 Ill. 605. In Smith v. Com., 1 Duvall, 224, Judge Robertson held that temporary drunkenness may in respect to responsibility be treated as temporary insanity; but this was repudiated in Shannahan v. Com., 8 Bush, 463.

⁵ See 1 Whart. & St. Med. Jur. §§ 207-10.

both as a stimulant and as a shield:¹ and the very fact, therefore, which shows peculiar malignant deliberation, would be interposed as an excuse. The authorities, however, concur in rejecting this position. Sir E. Coke tells us: "As for a drunkard who is *voluntarius daemon*, he hath, as has been said, no privilege thereby, but what hurt or ill soever he doth his drunkenness doth aggravate it. *Omne crimen ebrietas et incendit et detegit.*"² And though casual drunkenness cannot now be said to aggravate a crime in a judicial sense,³ yet it is settled that it forms no defence to the fact of guilt. Thus Judge Story, in a case already cited, after noticing that insanity, as a general rule, produces irresponsibility, went on to say: "An exception is, when the crime is committed by a party while in a fit of intoxication, the law allowing not a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime." Lord Hale said: "The third sort of madness is that which is *dementia affectata*, namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perfect but temporary frenzy; but by the laws of England such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses."⁴ And so Parke, B., said to a jury in 1837: "I must also tell you, that if a man makes himself voluntarily drunk it is no excuse for any crime he may commit whilst he is so; he takes the consequences of his own voluntary act, or most crimes would go unpunished."⁵ And Alderson, B., said in 1836: "If a man chooses to get drunk, it is his own voluntary act; it is very different from madness, which is not caused by any act of the person. That voluntary species of madness which is in a party's power to abstain from he must answer for."⁶ In harmony with this is the unbroken current of English authority.⁷

§ 50. In this country the same position has been taken with marked uniformity, it being held that voluntary drunkenness not

¹ See Nevling v. Com., 98 Penn. St. 323; State v. Robinson, 20 W. Va. 713. Gabbett C. L. 9; and see a learned article in 6 Law Rep. (N. S.) 554.

² R. v. Thomas, 7 C. & P. 817.

³ Co. Litt. 247 a.

⁴ See McIntyre v. People, 38 Ill. 515; Ferrell v. State, 43 Tex. 503.

⁵ 1 Hale, 7; 4 Black. Com. 26; 1

⁶ R. v. Meakin, 7 C. & P. 297.

⁷ Burrow's Case, 1 Lewin, 75; Rennie's Case, 1 Lewin, 76; R. v. Ayes, R. & R. 165; R. v. Gamlen, 1 F. & F. 60; 1 Russell on Crimes, 8.

amounting to settled insanity is no defence to the *factum* of guilt;¹ the only point about which there has been any fluctuation being the extent to which evidence of drunkenness is receivable to determine the exactness of the intent, or the degree of deliberation.

§ 51. When a particular condition of mind is requisite to constitute an offence, intoxication may be proved to explain such condition. Great caution is necessary in the application of this doctrine to prosecutions for homicides and other violent crimes, for, as has already been remarked, there are few cases of premeditated violence in which the defendant does not previously nerve himself for the encounter by liquor, and there would in future be none at all, if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, is, not that the fact of liquor having been taken affects the issue when the offence is shown to have been premeditated,² but that when there is no evidence of premeditation *aliunde*, and the defendant is proved at the time of the occurrence to have been in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show that the defendant was at the time in hot blood, making him peculiarly susceptible to supposed insult, which would

¹ U. S. v. Clarke, 2 Cranch C. C. 158; U. S. v. McGhie, 1 Curtis C. C. 1; U. S. v. Cornell, 2 Mason, 91; U. S. v. Drew, 5 Mason, 28; U. S. v. Forbes, Crabbe, 558; Com. v. Hawkins, 3 Gray, 463; Com. v. Malone, 114 Mass. 295; Kenney v. People, 31 N.Y. 330; People v. Robinson, 1 Parker C. R. 649; People v. Hammill, 2 Parker C. R. 223; People v. Robinson, *Ibid.* 235; People v. Pine, 2 Barb. 566; Resp. v. Weidle, 2 Dall. 88; McGinnis v. Com., 102 Penn. St. 66; Boswell v. Com., 20 Grat. 860; Gillooley v. State, 58 Ind. 182; Smurr v. State, 88 Ind. 504; Sanders v. State, 94 Ind. 147; Upstone v. People, 109 Ill. ; State v. White, 14 Kans. 538; State v. Welch, 21 Minn. 22; State v. John, 8 Ired. 330; State v. Stark, 1 Strobb. 479; State v. Paulk, 18 S. C. 514; Mercer v. State, 17 Ga. 146; Golden v. State, 25 Ga. 527; Choice v. State, 31 Ga. 424; Estes v. State, 55 Ga. 30; Marshall v. State, 59 Ga. 154; Hanvey v. State, 68 Ga. 612; State v. Bullock, 13 Ala. 413; Ford v. State, 71 Ala. 385; Tidwell v. State, 70 Ala. 33; State v. Coleman, 27 La. An. 691; Kelly v. State, 3 Sm. & Mar. 518; Schaller v. State, 14 Mo. 502; State v. Harlow, 21 Mo. 446; State v. Dearing, 65 Mo. 530; Smith v. Com., 1 Duvall, 224; Gollither v. Com., 2 Duvall, 163; Cornwall v. State, Mar. & Yerg. 147; Swan v. State, 4 Humph. 136; Pirtle v. State, 9 Humph. 663; Casat v. State, 41 Ark. 511; Carter v. State, 12 Tex. 509; Scott v. State, 12 Tex. Ap. 31; People v. Lewis, 36 Cal. 531.

² See *infra*, §§ 54, 389.

reduce the offence at common law to manslaughter,¹ or that he was not at the time capable of forming a deliberate or specific intent, which, as will be seen in the next section, affects the question of statutory degree.² "If the existence of a specific intention," says Sir J. F. Stephen,³ "is essential to the commission of a crime, the fact that an offender was drunk when he did the act which, if coupled with that intention, would constitute such crime, should be taken into account by the jury in deciding whether he had that intention."⁴

§ 52. Hence drunkenness is material under the statutes resolving murder into two degrees, in which the distinguishing test is a spe-

¹ See cases discussed *infra*, §§ 54, 389; and see R. v. Gamlen, 1 F. & F. 1858; People v. Rogers, 18 N. Y. 9; People v. Cassiano, 30 Hun, 388; Jones v. Com., 75 Penn. St. 403; Keenan v. Com., 44 Penn. St. 55; State v. Garvey, 11 Minn. 154; State v. McCants, 1 Speers, 382; Jones v. State, 29 Ga. 594; Malone v. State, 49 Ga. 210; Moon v. State, 68 Ga. 687; Haile v. State, 11 Humph. 154; Tidwell v. State, 70 Ala. 33; Dawson v. State, 16 Ind. 428; Cluck v. State, 40 Ind. 263; McIntyre v. People, 38 Ill. 514; Cartwright v. State, 8 Lea, 376; People v. Williams, 43 Cal. 344; State v. Trivas, 32 La. An. 1086; Ferrell v. State, 43 Tex. 503; Wenz v. State, 1 Tex. Ap. 36; Jeffries v. State, 9 Tex. Ap. 598.

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

So on a trial for murder, the defendant's counsel requested the court to charge "that if it appeared from the evidence that the condition of the prisoner from intoxication was such as to show that there was no motive or intention to commit the crime of murder, that the jury should find a verdict of manslaughter." The court refused, and it was held that the charge should have been given, as the question of intent was material to the degree of the crime. Rogers v. People, 3 Parker C. R. (N. Y.) 632; S. C., in error, 18 N. Y. 9. For advanced doctrine as to same point, see Smith v. Com., 1 Duvall, 224; Blimm v. Com., 7 Bush (Ky.), 320; which, however, are greatly qualified in Shannahan v. Com., 8 Bush, 463. See State v. Edwards, 71 Mo. 312. That this excuse is to be received with "great caution," see People v. Ferris, 55 Cal. 588.

² R. v. Moore, 3 C. & K. 319; R. v. Monkhouse, 4 Cox C. C. 55; U. S. v. Bowen, 4 Cranch C. C. 604; State v. Maxwell, 42 Iowa, 208; State v. Donovan, 61 Iowa, 369; State v. Trivas, 32 La. An. 1086.

³ Dig. Crim. Law, art. 28.

⁴ To this is cited R. v. Cruse, 8 C. & P. 541. This view is affirmed in Hopt v. People, 104 U. S. 631.

cific intent to take life.¹ In the Philadelphia riot cases of 1844, where it was shown that bodies of men were inflamed by sectarian and local prejudices, and blinded by a wild apprehension of danger to such an extent as to make them incapable of discrimination, or of precise or specific purpose, it was held that they could not be considered as guilty of that species of "wilful and deliberate" murder which constitutes murder in the first degree.² Analogous to this is the case of the drunkard, who in a fight slays an antagonist without any prior premeditation. In his intoxication he may be incapable of such mental action as the term "premeditated" describes, or of forming a "specific intent" to take life. And yet, at the same time, at common law, the offence might, strictly speaking, fall under the head of murder, for it would possess the incident of malice, would be independent of that of provocation, and would be prompted by a determination to inflict great bodily hurt. Under such circumstances the offence may be ranked as murder in the second degree, and this has repeatedly been decided by the courts.³ And if no malice be shown, the offence would be manslaughter, at common law.⁴

¹ Com v. Dorsey, 103 Mass. 412.

"When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."—Gray, J. Hopt v. People, 104 U. S. 631.

² Whart. on Hom. § 191.

³ Hopt v. People, 104 U. S. 631; State v. Johnson, 41 Conn. 584; S. C., 40 Conn. 136; People v. Batting, 49 How. Pr. 392; Penns. v. McFall, Add. 255; Com. v. Haggerty, Lewis, C. L. 403; Kelly v. Com., 1 Grant, 484; Jones v. Com., 75 Penn. St. 403; Com. v. Hart, 2 Brewst. 546; Com. v. Platt, 11 Phila. 421; Com. v. Jones, 1 Leigh, 598; Boswell v. Com., 20 Grat. 860; Rafferty v. People, 66 Ill. 118; Smith

v. State, 4 Neb. 277; Jones v. State, 29 Ga. 594; Curry v. Com., 2 Bush, 67; Swan v. State, 4 Humph. 136; Pirtle v. State, 9 Humph. 663; Lancaster v. State, 2 Lea, 575; Haile v. State, 11 Humph. 154; State v. Bullock, 13 Ala. 413; Kelly v. State, 3 Sm. & M. 518; State v. Harlow, 21 Mo. 446; State v. White, 14 Kans. 538; People v. Belencia, 21 Cal. 544; People v. Williams, 43 Cal. 344; State v. Trivas, 32 La. An. 1086. See *infra*, § 389. See, however, Estes v. State, 55 Ga. 30.

The question left to the jury in such cases is, whether the defendant's mental condition was such that he was capable of a specific intent to take life. In Missouri, the rule in the text is not accepted. State v. Edwards, 71 Mo. 324; State v. Dearing, 65 Mo. 530; nor in Vermont. State v. Tatro, 50 Vt. 483.

⁴ Hopt v. People, 104 U. S. 631.

§ 53. The same considerations apply to the question of specific intent in other relations.¹ Thus in an Ohio case it was properly held, that when the charge was knowingly passing counterfeit money with intent to cheat, the drunkenness of the defendant at the time of the offence was a fit subject for the consideration of the jury, there being no ground to suppose that the defendant knew the money to be counterfeit *before* he was drunk.² To perjury, also, drunkenness may be a defence,³ though not when the false oath was intelligently taken.⁴ Larceny, also, is not imputable to a person so drunk as to be incapable of a fraudulent intent.⁵ And when the defendant was indicted for an attempt to commit suicide by drowning, and it was alleged that she was at the time unconscious of the nature of her act from drunkenness, Jervis, C. J., said to the jury: "If the prisoner was so drunk as not to know what she was about, how can you find that she *intended* to destroy herself?"⁶ So, again, when the charge was assault with intent to murder, Patterson, J., said: "A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering the child, you may find them guilty of an assault."⁷ The same distinction applies to attempts.⁸ Whenever, however, the offence is not dependent on intent, *e. g.*, in double voting, then drunkenness is no defence.⁹

¹ See R. v. Monkhouse, 4 Cox C. C. 55; R. v. Stopford, 11 Cox C. C. 643; Com. v. Atkins, 136 Mass. 160 (a case of fraud); People v. Walker, 38 Mich. 156; Ingalls v. State, 48 Wis. 647.

² Pigman v. State, 15 Ohio, 555, which case was afterwards confined to its peculiar state of facts in Nichols v. State, 8 Ohio St. 435. See, to the same point, U. S. v. Roudenbush, 1 Bald. 514. But see State v. Avery, 44 N. H. 392. That in a forgery case evidence of "dipsomania" is admissible for the defence, see People v. Blake, Sup. Ct. Cal. 1884, 5 Crim. L. Mag. 723. *Supra*, § 48.

³ Lytle v. State, 31 Ohio St. 196.

⁴ People v. Willey, 2 Park. C. R. 19.

⁶ Wood v. State, 34 Ark. 341. *Infra*, § 885; S. P. State v. Bell, 29 Iowa, 316; Scott v. State, 12 Tex. Ap. 31. See Com. v. Finn, 108 Mass. 466; Rogers v. State, 33 Ind. 543; State v. Schingen, 20 Wis. 74.

⁷ R. v. Moore, 3 C. & K. 319; 6 Law Rep. (N. S.) 581.

⁸ R. v. Cruse, 8 C. & P. 541. See Roberts v. People, 19 Mich. 401; Mooney v. State, 33 Ala. 419; Jeffries v. State, 9 Tex. Ap. 598; State v. Garvey, 11 Minn. 154.

⁹ R. v. Doody, 6 Cox C. C. 463; R. v. Stopford, 11 Cox C. C. 643.

⁹ *Infra*, §§ 88, 1835; People v. Harris, 29 Cal. 678; *contra*, State v. Welch, 21 Minn. 22.

§ 54. In an English case, decided in 1819,¹ where Holroyd, J., is reported by Sir W. Russell, who adopts his opinion as text law, to have said that the fact of drunkenness might be taken into consideration to determine the question whether an act was premeditated or done only with sudden heat and impulse. Although this has been doubted,² yet it may now be considered as settled in England that where no prior intention to kill is shown, drunkenness is a condition from which hot blood may be inferred, and therefore deliberateness negatived.³ In this country we have repeated rulings to the effect that where the encounter was sudden, and the defendant, prior to such encounter, had no intention to kill, intoxication at the time of the encounter can be taken into consideration, to ascertain whether the defendant, when under a legal provocation, acted from malice or from sudden passion,⁴ and whether there was deliberation, or a specific intention to take life.⁵ But when an intention to kill, formed when the defendant was in possession of his faculties, is shown, the court will tell the jury that voluntary intoxication does not lower the offence to manslaughter.⁶ And, under any circumstances, the intoxication must be coupled with the act. Thus evidence that the defendant was in the habit at times of drinking to

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

¹ R. v. Grindley, 1 Russ. on Cr. 12, note *t*.
² R. v. Carroll, 7 C. & P. 145.
³ R. v. Meakin, 7 C. & P. 297; and see R. v. Gamlen, 1 F. & F. 90; R. v. Thomas, 7 C. & P. 817.
⁴ U. S. v. Roudenbush, 1 Bald. 514; Com. v. Hawkins, 3 Gray, 463; People v. Hammill, 2 Parker C. R. (N. Y.) 223; People v. Robinson, *Ibid.* 235; Keenan v. Com., 44 Penn. St. 55; Penns. v. M'Fall, Add. 255; McIntyre v. People, 38 Ill. 514; State v. Bell, 29 Iowa, 316; Ingalls v. State, 48 Wis. 647; Cornwall v. State, Mart. & Yer. 147; Kelly v. State, 5 Sm. & Mars. 518; State v. McCants, 1 Speers, 384; Pirtle v. State, 9 Humph. 663; Swan v. State, 4 Humph. 136; Hailer v. State, 11 Humph. 154; State v. Harlow, 21 Mo. (6 Bennett) 446; Jones v. State, 29 Geo. 594; Golden v. State, 25 Geo. 527; State v. Bullock, 13 Ala. 413; Mooney v. State, 33 Ala. 419; People v. Balencia, 21 Cal. 544; People v. King, 27 Cal. 507; People v. Williams, 43 Cal. 344; State v. Bell, 29 Iowa, 316; and see cases *infra*, § 389.
⁵ *Supra*, § 52.
⁶ R. v. Carroll, 7 C. & P. 145; R. v. Meakin, 7 C. & P. 297; R. v. Ayes, R. & R. 166; U. S. v. Cornell, 2 Mason, 91; Com. v. Hawkins, 3 Gray, 463; State v. Johnson, 41 Conn. 584; Friery v. People, 2 Keyes, 424; Penns. v. M'Fall, Add. 255; People v. Robinson, 1 Park. C. R. 649; 2 Park. C. R. 235; People v. Hammill, 2 Park. C. R. 223; Boswell v. State, 20 Grat. 860; Nichols v. State, 8 Ohio St. 435; Smurr v. State, 88 Ind. 504; Mercer v. State, 17 Ga. 146; State v. Bullock, 13 Ala. 413;

excess, and of the effect of this habit upon his mind, is incompetent unless confined to a period within a few days of the homicide.¹

§ 55. Interesting questions may arise as to what "voluntary" is. There may be persons who from constitutional peculiarities are so susceptible to stimulants that on even slight indulgence they become virtually insane. If such persons are aware of this infirmity, and nevertheless voluntarily take the stimulant, their subsequent insane condition, if it be only special and temporary, is no defence. But what if they are not aware of this peculiarity of their constitution? Or how is it if such susceptibility, instead of being constitutional, so that they can have notice of it, is exceptional, induced by some peculiar temporary debility or disease? Is a man, who, under such abnormal conditions, is maddened by a quantity of wine, which on former occasions he wisely and soberly used as a mere tonic, to be regarded as making himself voluntarily mad?² This question is elsewhere fully discussed.³ It is enough now to say that the tendency both of argument and authority is to answer the question in the negative.⁴ And *a fortiori* is this the case where the stimulant is given through the mistake or misconduct of others.⁵

"Voluntary" is conditioned by temperament.

7. Practice in Cases of Insanity.

§ 56. The mode of examining witnesses called to testify as to sanity is examined in detail in another work.⁶

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

Witness may give opinion based on observation.

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

Tidwell v. State, 70 Ala. 33; State v. Dearing, 65 Mo. 530; State v. Mullen, 14 La. An. 570; Shannahan v. Com., 8 Bush, 463, qualifying prior cases cited § 51; State v. Thompson, 12 Nev. 140, and cases cited *supra*, § 50.

¹ Real v. People, 3 Hand (42 N. Y.), 270; and see *supra*, § 48.

² See State v. Johnson, 40 Conn. 136.

³ 1 Whart. & St. Med. Jur. § 211.

⁴ Roberts v. People, 19 Mich. 401; Rogers v. State, 33 Ind. 543; but see Choice v. State, 31 Ga. 424.

⁵ See People v. Robinson, 2 Parker C. R. 235; Choice v. State, *ut supra*, *cf.* Pearson's Case, 2 Lew. 143-4, 216, remarks by Parke, J., and see *infra*, § 373.

⁶ Whart. Cr. Ev. § 417. See Com. v. Brayman, 136 Mass. 438.

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

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

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

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

§ 57. Whatever may once have been thought, it is now settled that the defence of insanity may be taken by the friends and counsel of a prisoner, even though this course be objected to by himself.¹ Thus in an English case, a man was indicted for shooting at his wife with intent to murder her, and was defended by counsel who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane, and was allowed to suggest questions, to be put by the judge to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed to show that the defence was an unfounded one; but, on the contrary, their evidence tended to establish it more clearly, and the prisoner was acquitted on the ground of insanity.² To refuse this right to the guardian or friends of the accused would be to assume his sanity, which is the question at issue.

§ 57 *a.* In some jurisdictions the defence of insanity must be set up on a special plea.³

§ 58. By the common law, if it be doubtful whether a criminal who, at his trial, in appearance is a lunatic, be such in truth or not, the issue is to be tried by the jury who

¹ State v. Patten, 10 La. Ann. 299.
See R. v. Pearce, 9 C. & P. 667.

² R. v. Pearce, 9 C. & P. 667.

³ Whart. Cr. Pl. & Pr. § 429 *a.*

are charged to try the indictment,¹ or, being a collateral issue, the fact may be pleaded and replied to *ore tenus* and a venire awarded, returnable instant, in the nature of an inquest of office.² If it were found by the jury that the party only feigned himself lunatic, and he refused to answer, he was, before the 7 & 8 Geo. IV. c. 28, s. 2, dealt with as one who stood mute, and as if he had confessed the indictment; but now, by virtue of that enactment, a plea of not guilty may be pleaded. The principal point to be considered by the jury under that statute is, whether the defendant is of sufficient intellect to comprehend the course of the proceedings on the trial, so as to be able to make a proper defence.³ The question whether the defendant was insane at the commission of the offence is considered at common law under the

¹ Bac. Ab. "Idiot" (B); R. v. Ley, the community, the court may order 1 Lewin, 239; 1 Russ. C. & M. 14. him to be committed to one of the See 1 Hawk. c. 1, s. 4; R. v. Haswell, state lunatic hospitals; otherwise he R. & R. 458. shall be discharged." Gen. Stat. c.

An article on this topic by Prof. Ordreux will be found in 1 Crim. Law Mag. 431 *et seq.*

² Fost. 46; 1 Lev. 61; Russ. C. & M., by Greaves, 14.

³ See R. v. Prichard, 7 C. & P. 303, 305; 1 Lewin, 84, S. C.

In Massachusetts, where one, having committed a homicide, was sent to the house of correction, pursuant to Stat. 1797, c. 61, s. 3, as a person dangerous to go at large, and was then tried for murder and acquitted on the ground of insanity, the court remanded him to the house of correction till he should be duly discharged. Com. v. Meriam, 7 Mass. 168. See Com. v. Braley, 1 Mass. 103; 13 Mass. 299; Com. v. Battis, 1 Mass. 95. But by the General Statutes it is provided that "when any person indicted for an offence is, on trial, acquitted by the jury, by reason of insanity, the jury, in giving their verdict of not guilty, shall state it was given for such cause; and thereupon, if his discharge or going at large is deemed manifestly dangerous to the peace and safety of

him to be committed to one of the state lunatic hospitals; otherwise he shall be discharged." Gen. Stat. c. 173, § 17. See 7 Gray, 584; Rev. Stat. Mass. c. 138, s. 13. In the same State, in case of insanity, "the grand jury shall certify that fact to the court," and thereupon the court is required to take order on the premises. Ibid. c. 136, s. 15. See Gen. Stat. c. 171; § 15.

In New York, it has been judicially held that the test of insanity, when set up to bar a trial, is, whether the prisoner is mentally competent to make a rational defence. Freeman v. People, 4 Denio, 9. On a preliminary trial to determine whether the defendant is sane enough to make a rational defence, the defendant is not entitled to peremptory challenges; but challenges for cause may be made. Ibid. See as to statute, 1 Crim. Law Mag. 435.

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

In Tennessee, under the statute, an analogous practice exists. Coldwell v. State, 3 Baxter, 418.

plea of guilty. As has been already seen, the defendant who sets up this defence is required, in some jurisdictions, to present it in a special plea to be tried before the plea of not guilty.¹

§ 59. If a party under sentence of death becomes insane after conviction, execution is to be deferred,² and in some jurisdictions the issue in such case is referred to a jury for determination.³ It has been ruled in such case that evidence of the convict's mental condition at the time of the commission of the crime is admissible to illustrate his present condition, provided there be other evidence of present insanity, or provided permanent insanity be thereby shown.⁴

§ 60. By the common law, every man is presumed to be sane until the contrary be proved; and the better opinion is, that when insanity is set up by the defendant, it must be proved as a substantive fact by the party alleging it, on whom lies the burden of proof.⁵ The finding of an inquisition of lunacy, which is admissible, shifts the burden.⁶

§ 61. Three distinct theories have been propounded as to the degree of evidence requisite to justify a conviction on the issue of insanity.

The first is that insanity, as a defence of confession and avoidance, must be proved beyond reasonable doubt; and that unless this

¹ See Whart. Cr. Pl. & Pr. § 429 a (9th ed.); Bennett v. State, (57 Wis.), 4 Crim. Law Mag. 378; Coldwell v. State, 3 Baxt. 418.

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

² Hale's Sum. 10; 1 Hawk. c. 1, § 3; 4 Black. Com. 24.

³ See State v. Lane, 4 Ired. 431; State v. Hinson, 82 N. C. 540; State v. Vann, 84 N. C. 722.

⁴ Spann v. State, 47 Ga. 553.

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

⁵ Whart. Cr. Ev. § 336; R. v. Stokes, 3 C. & K. 188; R. v. Taylor, 4 Cox C. C. 155; R. v. Haswell, R. & R. 458; Atty.-Gen. v. Parnter, 4 Brown C. C. 409; R. v. Layton, 4 Cox, C. C. 149; U. S. v. Lawrence, 4 Cranch C. C. 514; U. S. v. McGlue, 1 Curtis, 1; Com. v. Eddy, 7 Gray, 583; State v. Spencer, 21 N. J. L. (1 Zab.) 202; State v. Brandon, 8 Jones N. C. 463; State v. Starke, 1 Strobhart, 479; State v. Brinyea, 5 Ala. 241; People v. Myers, 20 Cal. 518; Boswell v. Com., 20 Grattan, 860; Loeffner v. State, 10 Ohio St. 598.

⁶ McGinnis v. Com., 74 Penn. St. 245; Wheeler v. State, 34 Ohio St. 394; Whart. Cr. Ev. § 336.

be done, the jury, the case of the prosecution being otherwise proved, are to convict. This is expressed by Hornblower, C. J., as follows: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be to find a sane man guilty."¹ Several English authorities are cited to the same effect.²

The second is that the jury are to be governed by the *preponderance* of evidence; and are not to require insanity to be made out beyond reasonable doubt.³ This view is now generally accepted in England;⁴ and is maintained in Maine;⁵ in Massachusetts;⁶ in Pennsylvania;⁷ in Virginia;⁸ in West Virginia;⁹ in Ohio;¹⁰ in Michigan;¹¹ in Minnesota;¹² in North Carolina;¹³ in South Carolina;¹⁴ in Alabama;¹⁵ in Georgia;¹⁶ in Louisiana;¹⁷ in Texas;¹⁸ in California;¹⁹ in Iowa;²⁰ in Idaho;²¹ and in Arkansas.²²

¹ State v. Spencer, 21 N. J. L. (1 Zab.) 202. In Graves v. State, 45 N. J. L. (16 Vroom) 203, however, the court held that preponderance was to determine. See Whart. Cr. Ev. § 729.

² 1 Whart. & St. Med. Jur. §§ 225, 226. See Com. v. Eddy, 7 Gray, 583; Com. v. Rogers, 7 Met. 500; Loeffner v. State, 10 Ohio St. 598.

³ See R. v. Layton, 4 Cox C. C. 149; R. v. Higginson, 1 C. & K. 130.

⁴ State v. Lawrence, 57 Me. 574. ⁵ Com. v. Eddy, 7 Gray, 583; Com. v. Rogers, 7 Met. 500; Com. v. Heath, 11 Gray, 303.

⁶ Lynch v. Com., 77 Penn. St. 205; Com. v. Ortwein, 76 Penn. St. 414. See Com. v. Winnemore, 1 Brewst. 356; Com. v. Haggerty, Lewis Cr. L. 402; Myers v. Com. 83 Penn. St. 131; Laros v. Com., 84 Penn. St. 200; Sayres v. Com., 88 Penn. St. 290; Neveling v. Com., 98 Penn. St. 322; Coyle v. Com., 100 Penn. St. 573. To exact "clearly preponderating evidence" is error. Ibid.

⁷ Baccigalupo v. Com., 33 Grat. 807.

⁸ State v. Strauder, 11 W. Va. 747.

⁹ Loeffner v. State, 10 Ohio St. 598; Bond v. State, 23 Ohio St. 349; Bergin v. State, 31 Ohio St. 111.

¹⁰ People v. Finley, 38 Mich. 482. ¹¹ State v. Gut, 13 Minn. 341; State v. Grear, 28 Minn. 426.

¹² State v. Starling, 6 Jones N. C. 366; State v. Brandon, 8 Jones N. C. 463. See State v. Payne, 86 N. C. 609.

¹³ State v. Stark, 1 Strobh. L. 479. ¹⁴ Boswell v. State, 63 Ala. 307; Ford v. State, 71 Ala. 385.

¹⁵ Carter v. State, 56 Ga. 463. ¹⁶ State v. Coleman, 27 La. An. 691.

¹⁷ Jones v. State, 13 Tex. Ap. 1. See Webb v. State, 9 Tex. Ap. 496; King v. State, 9 Tex. Ap. 515.

¹⁸ People v. Coffmann, 24 Cal. 230; People v. Hamilton, 62 Cal. 377, modifying People v. Wreden, 62 Cal. 377. See People v. Bell, 49 Cal. 486; People v. Messersmith, 61 Cal. 246.

¹⁹ State v. Felter, 32 Iowa, 49.

²⁰ People v. Walter, 1 Idaho, N. S. 386.

²¹ McKenzie v. State, 26 Ark. 334. As to Indiana, see Mitchell v. State, 63 Ind. 276.

Conflicting theories as to amount of evidence requisite to prove insanity.

A third view is, that in such an issue the *prosecution* must prove *sanity* beyond reasonable doubt. Thus, in a case in Michigan, in 1869, while it was admitted that sanity was the normal condition of the mind, and that the prosecution might rest upon the presumption that the accused was sane when he committed the act, until it was overcome by the opposite case, it was nevertheless determined, that, when any evidence which tends to overthrow that presumption is given, the jury are to examine, weigh, and pass upon it, with the understanding that, although the initiative in presenting the evidence is taken by the defence, the prosecution is bound to establish this part of the case as fully as it is bound to establish other essential incidents of guilt.¹

Similar views have been maintained by other American courts; and it has been not infrequently ruled, that, where there is reasonable doubt as to sanity, the jury must acquit.²

¹ *People v. Garbutt*, 17 Mich. 9.

In New York, the tendency in the main is to sustain the distinctions of the text, and to hold that while a reasonable doubt as to sanity is sufficient to require an acquittal in all cases in which sanity is part of the case of the prosecution, yet, when insanity is set up by the defence for the purpose of establishing general non-accountability, and of placing the defendant under permanent sequestration as a dangerous lunatic, such insanity must be established by a preponderance of proof. See *People v. McCann*, 16 N. Y. 58; *Walter v. People*, 32 N. Y. 147; *Ferris v. People*, 35 N. Y. 125; *Flanagan v. People*, 52 N. Y. 467; *Brotherton v. People*, 75 N. Y. 154; *O'Connell v. People*, 87 N. Y. 377; *Walker v. People*, 88 N. Y. 81. These cases are considered in detail in Whart. Cr. Ev. 9th ed. § 338.

In Missouri, the cases may be harmonized by the application of the above distinction. See *State v. Hundley*, 46 Mo. 414; *State v. Klingler*, 43 Mo. 127; *State v. Smith*, 53 Mo. 267; *State v. Simms*, 68 Mo. 305; *State v.*

Redemeier, 71 Mo. 173; and so in Indiana, *McDougal v. State*, 87 Ind. 24.

² As taking this position, may be cited, *U. S. v. Lancaster*, 7 Biss. 440; *State v. Bartlett*, 43 N. H. 224; *State v. Jones*, 50 N. H. 369; *State v. Patterson*, 85 Vt. 308; *State v. Johnson*, 40 Conn. 139; *Polk v. State*, 19 Ind. 170; *Bradley v. State*, 31 Ind. 492; *Stevens v. State*, 31 Ind. 485; *McDougal v. State*, 88 Ind. 24; *Fisher v. People*, 23 Ill. 283; *Hopps v. People*, 31 Ill. 385; *Chase v. People*, 40 Ill. 352; *Smith v. Com.*, 1 Duvall, 224; *Kriel v. Com.*, 5 Bush, 362; *Ball v. Com.* (Ky. 1884); *Dove v. State*, 3 Heis. 348; *Lawless v. State*, 4 Lea, 179; *State v. Marler*, 2 Ala. 43; *Cunningham v. State*, 56 Miss. 269; *State v. De Rance*, 34 La. An. 186; *Wright v. People*, 4 Nev. 407; *State v. Crawford*, 11 Kan. 32; *People v. Waterman*, 1 Neb. 343; *Webb v. State*, 9 Tex. Ap. 490. See *State v. Graves*, 45 N. J. L. 203.

In South Carolina, it is held, following the distinction of the text, that where the issue is at common law, whether there is capacity to commit crime, this capacity must be proved

§ 62. It may be said that the position, that unless there be a preponderance of proof of insanity, there can be no acquittal on the ground of insanity, is inconsistent with the principle that if there is reasonable doubt of guilt there can be no conviction. But there is no such inconsistency. Insanity, as a defence in criminal prosecution, has two distinct aspects, subject to very different rules. When the question, as in a charge of murder in the first degree, is whether there was a particular intention in the defendant's mind at a particular time, then, if such intention cannot be proved beyond reasonable doubt, there must be an acquittal of this grade of murder. An indictment, for instance, is found in Pennsylvania for murder in the first degree. By the law of that State there can be no conviction of murder in the first degree, unless it be proved that the defendant at the time of the homicide specifically intended to take the deceased's life. We will assume a case, however, in which the defendant's mind, at the time of the litigated event, was so affected by disease, that it is questionable whether he was then capable of forming a specific intent to take life. Now, in such a case, if there be reasonable doubt whether the defendant was capable of forming a specific intent to take life, the jury should be instructed (and this has been so done in several cases in Pennsylvania) to acquit of murder in the first degree, and convict of murder in the second degree, or of manslaughter.¹ The same rule applies to all other cases in which it is incumbent on the prosecution to prove a sane intent on the part of the defendant; in which cases such intent must be proved beyond reasonable doubt. It is otherwise, however, where insanity is set up, not to qualify the proof of intent, but as a bar to criminal procedure. In the former case, it goes to the question of guilt or innocence; in the latter case, it goes to the amenability or non-amenability of the defendant to criminal jurisdiction. In the former case the defence says, "not guilty of specific act charged;" in the latter case it says, "not the subject of penal discipline." The plea of insanity, when thus offered in bar of the prosecution, stands, as do analogous pleas of non-amenability

beyond reasonable doubt by the prosecution. *Coleman v. State*, 20 S. C. 441. to "clearly prove" insanity. *Casat v. State*, 40 Ark. 511.

In Arkansas, it is ruled by a majority of the court (Eaken, J., diss.)

¹ *Supra*, § 52.

bility, on the ground of want of jurisdiction.¹ This brings us to the rightful solution of this vexed issue. The test of "reasonable doubt" only applies to questions of "guilt" or "innocence." The defence of insanity, as a bar, like other defences based on non-amenability to penal discipline, is not one of "guilt" or "innocence." It is not one, therefore, when offered in bar of an indictment, to which the test of "reasonable doubt" applies. The errors into which judges have been led in this respect have been errors arising from the defective way in which the plea is presented. If it were offered specially in bar, as a preliminary issue, as it is in some jurisdictions, then no one would question that the case would go to the jury to be decided according to the preponderance of proof. Supposing that the plea, being special (as is the plea, for instance, of *autrefois acquit*), should be determined against the defendant, then he would be compelled to plead over, and then, to the questions of facts arising under a plea of not guilty, the test of "reasonable doubt" would be applicable. And it would be easy to conceive of cases in which, after a verdict against the defendant

¹ We may cite, as an illustration, the case of *McLeod*, 1 Hill, N. Y. 377, 25 Wend. 483, where, in order to sustain non-amenability to the New York tribunals, the defendant's counsel maintained that the defendant, in the transaction which was the subject of the indictment, was acting as a servant of the British government, under the direct order of that government. If this had been sustained, as a matter of fact, then the conclusion would have been, as a matter of law, that our quarrel was with the British government, and not with *McLeod*. But if the question of fact in such a case should be disputed, no one would claim that if there be reasonable doubt as to whether the defendant acted as the servant of a foreign government, he should be acquitted. What the jury would be told would be, "Here is a question of fact; if the proof satisfies you, that a defendant was a British subject, and acted under British or-

ders, then he is to be remanded to his own government for discipline."

Another illustration, already noticed in the text, is to be found in those cases in which, on a plea of *autrefois acquit*, a question of fact, to be determined by a jury, arises, whether the offence of which the defendant was acquitted, was the same as that on trial. In such a case the jury would not be told, "If you have a reasonable doubt you must find for defendant." What they would be told is, "If you decide that there is a preponderance of proof to the effect that the cases are the same, then you must so find; otherwise you must find that the cases are not the same." See *Whart. Cr. Pl. & Pr.* § 483. In neither of the cases last mentioned does the question of guilt or innocence arise, and in neither case, if the defence be properly pleaded, would evidence to show either guilt or innocence be relevant.

on the special plea of insanity, a verdict acquitting him of the highest grade of the offence might be had on the ground of the very insanity which was held not to be sufficient to sustain a verdict of non-amenability on the first plea. Suppose, for instance, that, in a case of homicide, the proof of insanity on the first trial was not sufficiently strong to transfer the defendant from the category of the sane to that of the insane, and yet that such evidence was strong enough on the second trial to raise a reasonable doubt as to whether the defendant had specifically intended to kill the deceased. In such case, though the issue of insanity had been determined on the first trial against the defendant, he should be convicted only of murder in the second degree, or of manslaughter, on the second trial, which would involve his acquittal of murder in the first degree. By maintaining this distinction we avoid the danger (incident to the application of the test of "reasonable doubt" to all issues of insanity raised in a criminal court) of committing a defendant as to whose sanity there is "reasonable doubt" to perpetual sequestration in an insane asylum.¹

§ 63. When insanity of a permanent type is shown to have

¹ *Walker v. People*, 88 N. Y. 81, above cited, is an illustration of this danger. *Walker* was tried for abduction. Suppose he had been indicted for an assault, and suppose, as it has frequently been decided to be permissible, his relatives or friends, against his protest, had interposed the plea of insanity. We can imagine, in fact, many cases in which this might be a convenient way of disposing of an uncomfortable relative or neighbor. A defendant of this class finds himself, when tried for some minor offence, confronted by a plea of insanity interposed in his behalf. If the view here contested be the law, the judge would have in such case but one course open to him. He would be obliged to hear the evidence, no matter what might be the defendant's protestations; and, what is more, he would be obliged to tell the jury that if they have a reasonable doubt of the defendant's sanity, they

must find him insane. The only way to avoid this absurdity is to put the determination of the issue of insanity, when set up to bar amenability, on the same basis in criminal as that adopted in civil courts. In both courts the presumption is that persons coming into courts of justice are sane, and that the burden of proof is on the parties contesting such sanity. In criminal courts, as well as in civil, the rule should be that to take a particular person out of the category of reasonable and responsible beings, and to subject him to the sequestrations and restrictions imposed by the law on adjudicated lunatics, at least a preponderance of proof of insanity should be required.

The above argument is expanded by me in the *Central Law Journal* for May 23, 1884. The subject is discussed more fully in *Whart. Cr. Ev.* §§ 338 *et seq.* See, also, 1 *Crim. Law Mag.* 445.

Insanity to be inferred from conduct. existed prior to the commission of an act, it will be inferred to have continued, unless the contrary be proved, down to the time of the act.¹ It is otherwise, however, when the proof is of temporary or spasmodic mania,² or of *delirium tremens*.³

Evidence, therefore, of prior insane conduct and declarations may be received on a trial for an act alleged to have been insane;⁴ and so may that of subsequent attacks of derangement,⁵ if connected in system with the defendant's condition at the time of the offence.⁶ Attempt at suicide is one of the incidents from which insanity may be inferred.⁷

§ 64. As facts from which insanity may be inferred, it is admissible to prove epilepsy,⁸ cerebral peculiarities, and anomalies of sensibility, pulse, secretion;⁹ and to put in evidence the history, conversation, writings, and deportment of the patient, so far as they bear on the issue.¹⁰

¹ Whart. Cr. Ev. § 730; 1 Jarm. on Wills (2d Am. ed.), 65; 1 Whart. & St. Med. Jur. §§ 61-4; R. v. Stokes, 3 C. & K. 185; R. v. Layton, 4 Cox, C. C. 149; Cartwright v. Cartwright, 1 Phil. Recl. R. 100; Hoge v. Fisher, 1 Pet. C. C. 163; Hix v. Whittemore, 4 Met. 545; State v. Spencer, 21 N. J. L. (1 Zab.) 196; State v. Huting, 21 Mo. 464; State v. Brinyea, 5 Ala. 241; State v. Stark, 1 Strobh. 479; State v. Wilner, 40 Wis. 304; State v. Reddick, 7 Kans. 143. See Webb v. State, 5 Tex. Ap. 596, where it was held that stronger proof of insanity would be required as a ground of irresponsibility than would be required to relieve from a contract.

² Ibid.; State v. Reddick, 7 Kans. 143; Lewis v. Baird, 3 McLean, 56; People v. Francis, 38 Cal. 183. See U. S. v. Guiteau, 1 Mackey, 498.

³ State v. Sewell, 3 Jones Law (N. C.), 245; People v. Francis, *supra*; State v. Reddick, *supra*.

⁴ Whart. on Cr. Ev. § 731; R. v. Haswell, R. & R. 458; Com. v. Brayman, 136 Mass. 438; Vance v. Com., 2

Virginia Cases, 132; U. S. v. Sharp, 1 Peters C. C. 118; McAllister v. State, 17 Ala. 434; McLean v. State, 16 Ala. 672; Lake v. People, 1 Parker C. R. 495; State v. Mewherter, 46 Iowa, 88. Insanity of the prisoner, at the instant of the commission of the offence, can only be established by evidence tending to prove that he was insane at some period before or afterwards. People v. March, 6 Cal. 543.

⁵ See 1 Whart. & St. Med. Jur. § 378; People v. March, 6 Cal. 543.

⁶ Com. v. Pomeroy, 117 Mass. 143.

⁷ Coyle v. Com., 100 Penn. St. 573.

⁸ 1 Whart. & St. Med. Jur. §§ 422, 470. See Laros v. Com., 84 Penn. St. 200; State v. George, 62 Iowa, 59, citing 1 Whart. & St. Med. Jur. § 470.

⁹ Ibid. § 347. But it has been ruled that family and neighborhood reputation is not admissible to prove that the prisoner was permanently injured in his mind, by reason of a wound which he had received. Choice v. State, 31 Ga. 424.

¹⁰ 1 Whart. & St. Med. Jur. §§ 378-88. See Whart. Cr. Ev. § 731.

It is admissible, in order to show mental incapacity, when the defendant, under trial for larceny, has been shown to be an opium-eater, and to have been deprived of his accustomed supply of the drug, to prove by competent testimony the effect of such deprivation on his mental condition.¹

§ 65. As a rule, it is competent to prove insanity in the family of the party whose sanity is under examination.²

It has been said that where hereditary insanity is offered as an excuse for crime, it must appear that the kind of insanity proposed to be proven is no temporary malady, and that it is notorious, and of the same species as that with which other members of the family have been afflicted.³ But this last qualification cannot be sustained, as insanity rarely descends in the same common type, but varies with individuals.⁴

Proof of hereditary insanity can only be admitted as cumulative evidence. By itself, the insanity of ancestors is no defence.⁵

Evidence that certain causes might induce insanity is not admissible without laying or offering to lay a basis of proof to show that insanity actually existed.⁶

7. Other Forms of Unconsciousness.

§ 66. Other forms of unconsciousness may be noticed as constituting a defence to a criminal charge. A man may commit an injury when asleep, as when in a state of sleep-walking or somnambulism.⁷ Or he may be under the influence of opium, or of ether, or other ano-

¹ Rogers v. State, 33 Ind. 543.

² 1 Whart. & St. Med. Jur. § 372;

R. v. Tucket, 1 Cox C. C. 103; R. v. Ox-

ford, 9 C. & P. 525; Smith v. Kramer,

1 Amer. Law Reg. 353; Bradley v.

State, 31 Ind. 492; State v. Felter, 25

Iowa, 67; People v. Garbutt, 17 Mich.

9. Thus insanity of uncles has been

received in evidence; Baxter v. Ab-

boit, 7 Gray, 71; and even of collat-

eral descendants from a common an-

cestor three generations back. Com.

v. Andrews, cited 1 Whart. & St. Med.

Jur. § 375; Edmund's Case, Ibid.;

and see Com. v. Rogers, 7 Met. 500.

³ State v. Christmas, 6 Jones N. C. (Law) 471.

⁴ 1 Whart. & St. Med. Jur. § 376; Whart. Cr. Ev. § 731.

⁵ See Snow v. Benton, 28 Ill. 306.

In Laros v. Com., 84 Penn. St. 200, it

is ruled that such evidence is not com-

petent until evidence of the defend-

ant's own insanity is given. See

People v. Pine, 2 Barb. 566; State v.

Christmas, 6 Jones N. C. 471.

⁶ Sawyer v. State, 35 Ind. 80; Brad-

ley v. State, 31 Ind. 492.

⁷ See these cases discussed in 1

Whart. & St. Med. Jur. §§ 482-4.

dynes.¹ The question then arises, was the defendant at the time of the act a free agent? If not, the act is not criminally imputable to him. But we have to keep in mind two possible conditions which may greatly vary the case. If the abnormal state was artificially induced in order to facilitate the commission of the crime, then the offence is malicious. If such state was negligently induced, then the defendant may be chargeable with a negligent offence.

II. INFANTS.

§ 67. Until an infant arrives at the age of seven, he cannot be convicted of a criminal offence. Under that age the infant may be chastised by his parents or tutors, but cannot be judicially punished, for he cannot be guilty in such a way as involves the ordinary penalty of crime.²

§ 68. Between the age of seven and fourteen responsibility is conditioned on capacity. If it appear that a child within these limits is *capax doli*, which is to be determined by the circumstances of the case, he may be convicted and condemned.³

The presumption that an infant is not *capax doli*, as to a child under seven, is irrebuttable.⁴ As to a child between seven and fourteen the presumption is rebuttable, the burden of overthrowing it being on the prosecution; the intensity of proof varying with age and other circumstances.⁵ It has been held in North Carolina that "as the reputed age of every one is peculiarly within his

¹ Rogers v. State, 33 Ind. 543. As to chloroform as a means of facilitating crime, see proceedings of N. Y. Med. Leg. Soc., pp. 298-317, N. Y. 1872. 3 Whart. & St. Med. Jur., §§ 245, 594.

² 1 Inst. 2; Burn's Justice (29th ed.), tit. Children; 1 Hale, 19, 20; 4 Bla. Com. 23; 2 Steph. Hist. Cr. Law, 98; R. v. Giles, 1 Moody, 166; Marsh v. Loader, 14 C. B. N., S. 535; Com. v. Mead, 10 Allen, 323; People v. Townsend, 3 Hill (N. Y.), 479; State v. Guild, 5 Halst. 163; State v. Goin, 9 Humph. 175.

³ R. v. Groombridge, 7 C. & P. 582; R. v. Vanplew, 3 Fost. & F. 520; State v. Doherty, 2 Tenn. 80; State v. Guild, 5 Halst. 163; Willet v. Com., 13 Bush, 230; Godfrey v. State, 31 Ala. 323. As to special provision in Massachusetts for trial of infants, see Com. v. Donahue, 126 Mass. 51. *Infra*, § 72.

⁴ Whart. Cr. Ev., § 801.

⁵ *Ibid.*; Hale's Sum. 43; 1 Hawk. c. 1, s. 8; 4 Bla. Com. 24; R. v. Wild, 1 Mood. C. C. 452; R. v. Smith, L. & C. 607; R. v. Owen, 4 C. & P. 236; R. v. Smith, 1 Cox C. C. 260; Com. v. Elliot,

own knowledge," a defendant setting up infancy has the burden on him to establish it.¹

An exceptional case is reported in New Jersey, where a boy of twelve years was convicted, on his own confession, imperfectly sustained by circumstantial corroboration, of murder, and was sentenced and executed.²

When the age of fourteen arrives, full criminal responsibility, at common law, attaches.³

4 Law Rep. 329; State v. Learnard, 41 Vt. 585; Com. v. Mead, 10 Allen, 398; Angelo v. People, 96 Ill. 132; State v. Pugh, 7 Jones, N. C. 61; Willet v. Com., 13 Bush, 230; State v. Toney, 15 S. C. 409; Hill v. State, 53 Ga. 578; State v. Adams, 76 Mo. 355; State v. Goin, 9 Humph. 175; State v. Fowler, 52 Iowa, 103. See note in 1 Green's Cr. R. 402. In Illinois the age of irresponsibility is extended to ten; Angelo v. People, 96 Ill. 209. In Texas the periods are nine and thirteen; McDaniel v. State, 5 Tex. Ap. 475; Under the N. Y. Penal Code of 1884 the limit is placed at twelve.

According to an enlightened German jurist and statesman, the age of criminal responsibility is postponed in proportion to the extent to which the State assumes the responsibility of the education of its children. "The better the school discipline, the more confidently can the State defer to riper years the application of penal justice. Thus, while in the Roman and canon law responsibility began at seven years, in modern Germany it does not begin till twelve." Schaper, in Holtz. Straf. ii. 161.

¹ State v. Arnold, 13 Ired. 184; *inf.* § 73.

² State v. Guild, 5 Halsted, 163. See State v. Bostick, 4 Harrington, 563.

³ State v. Goin, 9 Humph. 175; State v. Bostick, 4 Harrin. 563; State v. Handy, *Ibid.* 566; Irby v. State, 32 Ga. 496.

"The presumption of law in favor of infants under fourteen, and the necessity of satisfying the jury that the child, when committing the act, must have known that he was doing wrong, is well illustrated by the case of R. v. Owen, 4 Carrington & Payne, 236 (1830), where a girl ten years of age was indicted for stealing coals. It was proved that she was standing by a large heap of coals belonging to the prosecutor, and that she had a basket upon her head containing a few coals which the girl herself said she had taken from the heap. Littledale, J., in summing up to the jury, remarked: 'In this case there are two questions: First, did the prisoner take the coals? and second, if she did, had she at the time a guilty knowledge that she was doing wrong? The prisoner is only ten years of age, and unless you are satisfied by the evidence that, in committing this offence, she knew that she was doing wrong, you ought to acquit her. Whenever a person committing a felony is under fourteen years of age, the presumption of law is, that he or she has not sufficient capacity to know that it is wrong; and such person ought not to be convicted unless there be evidence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong.' The jury returned a verdict of 'Not guilty;' adding, 'We do not think the prisoner had any guilty knowledge.'" R. v. Smith, 1 Cox C.

Parental influence, not amounting to coercion, however much it may affect a jury's conclusion on the merits, is not a technical defence.¹

§ 69. A boy under fourteen is presumed by law unable to commit a rape, and therefore, it seems, cannot be guilty of it; and though in other felonies *malitia supplet aetatem* in some cases, yet it seems that as to rape the law presumes him impotent as well as wanting discretion.² Nor at common law is any evidence admissible to show that in fact he had arrived at the full state of puberty, and could commit the offence.³ But he may be a principal in the second degree, if he aid and assist in the commission of this offence, as with other felonies, and if intelligent evil purpose on his part be shown by the prosecution,⁴ which must, however, be plainly established. And though an infant under fourteen cannot be convicted of an assault with an intent to commit a rape;⁵ he may be convicted of an indecent assault under the 7 Will. IV. s. 1; 10 Vict. c. 85, s. 11.⁶ After he passes fourteen, the presumption vanishes; and in Delaware a boy just arrived at that age has been held in law capable of the offence.⁷

§ 70. An infant, under the limitations which have been above expressed, may be guilty of forcible entry, if concerned in actual personal violence,⁸ and the justices may fine him therefor; though it is doubtful whether under the old English statutes he could be imprisoned for this

C. 260; *People v. Davis*, 1 Wheeler C. C. 230; *Walker's Case*, 5 City Hall Rec. 137; *Stage's Case*, 5 City Hall Rec. 177, cited 5 Bost. L. Rep. N. S. 364; *State v. Doherty*, 2 Tenn. 80.

¹ *Infra*, § 94 a.

² 1 Hale, 630. And see *R. v. Eldershaw*, 3 C. & P. 396; *R. v. Groombridge*, 7 C. & P. 582.

³ *R. v. Philips*, 8 C. & P. 736; *R. v. Jordan*, 9 C. & P. 118; *Lewis C. L.* 558. But see *contra*, *People v. Randolph*, 2 Parker C. R. 174; *Williams v. State*, 14 Ohio, 222; *Moore v. State*, 17 Ohio St. 521, where the presumption is held rebuttable; and see more fully *infra*,

§ 551. See *State v. Pugh*, 7 Jones N. C. 61.

⁴ *Law v. Com.*, 75 Va. 385.

⁵ *R. v. Eldershaw*, 3 C. & P. 396; *R. v. Groombridge*, 7 C. & P. 582; *R. v. Philips*, 8 C. & P. 736; *R. v. Jordan*, 9 C. & P. 118; *R. v. Brimilow*, 2 Mood. C. C. 122; *S. C.*, 9 C. & P. 366; *State v. Sam*, Winston, N. C. 300; *State v. Pugh*, 7 Jones N. C. 61. See *contra*, *Com. v. Green*, 2 Pick. 380; *People v. Randolph*, 2 Parker C. R. 174; *Williams v. State*, 14 Ohio, 222.

⁶ *R. v. Brimilow*, 2 Mood. C. C. 122; 9 C. & P. 366, *S. C.*

⁷ *State v. Handy*, 4 Harrington, 566. *Infra*, § 551.

⁸ 1 Hawk. c. 24, s. 35.

offence.¹ As to other misdemeanors attended with a notorious breach of the peace, such as riot, battery, or the like, an infant is liable under the above limitations,² and he is indictable for perjury or cheating.³ But it is otherwise as to *quasi* civil suits. Thus, an infant under twenty-one is not responsible for not repairing a bridge or highway, or other such acts of omission of civil duty,⁴ though he may be convicted on a penal statute.⁵ An infant under seven cannot be punished criminally for a nuisance on his land.⁶

§ 71. As will hereafter be seen, an infant over fourteen, who falsely claims to be of age, and thus obtains money, is indictable for obtaining money by false pretences.⁷ But this can only be done when there is nothing in the infant's appearance to put parties dealing with him on inquiry as to the true facts.

Infant liable for false representations as to age.

§ 72. Upon a presentment against an infant for a misdemeanor, he has a right to appear and defend himself in person or by attorney, and it is an error to assign him a guardian, and to try the case on a plea pleaded for him by the guardian.⁸

When infant may appear by attorney.

§ 73. When age can be ascertained by inspection, the court and jury must decide.⁹ But ordinarily opinion of medical experts is admissible to prove age.¹⁰ And age is generally inferable from circumstances.

Age is inferable from circumstances.

§ 74. We have elsewhere seen¹¹ that no conviction should be permitted to rest on a confession without proof of the *corpus delicti*, and that a confession is dependent for credibility on the character and circumstances of the declarant. To children these cautions are peculiarly applicable, as from their immaturity and inexperience they are

Confessions of infants admissible.

¹ 1 Hawk. c. 64, s. 35.

² 1 Hale, 20, 21; 4 Bla. Com. 22; *Bullock v. Babcock*, 3 Wend. 391.

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

⁴ *R. v. Sutton*, 5 N. & M. 353; *Bla. Com.* 22; *Co. Lit.* 257.

⁵ See 4 Bla. Com. 308.

⁶ See *People v. Townsend*, 3 Hill N. Y. 479.

⁷ *Infra*, § 1149. See *People v. Kendall*, 25 Wend. 399; *infra*, § 1135.

⁸ *Word v. Com.*, 3 Leigh, 743. See as to Massachusetts, *Com. v. Donahue*, 126 Mass. 51.

⁹ *State v. Arnold*, 13 Ired. 184; *People v. Townsend*, 3 Hill (N. Y.), 470. See *supra*, § 70; *Whart. Cr. Ev.* § 310.

¹⁰ *State v. Smith*, Phill. (N. C.) L. 302. As to burden of proof see *supra*, § 68.

¹¹ *Whart. Cr. Ev.* § 532.

likely to indulge in loose talk. But a child's confessions, if not elicited by threats or promises, are technically admissible against him.¹

III. FEME COVERTS.

§ 75. There is no technical objection to an indictment naming the wife singly. It is not necessary that the husband should be included as a joint defendant, even though he was living with her at the time,² or was jointly participant with her in the offence, which is a matter of defence.³ But it is right and proper, in the latter case, that there should be a joinder, and though a nonjoinder is no defence, and is not demurrable, the court may on motion compel it.⁴ The husband may be singly indicted for his wife's acts done under his command,⁵ or in case of misdemeanors, in his presence with his knowledge and apparent assent,⁶ or, in cases where the business of the house is at issue, for her acts in their common home.⁷ The indictment need not negative coercion.⁸

§ 76. Indictments against wife jointly with husband are good on their face, and will be sustained on demurrer, on arrest of judgment, or in error.⁹ And this rule has been specifically applied to indictments for assault and battery;¹⁰ for keeping a bawdy house;¹¹ for keeping a gaming house;¹² for keeping a tippling house;¹³ for forcible

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

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

³ *Somerset's Case*, 2 St. Trials, 966 (1616); *R. v. Crofts*, 2 Strange, 1120.

⁴ *Rather v. State*, 1 Porter, 132.

⁵ See *Com. v. Barry*, 115 Mass. 146; *Mulvey v. State*, 43 Ala. 316.

⁶ *Infra*, § 1509; *Hensley v. State*, 52 Ala. 16.

⁷ *Infra*, § 1509.

⁸ *State v. Nelson*, 29 Maine, 329.

⁹ *R. v. Hammond*, 1 Leach, 499; *R. v. Mathews*, 1 Eng. L. & E. R. 549; 1 Den. C. C. 596; *R. v. Dixon*, 10 Mod. 335; *R. v. Cruse*, 8 C. & P. 541; *State v. Nelson*, 29 Me. 329; *State v. Potter*, 42 Vt. 495; *Com. v. Trimmer*, 1 Mass. 476; *Com. v. Tryon*, 99 Mass. 442; *State v. Bentz*, 11 Mo. 27; *State v. Parkerson*, 1 Strobb. 169.

¹⁰ *R. v. Cruse*, 8 C. & P. 541; *State v. Parkerson*, 1 Strobb. 169.

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

¹² *R. v. Dixon*, 10 Mod. 335.

¹³ *Com. v. Murphy*, 2 Gray, 510. *Infra*, § 1509.

entry and detainer;¹ for stealing and receiving;² for murder;³ and for treason.⁴

After a conviction of husband and wife jointly, of a severable offence, the court may affirm the judgment as to the husband, and reverse as to the wife.⁵ But where the offence is joint, the wife cannot be convicted without the husband.⁶

§ 77. If a *feme covert* be indicted as a *feme sole*, her proper course is to plead the misnomer in abatement, for if she pleads over, she cannot take advantage of it.⁷ She must aver her marriage in her plea, and prove it affirmatively.⁸ The practice on such a plea is elsewhere discussed.⁹ But notwithstanding she is thus precluded from setting up misnomer as a bar, she may, so it has been held, make the defence of marital coercion, though she has pleaded not guilty to an indictment charging her as a *feme sole*.¹⁰

§ 78. By the English common law, if a wife is party to a crime under her husband's direct command and constraint she is entitled to acquittal; and though by some of the old writers an exception is made in cases of treason, murder, and robbery,¹¹ the weight of authority is against this exception.¹² It is also a doctrine of the same law that if a crime of minor grade be committed by a wife in company with or in the presence of her husband, it is a rebuttable presumption of law that she acted under his immediate coercion.¹³ It is, however, conceded, that if she commit a crime of

Wife's misnomer must be pleaded in abatement.

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

¹ *State v. Harvey*, 3 N. H. 65.

² *R. v. M'Athey*, 9 Cox C. C. 251.

³ *R. v. Cruse*, 8 C. & P. 541; *Com. v. Chapman*, Phil. Pamph. 1831.

⁴ *Somerville's Case*, 1 Anderson R. 104.

⁵ *R. v. Mathews*, 1 Eng. L. & E. 549; 1 Den. C. C. 596.

⁶ *Rather v. State*, 1 Porter, 132.

⁷ *R. v. Jones*, J. Kel. 37; *Whart. Cr. Pl. & Pr.* §§ 96, 423 *et seq.*

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

⁹ *Whart. Cr. Pl. & Pr.* § 423; *Com. v. Neal*, 10 Mass. 152; *Com. v. Eagan*, 103 Mass. 71.

¹⁰ *U. S. v. De Quilfeldt*, 2 Cr. L. Mag. 214; 11 Rep. 455.

¹¹ *Infra*, § 94; *Russ. on Cr.* 19-22; *R. v. Stapleton*, *Jebb*. 93; 1 Cr. & D. 163; *R. v. Knight*, 1 C. & P. 116 n.

¹² *Greaves's Notes to 1 Russ. on Cr.* 19-24.

¹³ *Infra*, § 210; 1 Hawk. c. 1; *R. v. Smith*, 8 Cox C. C. 27; *R. v. Cohen*, 11 Cox C. C. 99; *Com. v. Eagan*, 103 Mass. 71; *State v. Williams*, 65 N. C. 398; *Davis v. State*, 15 Ohio, 72; *Miller v. State*, 25 Wis. 384.

her own voluntary act, or by the bare command of her husband in his absence,¹ or, as it is held by the old writers, if she be guilty of treason, murder, or robbery, or any other crime, *malum in se*, and prohibited by the law of nature, or which is heinous in its character, or dangerous in its consequences, even in company with or by command of her husband, then she is punishable as much as if she were sole.² It may be questioned, however, whether the coercive presence of the husband, if a defence at all, is not a good defence in all cases, and whether the exception taken as to the higher grades of felonies can be maintained.³ The difficulty, however, is in finding, in the present state of society, when the husband is as likely to support the wife if she is engaged in doing wrong, as the wife is to support the husband, any reason on which the presumption is to rest.⁴ And the presumption of coercion is rebutted by proof of independent criminal action on the part of the wife.⁵

§ 79. In any view, while proximity of the husband at the time of the commission of the crime is necessary to enable this presumption to apply,⁶ such proximity by itself starts the presumption.⁷ It is sufficient if the proximity is near enough

¹ *Com. v. Feeney*, 13 Allen, 560; *Sailer v. People*, 77 N. Y. 411; *State v. Camp*, 41 N. J. L. 306. See *State v. Haines*, 35 N. H. 207; *State v. Potter*, 42 Vt. 495.

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

³ 1 Russ. on Cr., by Greaves, 18, 25, note; *R. v. Manning*, 2 C. & K. 887; *R. v. Smith*, 8 Cox C. C. 27; *R. v. Wardroper*, 8 Cox C. C. 284; *Miller v. State*, 25 Wis. 384.

⁴ By the N. Y. Penal Code of 1882, §§ 17, 24, the presumption is abolished. Sir J. F. Stephen, Dig. C. L. (note to article 30), writes: "Surely, as matters now stand, and have stood for a great length of time, married women ought, as regards the commission of crimes, to be on exactly the same footing as other people. But owing partly

to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on almost every occasion where it ought to be applied."

⁵ *R. v. Price*, 8 C. & P. 19; *R. v. Torpey*, 12 Cox C. C. 45; *State v. Cleaves*, 59 Me. 298; *State v. Harvey*, 3 N. H. 65; *Com. v. Eagan*, 103 Mass. 71; *Com. v. Pratt*, 126 Mass. 462; *Goldstein v. People*, 82 N. Y. 231; *Uhl v. Com.*, 6 Grat. 706; *People v. Wright*, 38 Mich. 744, and other cases cited, Whart. Cr. Ev. § 733.

⁶ Whether proximity is near enough to imply control, see *State v. Shee*, 13 R. I. 535.

⁷ 1 Hawk. c. 1, s. 9; 1 Hale, 47; Dalt. c. 157; 4 Bl. Com. 29; *R. v. Cruse*, 8 C. & P. 541; 2 Moody C. C. 53, S. C.; *R. v. Dixon*, 10 Mod. 335;

to put the wife under the husband's supervision, though the parties are not at the time in the same room.¹ The presumption is, however, *prima facie* only, and may be rebutted, either by showing that the wife was the instigator or more active party, or that the husband, though present, was incapable of coercing, as that he was a cripple and bedridden, or that the wife was the stronger of the two, or that she was exercising a free volition,² or that the husband was not so

R. v. Fenner, 1 Sid. R. 410; *R. v. Grat*, 706; *State v. Williams*, 65 N. C. 398; *People v. Wright*, 38 Mich. 344; *Strange*, 1120; *R. v. Taylor*, 3 Burr. 1679; *R. v. Serjeant*, 1 R. & M. 352; *Arkansas statute*, see *Edwards v. State*, 27 Ark. 493.

Where a wife, by the incitement of her husband, but in his absence, knowingly uttered a forged order and certificate for the receiving of prize money, it was held that they might be indicted together, the wife as principal on the 49 Geo. III. c. 123, and the husband as accessory before the fact, at common law. *Morris's Case*, 2 Leach, 1096; 1 Russ. 18; *R. & R. C. C.* 270. And see *R. v. Atkinson*, cited 1 Russ. on Cr. 35; *R. v. Hill*, 3 New Sess. Cas. 648; 1 Den. C. C. 453; 1 Temp. & M. 150. See 1 Russ. on Cr. 21; *R. v. Hughes*, 2 Lewin, 228; cf. 1 Russell, 21; *R. v. Hill*, 3 New Sess. Cas. 648; 1 Den. C. C. 453. In a later case, however, the common sergeant, after consulting Bosanquet and Coltman, JJ., held that the wife was entitled to an acquittal on an indictment for counterfeiting, where it appeared that she uttered the money in the presence of her husband. *R. v. Price*, 8 C. & P. 19. And a woman who went from shop to shop uttering base coin, her husband accompanying her each time to the door, but not going in, was holden by Bayley, J., to be under her husband's coercion. *MS. Durham Spring Ass.* 1829; *Matthew's Digest*, 26; *Conolly's Case*, 2 Lewin, 229.

¹ *R. v. Conolly*, 2 Lewin, 229; *Com. v. Welch*, 97 Mass. 593; *Com. v. Muusey*, 112 Mass. 289.

² *State v. Cleaves*, 79 Me. 298; *Quinlan v. People*, 6 Parker C. R. 9; *Cassin v. DeLaney*, 38 N. Y. 178; *Sellers v. People*, 77 N. Y. 411; *Tabler v. State*, 34 Ohio St. 127; *State v. Parkerson*, 1 Strobb. 169; see 1 Russ. on Cr. 21; *R. v. Stapleton*, 1 Cr. & Dix, 163; *Jebb*, 193; *R. v. Price*, 8 C. & P. 19; *R. v. Cruse*, 8 C. & P. 553; *R. v. Torpey*, 12 Cox C. C. 45; 2 Mood. C. C. 53; *R. v. Matthews*, 1 Den. C. C. 596; *R. v. Cohen*, 11 Cox C. C. 99; 18 L. T. 489; *Com. v. Trimmer*, 1 Mass. 476; *Com. v. Eagan*, 103 Mass. 71; *Uhl's Case*, 6

near at the time as to sustain the presumption.¹ So, if a woman receive stolen goods into her house, knowing them to be such, or lock them up in her chest or chamber, her husband not knowing thereof; if her husband, so soon as he knows the fact, forsake his house and her company, and make his abode elsewhere, he is not to be charged for her offence; though the law otherwise will impute the fault to him, and not to her.² And ordinarily the pre-

¹ People v. Sellers, 77 N. Y. 411, 12 Cox C. C. 45. As to uttering, see R. v. Buncombe, 1 Cox C. C. 183.

² Dalt. c. 157.

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

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

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

"It does not apply to high treason or murder.

"It probably does not apply to robbery.

"It applies to uttering counterfeit coin.

"It seems to apply to misdemeanors generally."

In a note it is said: "As to high treason, murder, and robbery, see 1 Hale P. C. 45; Dalton, c. 157; 1 Hawk. P. C. 4; R. v. Buncombe, 1 Cox C. C. 183; but as to robbery, see Mr. Carington's argument in R. v. Cruse, 8 C. & P. 556. In R. v. Torpey, the present recorder of London held that the doctrine applied to robbery. 12 Cox C. C. 45. As to misdemeanors in general, see note to R. v. Price, 8 C. & P. 20; and 1 Russ. Cr. p. 145, note (b) 5th ed. See, too, R. v. Torpey,

12 Cox C. C. 45. As to uttering, see R. v. Price 8 C. & P. 19. As to false swearing, R. v. Dicks, 1 Russ. Cr. 34, 4th ed.

In People v. Sellers, 77 N. Y. 411, it is held that if the wife steals of her own will, or by the bare command or procurement of her husband, she is not excused, citing R. v. Buncombe, 1 Cox C. C. 183; R. v. Hughes, 1 Russ. on Cr. *22 (41). And that, as in the case before the Court, the alleged husband was two hundred feet or more away from the prisoner at the time of the larceny, it was not error for the trial court to call the attention of the jury to the fact, and to charge that it was for them to say whether it did not rebut the presumption of coercion, and whether she was in his presence.

Where a husband and wife were convicted jointly of receiving stolen goods, it was holden that the conviction of the wife could not be supported, though she had been more active than her husband, because it had not been left to the jury to say whether she received the goods in the absence of her husband. R. v. Archer, 1 Mood. 143. A married woman who swore falsely that she was next of kin to a person dying intestate, and so procured administration to the effects, was held responsible for the offence, though her husband was with her when she took the oath. R. v. Dicks, 1 Russ. Cr. 34 (4th ed.). So, where a husband delivered a threatening letter ignorantly,

sumption works as much against the husband as it does in favor of the wife.¹

§ 80. When the offence is one which, from the nature of things, is imputable to the husband, the presumption of his exclusive agency is peculiarly strong. Hence, a *feme covert*, on whose premises her husband has erected a nuisance, cannot be punished criminally for its existence.² But the husband and wife together may be indicted for forcible entry and detainer, though in such case the wife's punishment will be nominal;³ and it is said that a married woman, by her own act (but not in respect to what is done by others at her command, because all such commands of hers are void), may commit and hence be indictable for the same offence. In such case the fine, set upon the wife, shall not be levied upon the husband; for the husband is to be charged for the act or default of the wife only when he is made a party to the action, and judgment is rendered against him and his wife.⁴

When the injury comes from a breach of duty exclusively imposed on a husband, *e. g.*, providing food to an apprentice, the wife, being merely the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct.⁵

§ 81. A wife living apart from her husband may be indicted alone, and punished for keeping a disorderly house, or house of ill-fame;⁶ nor is it any defence that the husband was business

as the agent of the wife, she alone was held to be punishable. R. v. Hammond, 1 Leach, 499 (3d ed.).

A married woman who, in the absence of her husband, sells liquor illegally, is responsible, unless she prove that she did so under his command or influence. Com. v. Murphy, 2 Gray, 510; Com. v. Butler, 1 Allen, 4. See Com. v. Welch, 97 Mass. 593. *Infra*, §§ 81, 1509. The husband's declarations to a third party, that the wife acted under coercion, are inadmissible, being hearsay. Edwards v. State, 27 Ark. 493.

¹ State v. Boyle, 13 R. I. 537.

² *Infra*, §§ 1422 *et seq.*; see People v. Townsend, 3 Hill N. Y. 479.

³ State v. Harvey, 3 N. H. 65.

⁴ Dalt. c. 126; Hussey's Case, 5 Co. Rep. 129; Foster's Case, 11 Co. Rep. 107; Burn's Justice (29th ed.), tit. Wife.

⁵ R. v. Squire, *infra*, § 83, Stafford Lent Assizes, 1799; Burn's Justice, 29th ed., tit. Wife. See 1 Russ. on Cr. 490-1.

⁶ R. v. Dixon, 10 Mod. 335; Com. v. Lewis, 1 Met. 151; State v. Collins, 1 McC. 355; State v. Bentz, 11 Mo. 27. *Infra*, §§ 1455, 1509.

manager of the house.¹ So she may be indicted together with her husband, and punished with him, for the same offence; for the malfasance relates to the government of the house, in which the wife has a principal share, and constitutes an offence which may generally be presumed to be managed by the intrigues of her sex.² She may be indicted for keeping a gaming house,³ and when, in the absence of her husband, though in the house where they live and trade together, she sells intoxicating liquors under such circumstances as would, but for her coverture, prove her to be a common seller, she may be indicted as such, unless it appears that she acted by his command or under his coercion or influence.⁴

As has been already incidentally noticed, the "married women's" acts, conferring particular business privileges on married women, do not change the common law rules of marital criminal responsibility.⁵ Hence, the husband is indictable for the wife's act in the illegal sale of liquor in their common domicile.⁶

§ 82. It has been held that in cases of conspiracy and riot it will not suffice to join the husband and wife alone; and if all the parties named, except the husband and wife, be acquitted, judgment against the latter will be arrested.⁷ But if an overt act be performed by the wife apart from her husband, in execution of a conspiracy concerted by her, or concerning matters distinctively belonging to her sex, it may be questioned whether in such case she is not an independent person.

§ 83. The better opinion is, that in cases where a married woman incites her husband to a felony, she is an accessory before the fact,⁸ but she cannot be treated as an accessory after the fact for receiving her husband, knowing that

Distinctive rule as to accessories.

¹ Com. v. Cheney, 114 Mass. 281. ¹¹⁵ Ibid. 146. See Nolan v. Traber, 49
² 1 Hawk. c. 1, s. 12; State v. Md. 460. *Supra*, § 78; *infra*, § 1509.
 Bentz, 11 Mo. 27. *Supra*, § 76. ⁶ *Infra*, § 1509.
³ R. v. Dixon, 10 Mod. 335. ⁷ 1 Hawk. c. 72, s. 8; Com. v. Man-
⁴ Com. v. Murphy, 2 Gray, 510. son, 2 Ashmead, 31; disapproved,
Supra, § 79. however, in Casper v. State, 47 Wis.
⁵ Com. v. Wood, 97 Mass. 225; 535. *Infra*, § 1392; Whart. Pl. & Pr. §§
 Com. v. Gannon, 97 Ibid. 547; Com. 305, 755.
 v. Welsh, Ibid. 593; Com. v. Barry, ⁸ 1 Hale, 516; 2 Hawk. c. 29, s. 34.

he has committed a felony;¹ nor for receiving goods feloniously stolen by him;² nor for concealing a felony jointly with her husband.³ As we have seen, she will not be answerable for her husband's breach of duty, however fatal, though she may be privy to his misconduct, if no duty be cast upon her, and she be merely passive.⁴ A husband can be convicted of knowingly receiving goods stolen by his wife,⁵ but not of receiving goods which she had previously received without his cognizance, and passed to him.⁶

IV. IGNORANT PERSONS.

§ 84. If ignorance of a law were a defence to a prosecution for breaking such law, there is no law of which a villain would not be scrupulously ignorant. The more brutal, in this view, a man becomes, the more irresponsible would he be in the eye of the law, and the worst classes of society would be the most privileged. No penal law could be enforced, because there is no penal law a knowledge of which, by a due degree of self-stupefaction, could not be precluded. As, however, it is a postulate of penal laws that they should be obeyed, it is a condition of those laws that ignorance of them should be no defence to an indictment for their violation.⁷

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

¹ 1 Hale, 47; R. v. Manning, 2 C. & v. Anthony, 11 Blatch. 200; U. S. v. K. 887, 888. Learned, 11 Int. Rev. 149; State v.

² R. v. Brooks, 14 Eng. Law & Eq. Goodenow; 65 Mo. 30; Com. v. Bagley, 7 Pick. 279; Com. v. Elwell, 2 Met. 190; Com. v. Goodman, 97 Mass. 117; Com. v. Emmons, 98 Mass. 6; People

³ Ibid.; 1 Hawk. c. 1, s. 10.

⁴ R. v. Squire, 1 Russ. 80, 678 (3d ed.); Jerv. Arch. (9th ed.) 17. *Supra*, § 80.

⁵ See *infra*, § 992; R. v. M'Atthey, L. & C. 250; 9 Cox C. C. 251.

⁶ R. v. Dring, 7 Cox C. C. 382; Dears. & B. 329. *Infra*, § 992.

⁷ See Whart. on Neg. § 411, where this question is fully discussed; Whart. Cr. Ev. § 717, as to presumption of knowledge of law. For rulings to this effect in criminal cases see R. v. Price, 3 Per. & D. 421; 11 Ad. & E. 727; R. v. Esop, 7 C. & P. 456; R. v. Good, 1 Car. & K. 185; R. v. Hoatson, 2 C. & K. 777; The Ann, 1 Gallis, 62; U. S. Wayman v. Com., 14 Bush, 467; and

It is no defence to an indictment for a crime that it was the custom of the country to do the act that constituted the crime.¹

so as to illegal voting, *infra*, § 1835. As to conscientiousness as a defence, see *infra*, §§ 336, 1715; that a foreigner cannot set up this defence, see *R. v. Barronet*, Dears, 51; *R. v. Esop*, 7 C. & P. 456; *Cambioso v. Maffett*, 2 Wash. C. C. 98. But that such defence may be set up in mitigation of punishment, see *R. v. Lynn*, 2 T. R. 733; 2 Leach. 560.

Belief in the unconstitutionality of a law; belief in its violation of higher law; belief in its conflict with conscientious duty, will be no defence to an indictment for disobedience to such law. *U. S. v. Reynolds*, 98 U. S. 145. And even a conscientious belief that an act is right (*e. g.*, labor by a Jew on Sunday in contravention of the Sunday laws) will not prevent such act from being indictable when made so by the State. *Com. v. Has*, 122 Mass. 40; *Specht v. Com.*, 8 Penn. St. 312; though see *contra*, *Cincinnati v. Rice*, 15 Ohio, 225; *infra*, § 1431.

In this respect the Roman common law is more tender than the English. When an offence is such *jure gentium*, then all persons are expected to have notice that it is prohibited, and are liable to punishment for its commission. But it is otherwise, by the Roman law, when a government makes an act, in itself innocent, penal. In this case *ignorantia et error juris* is a defence, unless there be notice either express or implied. See Savigny, *System*, iii. pp. 111, 326. Indeed, there were certain conditions in which *ignorantia legis* is charitably assumed. Thus, for instance, the female sex:—

"D. de L. Corn. de fals. (48. 10.) L. 38. § 2. D. ad L. Iul. de adulter.

(48. 5.) So of infancy: L. 38. § 4. D. eod. So of rusticity: L. 7. § 4. D. de iurisdiet. (2. 1.) L. 3. § 22. D. de SC. Silan. (29. 5.) So of military service: L. 5. C. de his qui sibi adscrib. (9. 23.)

The later doctrine is thus stated by Boehmer, as cited by Geib (*Lehrbuch*, etc., § 71):—

"Iuris ignorantia contra delicta legibus communibus comprehensa vix allegari potest, tum quod talia ex recta ratione iam innotescant. . . . Facilius eius ratio habetur circa delicta solis legibus positivis particularibus determinata, quia harum ignorantia excusatio, nec tantopere culposa est, praeterea his saepe prohibetur, de quo ne somnando quidem quis cogitavit."

Of the rule in the text a marked illustration is to be found in a case decided by Judge Hunt, of the United States Supreme Court, at Canandaigua, New York, in June, 1873. The defendant, Susan B. Anthony, was indicted for illegally voting for representative to Congress, in November, 1872. In defence she put in evidence the opinion given to her by learned counsel to the effect that she was so entitled to vote. Judge Hunt, however, in his charge to the jury, after discussing the question on its general relations, said: "The principle is the same in the case before us, and in all criminal cases. The precise question has been several times decided, viz: that one illegally voting was bound and was assumed to know the law. (To this is cited *Hamilton v. People*, 57 Barbour, 625; *State v. Boyett*, 10 Ired. 336; *State v. Hart*, 6 Jones N. C. 389; *McGuire v. State*, 7 Humph. 54. And see *Com. v. Bradford*, 9 Met. 268.) No

§ 85. A distinction, however, is to be noticed in respect to cases in which the *gravamen* is negligent ignorance of law. A public officer, or a lawyer, for instance, is charged with such negligent ignorance, producing injury to another. In such case he is bound to show that he had the knowledge of the law usual with good specialists of his class. On the other hand, if I throw business into the hands of an agent not professing to be a specialist in the law, he is not liable to me for negligence in not possessing knowledge that he did not pretend to; in other words, he is not chargeable with *culpa levis*. I may prove that he entered into the agency without such knowledge; yet this will not be enough

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

system of criminal jurisprudence can be sustained upon any other principle. Assuming that Miss Anthony believed she had a right to vote, that fact constitutes no defence if in truth she had not the right. She voluntarily gave a vote which was illegal, and thus is subject to the penalty of the law." The defendant was convicted, and shortly afterwards the inspectors of election, who registered the name and received the votes of Miss Anthony and her co-defendants, were placed on trial. The proof on the part of the prosecution was similar to that in the case of Miss Anthony. The defence proved the good faith of the parties accused in receiving the votes, and rested. The defendants' counsel asked the court to charge the jury, that if the jury believed that the defendants acted honestly and according to their best judgment, and had only erred in judgment, they should be acquitted. This the court refused. Judge Hunt then announced his decision, overruling the defence, and stated that instead of ordering a verdict of guilty, as he did in the case of Miss Anthony, he would submit the case to the jury, with the instructions that there was no justification for the act of the defendants,

and that in effect they were all guilty. A verdict of guilty was subsequently rendered, which was sustained by the court. *U. S. v. Anthony*, 11 Blatch. 200; *U. S. v. Taintor*, 11 Blatch. 374. See this case criticized 2 Green's C. R. 218, 244, 275, 589; *U. S. v. Taylor*, 3 McCreary, 505. In *State v. Goodenow*, 65 Me. 30, it was held no defence to an indictment for adultery that the defendants believed that the female defendant, her husband having married again, could lawfully marry, and that they were so advised by the magistrate who married them, they relying upon the opinion of the magistrate in good faith. See *R. v. Lucy*, C. & M. 511; *State v. Welsh*, 21 Minn. 22; *Minor v. Happersett*, 53 Mo. 58. *Infra*, § 1835. In *Hoover v. State*, 59 Ala. 57, it was held that it was not admissible for the defendant, on an indictment for miscegenation, to prove that he was advised that the act was lawful, there being at the time an express decision of the Supreme Court to that effect. In *The Ann*, 1 Gall. 62, it was held that ignorance of an embargo law was no defence to an indictment for violation of its prohibition, though it was impossible for the defendant to have known of the law.

¹ *Bankers v. State*, 4 Ind. 114; *Penn. v. Lewis*, Add. 279; *U. S. v. Reynolds*, *ut supra*. See *State v. Burnham*, 56 Vt. 445.

to sustain a verdict against him. He will be only liable in this respect for gross negligence, or *culpa lata*, which consists in not knowing what every one ought to know. But if I employ him as an expert in law, then he is negligent if he enters upon the employment without due knowledge, and consequently is chargeable not only with *culpa lata*, but in addition to this, with *culpa levis*, or with negligence as a specialist.¹ At the same time it is essential to remember that *the knowledge required of a specialist is not perfect knowledge*—for if this were exacted no specialist could escape the imputation of negligence—but *such knowledge as specialists of the class in question are, under the particular circumstances, accustomed to possess.*²

A magistrate may set up *bond fide* non-negligent mistake of the law to an indictment for negligence;³ though it is otherwise when such mistake is negligent.⁴

§ 85 a. Cases, also, may occur in which evil intent is a condition precedent to conviction, but in which a mistake of law; if proved, would negative such evil intent. Here it is admissible to prove such mistake of law.⁵ Thus in larceny it is admissible to prove that the defendant took the

Mistake of law admissible to negative evil intent.

¹ See Whart. on Neg. §§ 26, 418, 510, 520, 749; Miller v. Proctor, 20 Ohio St. 442; and see Whart. on Cr. Ev. § 724.

² See Whart. on Neg. §§ 52, 744-9, and Montrieu v. Jeffrys, 2 C. & P. 113, where Abbott, C. J., declared that neither attorney, nor counsel, nor judge is expected to know all the law, nor to be liable for mistakes into which cautious men may fall. See, also, R. v. Mayor, etc., L. R. 3 Q. B. 629.

³ R. v. Jackson, 1 T. R. 653; R. v. Fielding, 2 Burr. 719; Linford v. Fitzroy, 13 Q. B. 240; People v. Powell, 63 N. Y. 88; State v. Porter, 4 Harring. 556; State v. Powers, 75 N. C. 281; State v. Gardner, 5 Nev. 377. See Com. v. Shed, 1 Mass. 227; People v. Coon, 15 Wend. 277; State v. Cutter, 36 N. J. L. (7 Vroom) 125; Jacobs v. Com., 2 Leigh, 709; State v. Gardner, 2 Mo. 22.

⁴ R. v. Stukely, 12 Mod. 493. *Infra*, § 1576.

⁵ See R. v. Langford, C. & M. 602; Cutter v. State, 36 N. J. L. 125; Dye v. Com., 7 Grat. 662; Whart. on Cont. § 198; Whart. Cr. Ev. § 724; 1 Steph. Hist. Cr. Law, 114, citing Burns v. Newell, L. R. 5 Q. B. D. 454. "The fact that an offender is ignorant of the law is in no case an excuse for his offence, but it may be relevant to the question whether an act which would be a crime if accompanied by a certain intention or other state of mind, and not otherwise, was in fact accompanied by that intention or state of mind or not." Stephen's Dig. Cr. Law, art. 33, citing Barronet's Case, 1 E. & B. 1, where it was held that if A., a foreigner, unacquainted with the law of England, kills B. in a duel in England, A.'s act is murder, although he may have sup-

goods under a claim of right, however erroneous;¹ in malicious mischief, that the act was believed to be the exercise of a legal right;² in assault, that he committed an assault under a mistaken conviction of his legal rights;³ in perjury, that the alleged perjury was under *bond fide* and intelligent advice of counsel;⁴ in misconduct in office, that the alleged misconduct was under advice of counsel on a debatable question of law;⁵ or under a *bond fide* non-negligent misconception of power.⁶ If, however, the ignorance is the result of negligence, then the defendant may be indicted for the negligence. And when the question does not depend exclusively on intent, it is no defence that the act charged as a crime was committed under the advice of counsel that it was lawful.⁷ But when the question is one of intent, such proof is admissible though it must be proved that the defendant acted on it.⁸

§ 85 b. When the question is whether a particular fact or group of facts falls under a particular rule of law, an error in this respect is to be regarded as an error of fact.⁹

And so of mistakes of subsumption of facts in law.

posed it to be lawful. Sir J. F. Stephen adds the following illustration: A., a poacher, sets wires for game, which are taken by B., a game-keeper, under the authority of an act of parliament (5 Anne, c. 14, s. 4), of the existence of which A. is ignorant. A. forcibly takes the wires from B., and is tried for robbery. His ignorance of the act is relevant to the question whether he took the wires under a claim of right. R. v. Hall, 3 C. & P. 409. In R. v. Reed, Car. & Mar. 398, Coleridge, J., said: "Ignorance of the law cannot excuse any person, but, at the same time, when the question is, with what intent a person takes, we cannot help looking into his state of mind, as if a person takes what he believes to be his own, it is impossible to say he is guilty of felony." On the other hand, in U. S. v. Reynolds, 98 U. S. 145, Waite, C. J., said: "Ignorance of a fact may sometimes be taken as a want of criminal intent, but not ignorance of the law."

¹ *Infra*, §§ 884-9. So as to malicious trespass, *Lossen v. State*, 62 Ind. 437. See 2 Steph. Hist. Cr. Law, 114.

² *Infra*, § 1072 a.

³ *Infra*, §§ 455 et seq.

⁴ *Infra*, § 1249.

⁵ *Infra*, §§ 1576, 1582.

⁶ *State v. Gardner*, 5 Nev. 377. See U. S. v. Railroad Cars, 1 Abb. U. S. 196.

⁷ U. S. v. Anthony, 11 Blatch. 200; *State v. Goodenow*, 65 Me. 33; *Com. v. Elwell*, 2 Met. 190; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Emmons*, 98 Mass. 6; *Cutter v. State*, 36 N. J. L. 125.

That an opinion of an attorney-general is no defence, see *Dodd v. State*, 18 Ind. 56; nor is that of a justice of the peace. *State v. Goodenow*, 65 Me. 30; *Black v. Ward*, 27 Mich. 191.

⁸ *Long v. People*, 50 Mich. 249; *infra*, §§ 936, 1249.

Whart. on Cont. § 199.

§ 86. Publication is the mode by which the will of the sovereign, as expressed through statute, is made known to the subject. The mere passage of a statute is not supposed to be a publication until a sufficient period of time has elapsed to enable the statute to be made known to the persons affected by it.¹

In many jurisdictions, the custom is for statutes to contain clauses specifying the time at which they shall operate; and in some States this is prescribed by constitutional limitation. As a rule, however, as is already seen, it is no defence (within the above limits) that the statute under which the trial takes place was unknown to the party indicted. In New York, it is provided that no act of the legislature shall take effect until twenty days after it is passed, unless there be a special provision to the contrary.²

§ 87. Ignorance or mistake of fact is admissible for the purpose of negating a particular intention.³ Thus

¹ R. v. Bailey, R. & R. 1, where a pardon was recommended on this ground; Burnsv. Nowell, L. R. 5 Q. B. D. 454; Ship Cotton Planter, 1 Paine, 23; U. S. v. 14 Packages, Gilpin, 235; though see The Ann, 1 Gallis. 62, cited *supra*, § 84; Heard v. Heard, 8 Ga. 380.

² 1 R. S. 244, § 12; Barb. C. L. 252.

³ See Dotson v. State, 62 Ala. 141. Responsibility, according to Berner, Lehrbuch, § 91, ceases when the will and the object are each present, but where they do not coalesce, and the connection between the two is prevented. Error facti et aberratio delicti. Under the latter the following cases are to be noticed:—

(a) Consequences which by a suitable forecast could not have been foreseen have no causal connection with the will of the actor. Responsibility cannot attach to them. They are simply *casus*. Thus a slight bodily injury, which in the party injured produces serious results beyond the range of calculation will be imputed to the actor simply as what it in appearance

was. He is not responsible for the unforeseen consequences. And with this accords the North German Code, § 224.

(b) If he acts on a false hypothesis, when, if it were correct, would justify his act, this act cannot generally be considered as a crime. For the will and the deed do not correspond.

(c) If he acts on a false hypothesis, which, if correct, would lower the grade of his guilt, the act is to be regarded as correspondingly lowered as to responsibility. For instance, A. shoots B., whom he supposes to be a stranger, but who turns out to be his father; this is not parricide, but mere homicide. So A. and B. go out together to steal; but A. is ignorant that B. is armed. A. is then responsible only as principal in a simple, as distinguished from an aggravated larceny. To this effect are the codes of the several German States. This law, it will be observed, is much more lenient than our own, which makes conspirators liable for all their co-conspirators' acts committed in pursuit of the common design.

if a man, supposing that he is killing a thief in his own house, kill one of his own family, he will be guilty, not of murder, but at the most, of negligent homicide;¹ or if, under an erroneous impression that the act is necessary in self-defence, he killed the supposed aggressor, the case is not murder, but is manslaughter or excusable homicide.² So a taking by mere accident, or in a joke, or mistaking another's property for one's own, is not larceny;³ nor is killing a wrong animal by mistake malicious mischief;⁴ nor is a false oath taken under advice of counsel, in the belief that the statement was true, perjury;⁵ nor is it extortion for an officer to receive money honestly believed to be due.⁶ It has also been held that where an innocent merchant vessel so conducts herself as to produce the belief she is piratical, a vessel capturing her is not liable to forfeiture.⁷ A prosecution, also, cannot be sustained for resisting an officer if it appear that the defendant honestly supposed the officer to be a private person.⁸ On the other hand, we must remember that if an unforeseen consequence ensue from an act which is in itself unlawful, and in its original nature wrong or mischievous, the actor may be criminally responsible for such consequences, although against the party's wish.⁹ We may therefore conclude that when a particular intent is necessary to constitute the offence (*e. g.*, in larceny, *animus furandi*; in murder, malice), then

¹ *Supra*, § 38; *infra*, §§ 467, 495; 1 Hale, 42, 43; 4 Bl. Com. 27; R. v. Levett, Cro. Car. 538. *Nulium crimen est in casu.* Cicero, pro Planc. c. 14.

² 2 Hale, 507. *Infra*, §§ 467–95. See, also, Com. v. Presby, 14 Gray, 65.

³ See *infra*, §§ 884–85, 902. This has been held where an ignorant person, finding goods, honestly believes that they are his. R. v. Reed, C. & M. 306; Merry v. Green, 7 Mees. & W. 623. See R. v. Matthews, 14 Cox C. C. 5.

⁴ State v. Matthews, 20 Mo. 55; State v. Graham, 46 Mo. 490.

⁵ U. S. v. Connor, 3 McLean, 573.

⁶ State v. Cutter, 36 N. J. L. (7 Vroom) 125. *Infra*, § 1576.

⁷ The Marianna Flora, 11 Wheat. 1. See also Clow v. Wright, Brayt. 118; though see U. S. v. Malek Adhel, 2 How. 210; U. S. v. Packages of Linen, 1 Paine, 129, where forfeiture was held

not to be dependent on the state of mind of parties implicated.

⁸ *Infra*, § 649; R. v. Ricketts, 3 Camp. 68; Yates v. People, 32 N. Y. 509; Logue v. Com. 38 Penn. St. 265. *Contra*, R. v. Forbes, 10 Cox C. C. 362. See Com. v. Kirby, 2 Cush. 577; Com. v. Cooley, 6 Gray, 350; People v. Muldoon, 2 Parker, C. R. 43; State v. Belk, 64 N. C. 10; Johnson v. State, 26 Tex. 117. In State v. McDonald, 7 Mo. Ap. 510, it was held that a conductor who *bona fide* and non-negligently ejected a passenger from a car on the ground of non-payment, was not indictable for assault; and see Clow v. Wright, Brayt. 118.

⁹ *Infra*, § 120. U. S. v. Liddle, 2 Wash. C. C. 205; U. S. v. Ortega, 4 Wash. C. C. 531; U. S. v. Benner, Baldwin, 234; 4 Bl. Com. 27.

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

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

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

¹ As authorities to the effect that error of fact may be proved to negative evil intent, see Broom's Leg. Max. 190; *R. v. Thurborn*, 1 Den. C. C. 387; *R. v. Forbes*, 7 C. & P. 224; *R. v. Allday*, 8 C. & P. 136; *R. v. James*, 8 C. & P. 131; *R. v. Tinkler*, 1 F. & F. 513; *R. v. Cohen*, 8 Cox C. C. 41; *R. v. Sleep*, 8 Cox C. C. 472; *R. v. Wagstaffe*, 10 Cox C. C. 530; *R. v. Matthews*, 14 Cox C. C. 5; *R. v. Twose*, 14 Cox C. C. 327; *U. S. v. Pearce*, 2 McLean, 14; *Com. v. Rogers*, 7 Met. 500; *Com. v. Kirby*, 2 Cush. 579; *Marts v. State*, 26 Ohio St. 162; *Gregory v. State*, Id. 510; *Steinmeyer v. People*, 95 Ill. 383; *Com. v. Stout*, 7 B. Mon. 247; *Farbach v. State*, 24 Ind. 77; *Stern v. State*, 53 Ga. 229; *Gordon v. State*, 52 Ala. 308; *Carter v. State*, 55 Ala. 181; *People v. Miles*, 55 Cal. 207. That the test is the defendant's apprehension, not that of jury, or of third person, see *infra*, §§ 488-91.

² See *infra*, § 492.

³ *Whart. Cr. Ev.* § 75; 1 Stark. C. P. 196; *Sedg. Stat. Law*, 2d ed. p. 80; *R. v. Myddleton*, 6 T. R. 739; *R. v. Jukes*, 8 T. R. 536; *U. S. v. Leathers*, 6 Saw. 17; *State v. Melville*, 11 R. I. 417; *Gardner v. People*, 62 N. Y. 299; *Halsted v. State*, 41 N. J. L. 552; *State v. Stimson*,

24 N. J. L. (4 Zab.) 478; *State v. Heck*, 23 Minn. 549; *Farmer v. People*, 77 Ill. 322; *State v. King*, 86 N. C. 603. As maintaining a view opposite to that in the text, see article by Mr. Bishop, 4 South. Law Rev., N. S. 158; and see, also, 12 Am. L. Reg. 469. As to pleading of *scienter* in such cases, see *Whart. Cr. Pl. & Pr.* § 164.

Sir J. F. Stephen (*Dig. Cr. Law*, art. 34) states the law as follows: "An alleged offender is, in general, deemed to have acted under that state of facts which he, in good faith and on reasonable grounds, believed to exist when he did the act alleged to be an offence; provided that, when an offence is so defined by statute that the act of the offender is not a crime unless some independent fact coexists with it, the court must decide whether it was the intention of the legislature that the person doing the forbidden act should do it at his peril, or that his ignorance as to the existence of the independent fact, or his mistaken belief, in good faith and on reasonable grounds, that it did not exist, should excuse him; provided, also, that voluntary or negligent ignorance of any such fact is no excuse for any such offence."

Of the last point he gives the fol-

dead.¹ And an indictment has been sustained in Massachusetts against a man for marrying a woman who believed herself to be a

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

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

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

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

Bennett, 14 Cox C. C. 45 (1877), where honest belief of death within the seven years was set up, Bramwell, L. J., said to the jury: "I cannot, and never do, recognize as a defence such a ruling as my brother Martin laid down in *R. v. Turner*. I shall therefore follow *R. v. Gibbons*, nor will I grant a case, but will ask the jury to convict the prisoner on the evidence before them." The defendant was convicted and sentenced to two years' penal servitude.

In *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337, it is said that the *mens rea* may be dispensed with by statute, but that the intention to so prescribe should be clearly and strongly expressed.

Sir J. F. Stephen, commenting on *R. v. Gibbons*, 12 Cox C. C. 237, says: "It seems to me that if the belief was founded on positive evidence the case would be otherwise. Suppose, e. g., a woman saw her husband fall overboard in the middle of the Atlantic, and saw a boat go out to search for him and return without him; suppose that she took out administration to his estate, heard nothing of him for five years, and then married again; would she be guilty of bigamy if by some strange chance he had escaped? Surely not. I am informed this view was taken by Denman, J., and Amphlett, J., in a case (*R. v. Moore*) tried at Lincoln Spring Assizes, 1877. I

¹ *Com. v. Mash*, 7 Met. 472. See *Com. v. Elwell*, 2 Ibid. 190.

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

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

widow, although eleven years had elapsed since she had last seen or heard from her husband, whom she had left,¹ it being held by the court that the statutory exceptions do not apply to the deserting party. It has been further held, that when a guilty party in a divorce suit marries again without leave of court (this being legally essential) during the life of the other party, and afterward obtains such leave, an honest belief that the second marriage is or has become legal has no effect in making it so, and in protecting the parties.² That the defendant honestly believed in the existence of a non-existent divorce is also no defence.³

think the proviso in 24 & 25 Vict. c. 100. s. 57 (art. 257), ought clearly to be read, not as excluding the general common law principle stated in this article, but as supplementing and completing it, by providing that a second marriage, after seven years' ignorance as to the life of the first husband or wife, shall not be criminal, although the party so marrying has no positive reason to believe, and perhaps does not believe, that the absent person is dead." In the report of the English commissioners of 1879, the rule in *R. v. Gibbons* was adopted, and this was approved by Sir J. F. Stephen. See his explanation in *Nineteenth Century* for January, 1880. As to scope of Texas statute in this relation, see *Neeley v. State*, 8 Tex. Ap. 64.

In *Cundy v. Le Cocq*, 51 L. T. N. S. 265; 32 W. R. 721, L. R. 13 Q. B. D. 207, where it was held that ignorance that the vendee was drunk is no defence to a charge for selling to a drunkard (the statute creating the offence not containing the word "knowingly"), Stephen, J., said: "On the other side it has been urged that the maxim of the criminal law, that before a person can be convicted of a crime there must be a 'guilty mind,' applies to this case. This maxim came into use in early times, when the criminal law was in an undefined state, for the

guidance of those who administered that law, and in those times the maxim may have been of general application. A 'guilty mind' is a necessary element in some crimes, but those crimes have now been defined, and the maxim has been superseded in consequence of the greater precision in the definitions of crimes, and now, the question whether a 'guilty mind' is necessary to constitute an offence turns upon the words of each particular statute. The case of *Reg. v. Prince (ubi sup.)* shows that a guilty knowledge is not always necessary to constitute an offence; and *Reg. v. Bishop*, L. R. 5 Q. B. D. 359, is to the same effect." The same distinction is taken in *Attorney-Gen. v. Lockwood*, 9 M. & W. 378; *Roberts v. Egerton*, L. R. 9 Q. B. 494; and *Fitzpatrick v. Kelly*, L. R. 8 Q. B. 337. And see *State v. Hopkins*, 56 Vt. 250.

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

² *Thompson v. Thompson*, 114 Mass. 566. See *infra*, § 1695.

³ *State v. Goodenow*, 65 Me. 30; *Hood v. State*, 56 Ind. 263; *Davis v. Com.*, 13 Bush, 318. See, however, *Squire v. State*, 46 Ind. 458, where it was held that an honest belief by a man that his first wife had been divorced from him was a defence, when he had made diligent inquiries which sustained this view.

Numerous illustrations to the same effect may be drawn from prosecutions for invasions of the laws making indictable the sale of liquors under certain conditions. It is no defence, for instance, to an indictment for keeping or selling adulterated or intoxicating liquors that the defendant did not believe them to be intoxicating or adulterated.¹ So, on an indictment for selling adulterated milk, the defendant is not protected by ignorance of the adulteration, or even by belief that the milk was pure.² And the same rule applies to indictments for selling other deleterious drinks.³

In several States selling intoxicating liquors to minors is indictable by statute, and in such cases, also, arises the question, whether the defendant knew that the vendee was a minor. Here, again, we have the rule before us applied, it having been repeatedly held that in cases in which knowledge is not part of the statutory offence, ignorance in this respect, coupled even with an honest belief that the vendee was of full age, is no defence;⁴ and the same rule applies to all cases of dealing illegally with minors.⁵

It is also no defence to an indictment for selling to persons of intemperate habits that the defendant did not know that the vendee was of intemperate habits;⁶ though it is otherwise when the statute

¹ *Com. v. Boynton*, 2 Allen, 160; *Com. v. Farren*, 9 Allen, 489; *Com. v. Nichols*, 10 Ibid. 199; *Com. v. Smith*, 103 Mass. 444; *State v. Smith*, 10 R. I. 258; *People v. Zeiger*, 6 Park. C. R. 355. See *R. v. Woodrow*, 15 M. & W. 404. *Infra*, § 1507. *Contra*, *Farrell v. State*, 32 Ohio St. 456.

² *Com. v. Farren*, 9 Allen, 489; *Com. v. Waite*, 11 Ibid. 264; *State v. Smith*, 10 R. I. 258.

³ *Com. v. Boynton*, 2 Allen, 160. See *Barnes v. State*, 19 Conn. 398.

⁴ *Infra*, § 1507; *U. S. v. Dodge*, Deady, 186; *Com. v. Goodman*, 97 Mass. 117; *Com. v. Emmons*, 98 Ibid. 6; *Com. v. Lattinville*, 120 Ibid. 385; *Com. v. Finnegan*, 124 Ibid. 324; *Barnes v. State*, 19 Conn. 398; *McCutcheon v. People*, 69 Ill. 601; *Farmer v. People*, 77 Ibid. 322; *Flynn v. Galesburg*, 12 Ill. App. 200; *State v.*

Hartfel, 24 Wis. 60; *State v. Cain*, 9 W. Va. 559; *Ulrich v. Com.*, 6 Bush, 400; *State v. Hause*, 71 N. C. 518; *Crampton v. State*, 37 Ark. 108; *Pounders v. State*, 37 Ark. 399. *Aliter*, *Stern v. State*, 53 Ga. 229 (though see *Reich v. State*, 63 Ga. 616); *Adler v. State*, 55 Ala. 16; *Brown v. State*, 24 Ind. 113; *Robinius v. State*, 63 Ind. 235; *Moore v. State*, 65 Ind. 382; *Faulks v. People* 39 Mich. 200; *Farbach v. State*, 24 Ind. 77; *Goetz v. State*, 41 Ibid. 162. The question in the latter cases depended on the construction of the statute.

⁵ *State v. Cain*, 9 W. Va. 559. See *Holmes v. State*, 88 Ind. 145.

⁶ *State v. Heck*, 23 Minn. 594; *Farmer v. People*, 77 Ill. 322; *Humpeler v. People*, 92 Ill. 400; *Dudley v. Santbine*, 49 Iowa, 650. *Contra*, *Crabtree v. State*, 30 Ohio St. 382.

makes the offence to be selling to persons of *known* intemperate habits, in which case knowledge is an ingredient of the prosecutor's case.¹

Analogous cases have arisen under statutes making it indictable to abduct, seduce, or violate girls under a specific age. Here, also, it is no defence that the defendant mistook the girl's age.² We have recently had a signal illustration of this application, where the rule was affirmed by the great majority of the English judges. The defendant was convicted under 24 & 25 Vict. of unlawfully taking an unmarried girl under sixteen years out of her father's possession and against his will. It was proved by the defendant that he *bonâ fide* believed, and had reasonable grounds for believing, that the girl at the time of the act was over sixteen. Cockburn, C. J., Kelly, C. B., Bramwell, Cleasby, and Amphlett, BB.; Blackburn, Mellon, Lush, Grove, Quain, Denman, Archibald, Field, and Lindley, JJ., held that the defence was of no avail, and that the conviction was right. The sole dissentient was Brett, J.³ A similar ruling is to be found in the Iowa reports, it being held in that State that knowledge that a child is under ten years is not necessary to convict a defendant of the statutory offence of assaulting a child under ten years.⁴ And it has been held in England, by the Court for Crown Cases Reserved, that the defendant's belief that the patients received were not lunatics, is no defence to an indictment for receiving lunatics without license.⁵ In Missouri, also, it is no defence to a suit for marrying minors that the defendant believed them to be of full age.⁶ Nor will the defendant be at liberty to prove that the minor appeared of full age. "His honest mistake in this regard will not protect him. The law explicitly de-

¹ Smith v. State, 55 Ala. 1. See So the statute provides." Beck, J. Crabtree v. State, 30 Ohio St. 382. State v. Newton, 44 Iowa, 45, citing

² R. v. Booth, 12 Cox C. C. 231; R. Jamison v. Burton, 43 Iowa, 283.
v. Olifier, 10 Ibid. 402; R. v. Robbins, ³ R. v. Prince, L. R. 2 C. C. 154; S. C., 13 Cox C. C. 138.
1 C. & K. 456; State v. Ruhl, 8 Ohio, C., 13 Cox C. C. 138.
447; Lawrence v. Com., 30 Grat. 845. ⁴ State v. Newton, 44 Iowa, 45.

Hence knowledge that a child was ⁵ R. v. Bishop, L. R. 5 Q. B. D. 259; 14 Cox C. C. 404; 42 L. T. N. S. 240, approved by Cooley, J., in Mich. 1884, People v. Roby, 17 Rep. 626. See 2 Steph. Hist. Cr. Law, 117, where the ruling in R. v. Bishop is sustained.
upon ten years is not necessary to convict a defendant of the statutory offence of assaulting a child under ten years. "The crime does not depend upon the knowledge of defendant of the fact that the child was under ten years of age, but upon the fact itself. ⁶ Beckham v. Nacke, 56 Mo. 546.

clares what is required for his protection, and unless he adopts the means pointed out, he must suffer the consequences."¹

In other lines of prosecutions, under statutes making acts indictable irrespective of intent, similar conclusions have been reached. Thus, it is no defence to an indictment for betting at a gaming house that the defendant believed that the house was licensed;² nor to an indictment for selling a calf under the statutory age, that the defendant did not know that the calf was below the limit;³ nor to an indictment against a public officer for illegally appropriating public money that he believed the appropriation to be legal and right;⁴ nor to an information against a retailer of tobacco for having adulterated tobacco in his possession, that he believed it on plausible grounds to be genuine;⁵ nor to an indictment for carrying an illegal number of passengers, that the defendant did not know that there was an excess;⁶ nor to an indictment for selling naphtha, that the defendant did not know that the oil was naphtha;⁷ nor to an indictment for illegally usurping an office, that the defendant honestly believed that he was truly elected to the office;⁸ nor to an indictment for illegally voting, that the defendant honestly believed that he was duly qualified;⁹ nor to an indictment for selling liquor on Sunday, that the sale was by a clerk without the defendant's knowledge or consent;¹⁰ nor to an indictment for inflicting capital punishment under a void warrant that the officer honestly believed the warrant to be valid.¹¹ With these rulings may be classed the well-known common law principle, that it is no defence to an indictment

¹ State v. Griffith, 67 Mo. 287, citing Beckham v. Nacke, 56 Mo. 546. ² Shuster v. State, 48 Ala. 199.

³ Com. v. Raymond, 97 Mass. 567. ⁴ Halsted v. State, 12 Vroom, 552.

⁵ R. v. Woodrow, 15 M. & W. 404; cited and approved in U. S. v. Bayard, 15 Rep. 200, 520; S. C., 16 Fed. Rep. 376; 21 Blatch. 287. ⁶ U. S. v. Thompson, 12 Fed. Rep. 245; State v. Balt. Steam Co., 13 Md. 181; Western R. R. v. Fulton, 4 Sneed, 589; though see Duncan v. State, 7 Humph. 148; Com. v. Stout, 7 B. Mon. 247. In Duncan v. State, and Com. v. Stout, the indictments were under statutes prohibiting officers of vessels from transporting "colored persons" in which statutes the question of color was left open.

⁷ 1 Com. v. Wentworth, 118 Mass. 441; though see Hearne v. Garten, 2 E. & E. 66.

⁸ *Infra*, § 1811. See State v. Hallett, 8 Ala. 159; McGuire v. State, 7 Humph. 54; State v. Hart, 6 Jones (N. C.), 389.

⁹ *Infra*, § 1835. ¹⁰ People v. Roby, Mich. 1884, 17 Rep. 626. *Infra*, §§ 247, 1503.

¹¹ *Infra*, § 401.

for a libel that the defendant was ignorant of the contents of the libel;¹ or that his motives were scientific or philanthropic.²

As diverging from the line of these cases just stated may be mentioned a series of rulings in Ohio, Indiana, and Texas. In Ohio, the precedent was set in a case rather political than juridical in its type. James G. Birney, conspicuous in the old anti-slavery agitation, was indicted, in 1837, for harboring a fugitive slave.³ The statute under which the prosecution was instituted did not make either the *scienter* or the intent essential to the offence, though it might well be argued that as this was a statute in derogation of liberty, and as in a free State no one has a right to view another man as other than a free man, the case was exceptional, and notice of the enslaved status of the fugitive must be brought home to the defendant in order to charge him with the statutory offence. Under the pressure of this argument the Supreme Court held, that, to make out the case of the prosecution, it was essential to prove that the defendant knew that the party harbored by him was a fugitive slave. In a subsequent case this ruling was held to establish the general principle, that there can be no conviction of a criminal offence without proof of guilty knowledge, and hence of guilty intent.⁴ The same view has been taken in Indiana,⁵ in Georgia,⁶ and, under local statute, in Texas.⁷

The function of imposing indictability on pernicious acts irrespective of intent, is one which has been exercised by legislatures, not only frequently but from necessity.⁸ It may be indispensable to public safety that storing of gunpowder, or of highly inflammable oils, in exposed localities should be prohibited; and as in such cases the statutes could be easily eluded if a *scienter* be requisite to conviction, the policy that requires the enactment of the statute requires also that the statute should relieve the prosecution from proving a

¹ Curtis v. Mussey, 6 Gray, 261; State, 41 Ibid. 162; Robinius v. State, People v. Wilson, 64 Ill. 195. *Infra*, 63 Ind. 235. But see, as qualifying above, Holmes v. State, 88 Ind. 168.

² R. v. Hicklin, L. R. 3 Q. B. 360. Bradlaugh, *ex parte*, 3 Q. B. D. 509. *Infra*, §§ 1607, 1654.

³ Birney v. State, 8 Ohio, 230.

⁴ Crabtree v. State, 30 Ohio St. 382; Farrell v. State, 32 Ohio St. 456.

⁵ Brown v. State, 24 Ind. 113; Farbach v. State, 24 Ibid. 77; Goetz v.

⁶ Stern v. State, 53 Ga. 229.

⁷ Watson v. State, 13 Tex. Ap. 76; Pressler v. State, 13 Ibid. 95, which last case was under a statute making it indictable to sell knowingly to a minor.

⁸ *Supra*, § 23 a.

scienter. Sometimes this is done by an express clause in the statute, as where a woman concealing the death of a bastard child was, by the old statutes, "deemed" to have been concerned in killing it, and where it is provided that persons selling spirituous liquors shall be "deemed" common sellers of the same, or that delivery of such liquors shall be proof of sale,¹ or that persons carrying concealed weapons shall be presumed to carry them knowingly. Such provisions are constitutional, as concerning matters of process,² and are illustrated by statutes prescribing that a person not heard of for a specific period shall be presumed to be dead, and that debts not acknowledged within a specific period shall be presumed to be paid. If this can be done by an express clause, it can be done by implication; and if so, where the legislature imposes a specific penalty on a person doing a particular thing, irrespective of *scienter*, it will be the duty of the courts to enforce the prohibition.³ The question is one of policy; and this may be taken into consideration when the legislative meaning is sought. That a man should be convicted of a malicious act without proof of malice, or of a negligent act without proof of negligence, is of course an enormity which no legislature could be supposed to direct. But it is otherwise as to certain mischievous acts which it may be a sound policy to prohibit arbitrarily, because they imperil public safety (as, for example, the selling of intoxicating drinks and defective storing of explosive compounds), and because to require *scienter* to be proved would be to defeat the object of the statutes, since in many cases, and those the most dangerous of the class, it would be out of the power of the prosecution to prove *scienter* beyond reasonable doubt. The legislature may properly say, "In such cases we presume *scienter*; whoever deals with these dangerous agencies does so at his risk." The same reasoning applies to illicit intercourse with young girls, a case above given. The act is itself an invasion of good morals, and if indulged in brings with it its own risks. Even at common law ignorance as to aggravating facts cannot be set up as a defence, as, on a trial for burglary, is the case with ignorance that the building entered was a dwelling-house. *A fortiori* is this the case when a statute, on grounds of public policy, makes *scienter* irrelevant. It is also to

¹ *Infra*, § 1528.

² See Whart. on Cr. Ev. § 715; Halsted v. State, 12 Vroom, 340, with note in 1 Cr. Law Mag. 340.

³ See this point well considered in

be observed that to declare that honest ignorance of fact is a defence would extend the same privilege, in many cases, to honest ignorance of law. Ignorance, for instance, that the State prohibits by indictment dealing with minors is morally as good a defence, in cases where the party dealt with has apparently reached majority, as is ignorance that such party is a minor. In both cases the defendant is ignorant that he is doing an illegal thing. That in the former case it is conceded that such ignorance is no defence shows that honest belief that an illegal act is legal is no necessary ground for acquittal. We cannot, therefore, lay down the rule that ignorance of inculpatory facts shall be always a defence, without extending the same immunity to ignorance of inculpatory law. And if we cannot so extend this immunity, then we must hold that ignorance does not necessarily acquit when *scienter* is not an essential of the offence.¹

§ 89. Even where, as affecting intent, ignorance of fact is set up, the defence is unavailable where the defendant, by the exercise of due diligence, could have become aware of his mistake.² Of course, if the defendant was ignorant of facts from a knowledge of which alone could malice be inferred, he cannot be convicted of a malicious crime. But in such case he may be convicted of negligence when his ignorance was culpable, and was productive of harm. A man who negligently mistakes a visitor for a burglar, and kills the visitor, cannot, indeed, be convicted of murder, but he can be convicted of manslaughter. And, as a general rule, if the defendant is chargeable with negligence in not acquainting himself with the true facts of the case, his ignorance is no defence.³ It is

¹ "It is certain that ignorance is, as a rule, no excuse as regards the liabilities of a quasi-criminal kind which arise under penal statutes (Carter v. McLaren, L. R. 2 Sc. & D. 125), or such as are purely civil."—Pollock on Cont., Wald's ed., 385, citing Fowler v. Hollins, L. R. 7 Q. B. 616; Hollins v. Fowler, L. R. 7 H. L. 757; Coles v. Clark, 3 Cus. 399; Curtis v. Cane, 32 Vt. 232; Hoffman v. Carew, 22 Wend. 285; Pease v. Smith, 61 N. Y. 477; Koch v. Branch, 44 Mo. 542.

² *Infra*, § 492.

³ See Whart. on Negligence, § 415; Hudson v. MacRea, 4 B. & S. 585; Com. v. Viall, 2 Allen, 512; People v. Reed, 47 Barb. 235.

In Bonker v. People, 37 Mich. 4, it was held that under a statute forbidding any person to join others in marriage, knowing he is not authorized to do so, or knowing of any legal impediment to the proposed marriage, actual personal knowledge is not required; but it was held that if a party so officiating neglects to take the testimony which he is required to take, and re-

no defence, for instance, to a physician indicted for malpractice, that he was ignorant of facts with which it was his duty to become acquainted.¹ Nor is it a defence to an engineer for negligent homicide that his negligence arose from ignorance of facts which he ought to have known.² Nor is it a defence to an indictment for perjury that the defendant believed what he swore to be true, if he had no probable cause for so believing;³ nor can persons selling dangerous compounds, required by law to be subject to certain tests, set up as a defence that they were ignorant that the tests were not satisfied.⁴ It is otherwise, in cases of this class, where the party charged has used due diligence to inform himself.⁵ Of course,

lies upon less satisfactory oral statements, such neglect will be imputed to illegal intent. "No doubt," said Cooley, C. J., "where guilty knowledge is an ingredient in the offence, the knowledge must be found; but actual, positive knowledge is not usually required. In many cases to require this would be to nullify the penal laws. The case of knowingly passing counterfeit money is an illustration; very often the guilty party has no actual knowledge of the spurious character of the paper, but he is put upon his guard by circumstances which, with felonious intent, he disregards. Another illustration is the case of receiving stolen goods knowing them to be stolen; the guilt is made out by circumstances which fall short of bringing home to the defendant actual knowledge. He buys, perhaps, of a notorious thief, under circumstances of secrecy and at a nominal price; and the jury rightfully hold that these circumstances apprise him that a felony must have been committed. Andrews v. People, 60 Ill. 354; Schriedly v. State, 23 Ohio St. 130. If by the statute now under construction actual personal knowledge is required, the statute may as well be repealed: for it can seldom be established even in the grossest cases. How many justices are

likely to know the exact age of all the girls in their township approaching the age of consent? or even of all those in their immediate neighborhood, except as they rely upon reputation or family report? Had he taken the proper evidence under oath and been deceived, perhaps he would have been justified, even though he had had reason to believe the age of consent had not been reached; but where he neglects the testimony which he is required to take, and pretends to rely upon the less satisfactory oral statements which he is not required to take, the neglect may well be imputed to illegal intent."

That in police prosecutions the *scienter* need not be proved, see *supra*, § 23 a.

¹ R. v. Macleod, 12 Cox C. C. 534; Whart. on Hom. §§ 143, 153.

² U. S. v. Taylor, 5 McLean, 242.

³ R. v. Muscot, 10 Mod. 192; R. v. Schlesinger, 10 Q. B. 670; R. v. Petrie, 1 Leach, 329 (3d ed.); State v. Gates, 17 N. H. 373; Com. v. Cornish, 6 Binn. 249; Com. v. Cook, 1 Rob. (Va.) 729; State v. Knox, Phil. (N. C.) § 312; *infra*, § 1246, and cases there cited.

⁴ Honrigan v. Nowell, 110 Mass. 470.
⁵ Hearne v. Garton, 2 E. & E. 66; U. S. v. Buck, 4 Philad. 161; 8 Am. L. Reg. 540; Duncan v. State, 7 Humph. 148; Squire v. State, 46 Ind. 459.

where the statute makes the *scienter* essential to the offence, then the *scienter* must be proved.¹

§ 90. In prosecutions for negligent exercise of a specialty, a person is not required to know facts outside of his profession. A person, for instance, not claiming to be skilled in medicine, and giving notice of his ignorance, cannot, if called upon to act as a medical attendant, be made responsible for his ignorance of the specialty, unless it appear that he displaced, by his rash acceptance of the post, a more competent person from undertaking its duties.² And, generally, we may hold that where a person is employed, not as a specialist, but as a non-specialist, undertaking a business of which he professes to know nothing, he then can only be held liable for gross negligence, or *culpa lata*, consisting of ignorance of facts which every ordinary person ought to know.³

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

V. CORPORATIONS.

§ 91. In the ancient case of *The Abbot of St. Bennet's v. The Mayor, etc., of Norwich*,⁴ Pigot said *arguendo* that a "corporation cannot do a personal tort to another, as a battery or wound-

¹ *R. v. Sleep*, 8 Cox C. C. 472. But see *U. S. v. McKim*, 3 Pitts. 155.

Subtle distinctions arise in this relation which in the Roman law are noticed under the titles of *Error in objecto*, and *Aberratio delicti*. *Error in objecto* is where A. designs to shoot B., but by mistake shoots C., mistaking C. for B., or where A. designs to steal B.'s property, but by mistake steals C.'s property. *Aberratio delicti* is where A. designs to shoot B., recognizes and aims at B., but accidentally shoots C., who at the moment happens to intervene. In other words, the error may arise from a mistake of the actor, or from a defection of his aim. Error of the former class exists when the object at which the actor aims is not that which he supposes it to be. Error of the second class exists when the means used by the actor glance from the intended object, and injure an unin-

tended person. As to the first case, we may generally remark that when the object actually injured has the same legal consequence as the object intended, then, at common law, the fact that there was a mistake as to the victim is no defence. *Infra*, §§ 109, 120.

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

² Whart. on Neg. §§ 730-7.

³ Whart. on Neg. §§ 28-45-48, and cases cited *supra*, § 89.

⁴ Y. B. 21 Ed. IV. 7, 13.

ing, nor can they do treason or felony, so far as the corporation is concerned." Much the same language is used in the case of *Sutton's Hospital*;¹ and in *Orr v. The Bank*² it was expressly ruled that a corporation, as such, could not through its agents be guilty of an assault and battery. It has been more recently held in England that such a body is not subject to be indicted for a violation of the Foreign Establishment Act.³ And Lord Holt is reported, in an anonymous case, to have laid it down generally that a corporation is not indictable at all, though its individual members are.⁴ This general proposition of Lord Holt has, however, received considerable qualification in modern times, and is now limited to cases of felonies, assaults, riots,⁵ and malicious wrongs.⁶ We may, therefore, hold that a corporation may be indicted for a breach of duty imposed on it by law, though not for a felony or for public wrongs involving personal violence, as riots or assaults.⁷ Thus an indictment will lie at common law against a corporation for not repairing a road, a bridge,

Corporations indictable for breach of duty.

¹ 5 Coke's Rep. 253.

² 1 Ohio, 36.

³ *King of the Two Sicilies v. Willcox*, 14 Jur. 751.

⁴ *Anon.*, 12 Mod. 559. In *The State v. Great Works Co.*, 20 Maine, 41, Weston, C. J., states the law thus: "A corporation is created by law for certain beneficial purposes. It can neither commit a crime nor misdemeanor by any positive or affirmative act, or incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may by vote, entered upon their records, require an agent to commit a battery; but if he does, it cannot be regarded as a corporate act for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offence thus indicated by them, the innocent dissenting minority would become equally amenable to punishment with the guilty majority. Such only as take part in the measure should be

prosecuted either as principals, or as aiding and abetting, or procuring an offence to be committed, according to its character or magnitude." As to the liability of the individual members, see further, *Kane v. The People*, 3 Wend. 363; *State v. Godfrey*, 12 Maine, 361; *Edge v. Com.*, 7 Barr, 275; *R. v. R. R. Co.*, 9 Q. B. 315. As to form of indictment, see Whart. Cr. Pl. & Pr. § 100.

⁵ *Kyd on Corporations*, 225-6; *R. v. Birmingham R. R.*, 3 Q. B. 223; 9 C. & P. 469.

⁶ *R. v. Willcox*, 1 Sim. N. S. 301; *Com. v. Proprietors*, 2 Gray, 339.

⁷ Per Patteson, J., 3 Q. B. 232; *State v. Great Works Co.*, 20 Maine, 41; *Com. v. Worcester Turnpike Co.*, 3 Pick. 327; *People v. Corporation of Albany*, 11 Wend. 539; *People v. Long Island R. R.*, 4 Parker C. R. 602; *Louisville R. R. v. State*, 3 Head, 523; *State v. Murfreesboro'*, 11 Humph. 217; *Barnett v. State*, 54 Ala. 579. See *Morawetz on Corporations*, § 94.

or a wharf, where by statute or prescription it is bound so to do;¹ or for disobedience to an order of justices for the construction of works in pursuance of a statute,² and this, though a specific remedy be given for the breach of duty, by the act of incorporation, if there be no negative words.³ In some jurisdictions in this country, it is true,⁴ it was once held that a corporation cannot be indicted for a nuisance in obstructing highways or rivers by its agents, the ground being the now exploded distinction between misfeasance and nonfeasance.⁵ But in England,⁶ after a full consideration of the authorities, a contrary principle was established. It was ruled there that an indictment lay at common law against an incorporated railway company for cutting through and obstructing a highway in a manner not conformable to the powers conferred on it by act of parliament. The case was put on general grounds; and the distinctions which had been attempted between nonfeasance and misfeasance were overthrown. Indeed, since it has been settled against some of the earlier authorities that trespass or case, for a private nuisance, would lie against a corporation,⁷ no good reason can be assigned why the same acts, when to the injury of the public at large, may not equally be the basis of criminal proceedings.⁸ And such is now

¹ Ibid.; *Lyme Regis v. Henley*, 3 B. & Adol. 77; *R. v. Birm. R. R. Co.*, 3 Q. B. 223; 3 Railw. Cas. 148; S. C., 9 C. & P. 469; *R. v. Severn R. R. Co.*, 2 B. & Ald. 646; *R. v. Commissioners*, 2 M. & S. 80; *Simpson v. State*, 10 Yerg. 525; *State v. N. J. Turnpike Co.*, 1 Harr. N. J. 222; *State v. Patton*, 4 Ired. (N. C.) 16; *Smoot v. Wetumpka*, 24 Ala. 112. See Anon., Loft, 556.

² *R. v. Birm. R. R. Co.*, *ut supra*.

³ *Susquehanna Road v. The People*, 15 Wend. 267; but see *Com. v. Turnpike Co.*, 2 Virg. Cas. 362.

⁴ *State v. Great Works Co.*, 20 Me. 41, overruled by *State v. Portland*, 74 Me. 268. See *Com. v. Turnpike Co.*, *ut supra*; *State v. R. R.* 23 Ind. 362.

⁵ See, to same point, 6 Vin. Abr. 309, Corp. Z. pl. 2.

⁶ See *R. v. Great North of Eng. Railway*, 9 Q. B. 315.

⁷ *Mayor of Lynn v. Turner*, 1 Cowp. 86; *Maund v. Monmouthshire Canal Co.*, 4 M. & G. 452; *Lyme Regis v. Henley*, 1 Bingham N. R. 222; 3 B. & Ad. 77; *Eastern Counties R. Co. v. Broom*, 2 Eng. L. & Eq. 406; *Dater v. The Troy R. R. Co.*, 2 Hill (N. Y.), 629; *Chestnut Hill Turnpike v. Rutter*, 4 S. & R. 6.

⁸ Lord Denman, in 9 Q. B. 315, uses this reasoning: "We are told that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings; of this there is no doubt. But the public know nothing of the former; and the latter, if they are identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of

generally considered to be the law when the object is the imposition of a fine on the corporation estate, or the abatement of a nuisance, a corporation being justly held to be as indictable for a misfeasance as for a nonfeasance.¹ But, at common law, under an indictment against a corporation as such there can be no punishment inflicted on the members of the corporation. They must be indicted personally to be punished corporeally.²

power for the purpose of gain, except the remedy be indictment against those who truly commit it, that is, the corporation acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings."

¹ *State v. Vermont R. R.*, 30 Vt. 108; *Com. v. Proprietors*, 2 Gray, 339; *Com. v. Vt. R. R.*, 4 Gray, 22; *Susq. Turn. Co. v. People*, 15 Wend. 267; *People v. New York & N. H. R. R.*, 59 N. Y. 266; *State v. Morris. R. R.*, 3 Zab. (23 N. J. L.) 360; *Louisville v. State*, 3 Head, 523; and see *Com. v. Ohio, etc., R. R.*, 1 Grant, 329; *North. Cent. R. R. v. Com.*, 90 Penna. St. 300; *Com. v. Turnpike Co.*, 2 Va. Ca. 362; *State v. Fertilizer Co.*, 24 Ohio St. 611; *Cincinnati R. R. Co. v. Com.*, 80 Ky. 137; *Paducah R. R. v. Com.*, 80 Ky. 147; *State v. Ohio R. R.*, 23 Ind. 362; *Angell & Ames on Corp.* §§ 394, 396; *Whart. Cr. Pl. & Pr.* § 100.

That a municipal corporation is indictable for a pollution of public waters, see *State v. Portland*, 74 Me. 268. That a railway corporation is indictable for Sabbath-breaking, see *State v. Balt. & Ohio R. R.*, 15 W. Va. 362. See, further, as recognizing criminal liability of corporations, *State v. Useful Man. Soc.*, 42 N. J. L. 504; S. C., 44 N. J. L. 502, § 1474; *State v. Louisville R. R.*, 86 Ind. 114; *State v. Omaha*, 14 Neb. 265. See, also, *infra*, §§ 341, 1474 *et seq.* That a corporation is indictable for libel see *infra*, § 1628 a. In *North. Cent. R. R. v. Com.*, 90 Penn. St. 300, quoted *infra*,

§ 1476, the indictability of private corporations for negligence was considered and affirmed. That a corporation is a "person" under statutes imposing duties, see *People v. Central R. R.*, 74 N. Y. 302; *State v. Cin. Fert. Co.*, 24 Ohio St. 611; *State v. Ohio & M. R. R.*, 23 Ind. 362.

² "Individual persons only," argues Merkel (*Holtz. Straf. ii.* 111), "can be made responsible criminally. Juridical persons cannot be thus made responsible. It is true that they cannot be regarded as inert masses of rights, for they are endowed by the law with independent business activity. But their will is a mere artificial creation; they are not possessed of that free, independent, personal action which is essential to penal responsibility. Suppose that a mayor, under authority of a municipal corporation, should organize a band of robbers in the town hall? Responsibility would be attached exclusively to the persons who thus abused their office; not to the municipal corporation." "Corporations," says Geib (*Lehrbuch*, § 87), "cannot, as such, commit crimes, as they are mere fictions, without the power of personal determination. They have no free will, but are bound by the will of the natural persons of whom they are composed. The latter are the responsible parties." This, however, is not inconsistent with legislation by which an indictment is used as a process against a corporation, guilty of negligence through its agents. See *Com. v. Boston & Low.*

In several jurisdictions in this country, criminal proceedings against railroad corporations for negligent injuries are prescribed and regulated by statute.¹ Statutes have also been passed making it indictable for corporations to act except under certain limitations.²

§ 92. The old mode of proceeding against a corporation as such, to compel an appearance to an indictment, was by distress infinite;³ while under recent statutes the course adopted is to summon and thus bring into court the proper officers of the corporations proceeded against, enforcing the process by attachment or distringas.⁴ A fine is the usual penalty inflicted,⁵ though, according to Lord Holt, in an indictment against the inhabitants of a county for not repairing, an attachment may go against all to "catch as many as one can of them."⁶ In such case, however, the indictment is against the inhabitants individually. And the individual members of a corporation, concurring in a wrongful act, may be severally indictable as a cumulative remedy.⁷

§ 93. *Quasi* corporations, as counties, townships, parishes, have long been held subject to indictment for a neglect of the duties imposed on them by law; as for not maintaining a road or bridge,⁸ or for not opening them when laid

R. R., 126 Mass. 61; *People v. Cent. R. R.*, 74 N. Y. 302.

¹ See *State v. Boston, etc. R. R.*, 58 N. H. 410; *Com. v. Boston & Me. R. R.*, 129 Mass. 500; *Com. v. Boston & Me. R. R.*, 133 Mass. 383; *Com. v. Boston & Low. R. R.*, 134 Mass. 211.

In New York the Revised Statutes provide that an indictment may be found against a corporation for some offences, since those statutes provide that "whenever an indictment shall be found against any corporation" it shall be "ordered by summons to appear and plead," and that if it neglects, "a distringas," as a procedure in the nature of an execution, "shall issue against its property to enforce the appearance." This "distringas" may be in any amount the court shall direct.

² See *Lee Ins. Co. v. State*, 60 Miss. 395.

³ *R. v. Birming. R. R. Co.*, 3 Q. B. 223,

per Patteson, J.; S. C., 9 C. & P. 469, per Parke, B. See 6 Viner Abr. 310, and Angell & Ames Corp. § 523, 2d ed. ⁴ *Railroad v. State*, 32 N. H. 215; *State v. Western R. R.*, 89 N. C. 585, and cases cited in § 91.

⁵ *R. v. Birming. R. R. Co.*, *ut supra*. ⁶ *R. v. Wilts. Cas. Temp. Holt*, 339. But see *Morgan v. Corporation of Carmarthen*, 3 Keble, 350.

⁷ *R. v. R. R.*, 9 Q. B. 223; *State v. Godfrey*, 3 Fair. (12 Me.) 361; *Kane v. People*, 3 Wend. 363; *State v. Conlee*, 25 Iowa, 237.

⁸ *Infra*, §§ 1473, 1584 a; *R. v. Wilts*, 6 Mod. 307; *R. v. Dixon*, 12 Mod. 198; *R. v. Strington*, 2 Wms. Saunders, 167, notes; *R. v. Clifton*, 5 T. R. 498; *R. v. Sheffield*, 2 T. R. 106; *R. v. Com.*, 1b. 232; *R. v. Mayor, etc.*, 3 East, 86; *R. v. Lancashire*, 2 B. & Ad. 138; *R. v. Hendon*, 4 B. & Ad. 628; *R. v. Devonshire*, 2 N. & M. 212; *R. v. St. Giles*, 5

out.¹ And it is now well settled that such corporations are indictable for a neglect of a duty imposed on them by statute to repair roads, even though other remedies be given, if such remedies are not exclusive.²

VI. PERSONS UNDER COMPULSION.

§ 94. Compulsion may be viewed in two aspects: (1) Where the immediate agent is physically forced to do the injury, as where his hand is seized by a person of superior strength, and is used, against his will, to strike a blow, in which case no guilt attaches to the person so coerced.³

Persons under compulsion irresponsible.

(2) Where the force applied is that of authority or fear. Thus, where a person not intending wrong, is swept along by a party of persons whom he cannot resist, he is not responsible if he is compelled to do wrong by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm if he refuses;⁴ but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence.⁵ Thus it is a defence to an indictment for treason that the defendant was acting in obedience to a *de facto* government, or to such concurrent and overbearing sense of the community in which he resided, as to imperil his life in case of dissent.⁶

Under the Roman law, when a subordinate acts in obedience to a superior's lawful commands, the defence *respondet superior*

M. & S. 260; *State v. Whittingham*, 7 J. C. T. R., 1 Harr. (N. J.) 222; *State v. Murfreesboro*, 11 Humph. 217.

¹ *State v. Town of Fletcher*, 13 Vt. 124; *State v. Dover*, 10 N. H. 394; ² 1 East P. C. 225. *Mower v. Leicester*, 9 Mass. 247; *Biddle v. Proprietors*, 1 Mass. 169. And see *Com. v. Wilmington*, 105 Mass. 599; *State v. Commis.*, Walk. (Miss.) 366; and cases cited at large in Whart. on Neg. §§ 250 *et seq.*, 959 *et seq.*

³ *State v. Kittery*, 5 Greenl. (5 Me.) 254. See *R. v. Shelderton*, 2 Keb. 221; *R. v. Vill. of Hornsey*, 1 Roll. R. 406; Whart. Cr. Pl. & Pr. § 100.

⁴ *State v. Kittery*, 5 Greenl. (5 Me.) 254; *State v. Dover*, 10 N. H. 394; *State v. Fletcher*, 13 N. H. 124; *Susqueh. R. v. People*, 15 Wend. 267; *State v. New*

⁵ Dig. Crim. Law, art. 31, citing *R. v. MacGrowther*, 18 St. Tr. 391; *R. v. Crutchley*, 5 C. & P. 133. See, also, 1 Steph. Hist. Cr. L. pp. 106 *et seq.* As to duress see Whart. on Cont. §§ 144-154; and see summary of publications in 29 Alb. L. J. 298. As to responsibility of servant for nuisance see *infra*, §§ 1422, 1432.

⁶ *Infra*, §§ 1803, 1803 a.

applies.¹ With us, also, a command, to be a defence, must be lawful.² "In all cases," says Sir J. F. Stephen, "in which force is used against the person of another, both the person who orders such force to be used and the person using that force are responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior; but the fact that he did so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders."³ But unless the order were one which the subaltern was required by the law of the land to obey,⁴ or unless physical compulsion were applied,⁵ the superior's order is no defence.

¹ L. 37, pr. D. ad L. Aquil. (9. 2.) L. 13. § 1. D. de iniur. (47. 10.) Is, qui iure publico utitur, non videtur iniuriæ faciendæ causa hoc facere: iuris enim executio non habet iniuriam. (L. 167. § 1. D. de reg. iur. (50. 17.) Qui iussu iudicis aliquid facit, non videtur dolo malo facere, quia parere necesse habet. L. 169. pr. D. cod. Is damnum dat, qui iubet dare; eius vero nulla culpa est, cui parere necesse sit. Can. 13. Caus. 23. qu. 5. Miles quum obediens potestati, sub qua legitime constitutus est, hominem occidit, nulla civitatis suæ lege reus est homicidii: immo, nisi fecerit, reus est imperii deserti atque contenti.

² *Infra*, §§ 646 et seq.; U. S. v. Carr, 1 Woods, 480.

³ Dig. C. L. art. 202.

Of this are given the following illustrations:—

(1) "A., a marine, is ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and has ammunition given him for that purpose. Boats persisting, after repeated warnings, in approaching the ship, A. fires at one and kills B. This is murder in A., although he

fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship [though desirable for the maintenance of discipline]. R. v. Thomas, 1 Russ. Cr. 823; 4 M. & S. 442.

(2) "A., the driver of an engine, orders B., the stoker (whose duty it is to obey his orders), not to stop the engine. The train runs into another in consequence, and C. is killed. B. is justified by A.'s order. R. v. Trainer, 4 F. & F. 105; 1 Russ. Cr. (5th ed.) 837, 838. The language of Willes, J., in this case, seems to be a little too wide, unless it is taken in connection with the particular facts."

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

⁴ U. S. v. Carr, 1 Woods, 480; U. S. v. Jones, 3 Wash. C. C. 220; Mitchell v. Harmony, 13 How. 115; State v. Sutton, 10 R. I. 159; State v. Sparks, 27 Tex. 627; People v. Melius, 1 N. Y. Cr. R. 39.

⁵ State v. Bugbee, 22 Vt. 32; Hays v. State, 13 Mo. 246; Com. v. Blodgett, 12 Met. 56, and cases cited *infra*, § 94 a. See Riggs v. State, 3 Cold. 149. As to *de facto* governments, see *infra*, § 1803.

As will hereafter be seen,¹ wrong done on our territory by a foreigner, under his sovereign's orders, is imputable to the sovereign. Even acts done in obedience to an insurgent government will be excused by the parent government where such insurgent government had the power of enforcing its orders.²

§ 94 a. The subject of marital compulsion has just been considered.³ The compulsion of a master is no defence to a servant, when charged with crime, unless such compulsion deprived the servant of his free agency.⁴ An agent, also, on the same ground, cannot set up as a defence his principal's command.⁵ Nor with the same limitation is a parent's order to a child a defence.⁶

Servant or child cannot defend on this ground.

VII. PERSONS UNDER NECESSITY: SELF-DEFENCE.

§ 95. Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.⁷ Homicide through necessity—i. e., when the life of one person can be saved only by the sacrifice

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

¹ *Infra*, §§ 283, 310.

² Ford v. Surget, 97 U. S. 59. *Infra*, § 1803.

³ *Supra*, § 78.

⁴ See State v. Bugbee, 22 Vt. 32; Com. v. Hadley, 11 Met. 66; Com. v. Drew, 3 Cush. 279; State v. Hull, 34 Conn. 132; Com. v. Gillespie, 7 S. & R. 469; State v. Matthis, 1 Hill (S. C.), 37; Hatley v. State, 15 Ga. 347; Jordan v. State, 22 Ga. 545; Schmidt v. State, 14 Mo. 137; State v. Bryant, 14 Mo. 340. *Infra*, § 1504. As to principal's liability, see *infra*, § 247.

⁵ "The agent or servant cannot be excused for a violation of the criminal law because the act was done in the course of his agency or servitude." Reese v. State, 73 Ala. 10, citing Winter v. State, 30 Ala. 22.

⁶ See Humphrey v. Douglass, 10 Vt. 71; People v. Richmond, 29 Cal. 414.

⁷ Stephen's Crim. Dig. art. 32. See R. v. Stratton, 21 St. Tr. 1045, cited by Sir J. F. Stephen.

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

of another—will be discussed in a subsequent chapter.¹ The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief.² To the same general effect speak high English and American authorities.³ Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.⁴

The same reasoning justifies a crew, in cases of necessity, in rising and deposing a master;⁵ a prisoner in escaping from a burning prison;⁶ a citizen in joining a rebellion, when otherwise his life would be imperilled;⁷ a vessel in entering a blockaded port or breaking home revenue laws.⁸ On the same reasoning a nuisance may be temporarily tolerated;⁹ and when any important authorized industry would be imperilled by the observance of laws prohibiting labor on the Sabbath, these laws may be for the occasion disobeyed;¹⁰

though there may be an invasion of privileges, there is no invasion of law. Merkel, in Holtz. ii. 137.

¹ *Infra*, § 510. See *Com. v. Jailer*, 7 Watts, 366.

² See citations *infra*, § 510.

³ See Broom's Leg. Max. 10; 1 East P. C. 70; though see 4 Bl. Com. 31; 1 Hale, 565.

⁴ Rossi *Traité*, ii. p. 212. Berner, *De impunitate propter summam necessitatem*, etc. (1861); Geib, *Lehrbuch*, ii. 225; and an interesting compendium in Holtzendorff, *Ency.* ii. 180. See *infra*, § 510.

⁵ *U. S. v. Ashton*, 2 Sumner, 13; *U. S. v. Borden*, 21 L. Rep. 100; *U. S. v. Hammer*, 4 Mason, 105. See *infra*, § 1878.

⁶ *Infra*, § 1679.

⁷ *Supra*, § 94; *infra*, §§ 1803, 1803 a. See *Res. v. McCarty*, 2 Dall. 86; *U. S. v. Thomas*, 15 Wall. 337. So in submitting to a rebellion, and paying

to the *de facto* authorities money confiscated by them. *U. S. v. Thomas*, *ut sup.*

⁸ *The Diana*, 7 Wall. 354; *The Gertrude*, 3 Story, 68; *The William Gray*, 1 Paine, 16. See Whart. Com. Am. Law, 146, 233, 573-6.

⁹ *Infra*, §§ 1424, 1474, 1475.

¹⁰ *Com. v. Knox*, 6 Mass. 76; *Com. v. Conway*, 3 Leg. Chron. (Pa.) 27; *Murray v. Com.*, 24 Penn. St. 270; *Crocket v. State*, 33 Ind. 416; *State v. Goff*, 20 Ark. 289. See *infra*, § 1431 a. See particularly Lord Macaulay's Report on Indian Codes, p. 52.

It is true that in the great majority of cases of this class the person maintaining, as against another, his own right, might act in accordance with a higher morality if he should sacrifice himself instead of maintaining his own right to the injury of another. But the State does not exact heroism from its subjects, nor does it undertake to

and property may be destroyed when necessary to avert any serious danger to the community.¹ "The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects."²

§ 96. It has been sometimes said that necessity can never be advanced as a defence when the necessity is the result of the defendant's own culpable act.³ This, however, as Berner⁴ demonstrates, cannot be accepted as universally true. Thus a person who negligently causes a house to catch fire will not, by this negligence, be barred from setting up necessity as a defence, if, in rushing from a burning chamber, he should crush another in the throng; nor would a trespasser, who, upon stealing fish, should fall overboard, and in his struggle to save himself upset a boat, be barred from setting up necessity, if life should thereby be accidentally lost, because his act which put him

Culpability does not preclude defence.

teach self-sacrifice. It permits, as much for the interests of good order as from its inability to teach pure morality, its subjects to repel, under due restrictions, assaults on their persons or property, even though in repelling these assaults the aggressor is put in danger of his life. But self-defence, it must be remembered, is not limited to assaults. A person whose house is on fire may seize, without incurring the charge of felony, the hose of a neighbor as a means of extinguishing the fire. A person who is bathing, and whose clothes have been stolen, may snatch up clothing he may find on a clothes-line, so as not to be obliged to enter into a village naked. For these two examples I am indebted to Berner, § 85.

In *Gilbert v. Stone*, Aleyn, 35 Style, 72, decided in 1648, it was held no defence to a man for breaking into another's close, and taking a horse, that he was pursued by twelve men,

and was in fear of his life. But this would not be good law in a case in which the defendant acted convulsively under a necessity he did not provoke and could not avoid. And even were we to concede civil liability, yet, supposing that it should appear that from an unprovoked attack this could be the only way of escaping with life, no criminal prosecution could be maintained.

In *Com. v. Brooks*, 39 Mass. 434, it was held that seizure by a *de facto* government of money belonging to a legitimate government was a defence to a suit by the latter against a custodian not implicated in the seizure.

¹ Whart. Com. Am. Law, §§ 573, 576.

² Lord Stowell, *The Gratitude*, 3 C. Rob. Ad. 266. See *The James Wells v. U. S.*, 7 Cranch, 22; *The Struggle v. U. S.*, 9 Cranch, 71.

³ See, to this effect, the *Argo*, 1 Gal-lis, 150; *R. v. Dunnett*, 1 C. & K. 425.

⁴ *Lehrbuch d. Strafrechts*, 140.

in this situation was wrongful. But if the necessity be rashly rushed into, it may cease to be a defence.¹

§ 97. The distinction between necessity and self-defence consists principally in the fact that while self-defence excuses the repulse of a wrong, necessity justifies the invasion of a right.² It is, therefore, essential to self-defence that it should be a defence against a present unlawful attack,³ while necessity may be maintained though destroying conditions that are lawful. In self-defence the attack must be upon interests which it is the duty of the party assailed to defend. But the right is not limited to attacks on his own person. Whatever the law places under his protection, that he may defend according to the law.⁴ Self-defence by an individual also differs from preventive punishment by a State in this, that the former hinders the crime, and is prospective, the latter punishes for the crime, and is retrospective. Since to constitute self-defence the attack must be unlawful, as a general rule, the right does not exist as against an officer armed with a legal warrant. Children, also, cannot exercise this right against their parents;⁵ nor pupils against their teachers;⁶ nor apprentices against their masters;⁷ provided the limits of the right of correction by the assailant be not overstepped. It follows that there can be no self-defence against self-defence. Self-defence is only permissible against an *unlawful* attack. If A., unlawfully attacked by B., resorts to violent means to repel the aggression, his repulse of B. is lawful; but if B., in pursuance of the struggle, deliberately and unnecessarily renews the attack on A., this is not self-defence, since self-defence only obtains against an unlawful attack.⁸

¹ *Inf.* § 485; The Joseph, 8 Cranch, 451; The New York, 3 Wheat. 59.

² See on this point, Berner, § 86; Levita, *Recht der Nothwehr*, 1856; Schaper, bei Holtzend. ii. p. 137. The following citations from the Roman law may be useful in this connection:—

“Melius est occurrere in tempore, quam post exitum vindicare.” L. l. o. (3. 17).

“Pudicitiam quam eriperet militi tribunus militares in exercitu C. Marii, propinquus ejus imperatoris, interfectus ab eo est, cui vim afferebat: facere

enim probus adolescens periculose, quam perpiti terpitur maluit. Atque hunc ille summus vir, scelere solutum, periculo liberavit.” Cicero pro Milon. c. 4. Paullus Rec Sent. v. 23. 8.

³ See *Filkens v. State*, 69 N. Y. 101.

⁴ *Infra*, § 98.

⁵ *Infra*, § 631.

⁶ *Infra*, § 632.

⁷ *Infra*, § 634.

⁸ *Infra*, § 485.

I have endeavored to give an exposition of several philosophical theories of self-defence in the *Southern Law*

§ 97 a. As will hereafter be seen more fully, the right of self-defence can only be appealed to to ward off a danger that is actual and immediate; though in determining what is immediate we must be guided by the conditions of each particular case. The fact, however, that an attack has been expected does not preclude me from repelling it when it comes. A public man, for instance, as was the case with the Duke of Wellington during the Reform Bill riots, may have good grounds to expect an attack on his house; but this does not prevent him from vigorously defending his house when the assault is actually made.¹ It has also been said that the right does not exist when the party attacked had an opportunity of calling on the public authorities to intervene. This, however, is not universally true. As there are few attacks which the injured party could not have more or less clearly expected, it would be incumbent on him, if the position here contested is sound, to call on the government for protection in every case, or else to lose the right.² But to call on the government for aid is only necessary when such aid can be promptly and effectively given. There are many cases of suspicion, also, in which a prudent man would decline to call in governmental aid, feeling that the case is not sufficiently strong to justify so extreme a remedy. As a rule, therefore, we cannot say that self-defence cannot be resorted to when the party asserting the right could have protected himself by calling in the government.³ Of this position we have abundant illustrations in cases of nuisance which a private citizen is authorized to abate without appealing to the law.⁴ “At common law,” so speaks a learned

Right may be exercised even though public authorities might have been called upon previously.

Review, for 1879, p. 366; condensed in the 8th edition of the present treatise, § 97.

That the English law of self-defence has fluctuated in sympathy with political economy, see article in *Crim. Law. Mag.* for Jan. 1882.

¹ See *R. v. Scully*, 1 C. & P. 319. *Infra*, §§ 487–496.

² *Beatty v. Gilberts*, 47 L. T. N. S. 194, Q. B. D. 1882, cited more fully *infra*, § 1535, where it is held that the

fact that the leaders of the “Salvation Army” expected that its meetings would

be attacked by a mob, did not make it necessary for them to disperse or invoke police aid.

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

⁴ See *infra*, § 1426. *R. v. Cross*, 3 Camp. 226; *R. v. Jones*, *Ib.* 230; *People v. Cunningham*, 1 Den. 528; *Wood on Nuisance*, § 529.

New Jersey judge,¹ "it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. . . . This common law right still continues. Any citizen, acting either as an individual or as a public official under the orders of local or municipal authorities, . . . may abate what the common law deems a public nuisance."² We must not push this right so far as to sustain deliberate aggressions on others. But we ought to maintain it so far as is proper for the defence of self. There is no pebble in our way on the highway that we could not remove by action of law. But there is no pebble on the highway as to which an action of law would not be absurd. We kick it out of the way, just as we exert the right of self-defence in innumerable other cases in which going to law would be equally absurd. And we may in like manner forcibly remove an intruder from a house or a railway car without stopping to call in a magistrate,³ or tear from a wall an insulting libel,⁴ or push back from a highway an overhanging bough.⁵ If so we may defend life and limb, though the attack is one we may have so far anticipated as to have been able to call in official aid in advance.⁶

§ 98. Whoever possesses a right is entitled to defend that right.

Objects for which self-defence may be exerted. No matter what may be the character of the right, it cannot lawfully be taken from the owner by violence; and violence applied for this purpose he may violently resist.

¹ *Manhattan Man. Co. v. Van Kenren*, 23 N. J. Eq. 251; *Turner v. Holtzman*, 54 Md. 148.

² See *Brightman v. Bristol*, 65 Me. 426; *Earp v. Lee*, 71 Ill. 193.

³ *Infra*, §§ 621-22, 1100, 1105; *Overdeer v. Lewis*, 1 W. & S. 90. In *Boddall v. Maitland*, 44 L. T. R. (N. S.) 248, C. D. 1881, the rightful owner of a house forcibly ejected a person wrongfully in possession, and injured his furniture. It was held that the violent entry of the rightful owner might be an offence under 5 Richard II. stat. 1, c. 8, but that no damages could be obtained for the forcible entry. Damages were, however, given for the injury to the furni-

ture. See *Newton v. Harland*, 1 Scott N. R. 474. *Infra*, § 1100.

⁴ *De Bost v. Beresford*, 2 Camp. 511.

⁵ *Lonsdale v. Nelson*, 2 B. & C. 311.

⁶ As illustrating the principle in the text may be mentioned a case in North Carolina decided in 1878, where it was held that the owner of land has the right to arrest and repress, as a nuisance, a person using loud and obscene language on the highway in front of such land; and when the person so offending is armed with a pistol, the limitation *molliter manus* does not apply. *State v. Davis*, 80 N. C. 361; citing *State v. Perry*, 5 Jones, 9; *State v. Robins*, 78 N. C. 431.

The Roman law is emphatic on this point, making the right to defend one of the incidents of the right to possess. "*Vim vi repellere licet, idque ius natura comparatur.*"¹ "*Ut vim atque iniuriam propulsemus, iuris gentium est.*"² "*Vim vi defendere omnes leges omniaque iura permittunt.*"³ Nothing, as has been well said,⁴ can be more general than these utterances. In our own law there have been tendencies to limit the right to the defence of home, of person, and of relatives in the first degree. No doubt there is a peculiar sanctity attached to these conditions which justifies even the taking of life in their defence. But this circumstance must not make us insensible to the fact that whenever a right has any value, then its possessor may protect it forcibly from assault.⁵

§ 99. It has also been said that a party who can fly from an aggressor is bound to fly, and cannot set up self-defence. This, as we will hereafter see,⁶ is so far true that an assailed party cannot, unless driven to the wall, take his assailant's life. But as an elementary proposition it is not true that if I can evade an attack by flight then I must fly to evade the attack. If this were the law, few persons in times of trouble could remain at their posts. This, however, by confining the right of self-defence to attacks of which there could be no prior suspicion, would virtually abrogate the right. For it would be to say that the right of self-defence only exists when there is nothing to defend. And besides, the fundamental principle is that right is not required to yield to wrong.⁷

Flight not necessary to self-defence.

¹ L. i. § 27 D. de vi.

² L. 3. D. de iust. et iure.

³ L. 45. D. § 4, ut leg. Aq.

⁴ *Berner*, § 87.

⁵ *Infra*, §§ 480, 495-508; and see particularly § 501.

⁶ *Infra*, § 486.

⁷ This is a settled rule of Roman law. See *Clarus Rec. Sent. Levita*, p. 237; and see cases cited *infra*, §§ 486-501. That an assault in defence of personal right is justifiable, see *infra*, §§ 501, 621. *R. v. Mitton*, 3 C. & P. 31; *R. v. Driscoll*, C. & M. 214; *State v. Elliot*, 11 N. H. 540; *State v. Miller*, 12 Vt. 437; *Com. v. Kennard*, 8 Pick. 133;

Com. v. Clark, 2 Met. (Mass.) 23; *Com. v. Power*, 7 Met. (Mass.) 596; *Com. v. Dougherty*, 107 Mass. 243; *Com. v. Mann*, 116 Mass. 58; *Filkins v. People*, 69 N. Y. 101; *Parsons v. Brown*, 15 Barb. 590; *State v. Gibson*, 10 Ired. 214; *State v. Covington*, 70 N. C. 71. See, however, *Hendrix v. State*, 50 Ala. 148. The law is thus stated by Sir J. F. Stephen (*Steph. Dig. Cr. L. art. 200*): "Any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm; and if the assault upon him is, notwithstanding, continued,

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

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

§ 101. An interesting question, which will be hereafter more fully discussed, arises as to the extension of the right of self-defence to injuries to honor. The cases which have heretofore been adjudicated in this relation have been mainly those in which persons whose character has been assailed have assaulted or killed the assailant. On these facts it has been uniformly held, as an elementary principle, that no words, no matter how insulting, will excuse an assault.⁴ At the same time insults of all kinds, words as well as blows, are to be taken into consideration in determining how far hot blood can be considered to exist.⁵ It is easy, also, to conceive of cases in which a party insulted is entitled to remove the instrument of insult; and we may adopt as sound law a ruling already noticed, that a person

he is in the position of a person assaulted in the employment of lawful force against the person of another." *Infra*, § 486 a.

¹ See *infra*, §§ 495-508, 1112.

² See *infra*, § 501.

³ *Roach v. People*, 77 Ill. 25.

⁴ See *infra*, § 619.

⁵ *Infra*, §§ 455 et seq.

insulted by a libel has a right to remove it from a wall on which it is posted.¹

§ 102. A future danger, as we will hereafter see, cannot be anticipated by an attack upon the expected aggressor, unless this be the only means of warding off the attack.² Nor is the party attacked excusable in using greater force than is necessary to repel the attack,³ remembering that the danger of the attack is to be tested, as will be hereafter noticed, from the standpoint of the party attacked, not from that of the jury or of an ideal person. Whoever, by his misconduct, puts another in a condition in which the mind cannot act with reasonableness, cannot complain that such reasonableness is wanting. If the injured party acts negligently or unfairly in coming to the conclusion that he is in danger of life, then he is liable for the consequences if he exceed the limit of self-defence; but if his conclusion be honest and non-negligent, then the party assailing him must bear the consequences of the mistake. This view has been maintained by the German courts;⁴ and will be vindicated fully hereafter.⁵ The same limitation, prohibiting an excess of force, applies to the private abatement of nuisances.⁶

Danger must be immediate and defence not to exceed attack.

¹ *Du Bost v. Beresford*, 2 Camp. 511; cited *supra*, § 97 a.

² See *infra*, §§ 484, 498, 624.

³ *Com. v. Dougherty*, 107 Mass. 243; *State v. Ross*, 26 N. J. L. 224; *State v. Lazarus*, 1 Const. C. R. 34; *Gallagher v. State*, 3 Minn. 270; *Patten v. People*, 18 Mich. 314; *State v. Burke*, 82 N. C. 551; *Oliver v. State*, 17 Ala. 587; *Cotton v. State*, 31 Miss. 504. *Infra*, §§ 498, 624.

⁴ *Archiv*, 1848, p. 592.

⁵ See *infra*, §§ 488-491.

In the same connection we may notice the following striking remarks from a leading German commentator:—

If the State would not expose to spoliation the rights she undertakes to protect,—rights such as life, limb, freedom, honor, chastity, property of

all kinds, family relationships,—she must leave the limits of self-defence to be determined, not by the tribunal by whom the case is ultimately to be coolly tried, but by the individual assailed himself, according to his capacity as exercised in the excitement, the confusion, and the surprise of the attack. It is particularly to be kept in mind that in self-defence the conflict is not simply between power against power, but between superior and prepared against inferior and unprepared power; that the assailant is rarely able to convince the assailed that the attack has an object less destructive than at the first glance it appeared to be; that the assailant knew this when he made the venture; that he in this way knowingly exposed his life and limbs to the violence, wild and

⁶ *Infra*, § 1426. See *State v. Paul*, 5 R. I. 185; *State v. Parrot*, 71 N. C. 311.

When the danger is over, the right of self-defence ceases.¹ It follows that when a thing which is the object of attack is finally taken from him, the loser cannot ordinarily use violence to recover it. For this purpose he must resort to process of law. The technical right extends to the defence of a thing before it is taken; not to its recovery after it is taken. "*Quamvis vim vi repellere omnes leges et omnia iura permittunt,—tamen id debet fieri cum moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam iniuriam.*"² If, however, he can retake it without undue violence he may do so.³ But an assault on his person he cannot punish when the danger is over. His right is defence, not retribution.⁴

§ 103. The inference to be drawn from the weapon used⁵ applies with peculiar force to cases of self-defence. A man who, when attacked, draws out a pistol and shoots down his assailant, cannot, under ordinary circumstances, claim that he was surprised by the attack. No one in a civilized society, where the law gives protection to those in danger, is entitled to carry concealed weapons, in order to meet an attack which he could avert by the ordinary processes of law. If, however, the weapon is one which it is customary to carry, or if it is caught up on a sudden, in fright or in hot blood, by the assailed, then no inference of premeditation can be drawn.⁶

frantic as it would necessarily be, which he himself called forth in the person assailed. Schaper, in Holtz. Straf. ii. 139.

¹ See *infra*, §§ 484 et seq.

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

³ State v. Elliot, 11 N. H. 540.

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

The right (self-defence) can only be exercised at the moment of the attack. It cannot, therefore, be exercised against the absent, though they be instigators of an actual attack. But between those present and acting

among the assailants the assailed is not bound to distinguish between the several degrees of activity or responsibility. Nor is he bound to call upon any of them to say what they purpose, and in what way they mean to carry out their purpose, since this depends upon contingencies which no one of them can preascertain. Nor does retreat of the assailant by itself necessarily exclude the idea of a perilous attack. An assailant may retreat as a feint, as is sometimes the case with robbers in attacks on country seats, and it may be added in other cases of malicious assaults. Schaper, in Holtz. Straf. ii. 145.

⁵ *Infra*, § 122.

⁶ See fully Whart. on Cr. Ev. § 764; and *infra*, § 484 et seq.

CHAPTER IV.

MALICE AND INTENT.

Malice is evil intent, and is convertible with <i>dolus</i> , § 106.	Premeditation requires no fixed period, § 116.
To <i>dolus</i> , will, object, and causation are essential, § 107.	Intent at time of action enough, § 117.
Sufficient if party charged contemplated result as a contingency, § 108.	Malice does not require physical contact, § 117 a.
<i>Dolus</i> classified as <i>determinatus</i> and <i>alternativus</i> , § 109.	In cases of doubt, verdict is taken for the lower degree, § 118.
<i>Dolus determinatus</i> is where a single object is persistently pursued, § 110.	Motive to be distinguished from intent: combination of motives no defence, § 119.
<i>Dolus alternativus</i> is where the purpose is capable of alternate realization, § 111.	Unintended injury derives its character from purpose to which it is incidental, § 120.
Malice to a class includes malice to an individual, § 112.	Motive need not be proportionate to heinousness of crime, § 121.
Fallacy of distinction between malice express and implied, § 113.	Malice inferable from facts, § 122.
Malice presumed to be continuous, § 114.	Consciousness of unlawfulness not essential, § 123.
But duration to be inferred from facts, § 115.	Malice distinguishable from fraud, § 124.

§ 106. MALICE may be defined as intent to do injury to another;¹ and may, for the purposes of this treatise, be regarded as having the same meaning as *dolus*.² *Dolus*, also, includes the idea of fraud, which in our present legal use is not convertible with malice; but so far as concerns injuries effected by force, *dolus* and malice are equivalent terms. A wound, which by our law would not be regarded as malicious, would not by the Roman law be regarded as caused by *dolus*. A wound, to whose author the Roman law does not impute *dolus*, would not be regarded by our law as malicious. Between *dolus* and *culpa* the line is drawn in the Roman law in the same way as

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

¹ By Holt malice is defined to be "a design formed of doing mischief to another," and this definition is adopted by Sir J. F. Stephen, 3 Hist. Cr. Law, pp. 70 et seq.

² See for a more detailed definition, Harris v. State, 8 Tex. Ap. 90; McKinney v. State, 8 Tex. Ap. 626.

in our own law the line between malice and negligence. There is, however, this difference between the two jurisprudences: to *dolus*, as a psychological study, the Roman jurists devoted great attention; to malice, as a psychological study, our jurists have given but little attention, contenting themselves in dealing curtly with the subject in the concrete.¹ In our own system, malice, in its most general sense, includes all unlawful intent; and is therefore distinguished from motive, which is ultimate purpose, and which, unless introduced as a link in a chain of inculpatory or exculpatory proof, is irrelevant. The motive of A. in killing B. may have been to rid the community of a villain. But this does not touch the issue, so far as A.'s state of mind is concerned; the question is not was A.'s motive good in killing, but was it his intent to kill.²

§ 107. According to an able recent commentator on the Roman Law,³ the following are the essential ingredients of *dolus*:—

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

If the will is not brought into connection with the act, the act is not to be considered as willed; yet we must remember that no thoughtful man can insulate a particular act so as to cut that act off from the consequences that naturally follow from it. I throw a stone into the water, intending simply to get rid of the stone from the land. Yet at the same time I cannot, as one who has previously observed similar results, and who reasons from the most familiar principles of physics,

To *dolus* will, object, and causation are essential.

¹ See Austin's Jurisp. ii. 327. This looseness of definition is deplored by Bramwell, J., in his evidence before the English Homicide Committee, as given in Whart. on Hom. § 29.

Malice is where a person "wilfully does that which he knows will injure another in person or property." Blackburn, J., in *R. v. Ward*, Law Rep. 1 C. C. 360; *Holland v. State*, 12 Florida, 117. It should not be forgotten in this connection that the legal meaning of the term *malitia*, or malice, is different from its popular meaning, which makes it synonymous with spite. Thus Lord

Holt says: "Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancor of mind lodged in the person killing for some considerable time before the commission of the fact; which is a mistake, arising from the not well distinguishing between *hatred* and *malice*. *Envy*, *hatred*, and *malice*, are three distinct passions of the mind." Kel. 127. The confusion arising from this ambiguity is discussed in 2 Steph. Hist. Cr. Law, 120.

² See *infra*, § 119.

³ Gessler's *Dolus*, Tübingen, 1860.

forget that this stone will cause a ripple on the surface of the water. A similar case, it is argued, arises when A. shoots at B., intending to kill him, but the ball glances and kills C., whom A. has reason to expect to be in close vicinity.¹ The intention to kill B., could it be so insulated as to detach it from any consequence except that intended, could not support an indictment for killing C.; but if it cannot be so insulated, and if shooting at B. naturally involves the contingency of missing B. and hitting C., then *dolus* is to be imputed to the killing C.²

We must at the same time remember that an instrumental intent, the realization of which produces an injury to another, may be either indifferent or criminal. A man may drop a stone from a roof on a street, and may do this either sportively or with intent to hurt a passer-by. When there is an intent to hurt, in other words, when to the intent to use a particular instrument the intent to hurt by the use of such instrument is added, then *dolus* exists. *Dolus* (malice) is therefore the condition of an offence by an instrument specifically intended, and the act must be immediately directed by the intent.³ *Culpa* (negligence) is the condition of an offence not intentional, but imputable to the lack of such diligence as it was the duty of the party to bestow.

§ 108. It is here that emerges the question that has been productive of so much difficulty in this branch of jurisprudence. Is it sufficient to constitute *dolus* (malice) that the fatal result should only appear to the assailant as a mere possibility? In answering this question we must remember that we are not able to select arbitrarily the instruments we want to effect a particular end, nor is there

Sufficient if party charged contemplated result as a contingency.

¹ See Meyer, § 106, who defines *dolus* to be the will to do in the concrete that which the law forbids in the abstract.

² See *infra*, § 318, and see *R. v. Smith*, Dears. C. C. 559; 7 Cox C. C. 51; 33 Eng. C. L. 567; *R. v. Stopford*, 11 Cox C. C. 643. In these cases the defendant intentionally shot at C., whom he mistook for B., and he was held to be guilty of wounding C. with intent to kill C. In *R. v. Hewlett*, 1 F. & F. 91, however, where the defen-

dant wounded B. unintentionally, his weapon glancing from A., whom he intended to kill, an acquittal was directed. See *infra*, § 120; *Wareham v. State*, 25 Oh. St. 601; *Lacefield v. State*, 31 Ark. 275; *Angell v. State*, 36 Tex. 542; *State v. Lee Vines*, 34 La. An. 1079.

³ See *R. v. Preston*, 2 Den. C. C. 353; *R. v. Chapman*, 1 Den. C. C. 432; *Morse v. State*, 6 Conn. 9; *Resp. v. Roberts*, 1 Dall. 39.

any instrument which we can speak of as absolutely in our power. Whatever we attempt we have to execute by means of agencies whose operation may be modified by numerous contingencies over which we have no control. No plan of wrong, therefore, can be framed by even the most capable and cautious of conspirators, which they must not regard as dependent upon contingencies for its consummation. An assailant, therefore, in meditating an attack on another, must contemplate the possibility of miscarriage. This possibility may be greater or less. A good marksman may be almost sure of hitting his intended victim; a man who sends an explosive compound to an enemy may estimate that the probability of injuring his enemy is slight. If the means adopted are such as cannot possibly succeed, then there is no such connection between the instrumental intent and the final intent as is essential to constitute guilt. But if there be no such impossibility, and if the means adopted, improbable as it would seem, have a fatal result, then the end is to be regarded as having been intended.¹

§ 109. We shall hereafter have occasion to distinguish between motive and intent;² motive being in this sense the moving power impelling to action for a particular result, intent being the purpose to use a particular means to effect such result. An analogous distinction is expressed in Germany by the words *Vorsatz* and *Absicht*. The intent, for instance, may be directed to the use of a particular instrument, but this instrument may be used to give effect to one of several motives, *e. g.*, a blow may be given with the motive of wounding, or disgracing, or killing; or when a house is set on fire, the motive may be either plunder or homicide. In this view *dolus* may be regarded as either *determinatus*, *alternativus*, or *eventualis*.

§ 110. 1. *Dolus determinatus* exists when the instrument is intentionally used to effect a single purpose, as when a deadly poison is intentionally given with the sole purpose of killing. It makes no difference whether or no the instrument will effect the object with apparent certainty. The person whose life is attempted may have ward off susceptibility to disease by antidotes. Or it may happen that the assailant may be limited in carrying out his

Dolus may be classified as *determinatus* and *alternativus*.

Dolus determinatus is where a single purpose is persistently pursued.

¹ See *infra*, §§ 169, 317-8; and see Robinson v. State, 54 Ala. 86.

² *Infra*, § 119.

plan to a single agency comparatively uncertain. In either case *dolus determinatus* is established.

§ 111. 2. *Dolus alternativus* or *eventualis*.—It may happen that the instrument selected may have two or more distinct effects, and that of the possibility of this the assailant is or ought to be aware. This may occur in the following cases:—

Dolus alternativus is where the purpose is capable of alternate realization.

a. The assailant has a primary object in view, and his final intention is directed to effect this object; but he recognizes a second object as either the possible or probable result of the instrument he employs. Cases of this class are divided by the Roman authorities as follows:—

a¹. *Dolus eventualis*.—When only the second object is criminal, as where A. shoots at a mark, seeing B. near the mark, and knowing that a slight divergence may cause the shot to miss the mark and to strike B.; and when B. is struck and killed.¹

b¹. *Dolus determinatus et eventualis*.—When both objects are criminal; as where A. shoots at B. and hits C., who is so near to B. that the hitting of C. was or ought to have been within the contemplation of A. as probable.²

b. When it is indifferent to the assailant which of several probable objects is effected by the instrument chosen by him.

a¹. When only one of these objects is criminal, which is *dolus alternativus* in its single sense.

b¹. When all are criminal, as where a man shoots at a crowd, not caring whom he hits; which is *dolus alternativus* in the ordinary sense.³

c. When the assailant desires to effect, and does effect, several criminal objects simultaneously. This brings a concurrence of several *doli determinati*, which are to be tried severally.⁴

d. The assailant has his intention fixed on a single criminal object, but while effecting such object he, accidentally and against his will, effects, by the instruments used, another

¹ See *R. v. Hewlett*, *supra*, § 107; 2 Steph. Hist. Cr. L. 112.

² *Infra*, §§ 120, 608.

³ For discussion of this question,

⁴ See comments, *supra*, § 107; *infra*, see Whart. Cr. Pl. & Pr. §§ 468 et seq. § 120.

criminal object. If so, the first contingency involves only *dolus*; the second only *culpa*. This covers the case, hereafter fully discussed, of a person who, when shooting a tame fowl, accidentally, and against his will, kills the owner of the fowl.¹

Dolus generalis is where an injury is directed at a crowd, let the blow fall where it may.²

§ 112. By the leading English writers of the old school, malice is held to denote not only special malevolence to the individual slain, but a generally wicked, depraved, and malignant spirit, a heart regardless of social duty, and deliberately bent on mischief.³ And, in general, any formed design of doing mischief is by these authors called malice, whether the mischief be intended to fall upon a particular person, or upon any person who may be within its range.⁴ Thus placing an obstruction on a railway track, with intent to kill, is a malicious homicide, and is murder, whether the intent be to kill a particular person, or to kill any one who may be on the train.⁵ And malice to a class includes malice to the members of that class.

¹ See authorities cited *supra*, § 106. *Infra*, § 320.

² *R. v. Fretwell*, L. & C. 443; 9 Cox C. C. 471. *Infra*, §§ 120, 319, 383.

³ *Fost.* 256, 262.

⁴ 1 Hawk. P. C. c. 31, s. 18; *Fost.* 257; 1 Hale, 451; 4 Black. Com. 199. *Infra*, §§ 120, 319.

⁵ *Presley v. State*, 59 Ala. 98. See *Clifton v. State*, 73 Ala. 474.

⁶ *Infra*, §§ 120, 319, 383.

In *R. v. Martin* (Crown Cas. Res.) 72 L. T. (Journ.) 83, the defendant was charged with malicious wounding, which resulted from his extinguishing the gas in the outward entry of a theatre and putting a bar across the passage, which caused a tumult in which several persons were wounded. The defendant was convicted, and the conviction was sustained by the court, Lord Coleridge, C. J., saying:—

"The prisoner was indicted under the statute 24 & 25 Vict. c. 100, s. 20,

which enacts that any one who unlawfully and maliciously wounds or inflicts grievous bodily harm upon any other person, with or without a weapon, shall be guilty of an offence, and punishable accordingly. (The words, 'with or without a weapon,' were introduced because difficulties often arose as to the use of a weapon or instrument.) What the prisoner in the present case did was this: he came out first and turned off the gas, and put across the passage an iron bar, and then he went his way. The people in the theatre, as they came out, finding the place dark, very naturally fell into a panic and rushed forward, and of course met the iron bar, and the person injured knocked his head against the bar and was seriously injured, though happily not killed. For that the prisoner was indicted, and the jury found all that was necessary to sustain the charge under the enactment that he

§ 113. The older English text books distinguish between "malice express" and "malice implied." This, however, as is elsewhere shown,¹ cannot be sustained. Our only way of proving malice is by inferring it from circumstances. Even should a party, when examined on the stand, say, "I did the act maliciously," the question would still remain, how far the statement is to be believed. The mode of proof is not demonstration, but inference.²

Fallacy of distinction between malice "express" and "implied."

§ 114. Supposing malice be proved to have existed a short time before a crime, it will be presumed to have continued down to the actual commission, unless modifying circumstances are shown to have taken place, or the defendant is in some other way proved to have acted under fresh controlling motives.³ Yet the presumptions in such cases are not of law, to be imposed in all cases by the court, but of fact, to be drawn or repelled by the circumstances of the particular case.⁴ In this view we must remember that it is not a law of our nature that an intention once formed continues; and we must also remember that it is far from being the case that by those who threaten crime, crime is uniformly executed. The most deliberate assassinations are those whose preparations are most artfully concealed; while persons who

Malice presumed to be continuous.

did unlawfully and maliciously inflict grievous bodily harm upon the person injured—that is, without a weapon or instrument in his hand. The question is whether under these circumstances he was guilty of everything the enactment includes, and I am clearly of opinion that he was. He must be taken to have intended the natural consequences of what he did. And what he did was to do what would certainly alarm and frighten a number of people and also to obstruct their exit by something which, when they came against it, would certainly cause them serious injury, and then if a person did thus come against it, and was so injured, then the prisoner did 'unlawfully and maliciously' cause him to be so injured—that is 'maliciously' not in the sense of actual malice against the particular indivi-

dual, but in the sense of doing an unlawful act calculated to injure, and by which another person was in fact injured—that is 'maliciously' injuring—just as in the case of a man who unlawfully fires a gun among a crowd, and who, if he kills one of them, is clearly guilty of murder. That principle is one of sound sense and reason and it is applicable here. The prisoner, therefore, was most properly convicted, and if he receives exemplary punishment I shall be satisfied with the result."

¹ Whart. on Cr. Ev. §§ 16, 734 *et seq.*

² See fully Whart. on Cr. Ev. §§ 7, 735-9. But see *contra*, *Jones v. State*, 5 Tex. Ap. 397.

³ See Whart. on Cr. Ev. §§ 738, 816; and see *infra*, § 477.

⁴ *Murray v. Com.*, 79 Penn. St. 311.

are apt the most noisily to threaten are often those who are the most reluctant to execute.¹

§ 115. No human gauge existing by which duration of malice can be measured, we are obliged to resort for this purpose to the same probable reasoning by which the existence of malice is proved. A. shoots B. in the public streets, without authority and without provocation. As reasonable beings usually intend any important step they take, we infer that A. intended this shot; but this, as we will hereafter see, is a matter not of legal presumption, but of logical inference.²

§ 116. To premeditation, which is an essential ingredient of malice, and which by many statutes is made a condition of certain crimes, it is logically necessary that there be a period of prior consideration; but as to the duration of this period no limit can be arbitrarily assigned. The reasons for this are obvious: (1) No psychological tests which the law can supply can help us in determining how long a time an evil intent was harbored. (2) In men of quick action, engaged in desperate enterprises, evil designs hastily hustle upon each other, shaping themselves almost instantaneously to meet new contingencies as they arise. The old are much less rapid in coming to a conclusion than are the young. Persons with mechanical aptitudes are more rapid in deciding as to mechanical acts than are persons without such aptitudes. A soldier would require less time to deliberate as to the use of a gun, a chemist as to the preparation of a poison, than would a person not accustomed to fire-arms or poisons. No limit as to premeditation can be arbitrarily imposed by the law. Whether there has been premeditation must be determined by the concrete case.

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

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

¹ *Infra*, § 477, and see *Cannon v. People v. Moore*, 8 Cal. 90; *Fahnestock State*, 57 Miss. 147; *Jones v. State*, 57 v. State, 23 Ind. 231; *Binns v. State*, 66 Ind. 684.

² *Infra*, § 122. See *People v. Clark*, 7 N. Y. 385; *Com. v. Drum*, 58 Penn. St. 9; *U. S. v. Cornell*, 2 Mason, 91; As to premeditation under statutes, see *infra*, § 380.

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

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

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

§ 117 a. Malice may be exerted against a party at a distance; as where A. lays poison for B. in his food, which B. afterwards takes and dies. And so where A. procures an idiot or lunatic to kill B., which is done. In both instances A. is guilty of the murder as principal.³ The same result follows when an injury is produced by frightening the injured party.⁴

¹ See *infra*, §§ 315, 380, 480; and see 3 Dev. (N. C.) 485; *People v. Moore*, 8 Cal. 90; *People v. Cotta*, 49 Cal. 166; *Peri v. People*, 65 Ill. 17; *McAdams v. State*, 25 Ark. 405; *Fahnestock v. State*, 23 Ind. 231; *Miller v. State*, 54 Ala. 155; *Green v. State*, 13 Mo. 382; *Mitchum v. State*, 11 Ga. 615; *Nichols v. Com.*, 11 Bush, 575; *State v. Decklotts*, 19 Iowa, 447; *Burnham v. State*, 43 Tex. 322; *Green v. State*, 38 Ark. 304. The rule in the text is applied even as to murder in the first degree, which by statute requires deliberation.

² *Infra*, § 380; *R. v. Noon*, 6 Cox C. C. 137; *U. S. v. Cornell*, 2 Mason, 91; *U. S. v. McGlue*, 1 Curt. C. C. 1; *Lanergan v. People*, 50 Barbour, 266; *People v. Clark*, 7 N. Y. 385; *People v. Sullivan*, 7 N. Y. 396; *Leighton v. People*, 88 N. Y. 117; *Com. v. Drum*, 58 Penn. St. 9; *State v. Rhodes*, 1 Houst. C. C. 476; *Woodside v. State*, 2 Howard's Miss. R. 655; *Dains v. State*, 2 Humphreys, 439; *Coffee v. State*, 3 Yerger, 283; *State v. Lipsey*, 3 Dev. (N. C.) 485; *People v. Moore*, 8 Cal. 90; *People v. Cotta*, 49 Cal. 166; *Peri v. People*, 65 Ill. 17; *McAdams v. State*, 25 Ark. 405; *Fahnestock v. State*, 23 Ind. 231; *Miller v. State*, 54 Ala. 155; *Green v. State*, 13 Mo. 382; *Mitchum v. State*, 11 Ga. 615; *Nichols v. Com.*, 11 Bush, 575; *State v. Decklotts*, 19 Iowa, 447; *Burnham v. State*, 43 Tex. 322; *Green v. State*, 38 Ark. 304. The rule in the text is applied even as to murder in the first degree, which by statute requires deliberation.

³ *Infra*, §§ 167, 206, 246, 278-9.

⁴ *Infra*, § 167; *supra*, § 116.

§ 118. As is elsewhere seen,¹ wherever on a prosecution for an offence, embracing two or more degrees, there is reasonable doubt as to whether the evidence sustains the higher degree, the verdict is to be taken for the lower. The rule in such case is "*in dubio mitius*."²

In cases of doubt, verdict must be taken for lower degree.

Motives to be distinguished from intent. Combination of motives no defence.

§ 119. The will acts under a variety of motives, some very complex.³ The motive varies with the man, what is strong with one being weak with another. The gratification of passion is a responsible motive; and so also is the general intent to violate law, fall the consequences on whom they may.⁴ And the law is, that no matter what may be the motives leading to a particular act, if the act be illegal, it is indictable, notwithstanding that some one or more of these motives may be meritorious.⁵ Thus the motive of promoting ultimate public good is no defence to an indictment for nuisance;⁶ intending to instruct the public is no defence to an indictment for libel;⁷ the motive of returning the goods is no defence to an indictment for embezzlement,⁸ or for larceny,⁹ nor is the motive of giving away the goods to another;¹⁰ scientific enthusiasm is no defence to an indictment for disinterring a corpse;¹¹ the motive of notifying of a fire is no defence to an indictment for

¹ Whart. on Cr. Ev. §§ 334, 721.

² See, also, *infra*, § 392.

³ See *infra*, § 153. For classification of motives, see Whart. Cr. Ev. § 784 *et seq.*; and see *Ettinger v. Com.*, 98 Penn. St. 338; *Marler v. State*, 68 Ala. 580; *Hogan v. State*, 13 Tex. Ap. 319; *Pinckford v. State*, 13 Tex. Ap. 468.

⁴ See 1 Whart. & St. Med. Jur. §§ 399, 404, 405; Whart. on Cr. Ev. §§ 135, 740.

⁵ *Supra*, § 88; *infra*, §§ 380-1; *R. v. Cox*, R. & R. 362; *R. v. Gillow*, 1 Mood. 85; 1 Lew. C. C. 57; *R. v. Davis*, 1 C. & P. 306; *R. v. Batt*, 6 C. & P. 329; *R. v. Johnson*, 11 Mod. 62; *R. v. Geach*, 9 C. & P. 499; *R. v. Bowen*, C. & M. 149; *R. v. Doddridge*, 8 Cox C. C. 335; *R. v. Ward*, 4 A. & E. 384 (*infra*, §§ 1416, 1421); *State v.*

Moore, 12 N. H. 42; *Com. v. Belding*, 13 Met. 10 (*infra*, § 1416); *Com. v. M'Pike*, 3 Cush. 181; *People v. Curling*, 1 Johns. 320; *People v. Cornetti*, 92 N. Y. 85; *State v. Cocker*, 3 Harring. 554; *State v. King*, 86 N. C. 603; *State v. Dineen*, 10 Minn. 407; *State v. Coleman*, 20 S. C. 119; *Perdue v. State*, 2 Ilumph. 494. See Whart. Cr. Ev. § 135. As to distinction between intention and motive, see 2 Steph. Hist. Cr. L. 110.

⁶ *Infra*, §§ 1416, 1420.

⁷ *Infra*, § 1594. *Steele v. Brannans*, L. R. 7 C. P. 261.

⁸ *Infra*, § 1053.

⁹ *Infra*, § 906.

¹⁰ *Infra*, § 899.

¹¹ *Com. v. Cooley*, 10 Pick. 37; 1 Russ. 464. *Infra*, § 1432 a.

arson;¹ the motive of ridding the community of a bad man is no defence to an indictment for homicide;² the motive of paying a debt with the proceeds is no defence to forgery.³ No matter what other motives, good or bad, coöperated, if the intent to do the particular unlawful act is either proved or implied, the offence, if committed, is complete.⁴ If the law were otherwise, there would be few convictions of crime, for there are few crimes in which extraneous motives are not mixed up with the particular evil motive.⁵

§ 120. When an intent exists to do wrong, and an unintended illegal act ensues as a natural and probable consequence, the unintended wrong derives its character from the general evil intent.⁶ A general malevolent purpose to break the law, for instance, or to inflict injury irrespective of any particular malice, gives color to a particular wrongful act committed in execution of the general

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

¹ *R. v. Regan*, 4 Cox C. C. 335.

² *Infra*, §§ 488 *et seq.*

³ *Infra*, § 718.

⁴ *U. S. v. Stores*, 4 Woods, 641; see *State v. King*, 86 N. C. 603.

As sustaining the position of the text as to concurrent bad motives, see *R. v. Hills*, 2 Moodey, 30; *R. v. Batt*, 6 C. & P. 329; *R. v. Geach*, 9 C. & P. 499; *R. v. Doddridge*, 8 Cox C. C. 335; *Smith v. Com.*, 100 Penn. St. 324; *State v. Moore*, 12 N. H. 42; *People v. Carmichael*, 5 Mich. 10; *Clifton v. State*, 73 Ala. 474. *Infra*, § 317. That the wrong was done in jest or sport is no defence. *Hill v. State*, 63 Ga. 578, and cases cited *infra*, §§ 373 a, 608 a.

⁵ See *infra*, §§ 122, 1168; Whart. Cr. Ev. § 734 *et seq.* See especially remarks on motives in 1 Whart. & St. Med. Jur. §§ 399-405. "Who would dare," asks a great German jurist, "to determine how far a single morbid tendency is isolated from all other tendencies in a particular person, so as to attach to it exclusively certain evil consequences; and who could shape a procedure, even if there could be such a severance, by which such tendency

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

In *R. v. Woodburne*, 16 St. Tr. 54, it was held that though the intent was to murder and not to disfigure, the defendant might be convicted of maiming with intent to disfigure. This, which strains to its extremest tension the doctrine in the text, is sustained by Sir J. F. Stephen in his *History of Crim. Law*.

⁶ See *supra*, §§ 107-110.

malevolent purpose. A man out of general malignity may fire on a crowd, or may displace a rail on a railway; and then, if any life be lost, he is responsible for murder, though he may have had no intention of taking any particular life.¹ It has been further ruled that if a man shoots A. by mistaking the person, when intending to shoot B., he is responsible for shooting A., under statutes which make it penal to shoot at another with *intent to kill the person shot at*.² And so has it been held with regard to murder at common law.³ We have the same distinction taken as to burglary, where the intent was to steal something different from that actually stolen;⁴ and as to arson, where the intent was to get a reward by giving the earliest information of a fire at the police station, and not to injure the owner;⁵ or where an unintended house was burned.⁶ And so if there be a deliberate intent, when taking lost goods, to steal, no matter who may be the owner, this intent may be viewed as an intent to steal from A., when A. is subsequently discovered as owner.⁷

In other words, when there is a general intent to do evil, of which evil the wrong actually done may be looked upon as a probable incident, then the party having such general intent is to be regarded as having intended the particular wrong.⁸ A man using a deadly weapon in a crowd, intending to kill, must be regarded as intending to kill all within the range of the weapon, whether as a primary object, or as incidental to such primary object. And a

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

² *R. v. Smith*, Dears C. C. 559; 33 Eng. Law & Eq. 567; *R. v. Jarvis*, 2 Mood. & R. 40; *Callahan v. State*, 21 Ohio St. R. 306; *Walker v. State*, 8 Ind. 290; *People v. Torres*, 38 Cal. 141. *Infra*, § 645 a. In *Com. v. McLaughlin*, 12 Cush. 615, it was held that when A. shot at B. and C., intending to kill whichever he hit, he might be indicted for an assault with intent to murder both B. and C.

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

⁴ See *infra*, § 810.

⁵ *R. v. Regan*, 4 Cox C. C. 335. It has been held, also, that where a party intending to commit a rape takes money

from the woman attacked, this may be robbery, though no money was demanded; *R. v. Blackham*, 2 East P. C. 711; *infra*, § 856.

⁶ *R. v. Pedley*, 2 East P. C. 1026; *R. v. Proberts*, 2 East P. C. 1030. *Infra*, §§ 836, 1283.

⁷ *R. v. Moore*, L. & C. 1; 8 Cox C. C. 416.

⁸ The distinction taken in the old books between *malum in se* and *malum prohibitum* in this relation is now exploded. A man who inflicts injury incidentally to attempting a statutory crime is, on the reasoning of the text, as responsible as is the man who inflicts injury incidentally to a common law crime.

general intent to do evil, such as to cover all the natural probable consequences of the act, may be inferred from the circumstances of the case.¹ If, however, as will hereafter be seen, it is plain that the offender's will was directed exclusively to a particular end, in which he failed, and that the act done by him was unintended in any sense, and was not a natural or probable result of his misconduct, then the more logical course is to indict him for a malicious attempt to do the unperformed act and for negligence in the act performed.² A third contingency arises when A., looking out for B., sees C., whom he mistakes for B., and whom he kills. This is murder, because his intent to kill, however mistaken his reasoning, was really pointed at C.³ But where one of several utterly distinct intents is necessary

¹ *Supra*, §§ 110-11. *R. v. Fretwell*, L. & C. 443; 9 Cox C. C. 471; *Washington v. State*, 60 Ala. 10; *Aiken v. State*, 10 Tex. Ap. 610; *State v. Gilman*, 69 Me. 163; *State v. Sloanaker*, 1 Hust. C. C. 62. See fully cases cited, *infra* §§ 317 *et seq.*, 383. Thus he who sets fire to his own house, intending to defraud the insurers, and burns his neighbor's house by the communicating of the fire, is indictable for maliciously burning the latter house. *R. v. Proberts*, 2 East P. C. 1030. *Infra*, § 830. That the injury must be a probable consequence of the act see *R. v. Faulkner*, 13 Cox C. C. 550, cited *infra*, § 829; *Com. v. Adams*, 114 Mass. 323.

² *R. v. Pembleton*, L. R. 2 C. C. 119; 12 Cox C. C. 607; *infra*, § 1070. As to concurrence of malice and negligence, see *infra*, § 128. And on the question of killing A. in mistake for B., see *infra*, §§ 317-322; *State v. Smith*, 32 Me. 369. In *R. v. Hewlett*, 1 F. & F. 91, the defendant was indicted for wounding A. with intent to do him bodily harm. The evidence showed that the defendant, intending to wound B., unintentionally wounded A. This was held a fatal variance. *S. P. Com. v. Morgan*, 11 Bush, 601; *Barcus v. State*, 49 Miss. 17; *Morgan v. State*,

13 Sm. & M. 242; *Lacefield v. State*, 31 Ark. 275. See, however, *R. v. Stopford*, 11 Cox C. C. 643. These cases are noticed *supra*, § 107; *infra*, § 645 a.

See discussion in 10 Cent. L. J. 37 *et seq.*

³ See *infra*, §§ 317-318.

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

(1) Where the actor errs in the execution of the act, and hurts a person other than he intended (*error in persona*), the true view is that the mistake is no defence. The actor is responsible, even when he had no desire to injure the person hurt, and would never have attacked such person. It is enough, to impute the crime to him, that he intentionally attacked an object under the protection of the law, and it is immaterial whether or no he effected his particular purpose. The opposite view, which in such cases holds the error to be essential, determining the defendant to be guilty of a negligent offence as to the injured party, and of an attempt as to the non-injured party, fails from its mistaking the period in which the of-

to constitute an offence, proof of one will not sustain the averment of another. Thus the allegation of an intent to steal in an indictment for burglary, will not be sustained by proof of an attempt to commit a sexual offence.¹

§ 121. It is sometimes argued, "Is it likely that one man should kill another for so small an object? Are we not to infer when there is a homicide which is followed by the stealing of a mere trifle, that the homicide was the result of sudden passion, rather than *lucri causa*? Or for a mere prejudice or spite is it likely that one man would assassinate another, and thus expose himself to the gallows? Or is a person likely to incur the penalties of larceny for the sake of an article of no intrinsic worth?" No doubt when a tender mother kills a child, or a friend kills a friend, and nothing more than the fact of killing is proved, we may be led to infer misadventure or insanity from the motivelessness of the act. But we have no right to make such inference because the motive is disproportionate. We are all of us apt to act on very inadequate motives; and the history of crime shows that murders are generally committed from motives comparatively trivial. A man unaccustomed to control his passions, and unregulated by religious or moral sense, exaggerates an affront, or nourishes a suspicion, until he determines that only the blood of the supposed offender can relieve the pang. For the smallest plun-

fence took shape. That period is the time immediately before the commission of the act; and when in this period the actor willed to injure the object before him, and did injure that object, this completes the offence; and the error he was in as to the identity of the object is as immaterial as error as to any other motive for action.

(2) On the other hand, where the intention is aimed at a specific object, and if by circumstances independent of his will another object of like character is struck (*aberratio ictus*), in this case the offence is not single and complete in itself, but (a) the attempt of a delict as to one object, and (b) negligent or casual injury in respect to the other

object. In this case the effect produced was not intended by the defendant, while in the former case the effect was intended, and would only not have been intended had the defendant not erred as to the identity of the object.

The old doctrine that an intention to burn A.'s house will sustain an averment, in an indictment for the arson of B.'s house, that the intent was to burn B.'s house (1 Curw. Hawk. p. 140) can no longer be sustained. Whart. Cr. Ev. §§ 149-50. See *R. v. Faulkner*, 13 Cox C. C. 550.

¹ *Infra*, § 811; *supra*, § 88 *et seq.*; and see Whart. Crim. Ev., 9th ed. § 149. See, however, *State v. Ruhl*, 8 Iowa, 447, cited *supra*, § 88; *infra*, §§ 1756, 1761.

der, also, murders have been deliberately executed. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime; never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs. When a powerful passion seeks gratification, it is no extenuation that the act is illogical; for when passion is once allowed to operate, reason loosens its restraints, and hence when there is a general wrongful intent, no specific commensurate motive need be shown.¹

§ 122. Malice, as is elsewhere abundantly shown,² is to be inferred from all the facts in the case, as a presumption of fact, and is never to be arbitrarily assumed as a presumption of law.³

Malice inferable from facts.

§ 123. To malice, consciousness of unlawfulness is not essential. At the first glance, it is true, it seems hard to punish a person for doing that which he thinks he has a right to do. And in questions of title to property this is undoubtedly the rule, because a man cannot be said to intend to steal that which he believes to be his own. In other cases, also, the knowledge that a thing is unlawful (in other words, the *scienter*) is an essential ingredient of the offence, as where the charge is an assault on an official person, knowing his legal status. But apart from these exceptions, ignorance of the law, as is elsewhere shown, is no defence;⁴ otherwise, the administration of penal

Consciousness of unlawfulness not essential.

¹ See *R. v. Fursey*, 6 C. & P. 81; 100 Penn. St. 324; *Hayes v. State*, 58 Kelly v. Com., 11 S. & R. 345; Com. v. Ga. 35. But see *Brown v. State*, 4 Tex. Laros, 84 Penn. St. 200; *McLain v. Ap. 275.*

Com., 99 Penn. St. 86; *Forsyth v. State*, 6 Ohio, 19; *Preston v. State*, 8 Tex. Ap. 30; *Hubby v. State*, 8 Tex. Ap. 597.

² See Whart. Cr. Ev. §§ 734, 764; and see *R. v. Price*, 5 C. & P. 510; *R. v. Harvey*, 3 D. & R. 464; *R. v. Selten*, 11 Cox C. C. 674; *Smith v. Com.*, 4. That the rule is applicable to homicide, see *infra*, § 380.

³ See *supra*, § 84.

law would depend on the uncertain and unascertainable mental conditions of persons accused.

§ 124. The task, often pronounced to be impossible, of exhaustively defining fraud, will not be here attempted.¹ It is enough to say, that fraud in a general sense, is the deceitful unlawful appropriation of the property of another, and a fraudulent intent is the intent to effect such appropriation. All fraud, therefore, is malicious, though all malice is not fraud, since many malicious offences (*e. g.*, those falling under the head of malicious mischief), exclude the idea of such appropriation. To fraud, also, deceit is essential, which is not always the case with malicious offences. A man may openly before the public rob another, yet, though this would be malicious, and would be indictable as robbery, it would not be fraudulent, as involving no deceit.

¹ See 3 Steph. Hist. Cr. Law, 121.

CHAPTER V.

NEGLIGENCE: AND HEREIN OF OMISSIONS.

Negligence is the omission of usual care, § 125.	Classification of indictable omissions, § 131.
Negligence is an intellectual, malice a moral defect, § 126.	Omissions may be malicious as well as negligent, § 131 a.
Tests of indictable negligence, § 127.	Mere omissions to render help not indictable, § 132.
Concurrence of malice and negligence, § 128.	Omission to guard dangerous agency indictable, § 133.
Negligence cannot constitute accessoryship, § 129.	Not necessary that negligence should be subject to civil suit, § 134.
Omission, to be indictable, must be defective discharge of duty, § 130.	Master may be liable for servant's negligence, § 135.
Omissions are breaches of affirmative commands; commissions of negative commands, § 130 a.	[As to contributory negligence, see <i>infra</i> , §§ 162-3.]

§ 125. A NEGLIGENT offence is an offence which ensues from a defective discharge of a duty, which defect could have been avoided by the exercise, by the offender, of that care which is usual, under similar circumstances, with prudent persons of the same class.¹ Negligence is of two kinds: *culpa levis*, which is the lack of the diligence and care usual with good specialists of the particular class under the circumstances; and *culpa lata*, which is the lack of the diligence and care exercised by honest and worthy non-specialists, dealing with similar objects.² In criminal cases this distinction operates mainly to determine the degree of evidence required to convict. A non-specialist (*e. g.*, a person not claiming to be a physician or lawyer) cannot be convicted merely on proof of want of or failure to apply due qualifications; while a person claiming to be a specialist can be convicted on such proof.³ *Culpa levissima*, or that slight aberration from

¹ Whart. on Neg. chap. i. See discussion in 4 Crim. Law Mag. 8. See *State v. Emery*, 78 Mo. 77.

² See Whart. on Neg. §§ 27 *et seq.*
³ Whart. on Neg. § 26; *supra*, § 89; as to physicians, see *infra*, § 362.

duty incident to all human action, is not punishable, since, as there are no persons to whom such negligence is not imputable, there are no persons, unless we recognize its non-indictability, who could escape punishment.¹

§ 126. Malice, as is elsewhere noticed,² arises from an evil purpose, negligence from a failure of purpose; malice is imputable to a defect of heart, negligence to a defect of intellect.³ If what results corresponds to what was intended, then the offence is malicious; if it does not correspond to what was intended, then, if the actor did not at the time exercise due care, the offence is negligent. On what we may call, therefore, the subjective side of an offence, there are two phases of indictability, the malicious and the negligent, corresponding to the ancient *dolus* and *culpa*. The legislature, however, may make penal dangerous acts irrespective of malice or negligence.⁴

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

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

“Provided, that no one is deemed to have committed a crime only because he has caused the death of, or bodily injury to, another by negligence which is not culpable. What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case.

“Provided, also, that no one is deemed to have committed a crime by reason of the negligence of any servant or agent employed by him.” Dig. Cr. L. art. 212. See R. v. Allen, 7 C. & P.

153; R. v. Barrett, 2 C. & K. 343; R. v. Conrahy, 2 Craw. & Dix, 86; R. v. Tindall, 1 Nev. & P. 719; 6 A. & E. 143. To impose criminal responsibility, Sir J. F. Stephen, 3 Hist. Cr. Law, 11, maintains that there “must be more, but no one can say how much more, carelessness than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused.” But the better view is that the only difference between criminal and civil procedure in such cases, is that in the first, there can be no conviction if there be reasonable doubt of guilt, while in the second, the verdict goes with preponderance of proof.

² *Supra*, § 106; and see Whart. on Neg. § 7.

³ See U. S. v. Keller, 19 Fed. Rep. 633; State v. Smith, 65 Me. 257; 2 Steph. Hist. Cr. L. pp. 95 *et seq.*

⁴ *Supra*, § 88.

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

Tests of
indictable
negligence.

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

(2) *Imperfect discharge of official duty*.—Wherever a specific duty is imposed on a public officer, there a negligent defect in the discharge of this duty, when inflicting injury on an individual, is indictable.²

(3) *Omission to discharge specific duty assumed or imposed by law*.—As we will presently see, this kind of negligence, when followed by injury, is indictable.³

(4) *Meddling with dangerous agencies*.—It is the duty of all men to be cautious in dealing with dangerous agencies; and whoever, by carelessness in handling such agencies, injures another, is indictable.⁴

§ 128. Interesting questions may arise when malice and negligence (or *dolus* and *culpa*) concur in a particular transaction. This may happen as follows:—

Concurrence of
malice and
negligence.

(1) When there are two successive acts of the same person, in the first of which there is a criminal intent which fails of execution, and in the second of which, without the intent to effect it, the object designed in the first act is effected. A., for instance, believes he has killed B., and casts him hastily into the water, to conceal the body, by which act, and not by the prior wounds, B. is killed. If the second act is to be viewed as a continuation of the first, then the death is to be imputed to the malice pervading the entire act. It is, however, conceivable that there is no such continuity. It may be that the original wound is struck in excitement; that the assailant, when the transaction is over, actually believes that the assailed is dead; and that subsequently the drowning of the body is in cool blood, after the heat of the contest is over, and with the intention only of putting the body out of sight.

¹ *Supra*, § 24.

² See *infra*, §§ 1563, 1568.

³ *Infra*, §§ 130 *et seq.*, 156. See as to physicians, *infra*, § 362.

⁴ See *infra*, §§ 329, 370.

In such case the first act would be indictable as an attempt to kill; the second, as a negligent homicide.¹

(2) It may be, however, that an unexpected and unintended consequence is coupled in the same act with a malicious design. A man, for instance, designs to seriously hurt, and unintentionally kills. In such cases, if the hurt he designs is a felony, the killing, by statute, if not by common law, may be murder; but it is otherwise if the intention is merely to inflict a slight hurt not a felony.²

§ 129. Negligent co-operation cannot constitute accessoryship in a malicious act, although a party occupying an official situation may be liable for negligence in the non-arrest of a criminal. To constitute the offence of accessoryship there must be malice, and malice cannot be inferred in any case where the co-operation is purely negligent. On the other hand, to negligent acts there may be malicious accessories; though, unless these acts are felonies by statute, all concerned, under the rule that in misdemeanors all parties are principals, are to be treated as principals. A curious and interesting question arises where one person intentionally puts another in the position of doing a negligent act, as where fire-arms are mischievously placed in the hands of a negligent or inexperienced person, or when the superintendent of a railroad knowingly and maliciously places a locomotive under the control of an engineer whom the superintendent knows to be incompetent. In such cases there is good ground for maintaining that the person thus originating the harm is liable for the consequences of the negligence of the immediate operator; and this is also the case when dangerous agencies are negligently left in the hands or in the way of incompetent persons.³ But with these exceptions, a party, who by negligence produces another's negligence, cannot, as we have seen, be chargeable with the consequences of the latter's negligence. Morally reprehensible, also, as may be he who by negligence induces another to perform a guilty act, he cannot be made responsible without unduly enlarging the range of criminal

¹ See *infra*, § 155.

² See *infra*, § 317; *supra*, §§ 107-111, 120. If, on the other hand, the offender should design malicious mischief to property, and then, without

intending it, carry it away, the offence would not be felony. See §§ 883 *et seq.*

³ *Infra*, §§ 130, 133, 154.

law. And even he who negligently induces another to injure himself is not responsible for such injury.¹

§ 130. Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested,² though in such cases they may constitute indictable offences. There is no such thing, in fact, as an omission that can be treated as an absolute blank. A man who is apparently inactive is actually doing something, even though that something is the abstinence from something else that he ought to have done. Even sleeping is an efficient act, and may become the object of penal prosecution when it operates to interrupt an act on the part of the defendant which the law requires of him with the penalty of prosecution for his disobedience. As, therefore, an omission takes its character from the prior responsibility that it suspends, that responsibility must be scrutinized when we undertake to estimate the penal character of an omission to perform it. And as a general rule in this respect we may say, that *when a responsibility specifically imposed on the defendant is such that an omission in its performance is, in the usual course of events, followed by an injury to another person or to the State, then the defendant is indictable for such an omission.*³ If the duty is absolute, then the defendant is responsible for its non-performance. "I

An omission to be indictable must be a defective discharge of a duty.

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

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

³ See *R. v. Hughes*, D. & B. C. C. 248; 7 Cox C. C. 301; *R. v. Haines*, 2 C. & K. 368; *R. v. Lowe*, 3 C. & K. 123; 4 Cox C. C. 449. *Infra*, §§ 156, 358. As to parents' neglect of child, see *infra*, §§ 336, 1563 *et seq.* The point in the text is considered in 2 Steph. Hist. Cr. Law, 112.

Lord Macaulay, in his Report on the Indian Penal Code, thus discusses the question in the text:—

"Two things we take to be evident: first, that some of these omissions ought to be punished in exactly the same manner in which acts are punished; secondly, that all these omissions ought not to be punished. It will hardly be disputed that a jailer who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who voluntarily causes the death of an infant intrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar."

myself," said Lord Campbell, in a case where this question was discussed,¹ "tried a prisoner for not taking proper care in managing the shaft of a mine. He intrusted the management to an incompetent person, who said at the time he was incompetent. The prisoner was convicted, and I did not hesitate to impose a severe sentence." But it is otherwise when the performance of the duty is discretionary.²

§ 130 a. Penal laws are either affirmative, equivalent to "thou shalt," or negative, equivalent to "thou shalt not." An omission to do what the first orders is equally indictable with an actual doing what the second forbids. The chief distinction between the two classes of laws is that the first, the affirmative command, requires a continuous course of action; while the second, the negative, is usually limited to a single act. Thus among affirmative commands we may reckon continuous duties of officers of all classes. A public officer is required to execute his office diligently; if he fail to do so, he is indictable for misconduct in office, though the failure may consist in a mere omission. Persons exercising private offices are subject to a similar duty, though as a rule they are not indictable for omissions unless such omissions are productive of harm to persons whom they have specially in charge.³ The same distinction applies to omissions in the discharge of natural duties. A husband is indictable for an omission in the discharge of his duty to his wife, whenever this duty imposes on him specially her support, she being incapable of self help, and whenever through the omission she is injured. A parent is in like manner indictable for an omission to feed and shelter a helpless child exclusively dependent on him. So if I put another person in a position where injury will accrue to him, if I omit to relieve him, should I withdraw from him the care I undertook to give him, I am indictable for the injury I cause by the omission.⁴ But the duty in such case must be averred and proved.⁵

¹ R. v. Pocock, 17 Q. B. 34; 5 Cox C. C. 172, cited *infra*, §§ 154, 339.

² R. v. Pocock, *Ibid.* See, also, cases, *infra*, § 247.

³ See *State v. McIntyre*, 3 Ired. 171, cited *infra*, § 1570.

⁴ See the question of omissions in discharge of offices discussed *infra*, §§ 329-376, 1563-1585.

⁵ *Com. v. Hartwell*, 128 Mass. 415.

§ 131. Indictable omissions may be classified as follows:—

Classification of omissions.

I. Omissions constituting defects in the performance of duties which have been undertaken. Under this head fall most of the adjudicated cases of so-called omissions—*e. g.*, omissions by switch-tenders to turn switches, of telegraph operators to send messages, of physicians to give required attention to patients.¹

II. Omissions constituting defects in the performance of duties which have not been *eo nomine* undertaken—*i. e.*, non-contractual duties.

1st. From the standpoint of general civic duty, among which may be noticed the omission of an accessory after the fact to notify the government of a felony, and the omission of a person swearing to a fact to acquaint himself as to such fact.²

2d. From the standpoint of official duty, as where an officer whose duty it is to make an arrest neglects to do so.

3d. From the police standpoint, as where a person neglects to cover a ditch or well belonging to him, over which he knows travellers are accustomed to pass, or to cleanse a defective drain.³ Under this head may be classed the omission of masters to control their servants in the use of agency which may be injuriously applied.⁴

§ 131 a. It has been frequently said that omissions are always negligent, and that consequently indictments based on omissions must be for negligent as distinguished from malicious offences. But this is a mistake.⁵ A man undertaking a duty may intentionally omit some act essential to its discharge, and in this case he is indictable for a maliciously imperfect discharge of the duty.⁶ And in this way, the increment of malice may turn a non-indictable offence into an indictable offence. Thus, if A. omits to succor B. when drown-

Omissions may be malicious as well as negligent.

¹ See *infra*, §§ 133, 156, 330, 367.

Cf. 3 Steph. Hist. Cr. L. 10.

² *Infra*, § 1247.

³ *Berner*, § 90; 1 Ben. & Heard Lead. Cas. 49; *R. v. Wharton*, 12 Mod. 510. *Infra*, §§ 329-369.

⁴ *Infra*, §§ 135, 247.

⁵ See 4 Crim. Law Mag. 9.

⁶ See remarks of Lord Campbell in *R. v. Hughes*, D. & B. 248; 7 Cox C. C. 301, cited *infra*, § 369. See cases in § 133.

ing, A. is not indictable for the omission. It is otherwise, however, if A. should induce B. to bathe with him, promising to succor B. in case of danger, and then should intentionally leave B. beyond his depth, and fail to relieve him, so that B. is drowned. In this case A. is indictable for malicious homicide.

§ 132. Whether a person who is under no specific obligation to rescue the life of another in danger is indictable for omitting to do so, when he can do so without danger to his own life, has been much discussed. In the Roman law the negative was maintained.¹ To such omissions, however, the canon law attached ecclesiastical penalties.² In our own system, mere omission to render help, unless in contravention of a duty specially assumed or imposed, is not an indictable offence.³ It is otherwise where the omission is to perform a legal duty.⁴

§ 133. Where a party puts a dangerous instrument in motion and then leaves it, penal responsibility is not diverted by the fact that the immediate injury is caused by an omission or negation of action;⁵ as where a party after putting poisoned food on his enemy's table, waits until the latter himself takes the food; or where, as we have just seen, a skilful swimmer, by false promises, entices another in deep water, and then leaves him to drown; or where a midwife, after cutting

¹ L. 3. § 22; L. 6. § 8. 9: D. de re milit. (4 q. 16). Tacit. Annal. xiv. 42-45.

² Can. 7. Caus. 23. qu. 3.

³ See *infra*, §§ 330-31.

If the law undertook to compel men to perform toward each other offices of mere charity, then the practical and beneficent duty of supporting self would be lost in the visionary and illusory duty of supporting every one else. It is scarcely necessary to point attention to the fact, that if the maxim be true that he who injures another by his omissions is indictable, then the converse must also be true that every one is obliged by law to omit nothing that would be of aid to any body else. But this, by destroying all specialty in business, would destroy all business

that is made up of specialties. No public enterprise (*e. g.*, a railroad when in working order) could be carried on safely if every one who conceives something to be wrong in it is required to rush in and rectify the supposed mistake. No man could courageously and consistently discharge his special office if all other persons were made both his coadjutors and overseers. Industry, also, would cease if the consequences of idleness were averted by making almsgiving compulsory; and finally, by requiring by law that alms should be given to all that need, there would be none who would not be too needy to give alms.

⁴ *Infra*, § 156.

⁵ See *infra*, § 166.

the umbilical cord, does not bind it up, so that the child bleeds to death;¹ or where a watchman omits to give notice of the approach of a train;² or where a person shooting a pistol neglects to properly guard it.³ In all such cases of withdrawal of action, after the destructive agency has been put in motion, there is no question of mere omission (*Unterlassung*). Such withdrawal of action, so argues a German jurist,⁴ closes almost all crimes of commission; for the actor brings his train of causes just to the point where that train can be left to itself; and even when he shoots at an opponent, he simply *lets it happen* (*lasst es nur geschehen*) that the ball goes on its mission, and perforates its object, so that the latter by his wound loses his life.⁵ And it may be held generally that it is the legal duty of a person putting in action a dangerous agency to prudently guard such agency, and if he fail to do so, he is responsible penally for the consequences.⁶

§ 134. To make negligence indictable it is not necessary that it should be in violation of a contract. Wherever the defendant fails to discharge a duty imposed on him, whether this duty be by natural law, or statute, or contract, then he is indictable for injuries thus produced, provided, as has just been seen, the duty is one with which he is specially charged. Civil and criminal responsibility are in this view far from being convertible.

On the one hand, contracts, as a general rule, cannot be made the basis of a criminal prosecution.⁷ On the other hand, there are many cases in which indictments lie (*e. g.*, nuisance and neglect of official duty in which there is no special damage to an individual), where no civil action can be maintained.⁸ And we may readily suppose cases in which contributory negligence sufficient to defeat a civil suit would not defeat a criminal prosecution.⁹

Not necessary that negligence should be in violation of a contract, or the subject of civil suit.

¹ *Infra*, §§ 156, 337, 393; Berner, Lehrbuch, p. 434.

² *Com. v. Boston & Me. R. R.*, 133 Mass. 383; *infra*, § 349.

³ *Smith v. Com.*, 100 Penn. St. 324; *State v. Hardie*, 47 Iowa, 647; *State v. Emery*, 78 Mo. 77. See *infra*, § 344; *R. v. Jones*, 12 Cox C. C. 628.

⁴ Berner, *ut supra*.

⁵ *R. v. Gardner*, 1 F. & F. 669.

⁶ *Infra*, §§ 337-43; *Com. v. Bost. & Low. R. R.*, 126 Mass. 69.

⁷ *R. v. Daniell*, 6 Mod. 99; *R. v. Wheatley*, 1 W. Bl. 273; *Com. v. Hearsey*, 1 Mass. 137.

⁸ *Supra*, § 15; *infra*, §§ 1421 *et seq.* ⁹ *Infra*, §§ 162, 163; remarks of Holmes, J., in *Com. v. Pierce*, Mass. 1884, 18 Rep. 756. See *infra*, §§ 329-370.

Negligent homicides will be hereafter specifically considered.¹

§ 135. A master or other principal, who acts through subordinates, and whose duty it is to exercise due care in the appointment of such officers, may be indictable, on the principle of *culpa in eligendo*, for an injury caused by the negligence of a subordinate whom he has negligently appointed.² And the master is likewise liable for his servant's negligence when such negligence is a natural incident of the employment.³ Wherever, also, due supervision could have prevented the mischief, then the master neglecting such supervision is indictable.⁴ But unless negligence of selection, or the lack of such due supervision as is usual among good business men under the circumstances, be imputable to the master, he is not criminally responsible for the servant's misconduct in matters not incidental to the service.⁵

¹ *Infra*, §§ 329-370.

² See Whart. on Neg. § 170.

³ *Com. v. Bost. & Low. R. R.* 126 Mass. 61.

⁴ *Infra*, § 341; *R. v. Dixon*, 3 M. & S. 11; *R. v. Medley*, 6 C. & P. 292; *R. v. Michael*, 2 M. C. C. 120; 9 C. & P. 356; *Com. v. Nichols*, 10 Met. 259; *Com. v. Morgan*, 107 Mass. 199. See *infra*, § 247.

⁵ *R. v. Bennet*, Bell C. C. 1; 8 Cox C. C. 74; *R. v. Wilmett*, 3 Cox C. C. 281; *Com. v. Mason*, 12 Allen, 185; *Barnes v. State*, 19 Con. 398; *State v. Privett*, 4 Jones N. C. (L.) 100; *Hipp v. State*, 5 Blackf. 149; *Anderson v. State*, 39 Ind. 553; and cases cited *infra*, §§ 247, 1503.

CHAPTER VI.

FITNESS OF OBJECT OF OFFENCE.

I. PHYSICAL UNFITNESS.

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

II. JURIDICAL DEFECTS.

Objects may be juridically unfit, § 137.

Outlaws are still under protection of the law, § 138.

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

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

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

But not as to public criminal immoralities, § 142.

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

Nor the deprivation of liberty, § 145.

Nor waive constitutional rights of trial, § 145 a.

Capacity to consent and actual consenting prerequisite, § 146.

Contributory negligence may be a defence, § 147.

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

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

Consent obtained by fraud is no defence, § 150.

I. PHYSICAL UNFITNESS.

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

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

II. JURIDICAL DEFECTS.

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

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

§ 139. *Persons condemned to death* are under the protection of the law until the period comes for their execution, and the executioner undertakes the work. "Non licet privata potestate hominem occidere vel nocentem."³ To the executioner alone is public authority to kill given, and this authority he is bound to execute in the way the law requires. In no other way is the killing justifiable. As a general

Object may be juridically unfit.

Outlaws are still protected by law.

Convicts can only be punished according to law.

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

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

³ Can. 9. Caus. 23, qu. 5.

principle, therefore, we may say that a convict can only be punished according to law, and that for any excess or variation of punishment those having him in charge are penally liable.¹

Subject, however, to this qualification, an officer is not penally liable for an injury inflicted by him on another person when in inflicting the injury the officer acted under the direction of the State.² "Is damnum dat, qui, jubet dare; ejus vero nulla culpa est, qui parere necesse sit."³

§ 140. A party may juridically divest himself of the protection of the law by assailing another in such a way that that other is authorized, in self-defence, to forcibly repel the assailant. The plea of self-defence is generally interposed in cases of homicide, and it is in connection, therefore, with the special topic of homicide that the law in this relation is considered in the greatest detail. It should be remembered, however, that there are other criminal prosecutions to which the same defence may be applicable. Thus, in false pretences, it is a defence that the prosecutor knew of the falsity of the statement.⁴ On the general question the following observations may be made:—

An assailant may divest himself of legal protection.

1. Rights may come in collision in such a way that neither party is compelled to make a sacrifice for the benefit of the other.⁵

2. Whenever a lesser right comes into collision with one far greater, then it is the duty of the possessor of the former right to recede.⁶

§ 141. *Volenti non fit injuria* is a maxim known both to the Roman and the English law; and in all prosecutions in which the injury is purely private, and is inflicted on the alienable as distinguished from the inalienable rights

A party may by assent to an injury bar

¹ See 1 East P. C. 297; 1 Hale, 481; *Guiteau*, to shoot Guiteau; and this finding was subsequently sustained by the Supreme Court of the United States. *Harrison v. Hodgson*, 10 B. & C. 445; *R. v. Friend*, R. & R. 20; *R. v. Porter*, L. & C. 394; 9 Cox C. C. 449; *R. v. Miles*, 6 Jur. 243; *State v. Roberts*, 52 N. H. 492; *State v. Hull*, 34 Conn. 132. See *infra*, § 408.

The principle in the text was affirmed in the United States in 1882 by a military court in the case of *Mason*, a soldier, who undertook, some weeks after the shooting of President Garfield by

Guiteau, to shoot Guiteau; and this finding was subsequently sustained by the Supreme Court of the United States. *U. S. v. Mason*, 105 U. S. 196.

² See *Berner*, § 84.

³ L. 169 pr. de R. I. See *infra*, §§ 307, 401, 508; *supra*, § 94.

⁴ *Infra*, §§ 150, 1178.

⁵ *Supra*, §§ 95 et seq. See fully *infra*, §§ 484 et seq., 884.

⁶ See *infra*, § 484.

a prosecution. *Volenti non fit injuria.*

of the party injured, the maxim is recognized as good by all modern jurisprudence.¹ Of this we will have frequent illustrations in the following pages. Thus, consent by an owner to the taking of goods is a defence to a prosecution for larceny;² consent to entrance into a house is a defence to a prosecution for burglary;³ consent to an assault, not connected with a breach of public order, is a defence to a prosecution for assault;⁴ consent to an intended rape bars a prosecution for rape;⁵ consent to an intended robbery bars a prosecution for robbery.⁶ But it is to be remembered that this proposition is by its very terms limited to injuries strictly private, and to those which concern the merely alienable rights of the party injured. And it should be also kept

¹ *R. v. Read*, 1 Den. C. C. 377; 2 Car. & Kir. 957; *R. v. Wollaston*, 12 Cox C. C. 180; 26 Law T. Rep. 403 (1872); *R. v. Martin*, 2 Mood. C. C. 123; *State v. Beck*, 1 Hill S. C. 363. In the Roman law we have the oft cited maxim, *Volenti non fit injuria*; or as put by Aristotle, ἀκούσαντες ὁ ἀδικεῖς ἑαδου. *Ethic Nicom.* v. 13. But this maxim was held not to include inalienable rights; while the better opinion was, that so far as concerns the State, no private individual can, by consenting that a crime shall be committed on him, estop the State from prosecuting. The Code on this point is clear. L. 38. D. de pact. (2. 14.) *Ius publicum privatorum pactis mutari non potest.* L. 45. § 1. D. de reg. iur. (50. 17.) *Privatorum conventio iuri publico non derogat.* L. 6. C. de pact. (2. 3.) *Pacta, quae contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati iuris est.* L. 13. pr. D. ad L. Aquil. (9. 2.) *Liber homo suo nomine utilem Aquilliae habet actionem: directam enim non habet, quoniam dominus membrorum suorum nemo videtur.*

But the Roman law cautiously limits the maxim to cases where, as in theft, etc., "against the will" is an essential ingredient of the offence, and in which

there is no breach of the peace or public scandal. L. 46. § 8. D. de furt. (47. 2.) § 8. I. de oblig. quae ex delict. (4. 1.) *Sed et si credat aliquis invito domino se rem commodatam contrectare, domino autem volente id fiat, dicitur furtum non fieri.* L. 1. § 5. D. de iniur. (47. 10.) . . . quia nulla injuria est, quae in volentem fiat. cap. 27. de reg. iur. in VI. (5. 13.) *Scienti et consentienti non fit injuria.* L. 1. § 5. D. quod. vi aut clam. (43. 24.) *Quid sit vi factum videamus. Vi factum videri Quintus Mucius scripsit, si quis contra, quam prohiberetur, fecerit.* L. 145. D. de reg. iur. (50. 17.) *Nemo videtur fraudare eos, qui sciunt et consentiunt.* L. 3. § 5. D. de hom. lib. exhib. (43. 28.) *Si quis volentem retineat, non videtur dolo malo retinere.* L. 6. § 2. D. de L. Fab. de plagiar. (48. 15.) *Lege Fabia cavetur, ut liber, qui hominem ingenuum, vel libertinum invitum celaverit, . . . eius poena teneatur.* L. 3. § 4. D. ad L. Inl. de vi public. (48. 6.) See *Lorimer's Inst.* (1874) p. 32. As to consent to attempts, see *infra*, § 188.

² *Infra*, § 915.

³ *Infra*, §§ 766-770.

⁴ *Infra*, §§ 556, 577, 636.

⁵ *Infra*, § 554.

⁶ *Infra*, § 855.

in mind that where an attempt is resisted, an indictment may be maintained for the attempt, though the consummated offence was subsequently agreed to.¹ Another qualification to be observed is, that a consent to the doing a particular thing is a bar only to a prosecution for doing such thing precisely and nothing more.²

§ 142. Any injury committed in such a way as to be an offence to the body politic can be prosecuted in defiance of the consent of the party immediately injured. Prize fighters, for instance, may agree to beat each other, and if this is done in private, and death or mayhem does not ensue, no prosecution lies at each other's instance;³ but it is otherwise when there is a breach of the peace,⁴ or when the fighting is so conspicuously brutal as to produce public scandal, or work public demoralization.⁵ Consent cannot cure duels, or incest, or seduction,⁶ or adultery, or the maiming of another so as to render him unfit for public service,⁷ or such operations on women as prevent them from having children, or operations to produce miscarriage,⁸ or (when this is by statute indictable) profligate dealings with minors. The reason is that parties cannot by consent cancel a public law necessary to the safety and morality of the State. *Ius publicum privatorum voluntate mutari nequit.*⁹

But not as to public criminal immoralities.

§ 143. The distinction between alienable and inalienable rights is asserted in the Declaration of Independence, and in the Bills of

¹ *Infra*, § 188.

² *R. v. Bennett*, 4 F. & F. 1105; *R. v. Case*, 4 Cox C. C. 220; *R. v. Flattery*, 13 *Ibid.* 388; *Don Moran v. People*, 25 Mich. 356; *Com. v. Stratton*, 114 Mass. 303; *Richie v. State*, 58 Ind. 355. *Infra*, §§ 188, 636.

³ See *Champer v. State*, 14 Ohio St. 437; *State v. Beck*, 1 Hill S. C. 363; *R. v. Coney*, L. R. 8 Q. B. D. 534; 15 Cox C. C. 46; 46 L. T. (N. S.) 307, where it was held by a majority of the English judges that mere presence at a prize-fight, without aiding or abetting, does not make the parties so present participants. *Infra*, § 636.

⁴ *State v. Burnham*, 56 Vt. 445.

⁵ *Poster*, 260; 1 East, 270; *R. v. Bil-*

lingham, 2 C. & P. 234; *R. v. Perkins*, 4 *Ibid.* 537. And see *Com. v. Wood*, 11 Gray, 85; *Com. v. Barrett*, 108 Mass. 302; *Sanders v. State*, 60 Ga. 126. See cases cited *infra*, §§ 217, 373, 636.

⁶ See *Tucker v. State*, 8 Lea, 633.

⁷ 1 Inst. 107 a, b; 1 East P. C. 396; *Steph. Dig. C. L. art. 207*; *People v. Clough*, 17 Wend. 351.

⁸ *Infra*, §§ 593-4; *Crichton v. People*, 6 Parker C. R. 363; though see *Smith v. State*, 33 Me. 48.

⁹ See *Berner's Lehrbuch des Strafrechts*, 132. *Infra*, §§ 451-2. And see *R. v. Bennett*, 4 F. & F. 1105; *R. v. Sinclair*, 13 Cox C. C. 28; and cases cited *infra*, §§ 577, 636.

Rights of most of the United States. Inalienable rights as thus generally defined are life, liberty, and the pursuit of happiness. The distinction, however, is not modern; it lies at the basis of the penal sections of the canon law, and from that law is more or less fully absorbed into the common law of continental Europe.¹

§ 144. *Life* is the first of these inalienable prerogatives. Thus, a man who kills another with the latter's consent is guilty of homicide.² Although some of the jurists of the stoical school here argued in the negative, the affirmative was determined under the Justinian Code; and by the English common law the criminality of the act is such that the consent of the party slain does not even lower the degree. And this rule exists not only in cases where there is malice, but where no malice exists, as in agreements for concurrent suicides.³ Yet we may readily conceive of cases where the degree of guilt would be greatly reduced. A physician, at the request of a dying man suffering intolerable agonies, may, from humane motives, precipitate death; or a soldier on the battle-field, after urgent appeals, may, with intense agony on his own part, yet from the same humane motives, take the same course as to a dying comrade. Yet even here the maxim *Volenti non fit injuria* cannot be applied. There is nothing in the consent to bar a verdict of guilty. That verdict, however, would be for the lowest form of voluntary manslaughter, and could properly be followed by executive pardon.

We may, therefore, justly argue that if life be an inalienable prerogative, then taking it by self is a public wrong, and those who are accessaries to this public wrong cannot plead in defence the suicide's consent.⁴

¹ See *infra*, §§ 451-2.

² *R. v. Hughes*, 5 C. & P. 126; *Com. v. Parker*, 9 Met. 263. So as to administration of poison. *Com. v. Stratton*, 114 Mass. 303; *Com. v. Pierce*, 18 Rep. 757; *Mass. Law. Rep.*, Dec. 25, 1884. See this question discussed as to suicide, *infra*, §§ 451-2.

³ See *infra*, §§ 451-2.

⁴ See *infra*, §§ 451-2; *Com. v. Parker*, 9 Met. 263; *Macauley's Indian*

Code, 449. As to consent in waiving constitutional and other privileges of trial, see *Whart. Cr. Pl. & Pr.* §§ 351, 518, 733.

On this topic may be consulted Lord Macaulay's Report on the Indian Code, 449.

"That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the con-

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

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

sent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods," *Harlan, J. Hopt v. People*, 110 U. S. 579.

¹ *Infra*, § 362. *Steph. Dig. C. L. art. 205*. As to how far assent is to be inferred, see *McClellan v. Adams*, 19 Pick. 333.

² Of this we have a remarkable illustration in a Pennsylvania case, in 1826, in which it was held that an agreement not to bring a writ of error in a criminal case, especially one of high degree, does not estop the defendant from bringing such writ. The question arose after a conviction of burglary, where it was alleged that

the defendant had agreed in writing not to bring a writ of error, and where a motion to quash the writ was on this ground made. But *Tilghman, C. J.*, in refusing the motion said: "What consideration can a man have received, adequate to imprisonment at hard labor for life? It is going but one step further to make an agreement to be hanged. I presume no one would be hardy enough to ask the court to enforce such an agreement, yet the principle is, in both cases, the same." *Smith v. Com.*, 14 S. & R. 69; and see *Whart. Cr. Pl. & Pr.* §§ 541, 733.

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

the exercise of his business capacity, are void, though agreements not to do business in particular localities may be sustained.¹

Nor waive constitutional rights of trial. § 145 a. Constitutional rights to trial by an independent jury, whose deliberations are to be guarded against outside interference, are to be placed in the same category. These a defendant cannot waive.²

Capacity to consent and actual consenting a pre-requisite. § 146. It need scarcely be added that even in those cases of purely private wrongs to which the maxim *Volenti non fit injuria* applies the party injured must be capable of giving consent.³ Thus, consent by insane persons and young children incapable of assenting is no bar.⁴ In cases of rape this has been frequently adjudicated;⁵ and the same reasoning holds good in cases of larceny. Thus consent is no defence to an indictment for larceny from or assault upon an insane person, or a person in a state of unconsciousness of the meaning of the guilty act.⁶ And so acquiescence extorted by fear or fraud is no defence.⁷ But where a surgical operation is probably necessary

¹ Whart. on Cont., §§ 430 et seq.

² See Whart. Cr. Pl. & Pr. § 733.

³ *R. v. Mayers*, 12 Cox C. C. 311; *Hadden v. People*, 25 N. Y. 373. *Infra*, § 189.

⁴ *E. g.*, in cases of abduction, in *U. S. v. Aucorala*, 17 Blatch. C. C. 423; *State v. Rollins*, 8 N. H. 550; *State v. Farrar*, 41 N. H. 53; *Com. v. Nickerson*, 5 Allen, 518. As to infants, see *Givens v. Com.*, 29 Grat. 830, and cases cited, *infra*, § 577.

⁵ See *infra*, § 577; *Hays v. People*, 1 Hill, N. Y. 351; *State v. Johnston*, 76 N. C. 209. In *Com. v. Burke*, 105 Mass. 376, the court held that "without her consent," and "against her will," were convertible terms; and hence that carnal knowledge of a woman unconscious with drink was rape. The statutory crime of having carnal knowledge of children is not dependent on consent, *infra*, §§ 577, 612.

⁶ See *Hadden v. People*, 25 N. Y. 373.

⁷ *Infra*, § 150; 2 East P. C. 486.

In November, 1872, the question of consent, as affected by ignorance of the act, came before Kelly, C. B., Martin, B., Brett, Grove, and Quain, JJ., on a crown case reserved, in which the defendant was charged with an indecent assault upon two boys, of eight years old. "The boys were not asked by the counsel on either side if it" (the act which consisted in his playing with their private parts, and then throwing them on their backs and laying on them, etc.) "was done against their will or with their consent," but they stated that they did not know what the defendant was going to do to them when he took them into the field and placed them on his lap and laid them on the ground. The defendant having been convicted, Kelly, C. B., said: "I am of opinion that the conviction should be affirmed. There being no actual consent, and on the other hand no actual fraud to induce consent, I think that where a

to relieve the patient from great danger, the fact that the patient is incapable of giving assent will justify proceeding with the operation without assent.¹ And it has been held in England, that it is a defence to an indictment for an indecent assault (not amounting to an assault with intent to ravish) on a child of over seven years, that the child assented.²

§ 147. As will hereafter be more fully seen³ there is no reason why a party who negligently puts himself in the way of danger should not be obliged to bear the consequences of his negligence, subject to the same qualifications as are applied in civil suits for damage produced by negligence.⁴ Of course his negligence, in exposing himself to danger, will be no defence to an indictment against persons who recklessly injure him when in that condition.⁵ And the person charged with contributory negligence must be one capable of being a juridical cause.⁶

§ 148. There may be a constructive estoppel of a prosecution of forgery by proof of laches on the prosecutor's part in permitting the defendant to sign for him his name;⁷ and so in larceny, by proof that the prosecutor intrusted the property stolen to the taker.⁸

Contributory negligence may be a defence.

Laches on prosecutor's part may be a defence.

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."

"In the present case the acts were done to children, and they were unconscious of the nature of the acts which the prisoner did or was about to do, and were therefore not in a condition to exercise their wills one way or the other, and I think that the acts done by the prisoner amounted to an assault." *R. v. Lock*, 27 Law T. Rep. 661; 12 Cox C. C. 244. *Infra*, § 556. The report in Law Rep. 2 C. C. R. 12, is more brief, and closes as follows: "And though there was submission on the part of the children, I do not think there was any consent; for they were so wholly ignorant of the nature of the act done as to be incapable of

exercising their wills one way or the other." See *R. v. Bennet*, 4 F. & F. 1105; *R. v. Case*, 4 Cox C. C. 220; 1 Den. C. C. 580. *Infra*, § 577.

¹ Steph. Dig. C. L. art. 205; *McClellan v. Adams*, 19 Pick. 333.

² *R. v. Roadley*, 14 Cox C. C. 463; 45 L. T. N. S. 515; *R. v. Read*, 1 Den. C. C. 377; 2 Cox C. C. 266. *Infra*, § 577.

³ *Infra*, §§ 162-3, 703.

⁴ See *infra*, § 163.

⁵ See Whart. on Neg. §§ 335 et seq.; *R. v. Kew*, 12 Cox C. C. 355.

⁶ Whart. on Neg. §§ 302 et seq.; *R. v. Kew*, 12 Cox C. C. 355. *Infra*, §§ 163, 1188.

⁷ *Infra*, § 669; *R. v. Forbes*, 7 C. & P. 224; *R. v. Parish*, 8 C. & P. 94; *R. v. Beard*, 8 C. & P. 143.

⁸ *R. v. Wilkinson*, R. & R. C. C. 470.

§ 149. The law as to detectives and decoys may be thus noted:—

(1) When to the constitution of an offence it is necessary that it should be committed without the consent of the party assailed, it is no defence that opportunities for the consummation of the offence were offered by government or by prosecution. Thus the owner laying a trap, such as putting out lights or lessening the difficulties of entrance, does not preclude a prosecution for burglary.¹ Exposing, also, of marked goods, by their owner, to a supposed thief, has been repeatedly held not to bar a prosecution for larceny.²

On the other hand, if, in cases of this class (*e. g.*, those in which to constitute the offence it is necessary that it should be without the consent of the party to be injured), the party endangered consents, then the prosecution fails.³ Thus if a woman consent to a sexual assault there can be no prosecution for rape;⁴ if the owner of property surrender his goods to a thief he cannot maintain larceny⁵ or embezzlement;⁶ if he leave his house-door open, he cannot maintain burglary;⁷ if he consent to be robbed in order to prosecute the robber, he cannot maintain robbery;⁸ but if on the other hand he simply leave marked property in such a position that if stolen it could be identified;⁹ or if, while keeping his door fastened, he put out the lights, and collect a party of armed friends to seize the expected burglar; here the existence of such traps forms no defence.

(2) The employment by the government of a detective in the guise of a confederate does not preclude a prosecution in cases where the detective does not make himself apparent principal in the crime. A distinction is here made between the detective and the

¹ *Infra*, §§ 766, 770; and see, generally, *R. v. Ady*, 7 C. & P. 140; *Thompson v. State*, 18 Ind. 628; *State v. Covington*, 2 Bailey, 569.

² *Infra*, §§ 917, 1039; *R. v. Hodge*, 2 Leach, 1033; *R. v. Egginton*, 2 B. & P. 509; *R. v. Williams*, 1 C. & K. 195; *R. v. Bannen*, 1 Ibid. 295; *R. v. Lawrence*, 4 Cox C. C. 438; *R. v. Johnson*, C. & M. 218; *U. S. v. Foye*, 1 Curt. 364; *Pigg v. State*, 43 Tex. 108; *Allison v. State*, 14 Tex. Ap. 122.

³ *Archbold's Crim. Pr. & Ev.* 364; *R. v. Egginton*, 2 Bos. & P. 508;

State v. Covington, 2 Bailey (S. C.), 569; *Dodge v. Brittain*, Meigs (Tenn.) 84; *Alexander v. State*, 12 Tex. 540. See 3 Ch. C. L. 925. *Infra*, §§ 231 *et seq.*

⁴ *Infra*, § 550 *et seq.*

⁵ *Infra*, §§ 914, 917.

⁶ *Infra*, § 917.

⁷ *Infra*, § 770.

⁸ *R. v. Fuller*, R. & R. 408; *R. v. McDaniel*, Fost. 121; 2 East Q. C. 605, *aff. by Dillon*, J.; *U. S. v. Whittier*, 5 Dill. 394.

⁹ *Infra*, § 917.

decoy. The detective discloses, it may be often by the agency of the criminals themselves, who are led to expose themselves unguardedly, a crime already concocted; the decoy suggests the crime and is herein its originator. It is true that all detectives are in one sense decoys, and all decoys are in one sense detectives. But when the decoy ceases to be detective, and becomes the apparent originator of the crime, then one of two consequences follows. If he was not employed by the government, then he becomes a co-conspirator liable to the same punishment as his associates, on the same principle as that which makes a person who appropriates lost property for the purpose of getting a reward indictable for larceny.¹ If, on the other hand, he was employed by the government to cause the offence to be committed, the government is precluded from asking that the offenders thus decoyed should be convicted. They are associates with the government in the commission of the crime, and the offence being joint, the prosecution must fail. If that which one principal does is not a crime, the other principal cannot be convicted for aiding him.

(3) Detectives, whose office is limited to that of observing a crime when in the process of concoction, or of exploring its causes when consummated, and who have not instigated it or encouraged it, except so far as is necessary, in order to be able to report its character, are public agents entitled, when acting *bona fide* and discreetly, to confidence and support. It is true that allowance is to be made for that zeal which leads officers of this class sometimes to attach undue importance to supposed signs of crime. It is important, also, that their testimony should, as far as possible, be corroborated. But the mere presence and apparent approval of a policeman is no defence where there is no authoritative instigation of the offence by the government;² nor *a fortiori* is the presence and apparent approval of a disguised detective, not recognized as

¹ *Infra*, § 906. See *Stoughton v. Blaikie*, *Lawton*, 18 Scottish Law Rep. State, 5 Wis. 291, and other cases 583, a conviction was quashed on the ground that the offence was instigated by an agent of the police. To the same effect see observations of court in 25 Alb. L. J. 184; 15 Irish Law Times, 129; and note to 10 Fed. Rep. 97; *Saunders v. People*, 38 Mich. 218. 30 Am. Rep. 129; 20 Cent. L. J. 3. In

² See *State v. Jansen*, 22 Kan. 498.

such by the offender, appointed to act as such by the government or the parties endangered.¹

(4) Where a criminal scheme is in operation (as where a number of libellous² or indecent documents are printed for transmission by mail), a party who calls for one of these is no more a participant in the crime of publication than is a party who buys a newspaper at a counter participant in the crime of publication.³

The same remark applies to the obtaining, by solicitation, of single articles, whose sale is prohibited by law, from a stock in the vendor's hands, as where a small quantity of drink is bought from a stock behind the counter,⁴ or where counterfeit money is obtained from one who has such money on hand,⁵ or where persons engaged in systems of revenue fraud are enticed to expose themselves in a way that leads to detection. In this line of cases it is not the crime that is instigated by the government. The crime has been already concocted—the prohibited books printed, the prohibited coin manufactured, the prohibited goods arrayed for importation. All that the government (or the prosecution, as the case may be) invites, is the exposure of that which already exists in overt shape. If the government, for instance, should say, "Import these goods, or write this libellous letter," there could be no prosecution. But if it simply say, though in disguise, "Is this the letter you have written, or these your goods?" then the prosecution can be maintained.⁶

(5) The testimony of accomplices, when introduced as witnesses

¹ That a detective is not indictable for an apparent attempt at crime committed by him in order to expose the real criminal, see *Price v. People*, 109 Ill. 109. That a detective acting *bona fide* is not an accessory before the fact, see *infra*, § 231 *a*, and cases there cited. On this point, see *R. v. O'Callaghan*, noticed in 70 Law T. (Journal), 13, where the question in the text is discussed.

² *R. v. Burdett*, 4 B. & Ald. 95; *Com v. Blanding*, 3 Pick. 304; *State v. Avery*, 7 Conn. 268; *Swindle v. State*, 2 Yerg. 581.

³ See *infra*, §§ 1828, 1831; *Bott v. U. S.*, 11 Blatch. 346; *Moore v. U. S.*, 19 Fed. Rep. 39.

⁴ *Infra*, §§ 1523, 1529.

⁵ *R. v. Holden*, R. & R. 154; 2 Taunt. 334; *infra*, § 707.

⁶ "Where persons are suspected of being engaged in the violation of criminal laws, or of intending to commit an offence, it is allowable to resort to detective measures to procure evidence of such fact or intention. Many frauds upon the postal, revenue, and other laws are of such a secret nature that they can be effectually discovered in no other way. Accordingly, there have been numerous convictions upon evidence procured by means of what are called decoy letters—that is, letters prepared and mailed on purpose to detect the offender; and it is no

for the prosecution, will not, as a rule, when uncorroborated, sustain a conviction; but detectives employed by government or prosecution to attend unlawful meetings in order to discover their secrets, or to watch persons concerned in crime, are not, even though apparently assenting to the purposes of such meetings, to be regarded as accomplices.¹

§ 150. Consent obtained by fraud, as a general rule, is to be treated as a nullity.² Thus, consent to a sexual offence, if fraudulently obtained, does not bar a prosecution for such offence;³ nor does consent to entering a house, if fraudulently obtained, bar a prosecution for burglary;⁴ nor does consent, when there is any deception as to the thing to be taken, bar a prosecution for larceny.⁵ And consent obtained from a drunken man does not bar a prosecution for kidnapping.⁶ Consent obtained by coercion is also no defence.⁷

objection to the conviction, when the prohibited act has been done, that it was discovered by means of letters specially prepared and mailed by the officers of the government, and addressed to a person who had no actual existence. The books contain many cases where such convictions have been sustained. *U. S. v. Foye*, 1 Curtis C. C. 364; *U. S. v. Cottingham*, 2 Blatchf. 470; *Regina v. Rathbone*, *Moody's C. C.* 310; *S. C.*, Carr. & Marsh. 220; *Regina v. Gardner*, 1 Carr. & Kirwan, 628; *Regina v. Williams*, *Ibid.* 195; *Regina v. Mence*, Carr. & Marsh. 234." *Dillon, J.*, *U. S. v. Whittier*, 5 Dill. 374. Compare *O'Brien v. State*, 6 Tex. Ap. 665.

¹ See cases cited in Whart. Cr. Ev. 9th ed. § 440; and see in addition, *Com. v. Downing*, 4 Gray, 29; *Berry v. People*, 1 N. Y. Cr. R. 43, 57; *Price v. People*, 109 Ill. 109; *Johnson v. State*, 3 Tex. Ap. 590.

One of the most nefarious and infamous conspiracies ever known in this country—that of the "Molly Maguires," in 1876, to coerce by assassination the coal proprietors of the

Pennsylvania anthracite region—was exploded, and the chief perpetrators brought to justice by the sagacity and courage of a detective who attended the meetings of the conspirators, and thus became possessed not only of their plans for the future, but of their exploits in the past. The fact is, there is no crime that is not committed under the influences of some sort of decoy; and to acquit in all cases where the offender is incited to the crime by some instigation of this kind would leave few cases in which there could be a conviction. *Campbell v. Com.*, 84 Penn. St. 187, cited *infra*, §§ 231, 238, 381, 529.

² *Infra*, §§ 557, 856. See 2 East P. C. 486; *R. v. Williams*, 8 C. & P. 286; *R. v. Hopkins*, C & M. 254; *R. v. Woodhurst*, 12 Cox C. C. 443; *Huber v. State*, 57 Ind. 341.

³ See *infra*, §§ 559, 561.

⁴ *Infra*, § 765.

⁵ *Infra*, § 915.

⁶ *Hadden v. People*, 25 N. Y. 373; *Infra*, § 590.

⁷ See *infra*, §§ 557, 772; *Lewis v. State*, 19 Kans. 260.

CHAPTER VII.

CAUSAL CONNECTION BETWEEN OFFENDER AND OFFENCE.

The will causes whatever effect it coöperates in producing, § 152.

A cause is that which turns the balance, § 153.

Other conditions coöperating do not affect the responsibility of one who operates with these conditions, § 154.

Otherwise when subsequent conditions occur to vary result, § 155.

Accelerating death of dying is homicide, § 155 a.

Omission to perform a legal duty indictable; and so of exposure of helpless dependents, § 156.

When death is negligently induced by a physician's misconduct, assailant is not responsible, § 157.

Medical man may be in such cases responsible, § 158.

No defence that death was caused by disease induced by wound, § 159.

Interposition of responsible will breaks causal connection, § 160.

Causation not broken by irresponsible intermediate agent, § 161.

Concurrent negligence of another no defence, § 162.

Injured party's contributory negligence may break causal connection, § 163.

Contributory negligence no defence when the result of fright caused by defendant's misconduct, § 164.

Prior negligence of party injured no defence if defendant by proper caution could have avoided injury, § 165.

Persons leaving dangerous agencies where they are likely to be unconsciously meddled with responsible for the consequences, § 166.

Causation not necessarily physical, § 167.

To negligent causation not necessary that damage should have been foreseen, § 168.

Responsibility ceases when *casus* intervenes, § 169.

§ 152. THE consequences of an act of the will can never be absolutely predicted. A thousand contingencies may intervene to defeat the most resolute purpose. Responsibility, therefore, at least for attempting a wrong, is not diverted because this wrong was arrested before consummation. Nor, as we have seen, is it necessary, to establish causation, that the effect should correspond with the conception. No purpose was ever completed as it was designed, and even should we suppose such a case, innumerable other agencies are concerned in the undertaking. It is not necessary, therefore, in order to establish a causal relation between the will and the effect, that the effect should be precisely what the party willed. Nor is it necessary that it should have been the primary object the offender

had in view, as it is sufficient if the object in view was one which could not be obtained without law-breaking.¹ Nor need such act of law-breaking be necessary to the execution of the purpose. It may be only incidentally involved in such purpose, yet if the will be to effect the purpose, lawfully or unlawfully, the will is to be regarded as causing the illegal act.² Thus, a party selling liquor recklessly to a crowd has been held responsible for their disorderly conduct;³ a person wilfully firing his own house is indictable for the wilful firing of any adjacent houses which become involved in the conflagration;⁴ a person contributing to a nuisance, for the incidents of the nuisance.⁵

§ 153. Assuming a cause to be that impulse which turns the balance between forces previously in equilibrium, many of the speculations of the old jurists in this relation become obsolete. Thus it used to be said that absolute lethality (*absoluter Letalität*) existed when a wound, apart from all other conditions, produced death; and abstract lethality existed when a wound would be fatal with persons of all kinds; and many refined distinctions were taken in cases where, if superior skill had been applied, the wound might not have been fatal, or where the death was attributable eminently to some idiosyncrasies of the deceased. Of course, when after a wound a new and independent causation intervenes, producing death, this relieves parties to whom such new causation is not imputable. But the co-operation of other contemporaneous or prior conditions does not relieve the party charged. He who turns the scale is chargeable with the result. In other words, a cause is, in this sense, that condition which determines the final result. It is the *preponderating* (*überwiegende*) condition.⁶

A cause is that which turns the balance.

¹ *Supra*, § 119. See on this topic, 1 Steph. Hist. Cr. L. 5.

² See *R. v. Whithorne*, 3 C. & P. 394; *R. v. Howell*, 9 C. & P. 437; *R. v. Haines*, 2 C. & K. 368; *U. S. v. Jones*, 3 Wash. C. C. 209; and see *supra*, § 119.

³ *State v. Burchinal*, 4 Harring. 572.

⁴ *Supra*, § 120; *infra*, § 530.

⁵ *Infra*, § 1430.

⁶ Trendelenburg, *Logische Untersuchungen*, 3d ed. p. 184; Meyer, § 34.

The cause of a change, so speaks another high German authority, is identical with a change of the equilibrium between forces producing and forces resisting the change. These forces may be balanced. The impetus, however slight, that disturbs the balance, is the cause of the movement. Binding, *Normen* (1872), p. 42.

§ 154. A free moral agent (and none other can be a cause in the eye of jurisprudence) does not cease to be responsible for an alteration effected by him in the ordinary course of events, because there were other conditions which were, in addition to his action, co-antecedents of the same result. Thus, in a case where the death of a child proceeded from suffocation, caused by the defendant, it was held, that when the primary cause of the suffocation was forcing moss into the throat of the child, the defendant's liability was not relieved by the existence of an intermediate process, namely, the swelling up of the passage of the throat, which occasioned the suffocation, such swelling having arisen by forcing the moss into the throat.¹ In this case, while the swelling of the throat was a *condition* of the death, the *cause* was the forcing the moss into the throat. The susceptibility of the human body to poison, to take another illustration, is a *condition* of poisoning; the administering of the poison is the *cause*.²

Again: Iron is dug from a mine; is melted in a furnace; is shaped in a factory; is sold, as a weapon, by a tradesman; is used to inflict a fatal blow by an assassin. Now the mining, the melting, the shaping, the selling, are all *conditions* of the murder, without which it could not, in the line in which it was effected, have taken place; but none of these acts is a *cause* of the murder, unless the particular act was done in concert with the murderer, to aid him in effecting his purpose. So a workman places on the roof of a house a tile which a stranger maliciously tears up and throws into a crowded street, killing a passer-by. Now the workman is a

¹ R. v. Tye, R. & R. 345. See *infra*, § 535. Sir J. F. Stephen illustrates as follows the position in the text:—

"A woman dies in her confinement. It can hardly be said that the father of her child has killed her, though the connection between his act and her death is perfectly distinct. Even if the connection which caused the birth of the child was a rape, I do not think that the death would amount to murder; nor would it be so if a husband, tired of his wife, and being warned that her death would be the probable

result of child-birth, intending and hoping to cause her death, actually caused it in the manner supposed." 3 Steph. Hist. Cr. L. 9.

That in prosecutions for false pretences it is not necessary to show that the false pretences used were the sole motive operating on the defendant will be hereafter seen. *Infra*, § 116.

² R. v. Webb, 2 Lew. C. C. 196; 1 M. & Rob. 405. See, also, Com. v. Costley, 118 Mass. 1; Tabler v. State, 34 Oh. St. 127.

condition of the killing, but not its juridical cause, unless the tile was placed so negligently on the roof as to make its dislodgment a result of natural laws, or the stranger who threw it down acted in concert with the workman.¹

¹ Sir J. F. Stephen, in his Digest of Cr. Law, article 219, says: "Dr. Wharton's work on Homicide contains an interesting and elaborate chapter (chap. xii. §§ 358-389), entitled 'Causal Connection,' into which some discussion is introduced on the distinction between causes and conditions—a distinction of which Dr. Wharton maintains, and of which Mr. Mill (see his Logic, vol. i. p. 398, etc.) denies, the solidity. For practical purposes, I think the article in the text is sufficient. And if this were the proper place, I should be disposed to discuss some of Dr. Wharton's positions."

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

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

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

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

Illustrations.

"(1) A. substitutes poison for medicine which is to be administered to C. by B. B. innocently administers the poison to C., who dies of it. A. has killed C. Donellan's Case. See my Gen. View, Cr. L. 338.

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

"(3) A., an iron-founder, ordered to melt down a saluting cannon which had burst, repairs it with lead, in a dangerous manner. Being fired with an ordinary charge, it bursts and kills B. A. has killed B. R. v. Carr, 8 C. & P. 163. See *infra*, §§ 337, 343, 369.

"(4) A., B., and C., road trustees under an act of parliament, and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and D. passing along it is killed. A., B., and C. have not killed D. R. v. Pocock, 17 Q. B. (N. S.) 34. See *infra*, § 339.

"(5) A., by his servants, makes fire-works in a house in London contrary to the provisions of an act of parliament (9 & 10 Wm. III. c. 77). Through the negligence of his servants, and without any act of his, a rocket explodes and sets fire to another house,

§ 155. Suppose that A. maliciously aims a blow at B., which stuns B., and A., thinking B. to be dead, buries B., and B. dies from being buried alive. Several cases of this kind (*e. g.*, one of infanticide) have arisen in Germany, and have been the subject of much learned discussion, and the better opinion, as is argued by Bar in his authoritative work on Causal Connection, is that A. is guilty, so far as concerns the first blow, not of murder, but of an attempt to murder. Such would be the result in our own law, should the case come up on an indictment charging murder by the first blow, for as the evidence would not sustain the allegation that the blow killed the deceased, the indictment would fall, and the only redress for the first blow would be to prosecute the defendant for attempt to kill. But how would it be with the death by the burying? Supposing this was the cause of the death, then the defendant is chargeable with manslaughter in killing the deceased, but would not be chargeable with murder, as there was no malice. Hence the defendant, in such a case, is chargeable, first with attempt to murder, and then with manslaughter. In a late English case, where this question is approached, the evidence left it doubtful whether the death was caused by beating or by subsequent exposure. In either case the result, owing to want of malice, would have been only manslaughter; and as the indictment contained counts fitted to either alternative, the court told the jury that if the death was caused either by the blows or the exposure, they were to convict of manslaughter.¹

In a case of earlier date, the indictment charged the death of a child to have been occasioned by exposure to cold. The evidence was that the child was found in a field, alive, with a contusion on the head, and that it died a few hours afterwards. The medical

whereby B. is killed. A. has not killed B. *R. v. Bennett*, Bell C. C. 1; 8 Cox C. C. 74. See *infra*, §§ 246 *et seq.*

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

By § 673 of the N. Y. Penal Code of 1882 it is provided that any person, who breaks a contract of labor, having reasonable cause to believe that the probable consequence of doing so will be to endanger human life, cause grievous bodily injury, or expose valuable property to destruction, shall be guilty of a misdemeanor.

¹ *R. v. Martin*, 11 Cox C. C. 136.

witnesses stated that the contusion was in itself sufficient to occasion death, and that the exposure might have accelerated it. It was submitted on behalf of the prisoner, that supposing the death to have been only accelerated by the exposure, the count which charged it as the cause could not be supported, and of this opinion was the judge who tried the case.¹

But this cannot be sustained. Supposing that the exposure accelerated the death, it "caused" the death. The contusion did not kill. The fact that it might have killed had the deceased lived long enough, could not support an indictment for killing: 1. Because the averment of death from the wound could not be sustained; 2. Because to allow a conviction for an act that was not committed, simply because it might have been committed, would allow convictions for the murder of men still alive.

When two causes unite simultaneously in producing the same result, either may be legally regarded as the efficient cause. In a remarkable case decided in New Mexico in 1883, it was held that where A. and B. shot at the same time C., they could be indicted together as principals.² This is no doubt good law if A. and B. were confederates. But suppose they were not, and that it should be proved that the two at the same moment fired shots each of which was fatal. In such case A. and B. should be indicted separately.

Where, however, there is any appreciable distance of time between two mortal wounds inflicted by different persons, then he who inflicted the last wound is guilty of the homicide, while he who inflicted the first wound may be indicted for an assault with intent to kill.³

§ 155 *a.* Hence to accelerate the death of a person already mortally wounded or diseased is homicide.⁴

§ 156. Omission to help may be an indictable offence, when such help is a legal duty. We have already seen that, as a rule, an omission to perform any link in a chain of duty is a breach of such duty.⁵ It has also been

Accelerating death of dying is homicide.

Omissions to perform a legal

¹ *R. v. Stockdale*, 2 Lew. 220.

² *Territory v. Yarberry*, 2 New Mex. 391.

³ *Fisher v. State*, 10 Lea, 15.

⁴ *R. v. Martin*, 5 C. & P. 128; *R. v. Johnson*, 1 Lew. C. C. 164; *R. v.*

Fletcher, 1 Russ. on Cr. 507; *State v. Wood*, 53 Vt. 560; *State v. Scates*, 5 Jones, N. C. 420; *People v. Ah Fat*, 48 Cal. 61. *Supra*, § 153; *infra*, §§

157, 160, 309, 310.

⁵ See *supra*, § 130.

duty indictable, and so of exposure of dependents.

noticed¹ that a mere omission to help is not indictable unless such help is a legal duty. An officer of a railroad, for instance, whose duty it is to protect trains from accidents, is indictable if from his neglect to render such protection hurt ensues;² a parent whose legal duty it is to nourish a child is responsible for an omission in this respect by which the child is injured, and so of a husband's neglect to render necessary assistance to his wife when such is his legal duty.³ Hence, *a fortiori*, it is indictable to put a helpless person in a position of which hurt is a natural consequence. This principle has been applied to cases where a boy, having been beaten by the defendant, was left by him in a country lane during a frosty night in January;⁴ where a lame person, incapable of moving, and without voice to cry for help, was forced out of a wagon, in a place where he froze to death;⁵ where a person carried his sick father against his will, in a severe season, from one town to another, by reason whereof he died;⁶ where a woman being delivered of a child left it in an exposed place covered only with leaves, in which condition it was killed by a kite,⁷ or by cold;⁸ where a child was placed in a hogsty, where it was devoured,⁹ and where a child was shifted by parish officers from parish to parish till it died for want of care and sustenance.¹⁰ And such was held to be the law where a master, knowing a seaman's debility and incapacity to hold on, forced him to go aloft, whereupon the seaman fell to the deck, and was killed;¹¹ and where the captain of a vessel omitted to lower a life boat so as to save a seaman.¹² But the injury must be the natural or probable consequence of the defendant's act to make him responsible for it.¹³

How far a parent is indictable for not obtaining sufficient medical attendance for a child will be hereafter considered.¹⁴

¹ *Supra*, § 132.

² *Supra*, § 133; *infra*, § 349.

³ *Infra*, § 1563.

⁴ *R. v. Martin*, 11 Cox C. C. 136; if the exposure had been malicious, the offence would have been murder. *R. v. Donovan*, 4 Cox C. C. 399. See *infra*, § 358.

⁵ *Nixon v. People*, 2 Scammon, 267. *Infra*, § 358.

⁶ 1 Hawk. P. C. c. 31, s. 4; 1 Hale, 431, 432.

⁷ 1 Hale, 431; 1 Hawk. P. C. c. 31, s. 6.

⁸ *R. v. Walters*, C. & M. 164; *Stockdale's Case*, 2 Lew. 220. *Infra*, §§ 335, 336, 459.

⁹ 1 East P. C. c. 5, s. 13, p. 226.

¹⁰ *Palm*, 545.

¹¹ *U. S. v. Freeman*, 4 Mason, 505. *Infra*, §§ 164, 337.

¹² *U. S. v. Knowles*, 4 Sawyer, 517.

¹³ *Infra*, § 169.

¹⁴ *Infra*, § 336.

§ 157. We have next to consider cases of homicide in which, after the deceased receives the wound, he is placed under the charge of a medical man, who, in probing the wound or otherwise operating on the patient immediately causes his death. If the medical man acts negligently or maliciously, and so introduces a new responsible cause between the wound and the death, this, on the principle just stated, breaks the causal connection between the wound and the death. The medical man in such case is indictable for the homicide; the original assailant only for an attempt. But if the medical man, following the usual course of practice which good practitioners under the circumstances are accustomed to adopt, occasions death when endeavoring to heal the wound, then the person inflicting the wound is chargeable with the death. For he who does an unlawful act is responsible, as we have just seen, for all the consequences that in the ordinary course of events proceed from the unlawful act. Now it is one of the ordinary consequences of a wound that a medical man should be called in to treat it; and it is one of the probable incidents of medical practice that the patient should die under treatment. And the person inflicting the wound is responsible for this, as one of the consequences which, in the natural course of events, result from his unlawful act.¹ It is no defence, in cases in which the deceased's death is not shown to have been produced by his own negligence or that of his medical attendant, that he might have recovered had a higher degree of professional skill been employed. The law does not exact from physicians the highest degree of professional skill,² but only such skill as men of their profession are, under the circumstances, accustomed to apply; and if we should convict only in cases where it is possible to conceive of recovery under another mode of treatment, we would convict in few cases in which death did not immediately follow the wound. The true test is, whether the deceased's death followed as an ordinary and natural result

When death is negligently induced by a physician's or surgeon's misconduct assailant is not responsible.

¹ *Infra*, § 163; *Com. v. M'Pike*, 3 Barnes, 34 La. An. 395; *Brown v. Cush*, 181; *Com. v. Green*, 1 Ashmead, State, 38 Tex. 482; *Powell v. State*, 13 Tex. Ap. 244. See *infra*, §§ 362 et seq. *McAllister v. State*, 17 Ala. 434; *Parsons v. State*, 21 Ala. 300; *State v. infra*, §§ 362 et seq.

² *Whart. Neg.* § 735; *supra*, § 153;

from the misconduct of the defendant. If so, it is no defence that the deceased, under another form of treatment, might have recovered.¹

§ 158. But the physician, not the assailant, is responsible where the defendant inflicted on the deceased a slight wound, in itself not dangerous, which wound, by the maltreatment of the physician, became mortal.² If, in consequence of some physical idiosyncrasies of the deceased, the wound, which in ordinary cases would not be fatal, produces death, then the defendant is chargeable with the homicide, for the result flowed from the defendant through the agency of natural laws. But if the result is caused by the malpractice of the physician, the wound not being in itself mortal, and the physician not acting in concert with the defendant, then the defendant is not responsible, for the wound, though a condition of the killing, is not its juridical cause.³ And where death of the deceased was accelerated by the want of the due skill and competency of his physician, then the latter cannot defend himself on the ground that the deceased was at the time laboring under a mortal disease.⁴

§ 159. Where a wound, in its regular course, induces a fever which leads to death, the party inflicting the wound is responsible for the consequences. Even if a man is laboring under a mortal

¹ *Infra*, § 163; 1 Hale P. C. 428; R. v. Holland, 2 M. & Rob. 351; R. v. Johnson, 1 Lew. C. C. 164; R. v. Lee, 4 F. & F. 63; R. v. Minnock, 1 Cr. & Dix Ir. C. R. 45; Com. v. M'Pike, 3 Cush. 181; Com. v. Hackett, 2 Allen, 136; State v. Bantley, 44 Conn. 537; Com. v. Green, 1 Ashmead, 289; U. S. v. Warner, 4 McLean, 463; Coffman v. Com., 10 Bush, 495; Bush v. Com., 78 Ky. 268; State v. Baker, 1 Jones N. C. 267; McAllister v. State, 17 Ala. 434; Bowles v. State, 58 Ala. 335; State v. Scott, 12 La. An. 274; State v. Barnes, 34 La. An. 395; Brown v. State, 38 Tex. 482; Kee v. State, 28 Ark. 155. As to physicians' liability, see *infra*, § 362; and see Parsons v. State, 21 Ala. 300.

² If one person inflicts upon another a dangerous wound, one that is calcu-

lated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offence either of manslaughter or murder, as the case may be, and he is none the less responsible for the result, although it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskilful or improper treatment aggravated the wound and contributed to his death." Pardee, J., State v. Bantley, 44 Conn. 537. See People v. Cook, 39 Mich. 236; Kelley v. State, 53 Ind. 311; Williams v. State, 2 Tex. Ap. 271; People v. Ah Fat, 48 Cal. 61.

³ Harvey v. State, 40 Ind. 516.

⁴ R. v. Cheverton, 2 F. & F. 833.

⁵ *Supra*, § 153; *infra*, § 362; R. v. Webb, 1 M. & R. 405; People v. Ah Fat, 48 Cal. 61.

disease, those who hasten his death are responsible for the homicide. Nor is it any defence that the constitution, age, or habits of the deceased made him peculiarly susceptible to such disease as the wound inflicted would probably engender.¹ But it is easy to imagine a case in which a slight scratch, by producing local inflammation, might terminate in death; and in such case it would seem hard, at the first view, to charge the defendant with a result which would not under ordinary circumstances follow from such a wound. Yet if the defendant intended to take life, and in shooting, for instance, inflicted a wound which, though not ordinarily dangerous, in the particular case produced lock-jaw, we cannot say that the deceased's death did not ensue in the ordinary course of events from the shooting. The difficulty arises where a scratch is negligently given by a non-lethal instrument. Here we can truly say that as the death was not an ordinary consequence of the negligence, there is no imputability of murder. Supposing, however, a person negligently uses a dangerous instrument, then we must hold he is liable for the consequences, peculiar as they may be, which wounds from this instrument produce. For it is in accordance with the ordinary course of events that a dangerous instrument if negligently used should produce dangerous results.²

§ 160. The interposition of concurrent wills, in pursuance of a common plan, makes each confederate liable for the action of his associates. It is otherwise, however, when responsibility is based, not on intentional, but on negligent injuries.³ As to these the rule is

No defence that death was caused by disease induced by wound.

Interposition of independent responsible will breaks causal connection.

¹ 1 Hale P. C. 428; R. v. Martin, 5 C. & P. 128; R. v. Webb, 1 M. & R. 405; R. v. Murton, 3 F. & F. 492; R. v. Martin, 5 C. & P. 128; R. v. Martin, 11 Cox C. C. 136; Rew's Case, Kel. 261; Com. v. Fox, 7 Gray, 585; Com. v. Hackett, 2 Allen, 136; State v. Bantley, 44 Conn. 537; Com. v. Green, 1 Ashm. 289; Com. v. Warner, 4 McLean, 463; Kelley v. State, 53 Ind. 311; People v. Cook, 39 Mich. 236; State v. Morea, 2 Ala. 275; McAllister v. State, 17 Ala. 434. And see Harvey v. State, 40 Ind. 516; Brown v. State, 38 Tex. 482; People v. Ah Fat, 48 Cal. 61; Powell v. State, 13 Tex. Ap. 244. *Infra*, § 340. That evidence of the deceased's prior health is admissible on the question of causation, see Phillips v. State, 68 Ala. 469.

² This is the case where the death was by erysipelas, induced by the wound, Denman v. State, 15 Neb. 138.

³ *Infra*, § 247. See R. v. Bennett, Bell C. C. 1; 8 Cox C. C. 74. As to liability of confederate for collateral crimes of his associates, see *infra*, § v. State, 40 Ind. 516; Brown v. State, 214.

that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent in a particular subject matter. Another person moving independently comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to the party whom my negligence leads into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative. We may expand this rule still further, and hold that a defendant, no matter how wrongful may have been his conduct, is not responsible for the acts of independent parties performed on the objects of the crime without his concert.¹ Thus, as we have just seen, is it with regard to a death produced by a physician attending a wound not in itself dangerous. So is it also when the wounded person indulges in excesses which destroy his life, or when he refuses to call in a physician, or to submit to any dressing of the wound.² Or, in a case of greater complication, the defendant wounds another so desperately that the latter can only live a few hours, when a third party comes in and kills the wounded man by a blow that acts instantaneously. Who is the cause of the death? Certainly the last assailant;³ for the particular death which occurred was produced, not by the defendant, or within the range of his action, but by the interposition of a foreign independent will.⁴ And so a rioter cannot be held responsible for a homicide by persons engaged in suppressing a riot.⁵

The following case is reported by Bar, in the able treatise on causal connection already referred to. The defendant left a loaded gun in a place where, it was assumed, damage would ensue from its negligent or ignorant use. A stranger, playing with the

¹ *R. v. Hilton*, 2 Lew. C. C. 214; dying by disease is killed by a blow *infra*, §§ 337, 370; *R. v. Ledger*, 2 F. from an assailant. *Com. v. Fox*, 7 & F. 857. See Whart. on Neg. § 134. Gray, 585.

² See *Harvey v. State*, 40 Ind. 516. ⁴ *State v. Scates*, 5 Jones N. C. 420,

³ *Supra*, § 155 a; *State v. Wood*, 53 and see *supra*, § 155 a. *Vt.* 560; *People v. Ah Fat*, 48 Cal. 61. ⁵ *Com. v. Campbell*, 7 Allen, 541. The same rule exists where a person. *Infra*, § 166.

gun, killed inadvertently, and by misadventure, the deceased. By the Supreme Court (Obertribunal) of Prussia, it was held that the defendant's negligence made him criminally responsible for the death of the deceased; and the reason given was that a person dealing negligently with dangerous mechanical agencies is responsible for all the consequences which might be reasonably contemplated as the result of such negligence. Now if this is limited to merely mechanical or natural results, the statement is true. If a loaded gun is placed in a position where on a mere touch it will be likely to explode, then the party so placing it is liable for the consequences. But when the gun is loaded in the usual way, and the casualty occurs through the independent voluntary action of a stranger taking the gun from its resting place and negligently playing with it in a different position and aimed in a new direction, then the causal connection is broken by this interposition of an independent, self-determining will. If the decision above given is correct, then there would be no limit to the responsibility which a single act of negligence would bring. A man, for instance, who owns a vicious horse, will be responsible if he does not exclude the possibility of trespassers mounting the horse and having thereby their necks broken. A host who places on his table rich but indigestible delicacies, would be responsible for an apoplexy caused by one of his guests overeating such delicacies. The manufacturer of such delicacies would be responsible for the improvident action of the host. No adventurous enterprise, no matter how beneficial to society; no powerful mechanical agent; could be put in motion without attaching to its originators all the calamities which the rash advance of such enterprise, or the imprudent use of such power, might generate. Another objection to this extension of such responsibilities is, that it would be in the power of any subsequent intruder to throw back criminal responsibility on the original projector or organizer, by simply carelessly meddling with his machinery. Thus, for instance, a mischief-maker by taking up and recklessly using a loaded gun could bring down a criminal prosecution on him who left the gun exposed; and so a trespasser, maliciously tampering with machinery, could designedly make the mill-owner responsible if it be shown that the machinery itself was

not so constructed as to bar all such casualties. One man's malice or mischief would thus create another man's guilt.¹

§ 161. It is otherwise, however, when the agent so interposing is irresponsible. An explosive compound, for instance, negligently packed, is put into the hands of a carrier to deliver, the carrier being ignorant of its contents. Who, in case of the package being left at the place of delivery, and there exploding, is liable for the injury produced by the explosion? Had the carrier known, or had he been in a position in which it was his duty to know, that the package was in this dangerous condition, then he would become liable, on the principle that he who negligently meddles with a dangerous agency is liable for the damage. But if he was non-negligently ignorant of the contents of the package, he is no more liable than is the car by which they are carried. No matter how numerous may be the agencies through which such a package is transmitted, the original forwarder, continues liable, while the carriers, in case of their being ignorant and innocent, are free from liability.² Thus a person who is guilty of negligence in manufacturing a dangerously inflammable oil is liable for the damage done by it, no matter how numerous may be the agents by whom it is innocently passed. "Certainly one who knowingly makes and puts on the market for domestic and other use such a death-dealing fluid cannot claim immunity because he has sent it through many hands."³ When, however, a vendee or agent knows the explosive or otherwise perilous character of a compound, and then negligently gives it to a third person, who is thereby injured, the causal connection between the first vendor's act and the injury is broken.⁴

So with regard to the negligent sale of poison. If B. negligently sells poison, under the guise of a beneficial drug, to A., he is liable for the injury done to A.; or to those to whom A. innocently gives the poison.⁵ He is not liable for the negligent act of a person to whom he gives the poison, advising him of its properties.⁶

¹ On this point compare observations in Whart. on Neg. §§ 854-856; and see *Snow v. R. R.*, 8 Allen, 441.

² *Infra*, § 617.

³ *Agnew, C. J., Elkins v. McKean*, 79 Penn. St. 493.

⁴ Whart. on Neg. § 161. See *infra*, § 206.

⁵ *Supra*, § 133; *infra*, §§ 166, 346.

⁶ *Infra*, § 226.

The same distinctions apply to the giving of a loaded gun to another. If the gun be given by B. with due warning to A., a person experienced in the use of fire-arms, who so negligently handles the gun that it explodes and injures C., then A., and not B., is liable. But if the loaded gun be given to an unconscious child, and the child not knowing what the gun is, handles it so that it explodes, and injures a third person, then the liability is attached, not to the child, but to the person giving the loaded gun.¹

That a person committing a crime through the agency of an insane medium is responsible, we will hereafter have occasion fully to see.² The same rule exists when the agent is compelled to commit the crime.³

§ 162. *The fact that another person contributed either before the defendant's interposition or concurrently with such interposition in producing the damage is no defence.*⁴ Indeed, this proposition, instead of conflicting with the last, goes to sustain it. A. negligently leaves certain articles in a particular place. B. negligently meddles with them. Supposing B.'s negligence to be made out, and he be a responsible person under the limitations above expressed, he cannot set up A.'s prior negligence as a defence. *A fortiori*, he cannot set up the concurrent negligence of D., a third person, who may simultaneously join him in the final negligent act.⁵

§ 163. It has been said that contributory negligence is no defence to a criminal prosecution.⁶ This, however, is not correct, since a person who negligently rushes into danger, such action not being incident to a lawful business, cannot afterwards prosecute, either criminally or civilly, the person producing the danger.⁷ A common illustration

Concurrent negligence of another no defence.

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

¹ *Infra*, § 344.

² As to indictment for action through an irresponsible agent, see *infra*, § 522. As to liability of principal for irresponsible agent, *infra*, § 207. And see, as to dangerous agencies, *infra*, §§ 343 et seq.

³ *Blackburn v. State*, 23 Ohio St. 146. *Infra*, § 216.

⁴ See *infra*, § 363.

⁵ Whart. on Neg. § 144. *Infra*, §

363. See *R. v. Pym*, 1 Cox C. C. 339; 1 Russ. Cr. 702; *Com. v. M'Pike*, 3 Cush. 181; *State v. Bantley*, 44 Conn. 537.

⁶ *R. v. Swindall*, 2 C. & K. 230; *R. v. Longbottom*, 3 Cox C. C. 439; *R. v. Hutchinson*, 9 Cox C. C. 555; *Com. v. Boston & Lowell R. R.*, 134 Mass. 211.

⁷ *Supra*, § 147. See *R. v. Walker*, 1 C. & P. 320; *R. v. Williamson*, 1 Cox C. C. 97; *R. v. Longbottom*, 3 Cox C.

of this principle will be found in the cases, elsewhere noticed, of prosecutions for malpractice, in which it is held a defence that the patient's misconduct was the immediate cause of his injury.¹ On the one side, we can conceive of cases where a party, after his

Where the deceased deliberately and unnecessarily hastened his own death, defendant not liable.

wound, commits suicide; and in which, as the death was caused by the suicide, and not by the wound, the allegation in the indictment, that the deceased died of the wound, could not be sustained. On the other side, cases constantly occur in which a wounded person neglects some precaution which might have contributed towards his recovery, but in which no one doubts but that the death is chargeable to the wound. The true line is this: if the deceased, in full possession of his senses, caused either deliberately or negligently his own death, then he and not the person inflicting the wound is chargeable with the death, though the latter is indictable for an attempt to kill.² But where the deceased's negligence contributed to his death, such negligence is no defence, when either (1) it was one of the ordinary incidents of the conduct of a person in his situation; or (2) when the wound would otherwise have been

C. 439. Compare *infra*, §§ 358, 1188; *State v. Preslar*, 3 Jones Law N. C. 421; *State v. Weaver*, Busbee, 9; *Parsons v. State*, 21 Ala. 301.

¹ See *supra*, §§ 157-9; *infra*, § 363.

In *R. v. Burchall*, 4 F. & F. 1077, decided in 1866, Willes, J., who must have been familiar with the prior cases above cited, said: "Deceased contributed to the fatal result by not getting out of the way, and until I see a decision to the contrary (by which it is presumed the learned judge meant a decision of the Court of Criminal Appeal) I shall hold that a man is not criminally responsible for negligence for which he could not be responsible in an action."

In *R. v. Kew*, 12 Cox C. C. 355, Byles, J., said he would reserve the question if required; but the case never came before the Court for Crown

Cases Reserved. It was subsequently held by Denman, J., in *R. v. Desvignes* (Law Times, vol. lxx. p. 76), that the current of authority was that in criminal cases contributory negligence is no defence. But this case, also, never came before the judges as a body; and it is not to be supposed that it will be ultimately held that the mere fact that there was some antecedent negligence on the defendant's part will make him liable for manslaughter when the death was brought about by the reckless misconduct of the deceased.

² *Supra*, §§ 157-9. *R. v. Connor*, 2 C. & K. 516; *Com. v. Boston & Me. R. R.*, 129 Mass. 800; *infra*, § 350; *Parsons v. State*, 21 Ala. 301; *Brown v. State*, 38 Tex. 482; *Williams v. State*, 2 Tex. Ap. 271; *State v. Smith*, 10 Nev. 106.

fatal.¹ And so, under similar circumstances, the negligence of an attendant physician or surgeon is no defence.² It is enough if the wound induced the death.³ The same distinction may be followed in other cases of negligence. A carriage is driven recklessly along a road and kills a drunken man, who, if he were sober, could have got out of the way. The deceased's drunkenness is in this case no defence,⁴ because the defendant had no right to drive recklessly along the road.⁵ But if, though there may have been some negligence on the defendant's part (*e. g.*, in the equipment of his carriage) the injury was primarily due to the deceased having flung himself recklessly in the defendant's path, such contributory negligence is a defence.

§ 164. At the same time it is an equally familiar rule that a party cannot shield himself by setting up as a defence contributory negligence, the result of fright or paralysis, caused by his own misconduct. The same rule applies *mutatis mutandis* to neglect by physicians.⁶ He, therefore, who causes another, under influence of fright, to run into a river, from which drowning ensues, is responsible for the death.⁷ He who by like processes causes another to leave the house and to die in the frozen fields on a stormy night is in like manner responsible.⁸ He who causes another,

Contributory negligence no defence when such negligence was the result of defendant's misconduct.

¹ *Supra*, § 157. See *infra*, §§ 340, 363; *R. v. Rew*, J. Kel. 26; *McAllister v. State*, 17 Ala. 434. In *R. v. Holland*, 2 Mood. & Rob. 351, the deceased had been severely cut with an iron instrument across one of his fingers, and had refused to have it amputated, and at the end of a fortnight lock-jaw came on, and the finger was then amputated, but too late, and the lock-jaw ultimately caused death. The surgeon expressed the opinion that early amputation would probably have saved his life. Maule, J., held that a party inflicting a wound which ultimately becomes the cause of death, is guilty of murder, though life might have been preserved if the deceased had not refused relief.

² *Supra*, § 157.

³ *Supra*, § 157; *Com. v. Fox*, 7 Gray, 585; *Bowles v. State*, 58 Ala. 335.

⁴ Whart. on Neg. § 300 *et seq.*

⁵ *R. v. Walker*, *ut supra*.

⁶ *Bowles v. State*, 58 Ala. 335.

⁷ See *infra*, § 521; *R. v. Pitts*, C. & M. 284; *R. v. Evans*, 1 Russ. Cr. 489; *R. v. Wager*, cited Steph. Dig. C. L. art. 220.

⁸ *Nixon v. People*, 2 Scam. 267. See, also, *R. v. Williamson*, 1 Cox C. C. 97. Where the defendant chased with an axe a boy, who, in his fright, ran unconsciously against a cask of wine and broke it, the defendant was held liable for the injury thus incidentally produced. *Vandenburg v. Truax*, 4 Denio, 464. So a person thrown from a bridge into a rapid river may be able to swim, and if in full possession of his

under the effect of fright, to open his safe, cannot set up this submission as a defence.¹ And the same distinction applies to the numerous cases already cited, in which a party, under fright, submits to spoliation or assault.²

On the other hand, it may be argued that an indictment does not lie against A. for killing B. when the death was the result of fright produced by mere threats, there being no such physical lesion as may be implied from any subsequent catastrophe or concussion induced by the fright. And so, although A. may die of a broken heart caused by the unkindness of B., B. is not on this ground indictable for killing A. Undoubtedly there is moral guilt in such cases proportionate to the degree of malice. But there is no technical guilt which the law can punish, for the reason that the law has no test to measure the relation of cause and effect in matters purely psychological. How much of the terror or "broken-heartedness," for instance, was due to the patient's own folly or wrong? What legal proof is possible of such terror or "broken-heartedness?" How can the death be, beyond reasonable doubt, traced to either? Hence it is that the law, when the case consists of these bald elements, declines to interpose.³

faculties to save himself; but if in the confusion and terror of the moment he loses his self-command and is drowned, the person throwing him in the water is liable. L. 5. § 7. D. ad Leg. Aquil. And if a person who has his clothes taken from him on a cold night is so numbed and enfeebled that he cannot seek refuge, and hence is frozen to death, the assailant is as liable for his death through freezing as he would be if the deceased had been tied to a stake in the open air in such a way that escape was impossible. L. 14. § 1. D. 19. 5. See R. v. Martin, 11 Cox C. C. 136. The same rule was held to apply where a seaman, forced aloft when unfit for the work, falls from the mast and is drowned. U. S. v. Freeman, 4 Mason C. C. 505. As to indictment, see *infra*, § 521.

¹ U. S. v. Jones, 3 Wash. C. C. 209.

² See *supra*, §§ 146-50; and see State v. Hardie, 47 Iowa, 647.

³ Suppose A., when on a coach, jumps off to avoid danger, acting unwisely in so doing, yet from confusion of mind produced by B.'s reckless driving? Or suppose that A., on a railway track, loses his presence of mind through the unexpected and irregular course of a train which is negligently driven; and suppose, that when thus confused, he unwisely but unintentionally runs into instead of out of danger? Is A., in either of these cases, the juridical cause of an injury thus produced, or is B., the negligent driver or engineer, the cause? Certainly the latter; for A., on the assumption that he is at the time incapable of judging, is not a responsible independent agent, capable of breaking the causal connection between the

§ 165. If I intrude negligently in a place where a dangerous but lawful business is conducted, I must bear the consequences if I am injured by machinery there placed. On the other hand, even against trespassers, no one can with impunity put in operation dangerous agencies without exerting in the control of such agencies the care usual to good business men under the circumstances. Thus, if A. is negligently on a road, B. cannot excuse himself for running A. down if by due diligence the collision could have been avoided by B.¹ So, generally, it is no defence that the deceased or his companions by their own negligence contributed to the result, if that result was precipitated by the malicious or reckless misconduct of the defendant.²

Prior negligence of party injured no defence if defendant by proper caution could have avoided injury.

defendant's negligence and the injury. It was B.'s negligence that put A. in this dangerous position, and thus forced him to make a choice between perilous alternatives when he was in a condition incapable of cool judgment; and B. is liable for the consequences. Whart. on Negligence, § 377; R. v. Longbottom, 3 Cox C. C. 439; Coulter v. Am. Un. Exp. Co., 5 Lansing, 67; Buel v. N. Y. Cent. R. R., 31 N. Y. 314; Frink v. Potter, 17 Ill. 406; Adams v. Lancas. R. R., 17 Weekly Rep. 884; Sears v. Dennis, 105 Mass. 310; Stevens v. Boxford, 10 Allen, 25; Babson v. Rockport, 101 Mass. 93; Lund v. Tyngsboro, 11 Cush. 563; Indianapolis R. R. v. Carr, 35 Ind. 510; Greenleaf v. Ill. Cent. R. R., 29 Iowa, 14; Snow v. Housatonic Co., 8 Allen, 441; Reed v. Northfield, 13 Pick. 94; and see, to same effect, R. v. Evans, O. B. Sept. 1812—MS. Bayley, J.; 1 Russ. on Cr. 489; R. v. Hickman, 5 C. & P. 151; R. v. Pitts, C. & Mars. 284, cited in Whart. on Hom. § 374.

So where the defendants carelessly overloaded a ferry-boat, and where the passengers, in a sudden fright, rushed to one side and upset the boat, in consequence of which A. was drowned, it was held that the carelessness of A.

and the other passengers was no defence to an indictment for the manslaughter of A. R. v. Williamson, 1 Cox C. C. 97.

Yet we must remember that if the deceased, in encountering the danger, acted, not convulsively but deliberately, and if, at the same time, the danger was not a natural and probable consequence of the defendant's misconduct, then the causal connection is broken. This view has been properly held to govern where a woman, not convulsively, or in fear, or through force, but of her own will, leaves her husband's house at night and is frozen to death; State v. Preslar, 3 Jones (N. C.) Law, 421; where a traveller voluntarily or negligently, and not in fear caused by the defendant, collides with a railway car; see Whart. on Neg. § 382; and where a person assaulted in a boat, not in fright or from necessity, but as a means of steadying himself, seizes another boat and is thus swept overboard. R. v. Waters, 6 C. & P. 328.

¹ R. v. Longbottom, 3 Cox C. C. 439; R. v. Swindall, 2 C. & K. 230. See R. v. Walker, 1 C. & P. 320; Whart. on Neg. § 355.

² See R. v. Kew, 12 Cox C. C. 355;

Contributory negligence, it is to be added, is to be determined from the stand-point of the party to whom it is imputed.¹

§ 166. A party who places poison in such a position that in the ordinary course of things it is likely to be unconsciously and non-negligently taken by passers-by is liable for the consequences.² But he is not responsible for the acts of an assassin, who, independently of him, takes and administers the poison to the deceased; for here again, though the preparing of the poison is a condition of the killing, it is not its juridical cause.³

The master of a house who leaves powder unlawfully and carelessly on his premises is not liable for its negligent misuse by his servants, who are capable of judging as to the danger,⁴ though it would be otherwise if the powder were left in a place frequented by children, who ignorantly meddle with it, and thereby produce damage;⁵ or if it were left in such a disguised state that a person of ordinary intelligence would not be able to detect its character;⁶ or if a dangerous substance were given to a party compulsorily.

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

¹ *Infra*, § 488.

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

³ See Com. v. Campbell, 7 Allen, 541; State v. Scates, 5 Jones (N. C.), 420. *Supra*, § 160.

⁴ R. v. Bennett, Bell C. C. 1; 8 Cox C. C. 74.

⁵ Whart. on Neg. § 161.

⁶ See 1 Hale, 431; R. v. Michael, 9 C. & P. 356; 2 M. C. C. 120. *Infra*, § 346.

⁷ Blackburn v. State, 23 Ohio St. 146. See *infra*, §§ 216, 226.

"If B.," as is argued in another work

(Whart. on Neg. § 91), "negligently sells poison, under the guise of a beneficial drug, to A., he is liable for the injury done to A.; or to those to whom A. innocently gives the poison. But suppose that A. has ground to suspect that the drug is poisonous, and then, instead of testing it, sells it or gives it to C.? Now, in such a case there can be no question that A. is liable for the damage caused by his negligence. But if A. is unconscious of the mistake, and acts merely as the unconscious agent of B., then there is no causal connection between A.'s agency and the injury, and B. is directly liable to C. Norton v. Sewall, 106 Mass. 143. Beyond this it is not safe to go. It is true that in a New York case, Thomas v. Winchester, 2 Selden (6 N. Y.), 397, the liability was pushed still further; but wherever an intelligent third party comes in, and negligently passes the poison to another, this breaks the

§ 167. The old English lawyers went great lengths in assigning responsibility to magical, or as it might now be called spiritualistic, causation.¹ Even Lord Hale gave his high authority to the position

causal connection, and makes such intervening negligence the juridical cause."

A more difficult question arises when poison intended to kill A. is voluntarily taken by B., who has notice that the drink is suspected to be poisonous. Agnes Gore, in an old case (9 Co. 11; 1 Hale P. C. 50; Plowd. Com. 574), was proved to have mixed poison in an electuary, of which her husband and her father and another took part and fell sick. Martin, the apothecary who had made the electuary, on being questioned about it, to clear himself took part of it and died. On this evidence a question arose whether Agnes Gore had committed murder; and the doubt was because Martin, of his own will, without invitation or procurement of any, had not only eaten of the electuary, but had, by stirring it, so incorporated the poison with the electuary that it was the occasion of his death. The judges resolved that the prisoner was guilty of the murder of Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband with the event which thence ensued: *Quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt*; and the stirring of the electuary by Martin, without putting in the poison by Agnes, could not have been the cause of his death. If Martin's trying the electuary was a natural and probable sequence of the prisoner's conduct, then she could properly have been convicted, though certainly not for the reason given by the judges. It makes no matter, however, whether this sequence be long or short. Poison, for instance, is introduced into a reser-

voir of water. The reservoir freezes, and remains frozen during winter. In the spring the ice melts, and the water flows through a series of channels until it is drunk by a child, who is killed. Here there is a continuous natural sequence which, however long, presents an unbroken chain. See, also, *infra*, § 346.

Suppose A., in exercise of a moral (as distinguished from physical) power over B., constrains B. to take poison, whereof B. dies, is A. responsible as principal in B.'s murder? If B.'s free agency is at the time extinguished, either by terror or by mental disease, then in such case A. is principal in the first degree. Blackburn v. State, 23 Ohio St. 146. If B.'s free agency is not extinguished, but he voluntarily commits suicide, then A., under the English common law, is indictable as principal in the second degree to B.'s self-murder. See *infra*, § 216.

¹ See an article on spiritualism and jurisprudence in Lippincott's Magazine for 1875, p. 423.

Bacon, in the *Preparation for the Union of Laws*, or, as we should call it, Draft of a Proposed Code, introduces the following clauses:—

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

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

Coke's authority is to the same purport. Indeed, by statute 33 Hen. VIII.

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

“It [homicide] must be operated by some act; therefore, death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce, and do produce, some act which is the immediate cause of death, it is homicide. *A blind man or a stranger in the dark directed by words only to a precipice where he falls and is killed*; a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule.” In this line may be cited a Massachusetts case,¹ in which it was held that a person who shoots a gun at a wild fowl, with knowledge and warning that the report will affect injuriously the health of a sick person in the neighborhood, and such effect is produced by the discharge, is guilty of an indictable offence.² And in New York it has been held that a death from

c. 8, all witchcraft or sorcery was made felony; and by 1 Jac. I. c. 12, this was extended so as to include the “hurting any person” by the “infernal arts” of “witchcraft, sorcery, charm, or enchantment.” Under this statute occurred the trial of Mary Smith in 1616 for witchcraft. She was convicted and executed, confessing her guilt. The evidence against her was chiefly to the effect that by some occult power of will she brought sickness and death upon certain persons who had incurred her enmity. This was held murder.

That “love powder” is not to be regarded as a cause, see *State v. Trice*, 88 N. C. 627, cited *infra*, § 1340.

¹ *Com. v. Wing*, 9 Pick. 1.

² In this case Parker, C. J., said: “Now the facts proved in this case, namely, the defendant's previous knowledge that the woman was so

affected by the report of a gun as to be thrown into fits, the knowledge he had that she was in hearing, the earnest request made to him not to discharge his gun, show such a disregard to the safety or even the life of the afflicted party, as makes the firing a wanton and deliberate act of mischief.” Compare *Com. v. Taylor*, 5 Binn. 77.

Lord Macaulay, in his Report on the Indian Code, goes further:—

“There is, undoubtedly, a great difference,” he says, “between acts which cause death immediately and acts which cause death remotely, between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the

fright produced by the defendant standing over the deceased with a deadly weapon, which he threatened to use, is imputable to the defendant as murder.¹

effect of the evidence in a particular case, not by the legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death. But if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide.

“Mr. Livingston, we observe, excepts from the definition of homicide cases [in which death is produced by the effect of words on the imagination or the passions. The reasoning of that distinguished jurist has by no means convinced us that the distinction which he makes is well founded. Indeed, there are few parts of his Code which appear to us to have been less happily executed than this. His words are these: ‘The destruction must be by the act of another; therefore, self-destruction is excluded from the definition. It must be operated by some act; therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce, and do produce, some act which is the immediate cause of death, it is homicide. A blind man or a stranger in the dark directed by words only to a precipice where he

falls and is killed; a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule.”

“This appears to us altogether incoherent. A. verbally directs Z. to swallow a poisonous drug; Z. swallows it, and dies; and this, says Mr. Livingston, is homicide in A. It certainly ought to be so considered. But how, on Mr. Livingston's principle, it can be so considered we do not understand. ‘Homicide,’ he says, ‘must be operated by an act.’ Where, then, is the act in this case? Is it the speaking of A.? Clearly not, for Mr. Livingston lays down the doctrine that speaking is not an act. Is it the swallowing by Z.? Clearly not, for the destruction of life, according to Mr. Livingston, is not homicide unless it be by the act of another, and this swallowing is an act performed by Z. himself.

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

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

“Suppose a man wants to murder his wife, and suppose that she is ill, and the doctor says to him, ‘She is

¹ *Cox v. People*, 80 N. Y. 600.

§ 168. It is not necessary, to constitute negligence, that the specific damage should have been foreseen as probable. If it were,

in a very critical state; she has gone to sleep, and if she is suddenly disturbed she will die, and you must keep her quiet.' Suppose he is overheard repeating this to another man, and saying, 'I want to murder her, and I will go and make all the noise I possibly can for the purpose of killing her.' You may imagine the evidence to be quite conclusive on that point: he goes into the room, makes a noise, and wakes her up with a sudden start, and frightens her, and she does die according to his wish. It seems to me that that act is as much murder as if he had cut her throat. Or suppose a case like this: a man has got aneurism of the heart, and his heir, knowing that, and knowing that any sudden shock is likely to kill him, suddenly goes and shouts in his ear, and does so with the intent to kill him, and does so kill him. It seems to me that if that man is not punished it is a very great scandal, for the act is just as bad as if he had killed him in any other manner. The fact is, that the objection to treating such cases as either murder or manslaughter arises from this, that in a general way, in such a case as unkindness, or many other cases of the same kind, you could never prove that the man intended either to kill or cause harm, or that it was common knowledge that there would be harm or death caused; and therefore in all those cases in which you would not wish to punish, the person would escape on account of the difficulty of proof. The only cases in which you would ever want to punish would be cases in which the difficulty of proof, by some such means as I have suggested, would be got

over." See, however, *Fairlee v. People*, 11 Ill. 1.

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

The doctrine of nervous causation was advanced to a questionable extreme in an English case, tried before Denman, J., in the Northern Circuit, in February, 1874. *R. v. Towers*, 12 Cox C. C. 530. The evidence was that T., the defendant, unlawfully and violently assaulted G., a young girl, having in her arms H., the deceased, a child four months and a half old. The child, which was previously very healthy, was greatly alarmed at the defendant's violence, accompanied as it was by the screams of G., its nurse; and it became "black in the face, and ever since that day it had

and if the offending party resorted to the inculpatory act to produce the particular end, then the case is one of malice, not of negligence.¹ On the other hand, it is of the essence of negligence that the injury caused by it should not have been foreseen as likely to arise in the

To negligent causation not necessary that damage should have been foreseen.

convulsions, and was ailing generally from a shock to the nervous system." It died thirty-two days after the assault. Medical testimony was adduced to show that the death was traceable to the sudden fright. Denman, J., said that he "should leave it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be of the nature of accident. The case was different from other causes of manslaughter, for here the child was not a rational agent, and it was so connected with the girl that an injury to the girl became almost in itself an injury to the child." In charging the jury, he said: "Mere intimidation, causing a person to die from fright, by working on his fancy, was not murder. But there were cases in which intimidations have been held to be murder. If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe his life was in danger, and he were then to back away from them and tumble down a precipice to avoid them, then murder would be committed. Then, did or did not this principle of law apply to the case of such tender years as the child in question. For the purposes of this case he would assume it did not; for the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question which would be for

them to decide, whether the death was directly the result of the prisoner's unlawful act—whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that under all the circumstances of the case. . . . If the man's act brought on the convulsions, or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter." The verdict was not guilty, so that the case was not subjected to further judicial consideration. But in harmony with the views heretofore expressed on this topic, I must come to a conclusion different from that expressed by Judge Denman on both the points raised by him.

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

2. If, however, the child's death was produced by merely nervous causes—

¹ See Whart. on Neg. § 74.

immediate case. The consequences of negligence are almost invariably surprises. A man may be negligent in a particular matter a thousand times without mischief; yet, though the chances

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

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

In *Kirland v. State*, 43 Ind. 146, it was held that the beating by the defendant of a horse which the prosecutor was driving was not assault and battery on the prosecutor. But see *infra*, §§ 609, 615.

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

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

"Lord Hale doubts whether voluntarily and maliciously infecting a person of the plague, and so causing his death, would be murder, i. 432. It is hard to see why. He says that 'infection is God's arrow.' A different view was taken in the analogous case of *R. v. Greenwood*, 1 Russ. Cr. 100; 7 Cox C. C. 404."

of mischief is only one to a thousand, we would rightly hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held, that it is no defence that a particular injurious consequence is "improbable," and "not to be reasonably expected," if it really appear that it naturally followed from the negligence under examination.¹ The term "reasonably to be expected" is to be treated, therefore, as convertible with "likely in the long run to ensue."

As improbability does not divest responsibility, responsibility is not always imposed by probability. The miner, the manufacturer, and the merchant may regard it not only as possible but probable that their staples may be used for guilty purposes, but neither miner, manufacturer, nor merchant becomes thereby penally responsible. Even a high probability of injury does not in all cases confer penal responsibility. A sick man, for instance, is suffering from a disease which will cause his death in a few days unless he submits to an operation, which, if it does not cure, will cause death in a few hours. The patient is incapable of expressing his will as to the operation. The operation is undertaken by a surgeon, skilfully, but unsuccessfully. The patient dies, not of the disease, but of the operation. The surgeon foresaw that it was highly probable that the operation would not succeed. But he is nevertheless to be regarded as irresponsible when we assume that his conduct was in conformity with the rules of science and the maxims of prudent practice. If bold operations are never to be attempted, then the advance of surgery is impossible; and it is reasonable, and in harmony with sound rules of life, that a few days of unconsciousness, or of agonizing pain, should be risked for even a faint probability of recovery.

§ 169. Responsibility (*imputatio*) ceases where *casus*, or, as we term it, the act of God, intervenes. If in the act producing the damage there is nothing to be imputed to the defendant, there is nothing with which he is chargeable. "Ac ne is quidem hac lege tenetur, qui casu occidit (the action being, in this case, for damages under the Aquilian law), si modo culpa ejus nulla inveniatur."² "In hac actione, quae ex hoc capitulo oritur, dolus et culpa punitur. Ideoque si quis in stipulam

Responsibility ceases when *casus* intervenes.

¹ *Supra*, § 108.

² L. 39. § 3. D. de Leg. Aq.

suam, vel spinam, comburendae ejus causa, ignem immiserit, et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit *requiramus num imperitia ejus aut negligentia id accidit*. Nam si die ventoso id fecit, culpa reus est; nam et qui occasionem praestat, damnum fecisse videtur. In eodem crimine est, et qui non observavit, ne ignis longius est procederit. *At si omnia quae oportuit observavit, vel subita vis venti longius ignem produxit, caret culpa.*¹ But *casus* is no defence if it was provoked by the defendant. He who exposes a helpless person in a cold night when a storm intervenes cannot set up as a defence that it was a storm that did the hurt.² It is otherwise, however, when the injury was not a probable or natural consequence of the defendant's act. Hence, where A. knocked B. down, and B., when down, received a mortal blow from a kick from a horse jumping on him, it was held that A. was not indictable for killing B.³

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

² *Supra*, § 166.

³ *People v. Rockwell*, 39 Mich. 503.

CHAPTER VIII.

ATTEMPTS.

I. OFFENCE GENERALLY.

An attempt is an unfinished crime and is indictable at common law, § 173.

Mere words do not constitute an attempt, § 174.

Not an offence to attempt to commit a non-indictable offence; attempts to commit suicide when indictable, § 175.

Attempt at negligence not indictable: intent is necessary to offence, § 176.

And so of attempts at police offences, § 177.

Attempt must have causal relation with act, § 178.

Solicitations not indictable, § 179.

Mere preparations not indictable as attempts, § 180.

The attempt must have gone so far that the crime would have been completed but for extraneous intervention, § 181.

Means must be apparently suitable, § 182.

If means are apparently and absolutely unfit, there can be no attempt, § 183.

Must be apparent physical capacity, § 184.

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II. INDICTMENT.

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Nor do statutory rulings affect question at common law, § 191.

Indictment must aver circumstances of attempt, § 192.

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III. JURISDICTION.

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IV. EVIDENCE.

Intent to be inferred from facts, § 196.

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V. PRINCIPALS AND ACCESSARIES.

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VI. VERDICT.

At common law no conviction of attempt on indictment for consummated crime, § 199.

VII. PUNISHMENT.

Punishment should be less than that of consummated crime, § 200.

I. OFFENCE GENERALLY.

§ 173. An attempt is an intended apparent unfinished crime. It must be intended, since it is of its nature that it should be

committed in order to effect a specific criminal result. It must be apparent, since if it be obviously not likely to effect the result at which it aims (*e. g.*, where a popgun is levelled at a ship, or a witch is employed to use enchantments), it is not indictable.¹ It must be unfinished, as otherwise the indictment would be for the complete crime, but there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attemptor.² On the other hand, there can be no attempt at negligence, because negligence precludes the idea of intention, which is essential to attempt.³

By the English common law it is a misdemeanor to attempt to commit either a felony,⁴ or a malicious misdemeanor, whether common law or statutory.⁵ Hence it is an indictable attempt falsely to accuse another of crime, if any step be taken which, in the usual course of events, would lead to a conviction, even though the accusation take not the form of libel. In this view, the fabrication of

¹ The word "apparent," it should be observed, has been the subject of much controversy. On the one side it is maintained that unless the attempt is one capable of success it is not indictable; and by those who urge this view the word "apparent," which covers cases where the means are apparently fit but are really unfit, is rejected. On the other side it is insisted that as we can never predicate infallible success of any attempt, the most we can say in any case is that the attempt is apparent, and that to say that merely apparent attempts should not be indictable would be to say that there should be no indictable attempts. See *infra*, §§ 182 et seq.

² *Infra*, § 181. *Sipple v. State*, 17 Vroom, 197.

³ *R. v. Boyce*, 1 Mood, C. C. 29; *State v. Keyes*, 8 Vt. 57; *Com. v. Martin*, 17 Mass. 359; *McKay v. State*, 44 Tex. 43; *infra*, § 176.

⁴ 1 Hawk. P. C. 55; *R. v. Higgins*,

2 East R. 5; *R. v. Kinnersley*, 1 Strange, 196; *Com. v. Barlow*, 4 Mass. 439; *State v. Danforth*, 3 Conn. 112; *Randolph v. Com.*, 6 S. & R. 398; *Hackett v. Com.*, 15 Penn. St. 95; *State v. Boyden*, 13 Ired. 505; *State v. Jordan*, 75 N. C. 27; *Griffin v. State*, 26 Ga. 493; *Nicholson v. State*, 9 Baxt. 258.

⁵ *R. v. Higgins*, 2 East R. 5; *R. v. Phillips*, 6 East R. 464; *R. v. Chapman*, 2 C. & K. 846; 1 Den. C. C. 432; *R. v. Williams*, 1 Den. C. C. 39; *R. v. Butler*, 6 C. & P. 368; *R. v. Roderick*, 7 C. & P. 795; *R. v. Goff*, 9 Up. Can. C. P. 438; *R. v. Watson*, 2 T. R. 199; *R. v. Roberts*, Dears. 539; 33 Eng. Law & Eq. 553; *State v. Keyes*, 8 Vt. 57; *Com. v. Kingsbury*, 5 Mass. 106; *State v. Murray*, 15 Me. 100; *Com. v. Harrington*, 3 Pick. 26; *People v. Washburn*, 10 Johns. R. 160; *Demarest v. Haring*, 6 Cow. 76; *Com. v. Smith*, 54 Penn. St. R. 209; *State v. Maner*, 2 Hill S. C. 453; *Berdeaux v. Davis*, 58 Ala. 611; *Ross v. Com.*, 2 B. Monr. 417.

mechanical inculpatory evidence is a substantive misdemeanor,¹ and *a fortiori*, the attempt to bribe a witness.² But to make an attempt indictable it must be to commit a consummated not an inchoate offence. Hence no indictment lies for an attempt to commit an attempt or assault.³

§ 174. Mere words, unless they are libellous, seditious, obscene, or provocative of breaches of the public peace, are not the subject of penal judicial action. Even when they express illegal purposes, they are often merely speculative; are uttered often by weak men as braggadocio; and always belong to a domain which criminal courts cannot invade without peril to individual freedom, and to the just and liberal progress of society. This liberty to express thought is recognized in all systems of civilized jurisprudence. "Cogitationis poenam nemo patitur," was a maxim of the Roman law,⁴ which is now accepted as part of the judicial system of all Christendom, and is adopted in the codes of the most arbitrary nations of Europe.⁵ And by the Roman common law, even *talking* about a criminal intent, and thus giving to it public expression, does not constitute, unless there be treason, an attempt.⁶

¹ *R. v. Simmons*, 1 Wils. 329.

² *Infra*, § 1332.

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

³ *Brown v. State*, 7 Tex. Ap. 569; *R. v. King*, 14 Cox C. C. 434. See Taylor v. State, 50 Ga. 79; *infra*, § 611.

⁴ L. 18. D. de Poenis, xlviii. 19.

⁵ See this shown in Holzendorff's Ency. "Versuch."

⁶ Very curious citations on this point are given by Geib, Lehrbuch, etc., § 99, among which are the following: Romagnosi Genesi del diritto penale, pp. 221, 222. Tentare un delitto, non è soltanto pensarlo, o deliberarlo; o vero dire di averlo pensato, o deliberato; ma bensì egli è porre in opera tutto quello che ne può ottenere l'esecuzione. . . . Dunque il palesare il pensiero e la deliberazione di un delitto, cui però si è desistito di mandare ad esecuzione, ovvero la jattanza di volerlo effettuare, senza però che s'intraprenda nulla in fatto colle azioni fisiche ed esterne, sono cose che non si possono veramente riguardare come attentati, nè si potrebbero punire come tali. Filangieri Scienza della legislazione, iii. 37. (T. iii. pp. 326, 327.) Carnignani Teoria delle leggi ii. pp. 302-304. Boehmer, Meditt. in C. C. C. art. 178, § 3. Wintgens

§ 175. Where a statute makes indictable attempts to commit indictable offences, this has been held not to include an attempt to commit suicide, consummated suicide being beyond the jurisdiction of the courts.¹ But at common law an attempt to commit suicide is indictable.²

§ 176. To constitute an attempt, it is essential that there should be an unlawful coincident intention to do the thing attempted, which intention must be logically inferrible from the facts.³ On the other hand, as we have seen,⁴ there can be no indictment for an attempt at negligence, for, from the nature of things, the attempt to neglect a duty is in itself, if successful, a malicious offence, and ceases to be a neglect. Hence comes the just principle of the Roman law, that where there is no *dolus* there can be no attempt.⁵

There is, however, no arbitrary measure of intent to be inferred from any particular act. Thus an attempted killing may be an attempt to commit murder or an attempt to commit manslaughter. The attempt to kill in hot blood, but not in self-defence, is an attempt to commit manslaughter; to attempt to kill coolly on an old grudge is an attempt to commit murder.⁶ An attempt to kill an officer, also, knowing him to be such, may be an attempt to commit murder; an attempt to kill him, not knowing who he is, may be only an attempt to commit manslaughter.⁷

Intention formed subsequent to the attempt will not be enough, as where a party having in his possession indecent prints (not

Diss. cit. pp. 19-24, 81. Lelièvre Davis, 2 Ired. 153; Griffin v. State, 26 Comm. cit. pp. 7-13, 26-28. The same Ga. 493; Jeff v. State, 39 Miss. 593; and view is expressed by Willes, J., in cases cited *infra*, §§ 182, 190, 196.

Mulcahy v. R. L. R., 3 H. L. 306.

¹ Com. v. Dennis, 105 Mass. 162. *Infra*, § 215.

² *Infra*, § 454; R. v. Doody, 6 Cox C. C. 463; R. v. Burgess, L. & C. 259; 9 Cox C. C. 247. Approved in Com. v. Mink, 123 Mass. 422.

³ See *infra*, § 196. R. v. Donovan, 4 Cox C. C. 399; R. v. Ryan, 2 M. & R. 213; R. v. Lallement, 6 Cox C. C. 204; R. v. Cheeseman, L. & C. 140; Com. v. Harney, 10 Met. 422; State v.

⁴ See *supra*, § 176, for cases.

⁵ See *supra*, §§ 125-129.

⁶ *Infra*, §§ 455 *et seq.*

⁷ *Infra*, §§ 413 *et seq.* See, generally, State v. Nichols, 8 Conn. 496; People v. Shaw, 1 Park. C. R. 327; State v. White, 45 Iowa, 325; Conner v. State, 59 Iowa, 357; Bonfanti v. State, 2 Minn. 132; Meredith v. State, 60 Ala. 441; and cases cited *infra*, § 641.

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

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

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

And so as to attempts at police offences.

The attempt must have causal relation with act.

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

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

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

² Com. v. Willard, 22 Pick. 476; Dobkins v. State, 2 Humph. 424; Pulse v. State, 5 Humph. 108; Ross v. Com., 2 B. Monr. 417; Hill v. State, 53 Ga. 125. See R. v. Upton, 2 Strange, 816; R. v. Bryan, 2 Stra. 866. See Whitesides v. State, 11 Lea, 474.

³ *Infra*, § 1529. See Pulse v. State, 5 Humph. 108. In Taylor v. State, 11 Lea, 708, this is extended to statutory misdemeanors; but unless under the peculiar terms of the applicatory statute, this cannot be sustained.

⁴ *Supra*, §§ 152 *et seq.*

series of conditions is necessary. It is necessary that the gun should be procured by the assailant. It is necessary that that gun should have been made by the manufacturer. It is necessary that the steel of the gun should have been properly tempered; that the bullet should have been properly cast; that the materials from which bullet, tube, and trigger were made should have been dug from the mine and duly fashioned in the factory. It is necessary that the assailed should be in a position to be shot, and that the assailant should be in a position to take aim. All these are necessary conditions to the shooting, without which the shooting could not take place. No one of them, however, is in the eye of the law the cause. A juridical cause is such an act, by a moral agent, as will apparently result, in the usual course of natural events, unless interrupted by circumstances independent of the actor, in the consequence under investigation.¹ Hence preparations, as will presently be more fully seen,² unless they are put in such a shape as by the usual course of events to produce the consequence in question, are not attempts.³

§ 179. Are solicitations to commit crime independently indictable? They certainly are, as has been seen, when they in themselves involve a breach of the public peace, as is the case with challenges to fight and seditious addresses.⁴ They are also indictable when their object is interference with public justice: as where a resistance to the execution of a judicial writ is counselled;⁵ or perjury is advised;⁶ or the escape of a

¹ *R. v. Meredith*, 8 C. & P. 589. See *R. v. Williams*, 1 Den. C. C. 39, cited *infra*, § 186; *State v. Colvin*, 90 N. C. 717.

² *Infra*, § 180.

³ In *R. v. Cheeseman*, 1 L. & C. 140, Blackburn, J., said: "There is no doubt a difference between the preparation antecedent to an offence and the actual attempt; but if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime." In *State v. Griffin*, 26 Ga. 493, it was held that taking an impression of the lock of a

warehouse, and having a key made to fit it, was an indictable attempt, though it was not shown whether the defendant intended to use the key himself. But this was a matter of inference for the jury. See *infra*, §§ 181, 195.

⁴ *Infra*, § 1773; *U. S. v. Ravara*, 2 Dallas, 297; *Whart. St. Tr.* 91; *Com. v. Whitehead*, 2 Boston Law Rep. 148; *Cox v. People*, 82 Ill. 191; *State v. Farrier*, 1 Hawks, 487; *State v. Taylor*, 3 Brev. 243; *State v. Tibbs*, 1 Dana, 524.

⁵ *State v. Caldwell*, 2 Tyler, 212.

⁶ See *infra*, §§ 1328, 1329 *et seq.*

prisoner is encouraged;¹ or the corruption of a public officer is sought,² or invited by the officer himself.³ They are indictable, also, when they are in themselves offences against public decency, as is the case with solicitations to commit sodomy,⁴ and they are indictable, also, when they constitute accessaryship before the fact.⁵ But is a solicitation indictable when it is not either (1) a substantive indictable offence, as in the instances just named, or (2) a stage towards an independent consummated offence? And the better opinion is that, where the solicitation is not in itself a substantive offence, or where there has been no progress made towards the consummation of the independent offence attempted,⁶ the question whether the solicitation is by itself the subject of penal prosecution must be answered in the negative.⁷ For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed. It would be hard, also, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers of Byron's "Don Juan," of Rousseau's "Emile," or of Goethe's "Elective Affinities." Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women; Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery. Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances or as libels. But to make bare solicitations or allurements indictable as attempts, not only unduly and perilously extends the scope of penal adjudication, but forces on the courts psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land.

¹ *People v. Washburn*, 10 Johns. R. 160. *Schofield*, Cald. 400; *R. v. Gregory*, L. R. 1 C. C. 77; 10 Cox C. C. 459; *R. v. Quail*, 4 F. & F. 1076. *Infra*, § 225. Under this head falls the anonymous case reported 6 C. & P. 388, where soliciting an engraver to engrave a plate for forgery was held indictable, the work being actually begun.

² *Infra*, § 1857.

³ *Walsh v. People*, 65 Ill. 58; *contra*, *Hutchinson v. State*, 36 Tex. 293.

⁴ *R. v. Ransford*, 13 Cox C. C. 9; 31 L. T. (N. S.) 488, cited *infra*.

⁵ *Infra*, § 225.

⁶ See *Higgins's Case*, 2 East, 5; *R. v.*

⁷ See *Cox v. People*, 82 Ill. 191.

What human judge can determine that there is such a necessary connection between one man's advice and another man's action, as to make the former the cause of the latter? An *attempt*, as has been stated, is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime. But this cannot be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject. Following such reasoning, several eminent European jurists have declined to regard solicitations as indictable, when there is interposed between the bare solicitation, on the one hand, and the proposed illegal act, on the other, the resisting will of another person, which other person refuses assent and co-operation.¹ To this effect are decisions that indictments do not lie in our own law for solicitations to commit adultery,² and solicitations to commit incest.³ It has also been held that a mere effort, by persuasion, to produce a condition of mind consenting to incest, without any act done towards actual consummation, is not an attempt.⁴ To the same purport is the reasoning of other tribunals in reference to soliciting to sell liquor.⁵ On the other hand, we have from the Supreme Court of Connecticut a direct decision to the contrary, on the question of soliciting adultery, which in that State is a statutory felony.⁶ We must, however, remember that such solicitations, when in any way attacking the body politic, either by way of treason, scandal, or nuisance, are, as has already

¹ Mittermaier, in note iii. to Feuerbach, 42; Berner, *Strafrecht*, 1871, § 102; Schwarze, *Commentar*, §§ 43-46. See, also, the elaborate argument by Bar, *Zur Lehre vom Versuch*. And see *infra*, § 1738.

² *Smith v. Com.*, 54 Penn. St. 209. See, also, *Kelly v. Com.*, 1 Grant (Penn.), 484, and *infra*, § 1738. In *Stabler v. Com.*, 95 Penn. St. 318, it was held that A.'s handing poison to B., and soliciting him to put it in C.'s spring, is not an "attempt to administer poison" under the statute.

³ *Cox v. People*, 82 Ill. 191.

⁴ *Cox v. People*, 82 Ill. 191.

⁵ *Com. v. Willard*, 22 Pick. 476. *Infra*, § 1529. In *Com. v. Flagg*, 135

Mass. 145, it was held that solicitation to arson is indictable; but in this case money was paid to the solicited agent in order to fix and prepare him for the work, and the mode of execution explained. The case was, therefore, one not of bare solicitation but of preparation.

⁶ *State v. Avery*, 7 Conn. 266. See *U. S. v. Lyles*, 4 Cranch C. C. 469, where it was held by one judge that a solicitation to commit a battery is indictable. As maintaining the indictability of solicitation, see opinion of court in *State v. Hayes*, 78 Mo. 307, relying on *Com. v. Jacobs*, 9 Allen, 274, where, however, the question was adequacy of preparations.

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

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

Mere preparations not indictable.

¹ *Collins v. State*, 3 Heisk. 12; *R. v. Hickman*, 1 Moody, 34; *R. v. Clayton*, 1 C. & K. 128; *Penns. v. McGill*, Add. 21. It has, however, been ruled that to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. But here the word "inciting" implied accessoryship before the fact. *Higgins's Case*, 2 East R. 5.

R. v. Ransford, 31 L. T. (N. S.) 488; 13 Cox C. C. 9, was a case of solicitation of a man to a boy to commit sodomy, and *Kelly, C. B.*, affirming a conviction, said: "I am of opinion that to incite or even solicit another to commit a felony, or to do any act with intent to induce another person to commit such offence, is a misdemeanor." *Brett, J.*, said: "The inciting a person to commit a felony is a misdemeanor. The case in 2d East's R. is an authority for that point." But in this case the person solicited was a boy of twelve, and there was the overt act

of the publication of a scandalous letter, which publication is in itself an indictable offence.

R. v. Most, L. R. 7 Q. B. D. 244; 44 J. T. N. S. 823; 14 Cox C. C. 583, affirming a conviction in a case where the defendant was charged with "encouraging" and "persuading" in a newspaper the murder of a foreign sovereign, was under the stat. 24 and 25 Vict. c. 100. Such publications may be indictable at common law when seditious or disturbing domestic or international peace. But they are not indictable as common law attempts.

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

poses. So, also, as to the possession of implements of forgery, and preparations for treasonable acts.

But if the preparation is not of itself indictable, or will not of itself, if uninterrupted extraneously, result in crime, the weight of reasoning is that it cannot be made *per se* indictable as an attempt.¹ For, *first*, there is no evidence, as a general rule, that can prove that a particular preparation was designed for a particular end. Thus a gun may be bought as well for hunting as for homicide. Nor can we lay down any intelligible line between preparations which betray more clearly and those which betray less clearly a felonious purpose.² *Secondly*, between preparation and execution there is a gap which criminal jurisprudence cannot fill up so as to make one continuous offence. There may be a change of purpose, or the preparation may be a vague precautionary measure, to which the law cannot append a positive criminal intent, ready to ripen into guilty act.

Yet we must again recur to the fact that some preparations for crime are of themselves of such a character, from their inherent illegal perniciousness, as to afford the subject matter for independent indictment,³ such, for instance, as the procuring of dies for the purpose of coining bad money,⁴ and procuring indecent prints with intent to publish them.⁵ And eminently is this the case when, as has been said, the preparations in question, by themselves, by force of ordinary natural laws, will, if undisturbed, result in crime.⁶ When such an attempt, if not interrupted by extraordinary

¹ *R. v. Eagleton*, Dears. 515; *R. v. Meredith*, R. & R. 46; 8 C. & P. 589; *R. v. Heath*, R. & R. 184; *R. v. Woodrow*, 15 M. & W. 404; *R. v. Renshaw*, 2 Cox C. C. 285; *U. S. v. Stephens*, 8 Sawyer, 116; 3 Cr. Law Mag. 536; *Bruce v. State*, 24 Me. 71; Com. v. Morse, 2 Mass. 138; *Randolph v. Com.*, 6 S. & R. 398; *People v. Brockway*, 2 Hill, N. Y. 558; *People v. Lawton*, 56 Barb. 126; *Cox v. People*, 82 Ill. 191; *Uhl v. Com.*, 6 Grat. 706; *Clarke's Case*, 6 Grat. 675; *State v. Colvin*, 90 N. C. 717; *Cunningham v. State*, 49 Miss. 685; *People v. Hope*, 62 Cal. 291. In *U. S. v. Stephens*, *ut sup.*, it was held

that purchasing liquor in a place where the sale is legal for the purpose of introducing it into another place where the sale is illegal, is not an indictable attempt in the latter place.

² See Rossi, *Traité de droit pénal*, 1855, t. ii. 121.

³ *Supra*, § 179.

⁴ *Roberts's Case*, Dears. C. C. 553.

⁵ *Dugdale v. R.*, 1 E. & B. 435; *R. v. Dugdale*, Dears. C. C. 64; *R. v. Roberts*, *ut supra*.

⁶ To this must be limited Lord Denman's expressions in *R. v. Chapman*, 1 Den. C. C. 432.

natural occurrences, or by collateral human intervention, is likely to result in crime, then the defendant is indictable.

§ 181. Certainly mere preliminary preparations, in character indifferent, cannot, as has been seen, be regarded as guilty attempts. Thus, walking down a street to a druggist's where poison is sold would not be indictable as an attempt to poison; but purchasing the poison and putting it in the way of other human beings would be so indictable.¹ So purchasing a gun is not indictable as an attempt,² but aiming it is.³ So owning a false weight is not itself indictable, but using it as a means of cheating is evidence, when connected directly with the proposed wrong, of an attempt to cheat.⁴ So to purchase iron to use in making false keys is not an attempt at a particular larceny; but it is otherwise when an impression is taken of a particular warehouse key, and a key, counterfeiting it, is made, with the intent to steal from such warehouse.⁵ In other words, to make the act an indictable attempt, it must be a *cause* as distinguished from a *condition*.⁶ And it must go so far that it would result in the crime unless frustrated by extraordinary circumstances.⁷

The attempt must have gone so far that the crime would have been completed but for extraneous intervention.

¹ *Mullen v. State*, 45 Ala. 43. See *R. v. Dale*, 6 Cox C. C. 14; *R. v. Meredith*, 8 C. & P. 589; *R. v. Simmons*, 1 Wils. 329; *R. v. Roberts*, 33 Eng. Law & Eq. 539; Dears. 553; *People v. Thomas*, 63 Cal. 48. "If a man intends to commit murder," says Jervis, C. J., in the last cited case, "the walking to the place where he intends to commit it would not be a sufficient act to make it an indictable offence." So also said Lord Abinger, in *R. v. Meredith*, 8 C. & P. 589: "Suppose a man intended to carnally abuse a child, and was to take his horse and ride to the place where the child was, that would be a step towards the commission of the offence, but would not be indictable." See an interesting extension of this principle in *R. v. McCann*, cited *infra*, § 187; *R. v. Taylor*, 1 F. & F. 511.

² It would be otherwise if the gun was put in process of use for purposes prohibited by law. *Roberts's Case*, Dears. C. C. 539.

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

³ See *R. v. Brown*, 48 L. T. (N. S.) 270. ⁴ *R. v. Cheeseman*, L. & C. 140, stated *supra*, § 178.

⁵ *Griffin v. State*, 26 Ga. 493. See *R. v. Roberts*, 7 Cox C. C. 39; Dears. C. C. 559.

⁶ *Supra*, § 178.

⁷ *Sipple v. State*, 17 Vroom, 197. In *R. v. Taylor*, 1 F. & F. 511, cited

§ 182. If the means are *apparently* adapted to the end, then the public peace, so far as the attempt is concerned, is as much disturbed as if they should be so actually; and hence the indictment for the attempt on such evidence can be sustained.¹ Were it otherwise, we would be

Means must be apparently suitable.

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

That applying a match which goes out before fire is communicated, may be an attempt at arson, see *R. v. Goodman*, 22 U. C. C. P. 338. That the least charring is burning, see *infra*, § 826.

That it is no defence to an indictment for carrying concealed weapons that the weapon carried could not be used,

see *Williams v. State*, 61 Ga. 417; *Hutchinson v. State*, 62 Ala. 3.

Preparations, which, unless made substantive crimes by statute, are not indictable as attempts, have been classified by a high authority as follows:—

1. Acts whose object is to ward off contingent discovery, or to secure to the perpetrator the undisturbed enjoyment of the fruits of the crime.

2. Acts undertaken by the perpetrator as experiments to determine the possibility of the crime, or to arrange an opportunity for its commission.

3. Acts consisting in securing the agencies necessary for the execution of the crime.

4. Acts conducing to the perpetrators' physical and mental training for the offence. *Zachariae in Meyer*, § 39.

¹ In Schwarze's essay on "Versuch und Vollendung," incorporated in Holtzendorff's *Strafrecht*, i. 270, we have an elaborate examination of the objective and of the subjective theories of attempt. By the first of those theories an attempt derives its punishability from the real character of the instrument used; by the second theory, from the intent which the instrument was employed to effectuate. From a condensed translation of this essay, published by me in the *Central Law Journal* for July 18, 1879, I reduce the following:—

As to this distinction, it may be observed that there is no agency of which it can be absolutely said that it will produce necessarily the intended effect; there is no cup between which and the lip there may not be a slip.

forced to penetrate to regions beyond the range of practical jurisprudence. For how can we say that any particular means will cer-

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

To this it is replied, to follow Schwarze's compendium of the arguments on both sides of this interesting question, that the use of an instrument in itself obviously unfit leaves us no

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

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

tainly effect any particular end? The best laid plans, we all know, are frustrated. The best of rifles loaded, capped, primed,

arsenic, a harmless drug. Is not the purchaser, supposing an intent to kill to be established, indictable for the attempt? Whether, when the means are utterly unsuitable to the end, we may infer a want of intent to hurt, is a question as to the amount of evidence requisite to prove the offence; it assumes that the attempt with unsuitable means may be proved, the dispute being as to the evidence necessary to prove it. Even assuming that at the outset means for the realization of the object are not wanting, this is the case with all kinds of attempts.

It is further objected that it is absurd to assume that there can be a "beginning" of an undertaking of which there cannot possibly be a "completion." But of many human actions must we not say that they can have no "completion?" yet can we say of these that they have no "beginning?" It is of the very essence of an attempt that the initiatory act has not worked the intended result. The reason of the non-occurrence of the result is indifferent; the only requisite is that the result should not have occurred. The opposite view would establish the immunity of all attempts, since the interruption of the offender's purpose in all cases of attempt shows the inadequacy of the means. A shot which fails because the intended victim is cased in armor is on this reasoning as little of an attempt as is a shot which fails because the gun is unloaded. It is said, indeed, that when there is no possibility of success in the attempt, then the attempt is not indictable. But how as to the shot at the man in armor, or as to poisons administered to a person who has taken antidotes, and is therefore poison proof?

The answer is, that in such cases the *intent* to kill is that which makes up the offence. But is not this abandoning the *objective* standpoint, upon which the adherents of this view rest? It is arguing in a vicious circle to say, as do the advocates of the objective theory, that the attempt is only indictable when the object is attainable; and yet that whether the object is attainable depends upon what was the intent. Suppose that the defendant, with intent to kill, used a poison which has lost its strength by time. He will not succeed in poisoning, and if the objective theory be strictly carried out, cannot be convicted. If it be replied that because he intended to kill he must be convicted, then the objective theory must be abandoned.

Other practical difficulties stand in the way of this view. A gun is loaded with a charge of powder too slight to carry the ball the required distance. Is not this an attempt? If not, how many additional grains of powder are necessary to make the offence? If it be, why is not shooting without powder (supposing the offender believed the gun to be loaded) an offence, and if shooting without powder be no offence, and shooting with inadequate powder be an offence, at what point between the two is the line to be drawn? Or an attempt to poison with an insufficient dose is said to be no offence, though if the dose be repeated day after day the poison would be fatal. See *infra*, § 596. Hence three or four times administering poison in doses, each by itself insufficient to hurt, would be an attempt, though neither particular administration would constitute an attempt. In other words, four zeros would constitute a unit. Where,

and well aimed, may miss fire; or the party shot at may wear a coat of impervious mail, or, as was once suggested by Chief Justice Gibson, when discussing a parallel point, may fall down and die of apoplexy from fright before the ball pierces his heart. How can we under any circumstances do more than say of any particular agency, that it is "apparently" adapted to produce the end? If so, the application of an agency apparently adapted to produce a crime is an indictable attempt, which, as we have seen, is a deliberate crime begun, but, *through circumstances independent of the will of the actor*, left unfinished. If the means employed appear both to assailant and assailed adequate, then the offence is complete. Indeed, the very fact that a man, when assaulted, is entitled to ward off by blows an attempt at violence, which is apparent only, but not real, is decisive of the issue. A. levels an unloaded gun at B.; and B. is justified in using violence to prevent an injury to himself, which after all is unreal though apparent.¹ But why? Simply because the levelling of an unloaded gun at another person in such a way as to produce terror in the latter is a breach of the public peace, as well as an invasion of the rights of the individual. The law, therefore, declares the attempt which is the subject of legal intervention to include that which is made with means apparently adequate, whether or no these means are actually such as to be

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

The true theory, it is therefore insisted, is the *relative subjective*; that is

to say, the test is, did the offender *intend* to hurt, and did he take means apparently calculated to effect his end. If so, the unsuitableness of the means makes no defence. To this rule an exception is to be made, excluding cases where unsuitable superstitious agencies are employed. And the validity of this exception is conceded in cases in which the agency of supernatural beings is invoked it being left discretionary with such beings to intervene or not. Hence the adherents of the subjective theory concede that it is not an indictable attempt for a person, intending thereby to kill another, to resort to incantations or invocations of supposed magicians or malevolent spirits.

¹ See, fully, *infra*, §§ 606, 642; and see Com. v. White, 110 Mass. 407.

necessarily successful if employed.¹ On the other hand, the offence is not an attempt if the party threatened knew the gun was unloaded and incapable of doing harm.² The same distinction is applicable on principle to indictments for attempts to poison,³ and attempts to administer drugs with intent to produce an abortion.⁴ And

¹ As sustaining the argument of the text, see *R. v. St. George*, 9 C. & P. 483; *R. v. Lallemond*, 6 Cox C. C. 204; *R. v. Cluderay*, 1 Den. C. C. 515; 2 C. & K. 907; *R. v. Gamble*, 10 Cox C. C. 545; *U. S. v. Bott*, 11 Blatch. 346; *Com. v. McDonald*, 5 Cush. 365; *Com. v. Jacobs*, 9 Allen, 274; *O'Leary v. People*, 4 Parker C. R. 187; *Slatterly v. People*, 58 N. Y. 354; *People v. Lawton*, 56 Barb. 126; *Mullen v. State*, 45 Ala. 43; *Tarver v. State*, 43 Ala. 354; *Henry v. State*, 18 Ohio, 32; *Kunkle v. State*, 32 Ind. 220 (overruling *State v. Swails*, 8 Ind. 524); *State v. Shephard*, 10 Iowa, 126; *Allen v. State*, 28 Ga. 395; *Tyra v. Com.*, 2 Metc. (Ky.) 1; *State v. Hampton*, 63 N. C. 13; *State v. Davis*, 1 Iredell, 125; *State v. Rawles*, 65 N. C. 334; *State v. Hinson*, 82 N. C. 597; *People v. Yslas*, 27 Cal. 630; *Long v. State*, 34 Tex. 566. See, also, *infra*, § 606. We have a parallel rule laid down in cases of forgery. *Infra*, §§ 700 *et seq.* In apparent conflict with the text is a group of English cases on statutes. In one of these it was held that "shooting at another person" does not take place when the "other person" is not in the place shot at; *R. v. Lovel*, 2 M. & R. 39; and that there can be no shooting with "loaded arms" when a gun is so stuffed that it cannot be fired. *R. v. Harris*, 5 C. & P. 159. See *R. v. Lewis*, 9 C. & P. 523; or when it does not contain an efficient charge; *R. v. Carr*, R. & R. 377; *R. v. Whitley*, 1 Lew. C. C. 123; *R. v. James*, 1 C. & K. 530; *R. v. Gamble*, 10 Cox C. C. 545. These

decisions may be right; but they do not touch indictments for attempts to kill, as the ground on which they rest is that the statute uses terms (*e. g.*, "loaded arms") which are incorporated in the indictment, and the averment of which must be substantially proved. *Infra*, § 645 *a.* See, as open to more general exception, *R. v. Shephard*, 11 Cox C. C. 302; *Vaughan v. State*, 3 Sm. & M. 553.

² *Crumbley v. State*, 61 Ga. 582; *infra*, §§ 606, 642.

³ See *R. v. Cluderay*, 1 Den. C. C. 515; 2 C. & K. 907; *State v. Clarissa*, 11 Ala. 57. In *R. v. Hennah*, *ut sup.*, "noxious drug" was held to mean a drug noxious in its essence, and not merely noxious when taken in excess. In *People v. Van De Leer*, 53 Cal. 147, it was held that a "noxious substance or liquid" is not such as might, when administered, be hurtful or injurious, but, like a poison, it must be capable of destroying life. As to "noxious" see *infra*, § 596.

⁴ *U. S. v. Bott*, 11 Blatch. 346; *Bates v. U. S.*, 11 Biss. 70; *infra*, §§ 596, 1831. In *R. v. Coe*, 6 C. & P. 403, the question came up under a statute making it indictable to administer medicine or "other thing" with intent to produce an abortion, and it was held to be immaterial what the thing was. Had the statute used the term "deleterious medicine," the nature of the medicine might become material. *R. v. Hennah*, 13 Cox C. C. 547. See *infra*, § 596. As to statutes of New Jersey and other States, see *infra*, § 596.

in forgery, as will be hereafter seen, analagous principles are laid down.¹

§ 183. But if the means are both absolutely and apparently inadequate, as where a man threatens another with magic, or aims at him a child's pop-gun, then it is plain that an attempt, in the sense of an apparent invasion of another's rights, does not exist.² For to constitute such an attempt there must be such a preliminary overt act as may, by the course of usual natural laws, apparently result, if not interrupted, in crime. It is the *appearance* of such connection between the attempt and the consummation that palliates violence on the party assailed in arresting the assailant before he goes further; and it is this *appearance* which the law, when there is guilty intent, makes indictable, in order to prevent breaches of the peace. But when the means used are so preposterous that there is not even *apparent* danger, then an indictable attempt is not made out. This distinction is apprehended by several thoughtful German commentators,³ who hold that *absolute* inadequacy of means is a defence, while *relative* inadequacy is only a plea in mitigation of sentence.⁴

§ 184. Whether there must be physical ability to complete the attempt on the part of the attemptor is a question which has already been touched upon in its general relations. It is enough now to view it simply in relation to *rape*. If there be *juridical* incapacity for the consummated offence (*e. g.*, infancy), there can be no conviction of the attempt;

If means are apparently and absolutely unfit, there is no attempt.

Must be apparent physical capacity.

¹ *Infra*, §§ 680, 696.

² *Blake v. Barnard*, 9 C. & P. 626; *R. v. James*, 1 C. & K. 530; *Tarver v. State*, 43 Ala. 354; *Robinson v. State*, 31 Tex. 170; *Smith v. State*, 32 Ibid. 593.

³ See summary in Geib, *ut supra*, § 102; *State v. Napper*, 6 Nev. 113. As to what constitutes a "noxious" drug, see further *infra*, § 596.

⁴ See the following from an eminent French jurist: Rossi, *Traité*, ii. pp. 310-313: D'ailleurs où est le danger pour la société? où est le mal matériel? Que lui importe qu'on essaie des actes impossibles? Ces actes

prouvent, dira-t-on, une perversité qui est à craindre. On veut donc franchir les bornes de la justice pénale, poursuivre et punir la perversité en général, sous le prétexte d'une acte qui n'a produit aucun mal matériel, pas même une danger, une alarme raisonnable? Dès lors, il y aurait plus de raison encore à punir les hommes notoirement vicieux et livrés à de funestes habitudes. Ils sont plus à craindre qu'une espèce de fou qui essaie une fois de faire un acte impossible. An analagous rule is laid down in forgery. *Infra*, § 695.

and therefore, a boy under fourteen cannot, according to the prevalent opinion, be convicted of an attempt to commit a rape, as principal, in the first degree.¹ It is otherwise when the incapacity is merely nervous or physical. A man may fail in consummating a rape from some nervous or physical incapacity intervening between attempt and execution. But this failure would be no defence to the indictment for the attempt. At the same time there must be *apparent* capacity.²

§ 185. That capability of success is essential to an attempt has been proclaimed by high English authority,³ Lord Chief Justice Cockburn saying "that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged." This limitation, however, has already been shown to be erroneous, it being clear that apparent adaptation may constitute the attempt.⁴ And in conflict with the above expressions of Chief Justice Cockburn is a subsequent case, in which the same court held that an attempt to produce miscarriage can exist when the attempt was made on a woman not pregnant.⁵ Certainly an attempt to suborn a witness would be indictable, though such witness was of a character so high as to make success impossible, or though the witness was incompetent.⁶ And so has it been ruled expressly that the taking a null false oath before an incompetent officer is an indictable attempt,⁷ and that it is no defence to an in-

¹ *Infra*, § 551; *R. v. Eldershaw*, 3 C. & P. 396; *R. v. Philips*, 8 C. & P. 736; *State v. Handy*, 4 Harring. 566. See, however, *Com. v. Green*, 2 Pick. 380; *People v. Randolph*, 2 Parker C. R. 213; *Williams v. State*, 14 Ohio, 222; *Smith v. State*, 12 Oh. St. 466. And see *supra*, §§ 69, 175; *infra*, § 551.

² *Infra*, § 554; *State v. Elick*, 7 Jones N. C. 68; *Lewis v. State*, 35 Ala. 380. See *Kunkle v. State*, 32 Ind. 220; *State v. Swails*, 3 Ind. 524; *supra*, § 182; *infra*, §§ 501, 606.

³ *R. v. Collins*, L. & C. 471.

⁴ *Supra*, § 182.

⁵ *Infra*, § 596; *R. v. Goodall*, 2 Cox C.

C. 40; S. C. 1 Den. C. C. 187, and under name *R. v. Goodchild*, 2 Car. & K. 293. See, to same effect, *Com. v. Taylor*, 132 Mass. 261; *Wilson v. State*, 2 Ohio St. 319; *State v. Howard*, 32 Vt. 380; *State v. Fitzgerald*, 49 Iowa, 260; though see *Com. v. Wood*, 11 Gray, 85.

⁶ *Infra*, §§ 1254, 1271.

⁷ *Infra*, § 1328.

In New York, on the trial of an indictment under the statute for an attempt to commit arson, it was shown that the prisoner solicited one K. to set fire to a barn, and gave him materials for the purpose. This was held sufficient to warrant a conviction, though the pris-

dictment for mailing drugs with the intent of producing abortion, that the drugs were harmless.¹ It has also been held that destroying a ship with intent to defraud the insurers is indictable, though the vessel was not insured.² And in forgery, which is in the nature of an attempt, absolute potency in the forged instrument is not necessary to sustain the indictment. It is enough if there is a possibility of fraud.³ If there be no possibility of success, and this was at the time known to the party attempting, it has been argued that no indictment lies.⁴ Yet this is not an absolute principle. A man may throw himself, from sense of duty, right or wrong, into an unlawful enterprise, which he knows must fail; but which does not cease to be indictable, because it never ceased to be desperate.

§ 186. We turn next from the actor to the object in view, and take up the question whether it is essential to an attempt that the object really exists.⁵ In England, in 1846, in a case just noticed, it was held that it was error to convict of an attempt to steal from the pocket, without proof that there was something in the pocket to steal;⁶ but this decision is not in accordance with the line of American authority,⁷ nor with the reason of the thing, for the offence is not private simply, against merely the person whose goods are imperilled; but public, indictable as a scandal and breach of public peace, irrespective of the question of personal loss. Independently of this consideration who can say

Must be probable object within reach.

oner did not mean to be present at the commission of the offence, and K. never intended to commit it; *People v. Bush*, 4 Hill, N. Y. 133. The New York statute, however, goes beyond those of England and Pennsylvania in incorporating the words: "and in such attempt shall do any act toward the commission of such offence." See criticism in *Stabler v. Com.*, 95 Penn. St. 318.

¹ *Infra*, § 1831. See *State v. Fitzgerald*, 49 Iowa, 260.

² *U. S. v. Cole*, 5 McLean, 513. That it is no defence to an assault to commit rape on a child, that the child was put in a position in which rape was impossible; see *Com. v. Shaw*, 134 Mass. 221, cited *infra*, § 576. As to analogous

rulings in forgery, see *infra*, §§ 680-696.

³ *Infra*, § 695.

⁴ See *R. v. Edwards*, 6 C. & P. 515.

⁵ See *supra*, § 136.

⁶ *R. v. Collins*, L. & C. 471.

Sir J. P. Stephen, Dig. C. L. art. 49, argues that in such case there is an assault with intent to commit a felony.

As to attempts to steal, see *R. v. Sutton*, 2 Moody, 29; 8 C. & P. 291; *R. v. Cheeseman*, L. & C. 140; 9 Cox C. C. 100; *State v. Beal*, 37 Ohio St. 108; *Wolf v. State*, 41 Ala. 412; *State v. Utley*, 82 N. C. 556.

⁷ *Com. v. McDonald*, 5 Cush. 365; *State v. Wilson*, 30 Conn. 500; *Rogers v. Com.*, 5 S. & R. 463; *Hamilton v. State*, 36 Ind. 280.

that the object of the thief was *exclusively* to take one particular article? If the pleading indeed, so put it to the court, as was the case in *R. v. Collins*,¹ and if it appear that the object thus stated is wanting, then this argument fails; but in ordinary cases, when a thief attempts to go to a place to steal, then the presumption is that if he cannot get the object primarily in view, he will content himself with another. This presumption was invoked in a German case, in which the assumption was that the object the thieves had in view, in an attempted entrance in a building, was some grain they believed to be stored there, which grain had been previously removed. It was held, however, that the attempt was to *steal*, and that when there is such an attempt the thief would look forward to taking whatever he could get.²

But more difficult questions arise when the object is absolutely non-existent. Suppose a man takes aim at a shadow or a tree, imagining it to be an enemy. The guilty intent here exists; but is there such an overt act as to make up an attempt? According to the definition of attempt heretofore given (a deliberate crime which is begun, but through circumstances independent of the will of the actor is left unfinished), we must answer this question in the nega-

¹ See *R. v. M'Pherson*, Dears. & B. C. C. 197, where the prisoner was indicted for breaking and entering a dwelling-house and stealing therein certain goods specified in the indictment. It appeared that at the time the house was being broken into the goods specified were not in the house, but there were other goods there belonging to the prosecutor. The jury found the prisoner guilty of breaking and entering the dwelling-house and attempting to steal the goods therein. But the Court of Criminal Appeal held that the conviction could not be supported. Cockburn, C. J., said: "I think attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged. Here

the attempt never could have succeeded, as the goods which the indictment charges the prisoner with stealing had been removed." Compare *R. v. Collins*, L. & C. 471; *Roscoe's Cr. Ev.* § 364; *People v. Jones*, 46 Mich. 441. In *State v. Beale*, 37 Ohio St. 108, the question in the text was discussed, and it was held that an indictment for burglary with intent to steal from a safe could not be defeated by proof that the safe was not used as a place of deposit for valuables. The distinction taken in *M'Pherson's Case* was disapproved. See *infra*, § 820.

² See Schwarze, *ut supra*; and see remarks of Coleridge, J., in *R. v. Clarke*, 1 C. & K. 421, as sanctioning this; and *Spears v. State*, 2 Ohio St. 585; *Hamilton v. State*, 36 Ind. 280, and cases cited *infra*, § 820.

tive.¹ To shoot at a shadow or a tree is not an indictable offence, unless under circumstances disturbing public peace.²

This reasoning, however, does not apply where there is an actual injury attempted to the person or property of another, though, from circumstances exterior to the actor's will, this injury does not produce its immediately contemplated result. Thus, as has been seen, an attempt at miscarriage may be proved, though it turns out the woman was not actually pregnant;³ and so, no doubt, an attempt at forgery could be sustained, although the forged paper attempted to be made could not by any possibility defraud.⁴ And so, if the shooting be at a shadow sufficiently near another person as to put the latter in peril; or if the shooting be at an empty carriage, the offender supposing it to be occupied, then the attempt is made out, on the ground that it is a misdemeanor to shoot into any place usually frequented by human beings.⁵ It need scarcely be added that where a person shoots at a crowd generally, intending to hurt any one who may be hit, he may be indicted for an attempt to hurt A.,

¹ See *R. v. Lovel*, 2 M. & R. 39, cited *supra*, § 182. See *supra*, §§ 107-111.

In *R. v. M'Pherson*, D. & B. 201, Bramwell, B., argued that if A. mistakes a log of wood for B., and intending to murder B. strikes the log with an axe, this is not an attempt to murder B. This is adopted by Sir J. F. Stephen. Dig. Cr. Law, art. 49. But how if A. had shot at the log. See, for criticisms on the conclusions in the text, *Cent. Law Jour.* July 18, 1879.

² An analogy may be found in cases of forgery, which ceases to be indictable when the person whose paper is forged is absolutely and notoriously non-existent. *Infra*, §§ 693-696.

Lady Eldon, when travelling with her husband on the Continent, bought what she supposed to be a quantity of French lace, which she hid, concealing it from Lord Eldon in one of the pockets of the coach. The package was brought to light by a custom officer at Dover.

The lace turned out to be an English manufactured article, of little value, but of course not subject to duty. Lady Eldon had bought it at a price vastly above its value, believing it to be genuine, intending to smuggle it into England. Here was an attempt to smuggle, though the object was one not susceptible of being smuggled.

In *Res. v. Malin*, 1 Dall. 33 (*infra*, § 1802), it was held that it was not treason when a subject, who starts to join the enemy, joins by mistake a troop of his own country. Though treason is in the nature of attempt, the statute makes an actual adhering to an enemy essential.

³ *R. v. Goodall*, 2 Cox C. C. 40; 1 Den. C. C. 187; 2 C. & K. 293; *Com. v. Taylor*, 132 Mass. 261. See 2 Steph. Hist. Cr. L. 225.

⁴ *R. v. Nash*, 2 Den. C. C. 493; *R. v. Dodd*, 18 Law Times, N. S. 89.

⁵ See *supra*, § 120; *infra*, §§ 319, 820.

one of the crowd.¹ So where A. shoots at B., mistaking him for C., if there is an actual assault on B., though under a mistake as to who he is, A. may be indicted for attempting to kill B.,² or for wounding B. with intent to kill.³

§ 187. Of abandoned attempts we have, in our criminal practice, few illustrations, unless it be in cases of attempts at treason, of which the English state trials give instances, where the defence was that the defendant withdrew from the traitorous conspiracy before an overt act. This defence, however, has been more than once overruled, for though it constitutes an appeal to clemency, it is no defence to the charge of traitorous combination.⁴

The true line of distinction is this: If an attempt be voluntarily and freely abandoned before the act is put in process of final execution, there being no outside cause prompting such abandonment, then this is a defence; but it is otherwise when the process of execution is in such a condition that it proceeds in its natural course, without the attemptor's agency, until it either succeeds or miscarries.⁵ In such a case, no

Abandoned attempts not indictable.

¹ R. v. Fretwell, L. & C. 443; 9 Cox C. C. 471. See *supra*, § 111; *infra*, § 319.

² R. v. Holt, 7 C. & P. 518. See R. v. Lallament, 6 Cox C. C. 204. See *infra*, §§ 317, 318, and particularly *supra*, §§ 107-111.

An interesting question arises whether an indictment lies when capability of success depends upon the intervention of an independent third person. "In R. v. Williams, 1 Den. C. C. 39, the prisoner was indicted under the last mentioned section for attempting to administer poison. It appeared that he had delivered poison to V., and desired him to put it into B.'s beer; V. delivered the poison to B. and told him what had passed. It was held that the prisoner could not be convicted on this indictment. But *quære* if this is not an attempt indictable at common law. See the case of R. v. Higgins, *supra*." Roscoe's Cr. Ev. 303. R. v. Williams is approved in Stabler

v. Com., 95 Penn. St. 318. The difficulty in such case, at common law, would be removed by averring the attempt to be to induce such third person to administer poison.

³ *Supra*, §§ 107, 120; *infra*, §§ 641, 645 a.

⁴ Stephens v. Myers, 4 C. & P. 349; 1 Hale, 618; though see R. v. Mulcahy, L. R. 3 H. L. Ap. 317; R. v. McCann, 28 Up. Can. Q. B. 516; Goff v. Prime, 26 Ind. 196. *Infra*, § 228.

⁵ State v. Allen, 47 Conn. 121; State v. McDaniel, Winst. 249; Lewis v. State, 35 Ala. 380; State v. Hayes, 78 Mo. 307. See *infra*, § 214. See, also, State v. Elick, 7 Jones, N. C. 68; Pinkard v. State, 30 Ga. 757, and other cases cited *infra*, §§ 576 *et seq.*

In the issue of voluntariness we may consider the following contingencies:—

Suppose that a burglar finds that the window he expected to enter has been blocked up during the night. Or suppose, as was the case in one of the

abandonment of the attempt, and no withdrawal from its superintendence, can screen the guilty party from the results.¹

But how, if in addition to abandoning the attempt, the guilty party takes means to cause it to effectually miscarry, as when he

attempts on the life of William III., the assassins, as they approach, see in the distance a regiment of cavalry encircling their intended victim. Or suppose that the pickpocket, just as he is inserting his hand, is arrested by a police officer. No one would doubt that in all these cases the consummation of the offence was hindered by causes outside of the will of the offender. He was physically prevented from effecting the purpose. He could not have penetrated the wall, or broken through the line of cavalry, or picked the pocket when in the policeman's grasp.

But a much more difficult question arises when the attempt is not *physically* interrupted by extraneous conditions, but where these conditions are such as to induce the offender to withdraw. Suppose that instead of finding the window walled up he sees some slight disarrangement in the premises which leads him to suspect that he is watched. Suppose that instead of seeing the line of cavalry in his way, he finds a change has taken place in the appointments of the palace, from which he infers that the plot has been discovered. Suppose that instead of being caught by the policeman he sees somebody in the distance, a good deal like a detective, curiously inspecting him. Certainly we cannot consider his withdrawal under such circumstances voluntary. And so speak the cases cited.

But suppose the hindrance which caused the offender to back out was imaginary. It was not a cause outside of himself. It was a cause inside of himself. Here, again, we are entangled

in a metaphysical discussion. Are what we see in any case real existences, or can our impressions of them be at the utmost anything more than mirrors within ourselves? But if all abandonment is voluntary when produced by impressions within ourselves, there can be no involuntary abandonments, since there are no abandonments not so produced. Such is the reply we may make, taking even the most realistic metaphysical theorists as our guides, to those who argue that an unreal impression of danger is not an effective condition. It is enough, however, to say that as in other cases (*e. g.*, self-defence) unreal impressions are regarded as effective conditions, they may be so regarded in this case.

¹ See R. v. Taylor, 1 F. & F. 511; R. v. Sharpe, 3 Cox C. C. 288; Com. v. Tobin, 108 Mass. 426; State v. Blair, 13 Rich. 93. Thus in treason, which is a high grade of attempt, where the attempt is frustrated by extraneous interruption, then such frustration is no defence. U. S. v. Pryor, 3 Wash. C. C. 234. But in such case (*e. g.*, an abortive attempt to communicate intelligence, or to furnish supplies to an enemy) the proper course is to indict for the attempt. But see *contra*, U. S. v. Pryor, *supra*, in which it was held that such attempt was treason; compare R. v. Hensey, 2 Ld. Kenyon, 366; 1 Burr. 642; and see *infra*, § 225. So an attempt to commit rape may be abandoned after the first approach, yet nevertheless such attempt is indictable. See Lewis v. State, 35 Ala. 380, cited *infra*, and see, also, *infra*, § 576 a.

informs a person to whom a poisoned dish has been sent that the dish is poisoned; and the mischief is stopped? Here, so far as concerns the actor, the attempt is abandoned before it has been virtually put in process of final execution; and hence this abandonment is a defence.¹ The offender has retreated in such a way as to render it impossible for evil consequences to ensue.

For the doctrine that abandonment of an attempt not yet put in process of final execution is a defence, two reasons are given.² First, the character of an attempt is lost when its execution is voluntarily abandoned. There is no conceivable overt act to which the abandoned purpose could be attached. Secondly, the policy of the law requires that the offender, so long as he is capable of arresting an evil plan, should be encouraged to do so, by saving him harmless in case of such retreat before it is possible for any evil consequences to ensue. Neither society, nor any private person, has been injured by his act. There is no damage, therefore, to redress. To punish him after retreat and abandonment, would be to destroy the motive for retreat and abandonment.³

It is to be noticed, however, that as the *attempt* is only provable by some overt act, so the *abandonment* of the attempt cannot be proved by mere conjectural tests or by declarations of mental change. As declaring an intention to do a thing is not an indictable attempt, so declaring an intention to give up an attempt is not an abandonment of the attempt. If it were otherwise, criminal attempts, especially political, would cease to be indictable, for there are few cases in which such criminal attempts, when in process of execution, are not disavowed. There must be substantive acts showing that the abandonment was real, just as there must be substantive acts showing the attempt was real.

It should be remembered, also, that if such abandonment is caused by fear of detection it is no defence, if the attempt progress

¹ See 1 Hale, 618; Goff v. Prime, 26 Ind. 196.

² Berner, Lehrbuch d. Strafrechts, p. 176. As to assaults, see *infra*, § 605.

³ The Roman law strikes at the same distinction: Gloss. ad L. 67. D. de furt. (47, 2.) Si processum est ad actum: si quidem consummatum est et perfectum, non potest postea poe-

nitere ut evitet poenam. Si autem actum non consummatum est nec perfectum: si quidem quia noluit, sed potuit, licet poenitere, et non incidit in poenam. See, also, Seneca Agamem. v. 242 sq. Nam sera nunquam est ad bonos mores via: Quem poenitet peccasse, paene est innocens. See *infra*, § 225.

sufficiently towards execution to be *per se* indictable before such abandonment. Thus if a thief, when moving his hand towards a pocket, desists on seeing a detective, the offence is made out. To the same effect, perhaps, may be cited two American decisions, in which attempts at rape, abandoned before consummation, were held indictable.¹ It is true that it may be observed that in these cases the offence of felonious assault was complete, prior to the period of abandonment. More exactly illustrative of the principle is an English case tried before Chief Baron Pollock, in which it appeared that the defendant, having lighted a lucifer match to set fire to a stack, desisted on discovering he was watched. It was held, and properly, that this abandonment of purpose was no defence.² It must also be remembered that if an attempt—*e. g.*, an assault—is frustrated by force, such frustration is no defence.³

§ 188. Where the attempt is resisted at first, but the consummation of the crime is assented to, the offender may be indicted for the attempt. In rape and robbery we can conceive of cases of this class. A man assaults a woman with intent to ravish. She resists; but ultimately yields. Here, if his intention was to use force to the end, he is

When attempt is resisted it may be independently tried, though

¹ Lewis v. State, 35 Ala. 380; State v. Elick, 7 Jones N. C. 68. See, also, State v. McDaniel, 1 Winston, 249. And see, as qualifying above, Kelly v. Com., 1 Grant (Penn.), 484. See *infra*, § 779.

² R. v. Taylor, 1 F. & F. 511. See *supra*, § 181.

³ Stephen v. Myers, 4 C. & P. 349. *Infra*, § 604.

In an Upper Canada prosecution for an attempt to commit burglary, it was proved that two defendants agreed to commit the offence on a certain night, together with C., who, however, was detained at home by his father who suspected the design. The defendants were seen about midnight entering a gate fifty feet from the house; they came towards the house to a picket fence in front, in which there was a

small gate, but there was no proof that they came nearer the house than twelve or thirteen feet, nor did they pass the picket gate. They went, as it was supposed, to the rear of the house, and were not seen afterwards. It was held by the Queen's Bench that there was not sufficient establishment of a persistence in the attempt to justify a conviction, the attempt appearing to have been voluntarily abandoned before any mischief was done. It was added, however, that if it appeared that such abandonment was not voluntary, but caused by surprise and interruption from others, and that but for such surprise and interruption they would have carried out their burglarious design, there was ground for a conviction. R. v. McCann, 28 Up. Can. Q. B. 517.

consummation is yielded to. indictable for the attempt,¹ though it is otherwise where he did not intend to use force.²

§ 189. Where the attempt is acquiesced in by the party injured, through fraud or incapacity, the acquiescence does not bar the prosecution.³

Acquiescence through fraud or incapacity no bar.

It is clear that when the person injured is incapable of giving assent, such assent cannot be set up as a defence.⁴

II. INDICTMENTS.

§ 190. In indictments for attempts the laxity permitted in assaults will not be maintained. No doubt it is enough to charge that A. did "make an assault" on B. But the reason is that "assault" is a term which describes an act easily defined; which asserts a consummated offence; and which is always indictable, no matter in what sense the term may be used. But "attempt" is a term peculiarly indefinite. It has no prescribed legal meaning. It relates from its nature to an unconsummated offence. It covers acts some of which are indictable and some of which are not.

§ 191. Nor do decisions under statutes rule the question at common law. It is within the power of the English parliament, and, as it has frequently been ruled,⁵ of the legislatures of our American States, to pass statutes declaring a particular act to be indictable, and providing that it shall be enough to describe such act in the statutory terms. When this is done by direction or implication, it is proper for the courts to hold, as has been done, that an indictment, charging that the defendant did "attempt" to feloniously steal from the house of A. B.,⁶ or "to commit a rape" on A. B.,⁷ is good. But this does not touch the question at common law.

¹ See *infra*, § 577; *State v. Hartigan*, 32 Vt. 607. For other cases see *supra*, § 141.

² *Ibid.*; *Taylor v. State*, 50 Ga. 79.

³ See *supra*, § 146. That the attempt may be indicted even though the woman after first resisting ultimately yields, see *People v. Bransby*, 32 N. Y.

525; *State v. Cross*, 12 Iowa, 66; *infra*, §§ 558, 577.

⁴ *R. v. Mayers*, 12 Cox C. C. 311.

Supra, § 146.

⁵ See Whart. Cr. Pl. & Pr. § 90.

⁶ *R. v. Johnson*, 1 L. & C. 489.

⁷ See *Lewis v. State*, 35 Ala. 380.

§ 192. At common law such facts must be set forth as show that the attempt is criminal in itself.¹ Attempts may be merely in conception, or in preparation, with no causal connection between the attempt and any particular crime; in which case, as has been seen, such attempts are not cognizable by the penal law. On the other hand, when an attempt stands in such connection with a projected, deliberate crime, that the crime, according to the usual and likely course of events, will follow from the attempt, then the attempt is an offence for which an indictment lies. Now it is a familiar principle of criminal pleading, that when an act is only indictable under certain conditions, then these conditions must be stated in the indictment in order to show that the act is indictable. Nor does it make any difference that the offence is made so by statute.² Thus statutes make indictable revolts and obtaining goods by false pretences; yet an indictment, charging simply that the defendant "made a revolt," or "obtained goods under false pretences," would be scouted out of court.³ On the same reasoning, in an indictment for an attempt to commit a crime, it is essential to aver that the defendant did some act, which, directed by a particular intent, to be averred, would have apparently resulted, in the ordinary and likely course of things, in a particular crime.⁴

Indictment must aver circumstances of attempts.

¹ Cumulation of incidents in this relation does not vitiate. *State v. Hayes*, 78 Mo. 243; *State v. Thomas*, 63 Cal. 544.

² Whart. Cr. Pl. & Pr. § 151.

³ *Ibid.* §§ 151-2. *Infra*, § 1227.

⁴ See, as sustaining the conclusions of the text, *R. v. Marsh*, 1 Den. C. C. 505; *R. v. Powles*, 4 C. & P. 571; *U. S. v. Ulrich*, 3 Dillon, 532; *State v. Wilson*, 30 Conn. 500; *Randolph v. Com.*, 6 S. & R. 398; *Mears v. Com.*, 2 Grant, 385; *Clark's Case*, 6 Grat. 675; *Thompson v. People*, 96 Ill. 158; *State v. Brannan*, 3 Nev. 238; *State v. Colvin*, 90 N. C. 190; *Anthony v. State*, 29 Ala. 27; *Beasley v. State*, 18 Ala. 535; *Trexler v. State*, 19 Ala. 21; *Lewis v. State*, 35 Ala. 380 (under a special statute); *State v. Johnston*, 11 Tex. 22.

The question, it should be remembered, depends largely on the construction of the statute. In Massachusetts, it is not necessary, in an indictment for an attempt to commit a crime, within the Rev. Stat. c. 133, § 12, that it should be directly charged that the act attempted was a crime punishable by law, provided it appear to be so from the facts alleged. In an indictment for an attempt to burn a building, it is not necessary to describe the combustible materials used for the purpose. *Com. v. Flynn*, 3 Cush. 529. See *Com. v. McDonald*, 5 Cush. 365; *Com. v. Sherman*, 105 Mass. 169. An indictment has been sustained which

§ 193. The cumulation of facts, therefore, to show the criminal character of the intent, is not duplicity. Thus a Massachusetts indictment under Rev. Stat. 133, § 12, is not bad for duplicity, when, besides setting forth an "attempt" to set fire to a building, it avers a breaking and

Cumulation of facts not duplicity.

charged that the defendant, with intent to steal the personal property of a certain woman, the property "being in her pocket and on her person," did "thrust, insert, put, and place his hand upon the dress, near and into the pocket of the said woman, without her knowledge, and against her will," etc. *Com. v. Bonner*, 97 Mass. 587. And the Supreme Court of the United States (*U. S. v. Simmons*, 96 U. S. § 360) has held that in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in its commission, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance. *Harlan, J.*, citing *Whart. C. L.* 7th ed. § 292; *U. S. v. Gooding*, 12 Wheat. 460; *U. S. v. Ulrick*, 3 Dillon, 535. See, to same effect, *State v. Dent*, 3 Gill & J. 8.

In Virginia, an indictment simply averring that the defendant "did attempt feloniously to maim," etc., *C. R.*, was held to be not sufficiently precise. *Clark's Case*, 6 Grat. 675. The indictment "should allege," said Leigh, J., "some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment." See *Ridenour v. State*, 38 Ohio St. 292, cited *infra*, § 582. In Pennsylvania, the same rule exists in reference to common law indictments for attempts. *Randolph v. Com.*, 6 S. & R. 398. In the same State, an indictment charging that S. A., on, etc., "in the night-time of the said day aforesaid, at, etc., did attempt to commit an offence prohibited by law, to wit,

with force and arms, with an axe, etc., with a wicked intent on the dwelling-house of D. H., etc., in the night-time, feloniously and burglariously did break and enter, and with the intent with the said axe to open and enter," etc., and steal, "but said S. H. did then and there fail in the perpetration of said offence," was held good as an indictment for an attempt to commit burglary at common law. *Hackett v. Com.*, 15 Penn. St. 95. But see *Mears v. Com.*, 2 Grant, 385.

In England an indictment stated that the prisoner "did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain from the Agricultural Cattle Insurance Company a large sum of money, to wit, the sum of £22 10s., with intent thereby then and there to cheat and defraud the said company," etc. It was held: 1st. That the nature of the attempt was not sufficiently set forth; 2d. That the indictment did not contain facts amounting to a statement of a misdemeanor, as the money was not laid to be the property of any one. *R. v. Marsh*, 1 Den. C. C. 505. See, also, *R. v. Cartwright*, R. & R. 106.

It is enough in England to charge that the defendant "the goods and chattels of C. D., in the dwelling-house of the said C. D., situate in the borough of B., did attempt feloniously to steal, take, and carry away." *R. v. Johnson*, 1 L. & C. 489. See *R. v. Bullock*, Dears. 653; *R. v. Marsh*, 1 Den. C. C. 505; 3 Cox C. C. 570. So also in New York and North Carolina. *People v. Bush*, 4 Hill, 133; *State v.*

entering of the building.¹ Hence the attempt may be alleged to be to commit more offences than one.²

III. JURISDICTION.

§ 195. The question of jurisdiction, when an attempt is pursued through two or more distinct sovereignties, is elsewhere discussed.³

It is clear that such attempt is cognizable in the place where, it not interrupted, it would have been executed:⁴ and from the very nature of things, it must be cognizable in the place where the preliminary overt acts constituting the attempt are committed.⁵

Attempts cognizable in place of consummation.

IV. EVIDENCE.

§ 196. As in consummated crimes the intent, which is here essential, may be inferred by the jury from facts.⁶ Thus when an indictment alleges that a party attempted to set fire to a dwelling-house, with intent to burn it, by attempting to set fire to another building, the jury are authorized to infer the alleged intent from the evidence of the attempt to set fire to the other building.⁷ It has been ruled, however, where a⁸ prisoner burned a hole in the guard-house where he was confined, in order to escape, and with no intent to consume or generally injure the building, that this was not an attempt to burn the house.⁹ And it is settled that there can be no conviction of an attempt to murder, unless an intent to kill be specifically shown.¹⁰

Intent to be inferred from facts.

Utley, 82 N. C. 556. And so in Missouri. *State v. Hughes*, 76 Mo. 323. *Contra*, *State v. Wilson*, 30 Conn. 500; *Clark's Case*, 6 Grat. 675. In *State v. Womack*, 31 La. An. 635, it was held not enough to aver that the defendant "attempted" to commit a larceny.

¹ *Com. v. Harney*, 10 Met. 422.

² *Ibid.*; *R. v. Fuller*, 1 B. & P. 180.

³ See *infra*, § 288.

⁴ *R. v. Collins*, L. & C. 471; 9 Cox C. C. 497.

⁵ *Griffin v. People*, 26 Ga. 493.

⁶ See *supra*, § 176; *R. Howlett*, 7 C.

& P. 274; *R. v. Jones*, 9 C. & P. 258; *People v. Scott*, 6 Mich. 287.

⁷ *Com. v. Harney*, 10 Met. 422.

⁸ *Jenkins v. State*, 53 Ga. 33.

⁹ But see *Luke v. State*, 49 Ala. 30.

¹⁰ *State v. Neal*, 37 Me. 468; *Reed v. Com.*, 22 Grat. 924; *Seitz v. State*, 23 Ala. 42; *Simpson v. State*, 59 Ala. 1; *Morman v. State*, 24 Miss. 54; *State v. Stewart*, 29 Mo. 519; *Wilson v. State*, 4 Tex. Ap. 637; *infra*, § 641. This point is further illustrated under the statutes making specific intents necessary to murder in the first degree, *infra*, § 384.

Whether when the intention is to hurt B., and the hurt falls on C., the defendant is indictable for an attempt to hurt C., has been already incidentally noticed.¹ But whatever may be said on this difficult question, we may regard it as settled, that when the indictment avers an attempt to do a particular act, there is a fatal variance if the act proved does not logically fall within the range of the act laid.²

Adaptation makes a *prima facie* case.

§ 197. If the instrument by which an attempt is effected is apparently adapted to the end (*e. g.*, a gun to shooting), this is a sufficient *prima facie* case. The defendant must prove that the gun was not loaded and known not to be so.³

V. PRINCIPALS AND ACCESSARIES.

§ 198. All confederates in the attempt, whether present or absent at the overt acts, are responsible as principals, when the attempt is a misdemeanor.⁴

Hence an averment that three joint defendants, in an indictment for an attempt at larceny, "put their hands" into the prosecutor's pocket, may be sustained by evidence that while all participated in the act, only one put his hand in the pocket.⁵

If the attempt is a felony, co-defendants are responsible according to the laws of principal and accessory.⁶

VI. VERDICT.

§ 199. The topic of verdict, in cases where an assault or attempt is proved on an indictment for a greater offence (*e. g.*, felony), is elsewhere noticed.⁷ It may now be specially stated, that while by the old common law there can be technically no conviction of an attempt on a count for felony, this power is given to juries in many jurisdictions by statute.⁸ But unless the *attempt* be averred in the

At common law no verdict of an attempt on an indictment for completed crimes.

¹ *Supra*, §§ 109-120. *Infra*, § 645 a. ⁴ *R. v. Wyatt*, 39 L. J., M. C. 83; *R. v. Sullivan*, C. & M. 209; *R. v. Kelly*, 1 C. & Dix, 186; *R. v. Mogg*, 4 C. & P. 364; *State v. Boyden*, 13 Ired. 505; *Ogletree v. State*, 28 Ala. 693; *People v. Woody*, 48 Cal. 80. ⁵ *Caldwell v. State*, 5 Texas, 18. ⁶ *Supra*, § 182. ⁷ *R. v. Hapgood*, L. R. 1 C. C. 221; *Uhl v. Com.*, 6 Grat. 706. *Infra*, § 223. ⁸ *Com. v. Fortune*, 105 Mass. 592. ⁹ See *R. v. Hapgood*, L. R. 1 C. C. 221; *Collins v. State*, 3 Heisk. 14. ¹⁰ Whart. Cr. Pl. & Pr. § 261. ¹¹ Whart. Cr. Pl. & Ev. §§ 249-50,

in the indictment, there can be no conviction of the attempt on statutes which simply give power to convict of minor offences included in major.¹

It has been held in England, that under an indictment charging H. with rape, and U. with aiding and abetting, H. could be convicted under the stat. 32 & 33 Vict. c. 29 of attempting to commit the rape, and U. of aiding him in the attempt.²

Whether an attempt merges in a consummated crime is hereafter considered.³

VII. PUNISHMENT OF ATTEMPT.

§ 200. For the reasons heretofore given, the punishment of an attempt should be less than that of the consummated crime. The attempt involves neither the duration of premeditation, nor the obduracy of purpose, which belong to the crime when complete. And the policy of the law is, by assigning more lenient punishment to the incomplete offence, to arrest offences in the process of completion. This view, so long neglected in English law, and which English and American judges, acting on what is called the preventive policy, even now sometimes lose sight of,⁴ is essential to a sound ethical jurisprudence.⁵

Punishment should be less than that of consummated crime.

465-7. So in N. Y. by Penal Code of 1882, § 36. See *R. v. Bird*, 2 Den. C. C. 94; *R. v. Reid*, 2 Den. C. C. 89; *State v. Wilson*, 30 Conn. 500; *Hill v. State*, 53 Ga. 125; *Wolf v. State*, 41 Ala. 412. ² *R. v. Hapgood*, L. R. 1 C. C. 221. ³ *Infra*, §§ 641 a, 1345. In New York by the Penal Code of 1882, there is no acquittal from merger of attempt, § 685. ⁴ *Supra*, § 10. ⁵ See Geib, *ut supra*, § 99.

¹ Whart. Cr. Pl. & Pr. §§ 249-50.

CHAPTER IX.

ACCESSARYSHIP, AGENCY, MISPRISION.

I. STATUTORY CHANGES.

Common law recently modified by statutes, § 205.

II. PRINCIPALS.

Principal in first degree is actual perpetrator, § 206.

Presence is not necessary when causal connection is immediate, *e. g.*, when agent is irresponsible, § 207.

Accessory before the fact cannot be convicted as principal, § 208.

Non-resident party may be liable for agent's acts, § 209.

Wife not ordinarily co-principal with husband, § 210.

Principals in the second degree are those present aiding and abetting, § 211.

Mere presence does not involve complicity, § 211 *a*.

Capacity to execute not always essential, § 211 *b*.

Confederacy must be real, § 211 *c*.

Mere sympathy not confederacy, § 211 *d*.

If principal is irresponsible, indictment should not be for aiding and abetting, § 212.

Confederacy with constructive presence may constitute principal, § 213.

But act must result from confederacy, § 214.

In duels all are principals, § 215.

Persons abetting suicide are principals in murder, § 216.

Persons executing parts of crime separately are principals, § 217.

Persons outside keeping watch are principals, § 218.

An abettor must be near enough to give assistance, § 219.

Persons confederating for wrongful purpose are chargeable with incidental felony, § 220.

Distinction between two degrees only essential when punishment varies, § 221.

Conviction of principal in the first degree not a condition precedent to trial of principal in second degree, § 222.

In misdemeanors all are principals, § 223.

And so as to treason at common law, § 224.

III. ACCESSARIES BEFORE THE FACT.

Commanding and counselling constitute accessoryship before the fact, § 225.

Several instigators may be combined, § 225 *a*.

Must be causal connection, § 226.

Silent acquiescence is not counselling, § 227.

Countermanded advice does not implicate, § 228.

Accessory not liable for collateral crime, § 229.

Relative guilt of accessory and principal, § 230.

Assistance must be rendered knowingly and really, § 231.

Detectives not accessories, § 231 *a*.

May be accessory before the fact to manslaughter, § 232.

Accessory before the fact need not be originator, § 233.

Quantity of aid immaterial, § 234.

Conditions of time immaterial, § 235.

Grade of guilt not necessarily the same, § 236.

Conviction of principal no longer a prerequisite, § 237.

Indictment must particularize offence, § 238.

Verdict must specify grade, § 239.

Attempts, § 240.

IV. ACCESSARIES AFTER THE FACT.

An accessory after the fact is one who subsequently assists or comforts the felon, § 241.

Knowledge of principal's guilt is essential, § 242.

Wife is not so liable, § 243.

Conviction of principal *prima facie* evidence of guilt, § 244.

Indictment must be specific, § 245.

V. PRINCIPAL'S LIABILITY FOR AGENT.

Where the agent acts directly under principal's commands, principal liable, § 246.

So when agent is in line of principal's business, § 247.

Non-resident principal infra-territorially liable, § 248.

VI. MISPRISION.

Misprision of felony is concealment of felony, § 249.

I. STATUTORY CHANGES.

§ 205. By the English common law, whenever there is a statutory distinction of punishment between principals in the first and principals in the second degree, a party charged as principal in the first degree cannot be convicted on evidence showing him to be principal in the second degree.

Common law recently modified by statute.

By the same common law, there can be no conviction of an accessory on an indictment charging him as principal. The obstructions of justice caused by these subtleties have long been deplored; and while in several of the States of the American Union it is already provided by statute that accessories before the fact are to be proceeded against as principals;¹ in other States, and in England, the change will probably not be long delayed. So far as concerns principals in the first and principals in the second degree, the distinction is now almost universally obliterated.² In the present chapter, however, in view of those jurisdictions in which the common law in this relation remains, the topic will be discussed as at common law.

¹ In New York, by the Penal Code of 1882, § 30, accessories before the fact are made principals, while accessories after the fact include, in addition to the common law definition, one who harbors an offender having reasonable ground to believe such offender is liable to arrest, or has been arrested, is indicted or convicted, or has committed a felony. So in Kansas. *State v. Mosley*,

31 Kan. 355. And Alabama. *Wicks v. State*, 44 Ala. 398.

² According to Sir J. F. Stephen, "there was (by the old law) no distinction between principals and accessories in treason and misdemeanor, and the distinction in felony made little difference, because all alike, principals and accessories, were felons, and as such punishable with death." 2 Hist. Cr. L. 231.

II. PRINCIPALS.

Principal in first degree is actual perpetrator.

Presence not necessary when causal connection is immediate, *e. g.*, when agent is irresponsible.

§ 206. A principal in the first degree, at common law, is one who is the actual perpetrator of the criminal act.¹

§ 207. To constitute, however, this grade of offence, it is not necessary that the party should have committed the act with his own hands, or be actually present when the offence is consummated;² for, if one lay poison purposely for another, who takes it and is killed, he who lays the poison, though absent when it is taken, is a principal in the first degree.³ Such, also, is the case with a party who maliciously turns out a wild beast intending to kill any one whom the animal may attack.⁴ A party, also, who acts through the medium of an innocent⁵ or insane medium,⁶ or a slave,⁷ is guilty, though absent, as principal in the first degree;⁸ while he would be guilty only as accessory before the fact at common law were the agent a responsible and conscious confederate.⁹ Thus, in *Sir William Courtney's* case, Lord Denman, C. J., charged the jury: "You will say whether you find that Courtney was a dangerous and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and conferring in his acts; and if you do, you will find them guilty, for they are then liable as principals for what was

¹ 1 Hale, 233, 615; Stephen's Dig. art. 35; *Rountree v. State*, 10 Tex. Ap. 110; *Cook v. State*, 14 Ibid. 96.

² See *Pinkard v. State*, 30 Ga. 757; *Berry v. State*, 4 Tex. Ap. 492; *Byles v. State*, Ibid. 505; *Sharp v. State*, 6 Ibid. 650; *Smith v. State*, 37 Ark. 274. *Infra*, § 219.

³ *Vaux's Case*, 4 Co. 44b; Stephen's Dig. art. 35; *Fost.* 349; *R. v. Harley*, 4 C. & P. 369; *R. v. Kelly*, 2 C. & K. 379; *R. v. Holloway*, 2 Den. 287; *R. v. Williams*, 1 C. & K. 589; 1 Den. C. C. 39; *People v. Bush*, 4 Hill, 133. See *Pinkard v. State*, 30 Ga. 757; *Green v. State*, 13 Mo. 382; *Collins v. State*, 3 Heisk. 14.

⁴ *Fost.* 349; 1 Hale, 514.

⁵ *Supra*, § 161; *R. v. Mazeau*, 9 C. & P. 676; *R. v. Michael*, 9 C. & P. 356; *S. C.*, 2 Moody C. C. 163; *R. v. Clifford*, 2 C. & K. 201; *R. v. Bleasdale*, 2 C. & K. 764; *Com. v. Hill*, 11 Mass. 36; *People v. Peabody*, 25 Wend. 472; *Adams v. People*, 1 Comstock, 173; *Collins v. State*, 3 Heisk. 14; *State v. Fulkerson*, Phillips N. C. 233.

⁶ 1 Hale, 19; 4 Bla. Com. 23; *R. v. Giles*, 1 Moody C. C. 166; *R. v. Tyler*, 8 C. & P. 616; *Blackburn v. State*, 23 Ohio St. 146.

⁷ *Berry v. State*, 10 Ga. 511.

⁸ *Supra*, § 161.

⁹ *Infra*, § 280.

done by his hand."¹ If, therefore, a child under the age of discretion,² or any other person excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the incitor, though absent when the act was committed, is *ex necessitate* liable for the act of his agent, and a principal in the first degree.³ So if A., by letter, desire B., an innocent agent, to write the name of "W. S." to a receipt on a post-office order, and the innocent agent do it, believing that he is authorized so to do, A. is a principal in the forgery; and it makes no difference that by the letter A. says to B. that he is "at liberty" to sign the name of W. S., and does not in express words direct him to do so.⁴ But if the agent be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the act is committed, is an accessory before the fact.⁵

§ 208. At common law, one indicted as principal cannot be convicted on proof showing him to be only an accessory before the fact,⁶ nor the converse.⁷

§ 209. A non-resident party, though at the time an inhabitant of a foreign State, may be at common law responsible as principal for his agent's criminal acts not amounting to felonies, in a particular jurisdiction,⁸ while as to felonies he would be an accessory before the fact. And a party who, thirty miles off, and in another county,

Accessory before the fact cannot be convicted as principal.

Non-resident party may be liable for agent's acts.

¹ Hawk. c. 1, s. 7; *R. v. Mears*, 1 Boston Law Rep. 205.

² *State v. Learned*, 41 Vt. 585; *Blackburn v. State*, 23 Ohio St. 146.

³ *Fost.* 340; 1 East P. C. 118; 1 Hawk. c. 31, s. 7; *R. v. Palmer*, 1 N. R. 96; 2 Leach, 978; *R. v. Giles*, 1 Mood. C. C. 166; *R. v. Michael*, 2 Mood. C. C. 87; 9 C. & P. 356; *R. v. Manley*, 1 Cox C. C. 104; *Com. v. Hill*, 11 Mass. 36; *Collins v. State*, 3 Heisk. 14. *Supra*, § 161.

⁴ *R. v. Clifford*, 2 C. & K. 201. See, also, *R. v. Palmer*, 1 Russ. Cr. 53; *Stephen Cr. Law*, art. 36.

⁵ *R. v. Soares*, R. & R. 25; *R. v. Stewart*, R. & R. 363; *Wixon v. People*,

5 Park. C. R. 119; or, if he be present, a principal in the second degree. *Fost.* 349. See *R. v. Manley*, 1 Cox C. C. 104; *Montague v. State*, 17 Fla. 662.

⁶ *R. v. Fallon*, 9 Cox C. C. 242; *State v. Wyckoff*, 2 Vroom, 65; *Hughes v. State*, 12 Ala. 458; *Josephine v. State*, 39 Miss. 613; *Walrath v. State*, 8 Neb. 80. See for other cases *infra*, §§ 238-245.

⁷ 1 Leach, 515; 1 East P. C. 352; *R. v. Plant*, 7 C. & P. 575; *State v. Larkin*, 49 N. H. 39. See *State v. Dewar*, 65 N. C. 572; *Hately v. State*, 15 Ga. 346.

⁸ *Infra*, §§ 278-280.

signals to another, by fire on a mountain, when to commit a highway robbery, is principal in the robbery.¹

§ 210. If a husband and wife commit a murder jointly, they may be regarded, so it has been held, as co-principals, on the ground that the doctrine of presumed coercion does not apply to murder.² And so a wife may be convicted, it is said, as an accessory before the fact to the husband.³

But the weight of opinion is to require proof of independent consent on part of the wife.⁴

III. PRINCIPALS IN THE SECOND DEGREE.

§ 211. Principals in the second degree are those who are present aiding and abetting the commission of the offence. As has been elsewhere shown,⁵ the assistant (principal in the second degree) is distinguished from the principal in the first degree in this, that the latter *directs* the unlawful act, the former *assists* it; the action of the latter is primary, that of the former is subsidiary. Hence the principal in the first degree is spoken of by the old writers as *causa principalis*, while the principal in the second degree is spoken of as *causa secundaria*, or secondary cause. The principal in the second degree, or assistant, is distinguished from the accessory before the fact, not merely because the former is present, and the latter absent, at the commission of the offence, but because the accessory before the fact, or instigator, acts deliberately; and so, with premeditation, though it may be not so cool and long, does the principal in the first degree; while the idea of such extended premeditation is not necessary to the principal in the second degree, or assistant, who is not supposed, as is the instigator, to exercise an organizing influence on the principal in the first degree, and who may be employed or induced to assist the latter without any previous conception of what the criminal act is intended to be. But unless the distinction is imposed by statute, it has ceased to be of practical interest, since principals in the second degree may be convicted on indictments charging them in the first degree.⁶

¹ *State v. Hamilton*, 13 Nev. 386. *Smith*, 8 Cox C. C. 27; *R. v. Wardroper*, *Ibid.* 284.

² *R. v. Manning*, 2 C. & K. 887.

³ *Ibid.*

⁴ *Supra*, §§ 78 et seq. See *R. v.*

⁵ 9 Cent. L. J. 205.

⁶ *Infra*, § 221.

§ 211 a. Merely witnessing a crime, without intervention, does not make a person a party to its commission, unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator.¹ A person, for instance, in order to produce a collision on a railroad, starts a car on the top of a high grade. A switch-tender, appointed to watch and adjust a particular switch, could avoid a collision by turning the switch, but intentionally refuses to do so. In such case he is an assistant in the homicide, if a homicide ensue.² A watchman appointed to guard a bank sees burglars approach, and lets them pursue their work without interruption. By so doing he becomes assistant in the felony. But unless this abstention from interference removes a check which would otherwise prevent the commission of the crime, and is therefore equivalent to a positive act of assistance, the person so abstaining does not become a party to the crime. He may be indicted for his neglect in not assisting the officers of the law in arresting the offenders. But he is not indictable as concerned in the offence which the offender in question commits.³ Hence, although a man be present while a felony is com-

Presence does not involve complicity.

¹ *Infra*, § 214; 1 Hale P. C. 439; *Fost.* 350.

As to how far presence at a prize fight involves complicity, see *R. v. Orton*, and *R. v. Coney*, cited *infra*, § 372, and remarks in *London Law Times*, Dec. 17, 1881. That a woman assisting in a rape may be principal, see *infra*, § 553 a.

A distinction is taken between physical and intellectual help, the latter being supposed to be help purely in words, or signs of encouragement. It should be observed, however, that all physical help is intellectual. A participant in a fight, for instance, to take an extreme case, sees a weapon offered to him by a person who is invisible. Here is physical aid in its most naked shape, since the person offering the aid is not even seen. But it is at the same time

intellectual aid (or psychical, to take the German term), since it gives the combatant reason to believe that he has a friend near ready to see him through. It is encouragement as well as assistance. 9 Cent. L. J. 206; *U. S. v. Neverson*, 1 Mack. 152; *U. S. v. Jones*, 3 Wash. C. C. 209; *State v. Hildreth*, 5 Ired. 440; *State v. Farr*, 33 Iowa, 573; *Butler v. State*, 2 Duv. 435; *Jones v. State*, 64 Ga. 697; *Laurence v. State*, 68 Ga. 289; *Smith v. State*, 37 Ala. 472; *Coehe v. State*, 9 Tex. Ap. 173; *Hancock v. State*, 14 *Ibid.* 393; *People v. Woodward*, 45 Cal. 293.

² *Supra*, § 131; *infra*, § 348.

³ "It is no criminal offence to stand by a mere passive spectator of a crime, even of a murder." *Hawkins, J., R. v. Coney*, cited *infra*. See *Washington v. State*, 68 Ga. 570.

mitted, yet if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavor to prevent the felony or apprehend the felon.¹ Something must be shown in the conduct of the bystander, which indicates a design to encourage, incite, or in some manner afford aid or consent to the particular act; though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.² "Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental, it is evidence, but no more than evidence, for the jury."³ It is not necessary, therefore, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favor their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting.⁴

§ 211 b. Nor is it necessary that the principal in the second degree should be personally capable of committing the offence.⁵ Thus a person incapable of rape may be principal in the second degree to rape;⁶ an unmarried man

Capacity to execute not always essential.

¹ 1 Hale, 439; Post, 350; Connaughty v. State, 1 Wis. 169; Butler v. Com., 2 Duv. 435; Plummer v. Com., 1 Bush, 76; Hilmes v. Stroebel (Ky. 1884), 18 Rep. 126; People v. Ah Ping, 27 Cal. 469.

² R. v. Taylor, L. R. 2 C. C. 147; R. v. Cruse, 8 C. & P. 541; R. v. Atkinson, 11 Cox C. C. 330; King v. State, 21 Ga. 220; Wright v. State, 42 Ark. 94. See White v. People, 81 Ill. 333; Clem v. State, 33 Ind. 418; State v. Farr, 33 Iowa, 553; Walrath v. State, 8 Neb. 80; Connaughty v. State, 1 Wis. 169; People v. Woodward, 45 Cal. 293; Savage v. State, 18 Fla. 909.

³ Cave, J. (after citing Foster, 350) in R. v. Coney, L. R. 46 L. T. N. S. 885.

⁴ Jerv. Arch. 4; Thompson v. Com., 1 Mete. (Ky.) 13; State v. Douglass, 34 La. An. 523.

⁵ R. v. Potts, R. & R. 353; R. v. Crisham, C. & M. 187; U. S. v. Snyder, 4 McCr. 618; U. S. v. Bayer, 4 Dillon, 407; 13 Bank. Reg. 403; *infra*, § 1340 a. As to suicide, see *infra*, § 216.

⁶ Audley's Case, 3 How. St. Tr. 401; R. v. Gray, 7 C. & P. 164; R. v. Crisham, C. & M. 187. See as to an infant co-defendant, Law. v. Com., 75 Va. 885.

may be principal in the second degree to bigamy;¹ a cripple decoying into a trap one whom he could not even strike, may be guilty of homicide; and one who cannot write, but supplies knowingly the materials, may be guilty of forgery.²

§ 211 c. The confederacy must be real. Thus if one of the parties to a proposed burglary enter the house, not in order to steal, but to entrap the other party, the latter, who has not entered the house, is not indictable for burglary;³ and as has been just seen, mere presence at the commission of a crime does not imply complicity.⁴

Confederacy must be real.

§ 211 d. Mere sympathy, also, even by a bystander, does not by itself constitute confederacy.⁵ Hence mere consent to a crime, when no aid is given, and no encouragement rendered, does not amount to participation.⁶ It is otherwise in respect to such silent assent to a statement of another to a third party as amounts to an approval.⁷

Mere sympathy not confederacy.

§ 212. We have already seen that he who acts through an irresponsible agent is liable as principal.⁸ It follows, therefore, that a person so acting is not liable as principal in the second, but as principal in the first degree. Hence, if a principal in a transaction be not liable under our laws, another cannot be charged merely for aiding and abetting him, unless such abettor do acts which render him liable as principal.⁹

If principal is irresponsible, indictment should not be for aiding and abetting.

§ 213. Any participation in a general felonious plan, provided such participation be concerted, and there be constructive presence, is enough to make a man principal in the second degree, as

¹ Boggus v. State, 34 Ga. 275. *Supra*, 315; Martin v. State, 25 Ibid. 315; State v. Cox, 65 Mo. 29; People v. Leith, 52 Cal. 521. As to sympathetic spectators at prize fights, see *infra*, §§ 372, 373, 1465 a. As to sympathetic neutrals, *infra*, § 1902.

² *Infra*, § 217.

³ People v. Collins, 53 Cal. 185. That a detective is not a confederate, see *supra*, § 149; Price v. People, 109 Ill. 109.

⁴ *Supra*, § 211.

⁵ *Infra*, §§ 227, 1402; R. v. Taylor, L. R. 2 C. C. 147; 13 Cox C. C. 681; Com. v. Cooley, 6 Gray, 350; Plummer v. Com., 11 Bush, 76; Clem v. State, 33 Ind. 418; Connaughty v. State, 1 Wis. 169; Guilford v. State, 24 Ga.

White v. People, 81 Ill. 333; Tullis v. State, 41 Tex. 598.

⁷ *Infra*, § 1170.

⁸ *Supra*, § 207. See, also, R. v. Tyler, 8 C. & P. 616.

⁹ U. S. v. Libby, 1 W. & M. 221. See U. S. v. Crane, 4 McLean, 317.

to any crime committed in execution of the plan.¹ Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of others with the possession of the goods, and then another of the party entice the owner away so that he who has the goods may carry them off, all are guilty as principals.² So, it has been ruled, that to aid and assist a person to the jurors unknown, to obtain money by ring-dropping, makes the party principal in the second degree, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of this practice.³ And so confederates watching outside, the object being to effect a murder, incur the same guilt as the confederate by whom the blow is struck.⁴

§ 214. But the act, in order thus to be imputed to all the confederates, must be the result and in execution of the confederacy;⁵ and if the crime is committed by a confederate as collateral to an escape after the plot is exploded;⁶ as when several are out for the purpose of committing a

¹ *Infra*, §§ 218, 1404; Stephen's C. L. 27; Sissinghurst's Case, 1 Hale P. C. 462; R. v. Manners, 7 C. & P. 801; Com. v. Knapp, 9 Pick. 496; Norton v. People, 8 Cow. 137; McCahey v. People, 83 N. Y. 408; Trim v. Com., 18 Grat. 983; Breese v. State, 12 Oh. St. 146; Green v. State, 13 Mo. 382; Selvidge v. State, 30 Tex. 60; Miller v. State, 15 Tex. Ap. 125; People v. Brown, 59 Cal. 345. See State v. Buchanan, 35 La. An. 89.

² R. v. Standley, R. & R. 305; 1 Russ. 24; R. v. Passey, 7 C. & P. 282; R. v. Lockett, *Ibid.* 300.

³ R. v. Moyre, 1 Leach, 314; R. v. Standley, R. & R. 305; R. v. Passey, 7 C. & P. 282; R. v. Lockett, *Ibid.* 300.

In R. v. Jeffries, 3 Cox C. C. 85, Cresswell, J., after conferring with Patteson, J., held that if A., one of two confederates, unlock the door of a room in which a larceny is to be completed, and then go away, and B., the other confederate, comes, and steals the goods, the

former is not a principal in the theft. This, however, is disapproved in State v. Hamilton, 13 Nev. 385, and, supposing that the aid rendered by A. promoted the execution of the felony, it is in conflict with cases above stated. ⁴ Mitchell v. Com., 33 Grat. 845. *Infra*, § 218.

⁵ See *infra*, §§ 220, 397; R. v. Hodgson, 1 Leach, 7; Duffey's Case, 1 Lew. 194; R. v. Cruse, 8 C. & P. 541; R. v. Price, 8 Cox C. C. 96; R. v. Taylor, L. R. 2 C. C. 147; U. S. v. Gibert, 2 Sumn. 19; Com. v. Campbell, 7 Allen, 541; State v. Lucas, 55 Iowa, 321; People v. Knapp, 26 Mich. 112; People v. Woodward, 45 Cal. 293; Mercersmith v. Stato, 8 Tex. Ap. 211. See Breese v. State, 12 Ohio St. 146, and cases cited *infra*, §§ 218, 220; *supra*, § 211 a.

⁶ R. v. Collison, 4 C. & P. 565; R. v. Howell, 9 C. & P. 437; People v. Knapp, 26 Mich. 112.

⁷ There can be no criminal responsi-

felony, and upon an alarm run different ways, and one of them main a pursuer to avoid being taken; the others are not to be considered principals in such act.¹ Persons, also, interfering in hot blood in a fight, which was started by the immediate parties deliberately, may be guilty only of manslaughter, while the immediate parties are guilty of murder.² And when H. and S. broke open a warehouse and stole thereout thirteen firkins of butter, etc., which they carried along the street thirty yards, and then called the prisoner, who was apprised of the theft, and he assisted in carrying the property away; he was held not a principal, the felony being complete before he interfered.³ And it may be, therefore, generally declared that a confederate is not responsible for a crime which is not a probable and natural result of the confederacy, unless such crime was committed with his assent.⁴

bility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should arise for any one to do it. In other words, the principle is quite analogous to that of agency, where the liability is measured by the express or implied authority. And the authorities are quite clear, and reasonable, which deny any liability for acts done in escaping, which were not within any joint purpose or combination." Campbell, J., People v. Knapp, 26 Mich. 112.

An interesting question, already discussed in some of its relations (see *supra*, § 187), arises where one confederate abandons the enterprise before the homicide is committed. Such abandonment, it has been held, is no defence where notice of it is not given to his associates before the blow is struck. State v. Allen, 47 Conn. 421.

B. is indicted for inflicting on C. an injury dangerous to life, with intent to murder. A. is indicted for aiding and abetting B. A. must be shown to have known that it was B.'s intent to murder C., and it is not enough to show that A. helped B. in what he did.

Steph. Crim. Dig. art. 37, citing R. v. Cruse, 8 C. & P. 546.

¹ R. v. White, Russ. & R. C. C. 99; R. v. Skeet, 4 F. & F. 931; R. v. Collison, 4 C. & P. 565; R. v. Howell, 9 C. & P. 437. In State v. Absence, 4 Port. 397, the maiming was part of an attack which the defendants were concerned in making; and the court erred in holding that the mayhem was not imputable to all the defendants.

² State v. King, 2 Rice's S. C. Dig. 106. See *infra*, §§ 479, 494.

³ R. v. King, Russ. & R. C. C. 332; R. v. McMackin, Russ. & R. C. C. 333. *Supra*, § 160.

⁴ See *infra*, §§ 220, 397, 478; R. v. Murphy, 6 C. & P. 103; R. v. Franz, 2 F. & F. 580; R. v. Horsey, 3 *Ibid.* 287; R. v. Skeet 4 *Ibid.* 931; R. v. Hawkins, 3 C. & P. 392; R. v. Tyler, 8 *Ibid.* 616; R. v. Price, 8 Cox C. C. 96; U. S. v. Jones, 3 Wash. C. C. 209; Com. v. Campbell, 7 Allen, 541; Watts v. State, 5 W. Va. 532; Manier v. State, 6 Baxt. 595; Lamb v. People, 96 Ill. 73; People v. Knapp, 26 Mich. 112; State v. Stalcup, 1 Ired. 30; Miller v. State, 15 Tex. Ap. 125; Harris

§ 215. In the case of murder by duelling, in strictness, all parties, as will be more fully seen, are technically principals.¹ And all persons present at a prize-fight, having gone thither for the purpose of encouraging the prize-fighters, are principals in the breach of the peace.²

§ 216. If one encourage another to commit suicide, and is present aiding him while he does so, such person is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, the other being present, but the latter fail in an attempt upon himself, he is principal in the murder of the first.³ Whether the influence of the defendant was the exclusive cause of the suicide is immaterial.⁴ All present at the time of committing the offence are principals, although only one acts, if they are confederates, and engaged in the common design of which the offence is a part.⁵ Where, however, the act is done in the absence of the party who incites it, the latter has been held in England not to be amenable to indictment as a principal, because he was not present; nor as an accessory before the fact at common law, because the principal cannot be convicted;⁶ nor as guilty of a substantive felony under 7 Geo. III. c. 64, s. 9, because that statute is to be considered as extending to those persons only who, before the statute, were liable either with or after the principal, and not to make those liable who before could never have been tried.⁷ But by subsequent statutes the English law in this respect is materially changed.⁸ That an

v. State, Ibid. 629. See R. v. Collison, 4 C. & P. 565; and see other cases cited infra, § 397.

That a mere sympathetic cognizance does not constitute complicity, see *State v. Cox, 65 Mo. 29; Connaughty v. State, 1 Wis. 169; People v. Leith, 52 Cal. 251. Infra, §§ 1400, 1402; supra, § 211 d.*

¹ See fully *infra, § 614.*

² *R. v. Perkins, 4 C. & P. 537; R. v. Murphy, 6 C. & P. 103; R. v. Young, 8 C. & P. 645. See Com. v. Dudley, 6 Leigh, 613. Cf. R. v. Coney, cited supra, § 212; infra, §§ 373, 636.*

³ See more fully *infra, §§ 448 et seq.; R. v. Dyson, Russ. & R. C. C. 523; R. v. Russell, 1 Moody C. C. 356; R. v. Allison, 8 C. & P. 418; Blackburn v. State, 23 Ohio St. 165; State v. Ludwig, 70 Mo. 412.*

⁴ *Com. v. Bowen, 13 Mass. 356; Whart. Prec. 107.*

⁵ *Green v. State, 13 Mo. 382. See supra, §§ 206-208.*

⁶ *R. v. Frotwell, 9 Cox C. C. 152; L. & C. 161.*

⁷ See *R. v. Leddington, 9 C. & P. 79; R. v. Russell, 1 Moody C. C. 356.*

⁸ See *infra, §§ 448 et seq.*

attempt to commit suicide may be indictable at common law is elsewhere seen.¹

A party who compels another to take poison, so as to produce death, is responsible for the murder as principal in the first degree.²

§ 217. Where one assailant strikes a blow which is not fatal, and a confederate follows it up with a fatal blow, both are principals in the homicide.³ If part of a crime also be committed in one place and part in another, each person concerned in the commission of either part is liable as principal.⁴ Hence if several combine to forge a document, and each executes, by himself, a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals.⁵ And if A. counsel B. to make the paper, C. to engrave the paper, D. to fill up the names of a forged note, and they do so, each without knowing that the others

Persons executing parts of crime separately are principals.

¹ *Supra, § 175.*

² Thus in a case tried in 1872 in Ohio (where suicide is not a crime, there being in that State no common law crimes), the evidence was that the defendant, Blackburn, gave to the deceased, Mary Jane Lowell, poison, to be taken by her; and there was evidence tending to show that the defendant, by threats of violence or otherwise, forced her to swallow the poison, or forced it down her throat. There was also evidence of a mutual agreement between the parties to commit suicide. The defendant was convicted of murder in the second degree, under the Ohio statute making killing by administering poison murder. This was sustained in the Supreme Court. "To force poison down one's throat," said Welch, J., "or to compel him by threats of violence to swallow it, is an administering of poison. Neither deception nor breach of confidence is a necessary ingredient in the act. It matters not whether the poison be put

into the hand or into the stomach of the party whose life is to be destroyed by it." *Blackburn v. State, 23 Ohio St. 146.*

In a reserved case before the English judges, the evidence showed that the prisoner had procured certain drugs and gave them to his wife, with intent that she should take them in order to procure abortion. She took them in his absence and died from their effects. On an indictment against him for manslaughter, it was objected that he was only an accessory before the fact, and that in law there cannot be an accessory before the fact to manslaughter. It was held that a conviction for manslaughter was proper. *R. v. Gaylor, 7 Cox C. C. 253; Dears. & B. C. C. 288.*

³ *Tidwell v. State, 70 Ala. 33.*

⁴ *R. v. Kelly, 2 C. & K. 379. See R. v. Lockett, 7 C. & P. 300; R. v. Whitaker, 1 Den. C. C. 310; Hanna v. People, 86 Ill. 243.*

⁵ *R. v. Bingley, Russ. & R. C. C. 446; R. v. Kelley, Ibid. 421.*

are employed for that purpose, B., C., and D. may be indicted for forgery, and A. as an accessory;¹ for if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others.²

§ 218. It has been already seen that actual immediate presence at the injury is not necessary; (1) when the defendant acts through an irresponsible agent (*e. g.*, through a lunatic or infant); and (2) when he acts through a material agent, such as poison, which does not require the presence of a guilty director to make it effective. Nor is it necessary that the party should be actually present, an ear or eye-witness of the transaction, in order to make him principal in the second degree; he is, in construction of law, present aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it should the occasion arise.³ Thus, if he be outside of an inclosure, watching, to prevent surprise, or for the purpose of keeping guard, while his confederates are inside committing the felony, such constructive presence is sufficient to make him a principal in the second degree.⁴ No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of a felony, and all take their part in furtherance of the common design, all are liable as principals.⁵ Actual presence is not necessary if there is direct connection between the actor and the crime. Turning out a wild beast with intent to do mischief, so that thereupon death ensues, involves, as we have seen, the guilt of a principal;⁶ and the same grade of

¹ *R. v. Dale*, 1 Moody C. C. 307.

² *R. v. Kirkwood*, 1 Moody C. C. 304.
See *R. v. Kelly*, 2 Cox C. C. 171.

³ See *State v. Douglass*, 34 La. An. 523.

⁴ Fost. 347, 350. 2 Hawk. c. 29, ss. 7, 8; 1 Russ. 31; 1 Hale, 555; *R. v. Borthwick*, 1 Doug. 207; 1 Leach, 66; *R. v. Gogerly*, Russ. & R. C. C. 343; *R. v. Owen*, 1 Mood. C. C. 96; *R. v. Vanderstein*, 10 Cox C. C. 177; *Com. v. Knapp*, 9 Pick. 496; *Com. v. Lucas*, 2 Allen, 170; *Ruloff v. People*, 45 N. Y. 213; *Mitchell v. Com.*, 33 Grat. 845;

Stephens v. State (Ohio, 1884), 18 Rep. 181; *State v. Hardin*, 2 Dev. & Bat. 407; *State v. Coleman*, 5 Porter, 32; *State v. Town*, Wright's Ohio R. 75; *Breese v. State*, 12 Ohio St. R. 146; *Tate v. State*, 6 Blackf. 110; *Doan v. State*, 26 Ind. 495; *State v. Squaires*, 2 Nev. 226; *Selvidge v. State*, 30 Tex. 60; *Truitt v. State*, 8 Tex. Ap. 148.

⁵ *Supra*, §§ 209-213; *R. v. Standley*, Russ. & R. C. C. 305.

⁶ Fost. 349; 1 Hale, 514.

guilt is imputable to him who, intending to kill, sets a spring-gun, or explosive machine,¹ no matter how far he may be from the place where the hurt is inflicted. Hence, as will presently be more fully seen, a confederate who aids in the commission of a robbery by a signal on a distant hill, notifying the approach of the parties to be attacked, is a principal in the robbery.² A person, however, is not constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to do so if necessary.³

§ 219. But persons not actually assisting are not principals at common law.⁴ Thus, where Brighton uttered a forged note at Portsmouth, the plan was concerted between him and two others, to whom he was to return, when he passed the note, and divide the proceeds. The three had before been concerned in uttering another forged note; but at the time this note was being uttered in Portsmouth, the other two stayed at Gosport. The jury found all three guilty, but, on a case reserved, the judges were clear that as the other two were not present, nor sufficiently near to assist, they could not be deemed principals, and, therefore, they were recommended for a pardon.⁵ Going towards the place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal, if he were at such a distance at the time of the felonious taking as not to be able to assist in it.⁶ And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals in cases where the felony is immediately executed by responsible agents, but are accessories before the fact.⁷ Presence, however, during the whole of the transaction, is not necessary; for as we

An abettor must be near enough to give assistance.

¹ See *supra*, §§ 161, 166; *infra*, § 2 East P. C. 974; Russ. & Ry. C. C. 25, S. C.; and see *R. v. Stewart* and others, *Ibid.* 363; *R. v. Badcock* and others, *Ibid.* 249; *R. v. Mannors*, 7 C. & P. 801. *Infra*, § 710.

² *State v. Hamilton*, 13 Nev. 386, cited *infra*, § 220; see *Scales v. State*, 7 Tex. Ap. 361; *McKeen v. State*, 7 *Ibid.* 631.

³ *United States v. Burr*, 4 Cranch, 492; *infra*, § 224.

⁴ *Taylor v. State*, 9 Tex. Ap. 100.

⁵ *R. v. Soares, Atkinson & Brighton*,

⁶ *R. v. Kelly*, R. & R. 421.
⁷ *R. v. Soares, R. & R.* 25; *R. v. Davis*, *Ibid.* 113; *R. v. Elsec*, *Ibid.* 142; *R. v. Badcock*, *Ibid.* 249; *R. v. Mannors*, 7 C. & P. 801.

have already seen, if several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals.¹ And presence is not to be determined by mere contiguity of space. A man who, on a mountain top at a distance of thirty miles, assists a highway robber, by a signal, in making an attack, is a principal in the robbery.²

§ 220. All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime.³ Thus, if several persons come armed to a house with intent to commit an affray or a personal outrage (such affray or outrage having bloodshed as a probable incident), and a homicide ensues while the assailants are engaged in such illegal proceedings, then even those who may not actually participate in any overt act of outrage, will be principals in the homicide.⁴ And where persons combine to stand by one another in a breach of the peace, with a general resolution to resist to the death all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view.⁵ So where a number of persons combine to seize with force and violence a vessel, and run away with her, and, if necessary, to kill any person who should oppose them in the design, and murder ensues, all concerned are

Persons confederating for wrongful purpose are chargeable with incidental felony.

¹ *R. v. Bingley*, R. & R. 446. See 2 East P. C. 768. See *supra*, § 217.

² *State v. Hamilton*, 13 Nev. 386. *Infra*, § 280. As giving a still larger meaning to "abet," see *State v. Stanley*, 48 Iowa, 221.

³ *Supra*, § 214; *Fost.* 351, 352; 2 Hawk. c. 29, s. 9; *R. v. Howell*, 9 C. & P. 437; *R. v. McNaughton*, 14 Cox C. C. 576; *Brennan v. People*, 15 Ill. 511; *Carrington v. People*, 6 Parker C. R. 336; *State v. Johnson*, 7 Or. 210; *Peden v. State*, 61 Miss. 268; *Allen v. State*, 12 Lea, 424. *Infra*, § 1536.

⁴ *Dalt. J. c.* 161; 1 Hale, 439; Hawk. b. 2, c. 29, s. 8; *Simmons v. State*, 61 Miss. 244; *Peden v. State*, 61 Miss. 268.

⁵ *R. v. Howell*, 9 C. & P. 437; *Com. v. Hare*, 4 Penn. L. J. 257; *Ruloff v. People*, 45 N. Y. 213; *Williams v. People*, 54 Ill. 422; *Miller v. State*, 25 Wis. 384; *Miller v. State*, 15 Tex. Ap. 125. See, however, qualification stated by *Bigelow, C. J.*, *Com. v. Campbell*, 7 Allen, 541.

principals in such murder.¹ Hence it is not necessary that the crime should be part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose.² Thus where A. and B. go out for the purpose of robbing C., and A., in pursuance of the plan, and in furtherance of the robbery, kills C., B. is guilty of the murder.³ In such cases of confederacy all are responsible for the acts of each, if done in pursuance of, or as incidental to, the common design.⁴ Where, however, a homicide is committed collaterally by one or more of a body unlawfully associated, from causes having no connection with the common object, the responsibility for such homicide attaches exclusively to its actual perpetrators.⁵ When, also, the offence is only manslaughter in the person striking the blow, it is only manslaughter in those engaged with him with the like temper and purpose;⁶ though if there be malice proved as to any one party, he may be separately found guilty of murder.⁷ It must also be remembered that a rioter is not responsible, on an indictment for murder, for a death accidentally caused by officers engaged in suppressing the riot;⁸ nor, in an affray, are the original parties responsible for a death caused by strangers wantonly and adversely break-

¹ *U. S. v. Ross*, 1 Gallison, 624. See § 397, and cases there cited; *R. v. Brennan v. People*, 15 Ill. 511. *Murphy*, 6 C. & P. 103; *R. v. Collison*,

² See cases cited *infra*; and see *R. v. Tyler*, 8 C. & P. 616; *R. v. Bernard*, 1 F. & F. 240; *R. v. Cooper*, 1 Cox C. C. 266; *Ferguson v. State*, 32 Ga. 658; *McPhane, C. & M.* 212.

Beets v. State, Meigs, 106; *supra*, § 220; *infra*, § 397.

³ *R. v. Jackson*, 7 Cox C. C. 357, and cases cited *infra*, § 229.

⁴ *R. v. Murphy*, 6 C. & P. 103; *R. v. Tyler*, 8 C. & P. 616; *U. S. v. Ross*, 1 Gallis, 624; *U. S. v. Gibert*, 2 Sumn. 19; *Com. v. Daly*, 4 Penn. Law Journal, 156; *Com. v. Neills*, 2 Brewster, 553; *Brennan v. People*, 15 Ill. 511; *People v. Knapp*, 26 Mich. 112; *Moody v. State*, 6 Caldw. 299; *Thompson v. State*, 25 Ala. 41; *State v. Blackman*, 35 La. An. 483; see *supra*, §§ 110, 120.

⁵ *Ibid.*; *supra*, §§ 160, 214; *infra*,

⁶ *R. v. Murphy*, 6 C. & P. 103.

⁷ *R. v. Caton*, 12 Cox C. C. 624. In this case there was an agreement to fight with fists. One of the party took a deadly weapon with him and used it without his associate's knowledge. It was held that the latter was not guilty of murder. This may be conceded, supposing that the object of the agreement was simply fighting with fists. But if the weapon was one likely to be carried and used in such a conflict, he ought to have been held guilty of manslaughter.

⁸ *Com. v. Campbell*, 7 Allen, 541.

ing in.¹ How far abandonment relieves from responsibility has been elsewhere noticed.²

§ 221. The distinction between principals in the first and second degree, it has been said, is a distinction without a difference; and, therefore, it need not be made in indictments.³ Such is only the case, however, where the punishment is the same for both degrees.⁴ But where, by particular statute, the punishment is different, then principals in the second degree must be indicted specially, as aiders and abettors.⁵ Where no such statute exists, in an indictment for murder, if several be charged as principals, one as principal perpetrator, and the others as aiding and abetting, it is not material which of them be charged as principals in the first degree, as having given the mortal blow; for the mortal injury given by any one of those present is, in contemplation of law, the injury of each and every of them.⁶ An exception to the rule just stated, however, may be found in rape, in which assistants, though present, can be charged only as principals in the second degree.⁷

¹ *R. v. Murphy*, 6 C. & P. 103. See *Williams v. State*, 69 Ga. 11; *State v. Davis*, 29 Mo. 391; *State v. Hesiar*, 58 Iowa, 68; *Dennis v. State*, 5 Pike, 230; *People v. Ah Fat*, 48 Cal. 61; *Clay v. State*, 40 Tex. 67; *State v. Kirk*, 10 Oreg. 505. See *infra*, § 522; *Washington v. State*, 68 Ga. 570.

² *Supra*, §§ 187, 214; *infra*, § 228.

³ *R. v. O'Brien*, 1 Den. C. C. 9; 2 C. & K. 115; *R. v. Rogers*, 2 Mood. C. C. 85; *R. v. Phelps*, 2 Mood. C. C. 240; C. & M. 180; *R. v. Crisham*, C. & M. 187; *U. S. v. Wilson*, Bald. 78; *State v. Dyer*, 59 Me. 303; *State v. Center*, 35 Vt. 378; *State v. McGregor*, 41 N. H. 407; *Com. v. Chapman*, 11 Cush. 422; *Com. v. Fortune*, 105 Mass. 592; *State v. Hill*, 72 N. C. 345; *State v. Jenkins*, 14 Rich. S. C. 215; *State v. Anthony*, 1 McCord, 285; *State v. Fley*, 2 Brevard, 338; *State v. Green*, 4 Strobhart, 128; *Hately v. State*, 15 Ga. 346; *Hill v. State*, 28 Ga. 604; *Williams v. State*, 69 Ga. 11; *State v. Hesiar*, 58 Iowa, 68; *Dennis v. State*, 5 Pike, 230; *People v. Ah Fat*, 48 Cal. 61; *Clay v. State*, 40 Tex. 67; *State v. Kirk*, 10 Oreg. 505. See *infra*, § 522; *Washington v. State*, 68 Ga. 570.

⁴ 2 Hawk, c. 25, s. 64; *Mackally's Case*, 9 Co. 67 b; *Fost.* 345.

⁵ 1 East P. C. 348, 350; *R. v. Home*, 1 Leach, 473. See *Rasnack's Case*, 2 Virg. Ca. 356; *Hoffman v. Com.*, 6 Randolph, 685; *Warden v. State*, 24 Oh. St. 143.

⁶ *Infra*, § 522; *Whart. Crim. Ev.* § 102; *Foster*, 551; 1 East P. C. 350; *R. v. Gutch*, M. & M. 433; *R. v. Borthwick*, 1 Doug. 207; *State v. Mairs*, 1 Cox R. 453; *State v. O'Neal*, 1 Houst. C. C. 58; *McCarty v. State*, 26 Mis. 299; *State v. Fley*, 2 Brevard, 338; *State v. Putnam*, 18 S. C. 175.

⁷ *Infra*, § 553 a.

§ 222. If the actual perpetrator of a murder should escape by flight, or die, those present, abetting the commission of the crime, may be indicted as principals; and though the indictment should state the mortal injury was committed by him who is absent or dead, yet if it be substantially alleged that those who were indicted were present at the perpetration of the crime, and did kill and murder the deceased by the mortal injury so done by the actual perpetrator, it shall be sufficient.¹ So the party charged as principal in the second degree may be convicted, though the party charged as principal in the first degree is acquitted.² And on an indictment for murder, the court may, in their discretion, try the principal in the second degree before the principal in the first degree.³

Conviction of principal in the first degree not a condition precedent to trial of principal in second degree.

§ 223. At common law, in misdemeanors, there are no accessories, all concerned, whether instigators or perpetrators, being principals, subject to be indicted as such.⁴ Thus, the master who knowingly permits his servant, while under his control, to retail liquor, in a house belonging to the master, is himself principal in the offence of keeping a tippling-house, and liable to the penalty.⁵ If A. counsel and encourage B. to set fire to a malt-house, and B. attempt to set it on fire, both may be jointly indicted as principals in the misdemeanor of attempting to

In misdemeanors all are principals.

¹ *State v. Fley*, 2 Rice's S. C. Digest, 377; 14 Fed. Rep. 554; *State v. Nowell*, 60 N. H. 199; *Com. v. McComber*, 3 Mass. 254; *Com. v. Nichols*, 10 Met. 259; *Lowenstein v. People*, 54 Barb. 299; *Com. v. Gillespie*, 7 S. & R. 469; *Uhl v. Com.*, 5 Grat. 706; *Stratton v. State*, 45 Ind. 468; *Stevens v. People*, 67 Ill. 587; *Curlin v. State*, 4 Yerger, 143; *Com. v. McAtee*, 8 Dana, 28; *Com. v. Major*, 6 Dana, 293; *Com. v. Burns*, 4 J. J. Marshall, 182; *State v. Westfield*, 1 Bailey, 132; *State v. Goode*, 1 Hawks, 463; *State v. Bardon*, 1 Devoreux, 518; *State v. Cheek*, 13 Ired. 114; *Schmidt v. State*, 14 Mo. 137; *Williams v. State*, 12 S. & M. 587; *Whitney v. Turner*, 1 Seam. 253; *Sanders v. State*, 18 Ark. 193.

² *R. v. Taylor*, 1 Leach, 360; *Benson v. Offley*, 2 Shaw, 270; 3 Mod. 121; *R. v. Wallis*, Salk, 334; *R. v. Towle*, R. & R. 314; 3 Price, 145; 2 Marsh. 465; *Archibald's C. P.* 6; *Brown v. State*, 28 Ga. 216; *State v. Ross*, 29 Mo. 32.

³ *Boyd v. State*, 17 Ga. 194.

⁴ 3 Inst. 21, 438; 1 Hale, 233, 613; *Dalt. J. c.* 161; *Fost.* 341; 12 Co. 812; *Co. Lit.* 57; *Hawk. b.* 2, c. 29, s. 1; 4 Bla. Com. 34; *Cro. C. C.* 49; *R. v. Greenwood*, 9 Eng. Law and Eq. 535; 2 Den. C. C. 453; *R. v. Williams*, C. & M. 259; *R. v. Dyson*, R. & R. 523; *U. S. v. Morrow*, 4 Wash. C. C. 733; *U. S. v. Mills*, 7 Peters, 138; *U. S. v. Hartwell*, 3 Cliff. 221; *U. S. v. Harries*, 2 Bond, 311; *U. S. v. Snyder*, 3 McCrary, 377; 14 Fed. Rep. 554; *State v. Nowell*, 60 N. H. 199; *Com. v. McComber*, 3 Mass. 254; *Com. v. Nichols*, 10 Met. 259; *Lowenstein v. People*, 54 Barb. 299; *Com. v. Gillespie*, 7 S. & R. 469; *Uhl v. Com.*, 5 Grat. 706; *Stratton v. State*, 45 Ind. 468; *Stevens v. People*, 67 Ill. 587; *Curlin v. State*, 4 Yerger, 143; *Com. v. McAtee*, 8 Dana, 28; *Com. v. Major*, 6 Dana, 293; *Com. v. Burns*, 4 J. J. Marshall, 182; *State v. Westfield*, 1 Bailey, 132; *State v. Goode*, 1 Hawks, 463; *State v. Bardon*, 1 Devoreux, 518; *State v. Cheek*, 13 Ired. 114; *Schmidt v. State*, 14 Mo. 137; *Williams v. State*, 12 S. & M. 587; *Whitney v. Turner*, 1 Seam. 253; *Sanders v. State*, 18 Ark. 193.

⁵ *Com. v. Major*, 6 Dana's Ky. 293; *infra*, §§ 247, 1503; *supra*, § 135.

set the malt-house on fire, although A. was not present at the time of the attempt.¹ A man who, though at a distance, is concerned in the furnishing of lottery tickets to another, to be sold in a place where their sale is prohibited, is guilty as principal in such sale.² In jurisdictions, also, where petit larceny is regarded either as a misdemeanor or as a minor felony subjected to a light penalty, all parties concerned in it are principals.³ An exception, however, to the rule, that in misdemeanors all parties concerned are principals, is taken in liquor cases, where it is held that a vendee is not indictable under the statutes;⁴ and, generally, accessories to police offences are not indictable.⁵ In negligences, also, there can be no accessories, since accessoryship is conditioned on joint intent.

§ 224. The old text-writers above cited unite in holding that in treason, also, there are no accessories.⁶ Under the Constitution of the United States, however, it has been argued that the reason of the common law doctrine that in treason all are principals, fails, and therefore that a person counselling or advising treason against the United States is an accessory before the fact,⁷ though it is hard to conceive, in an executed treason, of an accessoryship before the fact, that is not in itself a substantive act of treason. The principle, on the other hand, is said by an elementary writer of much learning to be in force in the several States; and he consequently argues that, in treason against the State of Virginia, accessories do not exist.⁸ But where the Constitution provides, as does the Constitution of the United States, that treason shall consist *only* in levying war against the State, or adhering to its enemies, accessoryship after the fact, which contains neither the element of levying war nor that of adhering to a public enemy, which is construed to mean exclusively a foreign power, cannot be claimed to constitute treason.⁹

¹ R. v. Clayton, 1 Car. & Kir. 128.

² Com. v. Gillespie, 7 Serg. & Rawle, 469.

³ Lasington's Case, Cro. Eliz. 750; Ward v. State, 3 Hill, N. Y. 395; 6 Hill, N. Y. R. 144; Shay v. People, 22 N. Y. 317; State v. Goode, 1 Hawks, 463; State v. Hart, 7 Mo. 321. In North Carolina the rule is extended to all thefts; State v. Gaston, 73 N. C. 93.

⁴ *Infra*, § 1529.

⁵ See *supra*, § 23 a.

⁶ See 1 Hale P. C. 233, 613; 3 Inst. 138; though see 2 Hale P. C. 223.

⁷ U. S. v. Burr, 4 Cranch, 472, 501; though see U. S. v. Hanway, 2 Wal. Jr. 139; charge on treason, *Ibid.* 134.

⁸ Davis's Criminal Law, 38. *Infra*, § 1812.

⁹ See *infra*, § 1793.

III. ACCESSARIES BEFORE THE FACT.¹

§ 225. An accessory before the fact is one who, though absent at the commission of the felony, procures, counsels, or commands another to commit said felony subsequently perpetuated in consequence of such procuring, counsel, or command.² To constitute such an accessory, it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, principal. The accessory is liable for all that ensues as incident to the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C. so as to inflict grievous bodily harm, and he beat C. so that C. dies, A. is accessory to the murder, if the offence be murder in B.³ So if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house.⁴ And if the offence commanded be effected, although by different means from those commanded, as, for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him, J. W. is, nevertheless, liable as accessory.⁵

As we have already seen, the common law has recently been changed in several States so as to treat accessories before the fact as principals.⁶ In many jurisdictions, however, the offences continue distinct, so that acquittal as a principal does not bar a prosecution as accessory.⁷

¹ For indictments under this head see Whart. Plead., Tit. Accessary.

² 1 Hale, 615. The meaning of the word "command" will be more fully considered in note to § 226. See State v. Mann, 1 Hayw. N. C. 4; Willoughby, *ex parte*, 14 Nev. 451. The question as to the place where the accessory is liable, is discussed *infra*, §§ 248, 278, 279; see State v. Ayers, 8 Baxt. 96.

A. supplies B. with corrosive sublimate, knowing that B. means to use it to procure her own abortion, but being unwilling that she should take the poison, and giving it to her because she threatened to kill herself if he did not. B. does so use it, and

dies. Even if B. is guilty of murdering herself, A. is not an accessory before the fact to such murder. Steph. Crim. Dig. citing R. v. Fretwell, L. & C. 161; compare R. v. Cooper, 5 C. & P. 535; R. v. Gordon, 1 Leach, 515; 1 East P. C. 352.

³ 4 Bl. Com. 37; 1 Hale, 617.

⁴ *Ibid.*; Fost. 370.

⁵ *Ibid.* 369; State v. Tazwell, cited *infra*, § 226.

⁶ *Supra*, § 205.

⁷ See Whart. Crim. Pl. & Pr. § 458; Com. v. Pettes, 126 Mass. 242; State v. Buzzell, 58 N. H. 257.

The complications in the law of accessoryship is in some sense attri-

§ 225 a. As has been elsewhere noticed,¹ cases frequently occur in which two or more instigators coöperate in procuring one or more agents to act in the perpetration of a crime. Such cases may be classified as follows:² (1) The instigators may act concurrently with the perpetrator. In such case the ordinary law of conspiracy applies. The parties must be intentional participants in a common unlawful design. It is not enough that they are casual, incidental coöperators. To charge a party with an intentional coöperation, he must know that

butable to the circumstance that it involves one of the most difficult metaphysical problems. If the will is free, how can we punish the instigator of a crime as equally guilty with the perpetrator? The latter, it is assumed, acted with perfect freedom; we may therefore punish the instigator for giving bad counsel, as we would punish the publishers of bad books, but we cannot charge him with doing an act at whose commission he was not present, which he had no power to order, but whose performance is imputable to the free and independent will of another person. On the other hand, if the will is necessitated, we certainly cannot punish the agent whose action is determined by another. But, illogical as it may be, we punish both. Each, we say, is responsible for the act, and by no other view could public justice be subserved. Unless the perpetrator is responsible, there is no law by which injuries can be redressed; unless the instigator is responsible, there is no law by which right can be vindicated. In other words, if the perpetrator is not made responsible, there can be no retribution for wrong acts; if the instigator is not made responsible, there can be no retribution for wrong agents. In the one case there would be no responsibility for conduct, in the other there would be no responsibility for impulse. We therefore punish the

instigator as if he were free while the perpetrator was coerced, while we punish the perpetrator as if he were free and the instigator did not exist. Nor is this strange, for the same solution is accepted by us in all other lines of moral judgment. We condemn the tempted, when he yields on the ground that he yields voluntarily; we condemn the tempter on the ground that he caused the yielding. Sir W. Hamilton treats this as one of the illustrations of the practical harmony between necessity and free will. If we reject determinism, there is no law by which man can be ruled; if we reject free agency, there is no man to be ruled by the law. And in our doctrine as to principal and accessory, we treat the principal both as free and as coerced; as free when we prosecute him individually, as coerced when we prosecute his instigator. The topic, in this connection, has been discussed by Voikmann, *Grundriss der Psychologie*, 1856, pp. 374, 397; Wahlberg, *das Princip der Individualisierung in der Strafrechtspflege*; and by Drobisch, in *die moralische Statistik und die menschliche Willensfreiheit*, p. 28. See Geyer in *Holzendorff's Strafr.* ii. 340, who takes the necessitarian side of the controversy.

¹ 9 Cent. L. J. 205.

² See Holtz. *Strafr.* ii. 377.

the others are working with him for the same criminal purpose, and he must contribute something to the common effort. If this is not done, he cannot be regarded as an instigator, or accessory before the fact. (2) Instigation may not be concurrent, but successive. In other words, A. may instigate B. to instigate C.¹ In such case, supposing the causal relation be established, and C. is really induced to act by A., through B.'s agency, A. is as much responsible as if he induced C. to act by letter.

When procurement is by an intermediate agent, the accessory leaving it to such agent to find a perpetrator, it is not necessary that the accessory should be cognizant of the name of the perpetrator.²

§ 226. The procurement need not be tactual, it being sufficient if one or more persons become the medium through whom the work is done.³ It makes no matter how long a time or how great a space intervenes between the advice and the consummation,⁴ provided that there is an immediate causal connection between the instigation and the act.⁵ In cases,

Must be causal connection.

¹ *McDaniel's Case*, Fost. 121; Com. v. Glover, 111 Mass. 395.

² *R. v. Cooper*, 6 C. & P. 535; *R. v. Williams*, 1 Den. C. C. 39.

³ Fost. 125; *R. v. Somerset*, 19 St. Tr. 804; *R. v. Cooper*, 5 C. & P. 535. *Supra*, § 225 a.

⁴ See *infra*, § 280.

⁵ *R. v. Sharpe*, 3 Cox C. C. 288; *R. v. Blackburn*, 6 Cox C. C. 333; Com. v. Glover, 111 Mass. 395; *Oliver v. Com.*, 77 Va. 590.

In *Saunders's Case*, Plowd. 475; 1 Hale P. C. 431, as condensed by Sir James F. Stephen (*Steph. Dig.* art. 41): "A. advises B. to murder C. (B.'s wife) by poison. B. gives C. a poisoned apple, which C. gives to D. (B.'s child). B. permits D. to eat the apple, which it does, and dies of it. A. is not accessory to the murder of D." "This decision," adds Sir James F. Stephen, "is of higher authority than Foster's *dicta*, and marks the limit to which they extend, if it does not throw

doubt upon them." The proper solution in such case is that A. is indictable for an attempt to kill C.; but that there is no causal connection between his act and the killing of D., see Whart. on Neg. §§ 90, 91; *supra*, §§ 160, 161.

Modes of Instigation.—"Procure" is the first term used in the ordinary definition of our old accessoryship before the fact. The most obvious mode of procuring is by hiring. The instigator takes the agent into his service, and engages him for a reward to commit the proposed crime. The "procuring," however, must be *before* the act. It has been much discussed whether promising a reward to a person already resolved on the act constitutes an instigation. But the better opinion is that it does in cases where the perpetrator is strengthened in his purpose by the reward.

"Counselling," to come up to the definition, must be special. Mere

however, where the instigation consists in the furnishing aid, it is not necessary that the specific materials or machinery contributed

general counsel, for instance, that all property should be regarded as held in common, will not constitute the party offering it accessory before the fact to a larceny; "free-love" publications will not constitute their authors technical parties to sexual offences which these publications may have stimulated. Several youthful highway robbers have said that they were led into crime by reading Jack Sheppard; but the author of Jack Sheppard was not an accessory before the fact to the robberies to which he thus added an impulse. Under the head of "counsel" may be included advice and instruction as to the modes of committing particular crimes, *e. g.*, pocket picking. General instruction, it is true, could not be "counselling" in the sense before us; though it is otherwise with special instructions as to the management of a particular case.—*Persuading* and *tempting* to a particular crime falls under this head. The modes in which this kind of counselling may be manifested are numerous. The counsel need not be exclusively in words. It may consist, at least in part (*e. g.*, Faust and Mephistopheles), in the exhibition of some object of desire. It is possible, also, to conceive of cases in which there is no immediate communication between the seducer and the seduced. Third persons may be used as innocent or compulsory go-betweens. *Infra*, § 231.

"Command" is a term borrowed from the Roman *mandatum*, which is frequently used in this connection. Viewing the term nakedly, it describes few cases of accessoryship. Men are rarely to be found who would commit a crime because "commanded" to by another, unless they are under special obliga-

tions to such other. Among such obligations we may primarily notice that of wife to husband, which the law recognizes in some cases as a defence to the wife when on trial. Next to this may be enumerated the obligation of child to parent, of servant to master, of subordinate to superior. These obligations do not constitute a legal excuse unless the perpetrator acts under compulsion—*vis compulsiva*—or unless the command generates in him an error of fact which induces him to regard the act as innocent. Military command, also, may be an excuse to the subaltern, when he acts *bonâ fide* under the command, and not in satisfaction of any special private malice of his own. *Supra*, § 94. A police officer is in the same way protected, provided he acts within the range of his office, and executes what he believes to be an official duty for a public end. It is otherwise when he knowingly executes a command issued for extortionate or other unlawful purposes. A command need not be in words. It may be in signs. See Holtzen. Strafr. ii. 353.

"Advising" may be by a process of deception, by a misrepresentation of facts. A. contrives to induce B. to believe he has received an injury from C., which it is B.'s duty to avenge by taking C.'s life. Supposing A. to act in this way with the malicious purpose of killing C. by the agency of B., and to then specifically advise the killing of C., A. is guilty at common law as accessory before the fact, or, under our recent statutes, as principal. 9 Cent. L. J. 204.

"Suppose, for instance, A. tells B. of facts which operate as a motive to B. for the murder of C. It would be an abuse of language to say that A.

by the accessory should have been used by the principal.¹ Nor does it matter whether the instigator counselled the perpetrator directly or through an intermediate agent.

§ 227. Counselling is said in the old books to be either direct or indirect; direct consisting in express counsels, indirect in the intimation of approval or desire.² But concealment of the knowledge that a felony is about to be committed does not constitute such accessoryship,³ nor does mere momentary acquiescence in the proposed felonious plan.⁴ But any specific contribution of advice, afterwards acted on, constitutes the offence. It is necessary, as has been seen, that the solicitation be made either directly or indirectly, to the person committing the act.⁵ But knowingly to invite a person to a place so that he may be there murdered constitutes, when he is murdered accordingly, the offence.⁶ Accessoryship cannot be based on negligence.⁷ That sympathy does not constitute coöperation has been already seen.⁸

Silent acquiescence is not counsel-ling.

had killed C., though no doubt he has been the remote cause of C.'s death. . . . In Othello's case, for instance, I am inclined to think that Iago could not have been convicted as accessory before the fact to Desdemona's murder, but for the single remark: 'Do it not with poison, strangle her in her bed.' 3 Steph. Hist. Cr. L. 8.

¹ State v. Tazwell, 30 La. An. Pt. II. 884.

² 1 Hale, 616.

³ Noftinger v. State, 7 Tex. Ap. 301; Rucker v. State, *Ibid.* 549.

⁴ 1 Hale, 616; 2 Hawk. c. 29, s. 23; *supra*, § 211 a.

B. and C. agree to fight a prize fight for a sum of money; A., knowing their intention, acts as stakeholder. B. and C. fight, and C. is killed. A. is not present at the fight, and has no concern with it except being stakeholder. Even if in such a case there can be an accessory before the fact, A. is not accessory before the fact to the man-

slaughter of C. Steph. Dig. art. 39, citing R. v. Taylor, L. R. 2 C. C. 147. See other cases on prize fights, cited *infra*, § 372.

⁵ R. v. Blackburn, 6 Cox C. C. 333.

⁶ R. v. Manning, 2 C. & K. 887.

⁷ *Supra*, § 129.

When the question of punishment comes up, it is not unimportant to inquire to what extent the perpetrator was overborne by the superior will of the instigator, and how far the latter is to be considered as the exclusive contriver of the crime. As has been well said, when a bandit, whose trade is assassination, offers himself for this purpose to a rich grandee, the case is very different from that of an unsophisticated and comparatively innocent agent who is led by the protracted and subtle wiles of a Mephistopheles into a path of guilt he never would otherwise have approached. Geyer, in Holtz. Strafr. ii. 353. A distinction, also, is to be made between a single

⁸ *Supra*, § 211 d.

§ 228. If the advice of the accessory be countermanded before it operates in any way, he is relieved from responsibility;¹ and if an instigator, when withdrawing, not merely expresses his disapproval of the crime, but takes all the measures in his power to prevent its consummation, and such measures fail because of *casus*, or some new intermediate impulse, then his criminality ceases. But it does not cease simply because, after starting the ball, he changes his mind, and tries, when too late, to stop it. To emancipate him from the consequences, not only must he have acted in time, and done everything practicable to prevent the consummation, but the consummation, if it takes place, must be imputable to some independent cause. On the other hand, it is plain that when the instigator changes his mind, after having gone as far as an attempt, and abandons a further prosecution of the design, he is indictable for the attempt. It has been argued that if the frustration of the attempt is due to his interposition, consequent upon his repentance, he is relieved from all prosecution. But it is hard to see how his repentance, *subsequent* to the attempt, can cancel his responsibility for the guilt of the attempt; though it would be otherwise if he intervened prior to the attempt.²

Accessory
not liable
for collat-
eral crimes.

§ 229. While an accessory before the fact (or instigator) is responsible for all crimes incidental to the criminal misconduct he counsels,³ or which are among

hasty and ill-considered word (as was alleged by Queen Elizabeth to have been the case with her order for the execution of Queen Mary), and a chain of cool and deliberate directions. But these distinctions do not go merely to the question of degree of punishment. The amount of potency with which the instigation was applied has much to do with determining whether there was really a causal relation between the instigation and the criminal act. The former may have been merely a strong expression of enmity, or a strong opinion as to the right to do a particular thing, without any intention that the criminal act should result from the ex-

pression. If so, the criminal act is not imputable to the alleged instigator. Cent. L. J. 1879, p. 184.

¹ *Supra*, § 187; 1 Hale, 618.

² Cent. L. J. 1879, p. 203. For further views, see *supra*, § 187.

³ See *supra*, § 120; Steph. Dig. art. 41; R. v. Gaylor, 7 Cox C. C. 253.

Thus, where A. instigates B. to rob C., and B. murders C. in carrying out the robbery, A. is accessory before the fact to the murder. *State v. Davis*, 87 N. C. 514. See, to same effect, *Stephens v. State*, Sup. Ct. Ohio, 1884, citing *U. S. v. Ross*, 1 Gall. 624; *Stepp v. State*, 11 Ind. 62; *People v. Vasques*, 49 Cal. 550; *supra*, § 213.

its probable consequences, it is otherwise as to collateral crimes, not among such incidental and probable consequences.¹

¹ *Supra*, § 214; *People v. Knapp*, 26 Mich. 112; *Lucas v. State*, 55 Iowa, 221; *Watts v. State*, 5 W. Va. 532. See *Foster*, 370; 1 Hale, 687; 3 Inst. 51; *Stephens v. State* (Ohio, 1884), 18 Rep. 181.

The question in the text is considered by me in the Central Law Journal for 1879, where the views of the later German authorities are given. From this I condense the following:—

Suppose the perpetrator, undertaking to execute the purpose of the instigator, commits acts, while performing his mandate, in excess of such purpose. Is the instigator responsible for the excess?

If we relied solely on the analogies from the civil side of the law, we would say that the principal or master is liable for all such acts when done in the discharge of the agency or service, though these acts were expressly forbidden by the principal or master. This rule holds good on the criminal side of the law, so far as concerns indictments for negligence. But it cannot be extended to indictments for malicious acts. A. counsels B. to commit a specific crime. B., in committing this crime, maliciously commits another collateral crime, not within the scope of A.'s counsel, and, it may be, forbidden by A. A. cannot, at common law, be convicted of doing intentionally and maliciously this collateral act, which he never intended, and which he had even forbidden. Of negligence in putting these powers in his agent's hands, or of negligence as incidental to the working of the illegal instrumentality he put in motion, he may be convicted, but not of designing something he did not design. Of negligence he may be certainly con-

victed, if the crime, though unforeseen by him, is incidental to one procured by him: as when he sends a servant out to steal property in the night, and the servant, in striking a match, sets fire to the house.

Quantitative variations in the mode of executing a crime are not to be viewed as excesses in the sense above stated. A homicide, for instance, is imputable to the instigator, though executed with a cruelty in excess of that commanded. So if A. directs B. to inflict on C. an injury whose probable consequences will be death, A., as we have seen, is as chargeable, if death ensues, as is B., with the homicide. *Supra*, § 214. As to minor crimes, instigation to commit a greater crime incloses instigation to commit a lesser crime. If A., for instance, counsels B. to commit highway robbery, which results in larceny, A. is accessory before the fact to the larceny. But it is otherwise as to minor offences not included in the major. Thus counselling to commit larceny would not involve accessoryship to the offence of cheating by cards, though part of the same transaction.

As is seen above, the accessory before the fact is not liable for any malicious excursions made, outside of the range of the employment, by the perpetrator. It should be remembered, however, that the instigator may often use ambiguous terms: "Get me this thing anyhow;" or, "Bring me this man alive or dead." If so, the instigator is chargeable with any misconstructions the ambiguity may produce. It is in this sense that James II. and Louis XIV. are chargeable with instigation in the attempted assassinations of William III.

§ 230. The question of the relative guilt of the accessory before the fact and the instigator has been elsewhere discussed.¹ It is argued on the one side that instigation, from the nature of things, involves more design, premeditation, coolness, and intelligence than does perpetration. The instigator bears to the perpetrator the relation of the seducer to the seduced. The instigator would have perpetrated the crime anyhow; the perpetrator would not have perpetrated it without the instigation. To this it is answered that instigation does not necessarily involve premeditation, but that premeditation is necessarily involved in perpetration.² Instigation may consist in the expression of a momentary petulant desire, as was the case with Henry II., when saying he wished he was rid of Becket, or of advice which the adviser himself never expected to have embodied in action. Perpetration, on the other hand, when in obedience to a plan previously entertained, involves not merely premeditation, but action as a realization of this premeditation. Not only is the criminal design harbored, but it is unflinchingly matured and executed. Nor is the relation of instigator and perpetrator always that of seducer and seduced. The relation may be that of confederate with confederate. Each enters into the partnership of crime; and the chief difference between the two is that the instigator is not present at the act which the perpetrator commits. The perpetrator may be as much the seducer of the instigator, as the instigator of the perpetrator. Henry's barons, in taunting him with Becket's insults, and offering themselves as the avengers of those insults, may have been the tempters who led Henry to utter the fatal wish, and thus have been the original planners as well as the final perpetrators of the crime to which he gave a hasty intermediate assent. Instigation, therefore, does not necessarily involve origination.³ The accessory before the fact may be really the agent of the principal. To this it is rejoined that what we have to do with is instigation in its logical sense, as the origination of a crime to be effected through another; and that this involves a double criminality, that of the instigator himself and that of the perpetrator; that the instigator is

¹ See Central L. J. for 1879, p. 183; ² R. v. Tuckwell, C. & M. 215; Keithler v. State, 10 Sm. & M. 192.

³ See Oliver v. Com., 77 Va. 590; Cook v. State, 14 Tex. Ap. 96.

in this respect a free agent, bringing into effect an act doubly criminal as infringing the rights of the object of the crime, and as steeping in guilt its agent. At common law, the assumption is that the guilt of the perpetrator (principal) is imputable to the instigator (accessory before the fact), and hence the conviction of the latter is to depend on the conviction of the former, as a condition precedent, and must be of the same grade of offence. Where under recent legislation, however, the instigator (accessory before the fact) is treated as principal, there principal and accessory before the fact (or instigator and perpetrator) may, as we will presently see more fully, be convicted of different grades.¹

§ 231. The assistance must be rendered knowingly. It is not necessary, indeed, that the principal should know all the conditions of the help rendered to him, but it is necessary for the accessory to know the guilty purpose he contributes to help. The chief of a plot, for instance, is not bound to know a coöperator in order to implicate the latter as accessory; but the coöperator cannot be convicted unless he is shown to have been acquainted with the character of the plot.²

Assistance must be rendered knowingly and really.

§ 231 a. A detective entering apparently into a criminal conspiracy already formed for the purpose of exploding it is not an accessory before the fact.³ For it should be remembered that while detectives, when acting as decoys, may apparently provoke the crime, the essential element of *dolus*, or malicious determination to violate the law, is wanting in their case. And it is only the *formal* and not the *substantive* part of the crime that they provoke. They provoke, for instance, in larceny, the asportation of the goods, but not the ultimate loss by the owner. They may be actuated by the most unworthy of motives, but the *animus furandi* in larceny is not imputable to them; and it is in larcenous cases or cheats that they are chiefly employed. They may, however, become liable for negligence in their conduct, when it leads to injuries which prudence on their part might have avoided; as when they instigate an ambush which results in a homicide;⁴ or when the checks they look forward to as likely to explode a plot, whose execution they advise, are not properly applied. Nor should it be

Detectives not accessories.

¹ *Infra*, §§ 232, 236.

² *Supra*, § 129.

³ *Supra*, § 149, where the cases are given. Campbell v. Com., 84 Penn. St.

187; Price v. People, 109 Ill. 109. See Whart. Cr. Ev. § 440.

⁴ See *supra*, § 149.

forgotten that if one who silently watches a crime until it ripens is an accessory, then the guilt of accessoryship falls on a parent who watches anxiously but silently a child's course until the period when interposition and warning would be likely to be successful, and on a specialist in science, who, suspecting that there may be some wrongful purpose in preparations in a neighboring laboratory, forbears to give notice of the danger until he sees that it assuredly exists. Eminently is this the case with persons who, from a sense of duty, or under the direction of the public authorities, watch even as apparent members the progress of conspiracies which could in no other way be exposed.¹

§ 232. It has been doubted whether there can be an accessory before the fact to manslaughter, since accessoryship presupposes premeditation, and premeditation is incompatible with manslaughter.² But, as will be seen, an instigator may, in hot blood, stimulate a person incensed with another to execute a deed of vengeance on such other, when the offence of the perpetrator would be only manslaughter; and we may also hold that an instigator may be guilty of murder in instigating another to commit manslaughter by the rash use of dangerous instrumentalities.³ *A fortiori* there may be an accessory before the fact to murder in the second degree.⁴

§ 233. It is not material that an accessory should have originated the design of committing the offence. If the principal had previously formed the design, and the alleged accessory encouraged him to carry it out by stating falsehoods, or otherwise, he is guilty as accessory before the fact.⁵

§ 234. The quantity of aid rendered is of no consequence. A counterfeiting raid, for instance, may have a hundred persons concerned as accessories, some contributing very little aid. All, however, are technically guilty.⁶ What

¹ See *Campbell v. Com.*, 84 Penn. St. D. & B. 288; *R. v. Taylor*, L. R. 2 C. 187, cited *supra*, § 149; *Cent. L. J.* for C. R. 147. 1885, p. 5.

² See *R. v. Taylor*, L. R. 2 C. C. R. 147; *Boyd v. State*, 17 Ga. 202. Compare 2 Hawk. P. C. p. 444, s. 24. See *infra*, § 236.

³ *Infra*, § 236. See, to same effect, *R. v. Smith*, 2 Cox C. C. 233; *Steph. Dig. C. L. art. 229*, citing *R. v. Gaylor*, 262

⁴ *Infra*, § 546. *Hagan v. State*, 10 Ohio St. 459. That there may be accessories after the fact to manslaughter, see *R. v. Greenacre*, 8 C. & P. 35; *R. v. Richards*, 13 Cox C. C. 611.

⁵ *Keithler v. State*, 10 S. & M. 192. See *R. v. Tuckwell*, C. & M. 215.

⁶ See *supra*, § 217.

distinguishes the act of the accessory from that of the principal is that the accessory, while concerned in facilitating the execution of the guilty purpose, takes no part in this execution, leaving it to the principal.¹

§ 235. There is no particular period of time to which accessoryship is limited. It may take place when the guilty act is concocted, when it is prepared, or when it is executed, provided that in the latter case there is not actual presence.² And it may be coupled with accessoryship after the fact.³

Conditions of time immaterial.

§ 236. A question of considerable interest has arisen as to the extent to which the principal's personal relations are to be imputed to the accessory. A public officer, for instance, committing a specific act, is liable to a severer punishment than would be a private citizen. Is a private citizen, who is an accessory to an officer in such an offence, chargeable with the same grade of guilt? Or is an accessory to a trustee, who is guilty of embezzlement, to be charged with the same grade of guilt as would the trustee? On this question we have the following possible theories:—⁴

Grade of guilt not necessarily the same.

(1) The accessory is absorbed in the principal, so that the principal's personal relations, in respect to the crime, are imputable to the accessory.

(2) Each offender is chargeable only for what he really is. Thus, the non-public officer cannot be punished as a public officer, and the non-trustee cannot be punished as a trustee. Hence, according to this view, where a principal in a homicide, from the fact of his bearing a particular relation to the deceased, would be guilty of murder in the first degree, an accessory not bearing this relation would be guilty only of murder in the second degree.

(3) We may distinguish, as do several codes, between those qualities which establish or cancel, and those which increase or diminish, punishability. As to the first, the personal relations of the principal are the standard. As to the second, each offender is to be judged according to his own peculiar relations. Hence, to take up the last case, an accessory to a murder, whose grade is de-

¹ See *supra*, § 206.

² *R. v. Blackson*, 8 C. & P. 43.

³ See *Watson v. State*, 9 Tex. Ap. 237.

⁴ *Berner*, § 111.

terminated by the personal qualities of the perpetrator, is to be judged from his own and not his principal's relations. A non-officer, also, who aids an officer in an offence, whose grade is increased by the official relation, is liable only for the lower grade of the offence. On the other hand, a non-officer who aids in a purely official crime (*e. g.*, acceptance of a bribe by a judge) is, by the force of the distinction before us, liable as accessory to the crime.

Another question arises in homicides when the accessory and the principal are acting under different degrees of passion. Under the old law, the defendant was first convicted, and then the accessory was charged with being accessory to the offence which the conviction covered. But now that instigation is a substantive offence, it must be remembered that the offence of the instigator is not necessarily of the same grade as that of the perpetrator. The instigator may act in hot blood, in which case he will be only guilty of manslaughter, while the perpetrator may act coolly, and thus be guilty of murder. The converse, also, may be true: the instigation may be cool and deliberate, the execution in hot blood by a person whom the instigator finds in a condition of unreasoning frenzy. A person desiring coolly to get rid of an enemy, for instance, may employ as a tool some one whom that enemy has aggrieved and who is infuriated by his grievance. Hence an accessory before the fact (or to adopt the terms of recent codes, an instigator) may be guilty of murder, while the principal (or perpetrator) may be guilty of manslaughter; or the accessory before the fact (instigator), acting in hot blood, may be guilty of manslaughter, while the perpetrator (principal), acting with deliberate malice, may be guilty of murder.¹

Conviction of principal no longer a prerequisite. § 237. At common law, the conviction of some one who has committed the crime must precede or accompany that of one charged as accessory.² A prisoner does not

¹ That joint participants may be guilty of different degrees, see *Fost.* 16 Mass. 423; *Com. v. Woodward*, 106, 129; *Whart. Cr. Pl. & Pr.* §§ 307, 753; *Klein v. People*, 31 N. Y. 229; *W. & S.* 385; *Brown v. State*, 18 Ohio 496; *Com. v. Williamson*, 2 Va. C. 211; *Smith v. State*, 46 Ga. 298; *State v. Andrews*, 3 Mass. 126; *Com. v. Pybass*, 4 Humph. 442. As to N. Y. statutes, see *supra*, § 205.

² See *U. S. v. Crane*, 4 McLean, 317; *U. S. v. Briggs*, 5 Pick. 429; *Com. v. Phillips*, 16 Mass. 423; *Com. v. Woodward*, 106, 129; *Whart. Cr. Pl. & Pr.* §§ 307, 753; *Klein v. People*, 31 N. Y. 229; *W. & S.* 385; *Brown v. State*, 18 Ohio 496; *Com. v. Williamson*, 2 Va. C. 211; *Smith v. State*, 46 Ga. 298; *State v. Andrews*, 3 Mass. 126; *Com. v. Pybass*, 4 Humph. 442. As to N. Y. statutes, see *supra*, § 205.

waive his right to call for the record of such conviction, by pleading.¹ Conviction of the principal is not admissible evidence, until judgment has been rendered on the verdict;² and, when the trials are concurrent, there can be no judgment against the accessory until there is a sentence of the principal.³ The record must be proved in the usual mode.⁴ But even at common law, where there are two principals, and only one convicted, the other being dead, the accessory must answer notwithstanding the non-conviction of the deceased.⁵ By statutes, however, now almost universally adopted, the offence of an accessory is made substantive and independent, and consequently the accessory may be tried independently of the principal, though in such case the guilt of the principal must be alleged and proved.⁶ And the principal may be averred to be unknown.⁷

¹ *Fost.* 360; 1 Hale, 623; *U. S. v. Burr*, 4 Cranch, 502.

In North Carolina, the principle has been somewhat expanded, it having been there held that the accessory is not liable to be tried while the principal is amenable to the laws of the State and is still unconvicted. *State v. Groff*, 1 Murphy's R. 270. See *State v. Goode*, 1 Hawks, 463; *Harty v. State*, 3 Blackford, 386.

² *State v. Duncan*, 6 Iredell, 236.

³ 2 Curw. Hawk. § 41.

⁴ *People v. Gray*, 25 Wend. 465.

⁵ *Com. v. Knapp*, 10 Pick. 477.

⁶ See *State v. Ricker*, 29 Me. 84; *Pettes v. Com.*, 126 Mass. 242; *People v. Gray*, 25 Wend. 465; *Holmes v. Com.*, 25 Penn. St. 221; *Com. v. Hughes*, 11 Phila. 430; *Brown v. State*, 18 Oh. 131; *Hatchett v. Com.*, 75 Va. 925; *Ulmer v. State*, 14 Ind. 52; *Baxter v. People*, 3 Gilman, 368; *Yoe v. People*, 49 Ill. 410; *State v. Comstock*, 46 Iowa, 265; *Ogden v. State*, 12 Wis. 532; *Jordan v. State*, 56 Ga. 92; *Loughridge v. State*, 6 Mo. 594; *People v. Campbell*, 40

Cal. 129; *People v. Onteveras*, 48 Cal. 19; *State v. Cassidy*, 12 Kans. 550. As to English statute, see *R. v. Hughes*, Bell C. C. 242; *R. v. Gregory*, L. R. 1 C. C. 77; 10 Cox's C. C. 459. As to New York statute see *supra*, § 205.

At common law an accessory is discharged by the acquittal of his principal on those charges whereon the indictment against himself is founded. *U. S. v. Crane*, 4 McLean, 317.

Even in a case where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory charged in the same indictment as accessory before the fact to the said "felony and burglary," and the jury acquitted the principal of the burglary, but found him guilty of the larceny, the judges, it is said, were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should be acquitted also. *R. v. Dannelly*, R. & R. 310; 2 Marsh. 571.

⁷ *Com. v. Adams*, 127 Mass. 15.

When principal and accessory are tried separately, conviction of the principal is *prima facie* evidence of his guilt, on the trial of the accessory, but may be collaterally disputed when the issue is the guilt of the accessory.¹

Under the recent statutes, which treat principals and accessories before the fact as confederates, the declarations and acts of the one, in furtherance of the common plan, are admissible against the other.² It is otherwise when the conspiracy is terminated,³ the accessory being tried for a substantive offence, and the principal's

¹ R. v. Turner, 1 Moody, 347; U. S. v. Hartwell, 12 Int. Rev. Rec. 72; S. C., 3 Cliff. 221; State v. Ricker, 29 Me. 84; State v. Rand, 33 N. H. 216; Com. v. Knapp, 10 Pick. 477; Com. v. Stow, 1 Mass. 54; People v. Buckland, 13 Wend. 592; State v. Duncan, 6 Iredell, 236; Keithler v. State, 10 Sm. & M. 192. *Infra*, § 244.

It should be observed that the statute of 7 Geo. IV. c. 64, s. 9, which several American statutes copy, only applies where the accessory might at common law have been indicted with or without the conviction of the principal; and, therefore, where a defendant was indicted as accessory before the fact to the murder of S. N., she having, by his procurement, killed herself, it was ruled that the statute did not apply. R. v. Russell, 1 Mood. C. C. 356; R. v. Gaylor, 7 Cox C. C. 253; Dears. & B. C. C. 288.

At common law where the principal and accessory are tried together, if the principal plead otherwise than the general issue, the accessory is not bound to answer, until the principal's plea be first determined. 9 H. 7, 19; 1 Hale, 624; 2 Inst. 184. Where the general issue is pleaded, however, the jury must be charged to inquire first of the principal, and if they find him not guilty, then to acquit the accessory; but if they find the principal

guilty, they are then to inquire of the accessory. 1 Hale, 624; 2 Inst. 184. See Holmes v. Com., 25 Penn. St. 221. In Massachusetts an accessory before the fact may be tried in the county of the consummated act, though the act of accessoryship was committed elsewhere. Com. v. Pettes, 114 Mass. 307. See *infra*, §§ 279, 287.

In Virginia an accessory cannot be prosecuted for a substantive offence, but only as accessory to the principal felon. The guilt of the principal felon must be proved, but not his conviction. Hatchett v. Com., 75 Va. 925.

In Tennessee, where a principal to a murder was sentenced to imprisonment for life, in accordance with the statute of 1838, c. 29, an accessory before the fact, subsequently tried and convicted (the jury bringing in a general verdict of guilty, without finding mitigating circumstances), was held to be properly sentenced to imprisonment for life. Nuthill v. State, 11 Humph. 247.

As to Louisiana, see State v. Washington, 33 La. An. 1473.

An accessory cannot take advantage of an error in the record against the principal. State v. Duncan, 6 Iredell, 236; Com. v. Knapp, 10 Pick. 477.

² See *infra*, § 1405.

³ R. v. Turner, 1 Moody C. C. 347; State v. Newport, 4 Harring. 567.

confessions, after the joint action is closed, not being receivable against him.¹

§ 238. At common law it is not necessary, in an indictment against an accessory before the fact in a felony, to set out the conviction or execution of the principal. It is enough to aver the latter's guilt.²

The indictment must show the commission of the offence as particularly as is necessary in an indictment against the principal.³ In States where it is provided by statute that an accessory before the fact shall be deemed and considered as principal and punished accordingly, an accessory may be indicted and convicted as a principal.⁴ It is otherwise at common law,⁵ and in States where this law prevails, an accessory before the fact, though by statute punishable as principal, must nevertheless be indicted, not as principal, but as accessory before the fact.⁶

§ 239. At common law, the verdict must specify the grade, and under a verdict of "guilty as accessory," the defendant cannot be sentenced as accessory before the fact.⁷ As has just been seen, accessory and principal (or instigator and perpetrator) may, under recent codes, be convicted of different grades.

¹ Ibid.; Ogden v. State, 12 Wis. 532. See, as taking a less restricted view of admissibility, U. S. v. Hartwell, *supra*; R. v. Bick, 4 C. & P. 377.

² State v. Sims, 2 Bail. S. C. Rep. 29; State v. Evans, Ibid. 66; Holmes v. Com., 25 Penn. St. 221.

³ Com. v. Dudley, 6 Leigh, 614; Jordan v. State, 56 Ga. 92. See People v. Schwartz, 32 Cal. 160; People v. Crenshaw, 46 Cal. 65; People v. Thrall, 50 Cal. 415. See State v. Mosley, 31 Kan. 355.

⁴ Cathcart v. Com., 37 Penn. St. 108; Campbell v. Com., 84 Penn. St. 187; Com. v. Hughes, 11 Phila. 430; Raiford v. State, 59 Mich. 106; Jordan v. State, 56 Ga. 92; Baxter v. The People, 3 Gilman, 368; State v. Zeibart, 40 Iowa, 169; Dempsey v. People, 47 Ill. 323; Yoe v. People, 49 Ill. 410; State v. Cassidy, 12 Kans. 550. See *infra*, § 245; and see Whart. Pl. & Pr. § 458; Ward v. Com., 14 Bush, 232.

⁵ R. v. Fallon, 9 Cox C. C. 242; R. v. Plant, 7 C. & P. 575; State v. Larkin, 49 N. H. 39; State v. Wyckoff, 2 Vroom, 65; Hughes v. State, 12 Ala. 458; Josephine v. State, 39 Miss. 613; Walrath v. State, 8 Nebr. 80. For other cases see *infra*, § 245.

⁶ Pettes v. Com., 126 Mass. 242; People v. Campbell, 40 Cal. 129. See People v. Gassoway, 28 Cal. 404; People v. Shepardson, 48 Cal. 189. *Infra*, § 245; Williams v. State, 41 Ark. 173. "Incite, move and procure, aid, counsel, hire, and command the said person as aforesaid unknown, the said felony and abortion in manner and form aforesaid to do and commit," has been sustained in Massachusetts as sufficiently describing the offence of an accessory before the fact. Com. v. Adams, 127 Mass. 15.

⁷ State v. Rose, 20 La. An. 143.

§ 240. If the felony is not committed, he who counsels or commands its commission is not liable as accessory before the fact, but he may be convicted for the attempt as a substantive misdemeanor, if steps were taken to consummate the offence.¹

VI. ACCESSARIES AFTER THE FACT.

§ 241. Although in other jurisprudences he who directs or counsels a specific offence is involved in the same penalty as the actual perpetrator, the English common law stands alone in assigning the same grade of guilt to those who conceal or protect the perpetrator after the commission of the offence.² That such persons should be punished is eminently just; but it is eminently unjust that they should be punished in the same way as the criminal whom they shelter.

By the English common law, however, a person, according to the text-books, who, when knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon,³ whether he be a principal or an accessory before the fact, is an accessory after the fact, involved in the same penalty as the principal.⁴ When

¹ 2 East R. 5; Ch. C. L. 264. *See* common law. *Williams v. State*, 55 Ga. 391.

² What we call accessoryship after the fact is punished in Germany and France as an independent offence, in the nature of our Escape, or Prison Breach. *See* Berner, *Lehrbuch*, 1877, pp. 196, 197.

In England, the old common law has been modified by stat. 24 & 25 Vict., which limits the punishment to imprisonment for four years. *See* R. v. Fallon, L. & C. 217; 9 Cox, 242.

Receiving stolen goods does not, at common law, constitute accessoryship after the fact to the larceny. It was otherwise by the statute 3 Will. & Mary. In most jurisdictions, however, the reception of stolen goods is now an independent crime. *See* *infra*, §§ 982 *et seq.*

Receiving money, knowing that it was obtained by robbery, does not constitute accessoryship after the fact at

³ 1 Hale, 618; 4 Bl. Com. 37; Roscoe's Cr. Ev. 184; *see* R. v. Lee, 6 C. & P. 536.

A man who employs another person to harbor the principal may be convicted as an accessory after the fact, although he himself did no act to relieve or assist the principal. *R. v. Jarvis*, 2 Moo. & R. 40. So it appears to be settled that whoever rescues a felon imprisoned for the felony, or voluntarily suffers him to escape, is guilty as accessory. *Hawk. P. C. b. 2, c. 29, s. 27. See* Roscoe's Cr. Ev. 184; and *see* generally as to how far "concealing" constitutes accessoryship after the fact, *White v. People*, 81 Ill. 333.

⁴ *Wren v. Com.*, 26 Grat. 952; *Taylor v. Com.*, 11 Bush, 154; *Lloyd v. State*, 42 Ga. 321; *Harrol v. State*, 39 Miss. 702; *People v. Gassaway*, 28 Cal.

we examine the cases given, however, we find that the assistance to a felon, which constitutes this form of accessoryship, is such assistance as to some extent shelters the principal from prosecution, as, for instance, where the alleged accessory concealed the principal in his house,¹ or shut the door against his pursuers, until he should have an opportunity of escaping,² or took money from him to allow him to escape,³ or supplied him with money, a horse, or other necessities, in order to enable him to escape,⁴ or where the principal was in prison, and the accessory, before conviction, bribed the jailer to let him escape, or supplied him with materials for the same purpose,⁵ or in any way aided in compassing his escape.⁶ Merely suffering the principal to escape, however, it is held, will not impute the guilt of accessoryship to the party so doing.⁷ And it is conceded that if a person supply a felon in prison with victuals or other necessities, for his sustenance;⁸ or succor and sustain him if he be bailed out of prison;⁹ or professionally attend a felon sick or wounded, although he know him to be a felon;¹⁰ or speak or write in order to obtain a felon's pardon or deliverance,¹¹ or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly;¹² or even if he himself agree, for money, not to give evidence against the felon;¹³ or know of the felony and do not disclose it;¹⁴ these acts will not be sufficient to make the party an accessory after the fact. There must be some independent criminality to make them an offence.¹⁵ Statutes, also, now exist, making accessoryship after the

404; 2 Hawk. c. 29, s. 1; *P. Wms. v. Brannon*, London Law Times, Feb. 28, 1880, p. 319.

¹ Dalt. 530, 531. *Infra*, § 652, and cases there cited.

² 1 Hale, 619.

³ 9 H. 4, l.

⁴ Hall's Sum. 218; 2 Hawk. c. 29, s. 26. *See* *Com. v. Filburn*, 119 Mass. 297.

⁵ 1 Hale, 621; *Hawk. b. 2, c. 29, s. 26*; Archbold, by Jervis, 9.

⁶ *See* *infra*, §§ 1672, 1677, as to prison breach.

⁷ Hale, 619; *Wren v. Com. ut supra*; *Taylor v. Com.*, 11 Bush. 154. *See* R.

⁸ 1 Hale, 620. *See* R. v. Chapple, 9 C. & P. 355.

⁹ 1 Hale, 620.

¹⁰ 1 Hale, 332.

¹¹ *Ibid.*

¹² 3 Inst. 139; 1 Hale, 620.

¹³ Moore, 8. *See* *Wren v. Com.*, 25 Grat. 789.

¹⁴ 1 Hale, 371, 618. *State v. Hann*, 40 N. J. L. 228; *State v. Giles*, 52 Ind. 356; *State v. Fries*, 53 Ind. 489; *White v. People*, 81 Ill. 833.

¹⁵ *Reynolds v. People*, 83 Ill. 479; *Welch v. State*, 3 Tex. Ap. 413.

fact substantively indictable. Even interference with public justice by promoting the escape of a criminal is now tried as an independent offence.¹

§ 242. Three things are laid down in the books as necessary to constitute a man accessory after the fact to the felony of another.

Knowl-
edge of
principal's
guilt essen-
tial.

1. The felony must have been committed.²

2. The defendant *must know that the felon is guilty*,³ and this, therefore, is always averred in the indictment.⁴ And though it has been intimated that constructive notice of the felony will, in some cases, suffice: as where a man receives a felon in the same county in which he has been attainted, which is supposed to have been a matter of notoriety;⁵ yet the better opinion is that there should be laid such a basis of inculpatory facts as properly to raise the presumption of knowledge.⁶

3. The felon must be to some extent sheltered from pursuit by the defendant.⁷

§ 243. The only relation, so it is said, which excuses the harboring a felon is that of a wife to her husband, because she is con-

¹ *Infra*, §§ 652, 1672, 1677; *Com. v. Miller*, 2 Ashm. 61. That presence at the crime is not necessary, see *Pinkard v. State*, 30 Ga. 757.

² 1 Ch. C. L. 264; 1 Hale, 622; 2 Hawk. c. 29, s. 35; *Harrol v. State*, 39 Miss. 702; *Poston v. State*, 12 Tex. Ap. 408.

³ 1 Hale, 622; Hawk. b. 2, c. 29, s. 32; *Com. Dig. Justices*, T. 2. See *R. v. Butterfield*, 1 Cox C. C. 93; *R. v. Greenacre*, 8 C. & P. 35; *Wren v. State*, 26 Grat. 952. That such knowledge is to be inferred from facts, see *White v. People*, 81 Ill. 333; *Tully v. Com.*, 13 Bush, 142.

⁴ Hawk. b. 2, c. 29, s. 33.

It is sometimes said that the inception of the offence of accessories after the fact must be subsequent to that of the principal offence. This, however, is not necessarily the case. A receiver, for instance, may make his

arrangements to receive the goods obtained by a projected larceny. If he does not act in concert with the principal offender,—in other words, if the principal does not know that he is thus acting,—he is an accessory after the fact. But it is otherwise if his reception is in consequence of a previous engagement. If he should say, "Go ahead; I will stand by you, and take care of the things after you get them," he is accessory before the fact, or instigator, and hence, by recent legislation, principal. He encourages the thief, and becomes therefore a party to theft.

⁵ *Dyer*, 355; *Staunf.* 41 b.

⁶ 1 Hale, 323, 622; *R. v. Burridge*, 3 P. Wms. 475; *Tully v. Com.*, 13 Bush, 142.

⁷ *R. v. Chapple*, 9 C. & P. 355; *Lloyd v. State*, 42 Ga. 221.

sidered as subject to his control, as well as bound to him by affection.¹ But by the English common law no other ties, however near, will excuse; for if the husband protect his wife, a father his son, or a brother his brother, they contract the guilt, and are liable to the punishment, of accessories to the original felony.²

§ 244. At common law, as we have seen,³ the conviction of the principal is a necessary prerequisite to the conviction of the accessory. Where the principal and accessory are joined in an indictment, and tried separately, the record of the principal's conviction is irrebuttable proof of such conviction, and is *prima facie* evidence of his guilt, upon the trial of the accessory; and as the burden of proof is on the accessory, he must then show that the principal ought not to have been convicted.⁴ But the accessory, in such case, is not restricted to proof of facts that were shown on the former trial, but may prove others which are incompatible with the guilt of the principal.⁵ If the conviction of the principal be reversed, this brings with it the reversal of the judgment against the accessory.⁶

Conviction of principal *prima facie* evidence of his guilt.

§ 245. An accessory after the fact cannot be convicted on an indictment charging him as principal.⁷

Indictment must be specific.

The question of jurisdiction is hereafter considered.⁸

V. LIABILITY OF PRINCIPAL FOR CRIMINAL ACT OF AGENT.

The cases under this head may be classed as follows:—

¹ 1 Hale, 621; Hawk. b. 2, c. 29, s. 34; 4 Bla. Com. 39; *Com. Dig. Jus. T. 2.*

² *Ibid.* As to N. Y. statute, see *supra*, § 205.

³ *Supra*, § 237.

⁴ *Com. v. Knapp*, 10 Pick. 484; *State v. Chittum*, 2 *Doverenx*, 49; *State v. Duncan*, 6 *Iredell*, 236. See *supra*, § 237.

⁵ *Com. v. Knapp*, 10 Pick. 484. See *State v. Sims*, 2 *Bail. S. C.* 29; *State v. Crank*, *Ibid.* 66.

⁶ *Ray v. State*, 13 *Neb.* 55.

⁷ *Supra*, § 238; *R. v. Fallon*, 9 *Cox C. C.* 242; *R. v. Soares*, *R. & R.* 25; *State v. Wyckoff*, 2 *Vroom*, 65; *Reynolds v. People*, 83 *Ill.* 479; *Wade v. State*, 71 *Ind.* 535; *State v. Dewar*, 65 *N. C.* 572; *McCoy v. State*, 52 *Ga.* 287; *Anderson v. State*, 63 *Ibid.* 675; *Hughes v. State*, 12 *Ala.* 458; *Josephine v. State*, 39 *Miss.* 613; *People v. Campbell*, 40 *Cal.* 129. Under statutes, see *supra*, § 238.

⁸ *Infra*, §§ 287, 288.

(a) *Where the Agent acts directly under the Principal's Commands.*

§ 246. When the agent performs the illegal act under an absent principal's direction, either express or implied, this imposes responsibility on the principal.¹ In misdemeanors the act may be charged to have been done by the principal himself, without reference to an agent.² Such, also, is the case in felonies, where the agent is innocent, insane, or a slave, in which case the party commanding the felony to be done, though absent at the time of its commission, is principal in the first degree.³ In felonies, where the agent is responsible, the absent principal is at common law accessory before the fact.⁴ As we have seen, an agent, when physically free, is not relieved from responsibility by the fact that he is acting under his principal's directions.⁵

(b) *Where the Agent is acting at the Time in the Line of the Principal's Business, but without Specific Instructions.*

§ 247. A principal is *prima facie* liable for the illegal acts of an agent done in a general course of illegal business authorized by the principal,⁶ and this is eminently the case in indictments for nuisances, which could not be abated if the master was not liable for the servant's acts, if in general furtherance of the master's plan.⁷ And the rule applies to all cases where a master inflicts indictable injury through a servant. Thus, where a barkeeper in a hotel sells liquor, or a salesman in a bookstore in the usual course of business sells a

¹ See *Felton v. U. S.*, 96 U. S. 699; *Lathrop v. State*, 51 Ind. 192; *infra*, § 1503; *supra*, §§ 205 *et seq.*

² *U. S. v. Morrow*, 4 Wash. C. C. 733; *Com. v. Stevens*, 10 Mass. 181; *Seaman v. Com.*, 1 Weekly Notes, 14, and note appended thereto; *Sloan v. State*, 8 Ind. 312. For master's liability for servant's negligent act, see *supra*, § 135; *infra*, §§ 341, 1422, 1503.

³ *Supra*, §§ 207, 223; *infra*, § 341; *R. v. Michael*, 2 M. C. C. 120; 9 C. & P. 350; *R. v. Spiller*, 5 C. & P. 333. ⁴ *See Felton v. U. S.*, 96 U. S. 699; *a felony, the employer and not the agent is accountable criminally.*" *R. v. Bleasdale*, 2 C. & K. 764.

⁵ *Infra*, § 247.

⁶ *Supra*, §§ 94 *et seq.*; *Play v. People*, 86 Ill. 147.

⁷ *R. v. Dixon*, 3 M. & S. 11; *Roberts v. Preston*, 9 C. B. (N. S.) 208; *State v. Wentworth*, 65 Me. 234; *Com. v. Nichols*, 10 Met. 259; *Anderson v. State*, 22 Ohio St. 305; *Molihan v. State*, 30 Ind. 266; *infra*, § 1503.

⁸ *R. v. Stephens*, L. R., 1 Q. B. 702-10.

libellous book, or where a clerk publishes a libel in a newspaper, the principal is responsible, and, if there be no other evidence, may be convicted.¹ Even the fact that the principal, who was the publisher of a newspaper, was living at the time one hundred miles distant from the place of publication, was sick and entirely ignorant of the libel being published, is at common law no defence.² A master, also, may be liable for the negligence of a servant whom he negligently appoints or negligently controls.³ But it is otherwise if the agent be without authority, express or implied, and the act be out of the range of the agent's business, and against the principal's express and *bond fide* commands.⁴ It should also be remembered that as it is only by agents that corporations can act, it is not necessary to prove, on charging a corporation with a criminal act committed by an agent, within his range of duty, that this act was specifically authorized by the corporation.⁵

¹ *R. v. Almon*, 5 Burr. 2686; *R. v. Dodd*, 2 Sessions Cases, 33; *R. v. Gutch*, Moody & M. 433; *U. S. v. Nunne-*

macher, 7 Biss. 111; *Com. v. Park*; 1 Gray, 553; *Com. v. Nichols*, 10 Met. 259; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Met. R. R.*, 107 Mass. 236; *Com. v. Boston R. R.*, 126 Mass. 61; *State v. Smith*, 10 R. I. 258; *Com. v. Gillespie*, 7 S. & R. 469; *State v. Mathis*, 1 Hill S. C. 37; *Britain v. State*, 3 Humph. 203; *Com. v. Major*, 6 Dana, 293; *Hipes v. State*, 73 Ind. 39; 1 Bennett & Heard Lead. Cas. 241; *infra*, §§ 341, 1422, 1467, 1503. This rule holds even as to the sale of liquor on Sunday by a clerk without the owner's consent. *Noecker v. People*, 91 Ill. 494; *People v. Roby*, Mich. 1884, 17 Rep. 826. In *People v. Utter*, 44 Barb. 170, the court, on the other hand, held that a master was not responsible for a sale of liquor on Sunday unless it was shown to have been with his direction or assent. See *Anderson v. State*, 22 Ohio St. 305.

² *R. v. Gutch*, Moody & M. 433.

³ *Supra*, § 135.

⁴ See *supra*, § 135; *infra*, § 1503; *R. v. Bennett*, Bell C. C. 1; 8 Cox C. C. 74, cited *supra*, § 154; *Felton v. U. S.*, 96 U. S. 699; *U. S. v. Halberstadt*, Gilp. 262; *Com. v. Nichols*, 10 Met. 259; *Barnes v. State*, 19 Conn. 398; *State v. Privett*, 4 Jones, 100; *State v. Dawson*, 2 Bay, 360; *Hipp v. State*, 5 Blackf. 149; *O'Leary v. State*, 44 Ind. 91; *Anderson v. State*, 39 Ind. 553; *State v. McGrath*, 73 Mo. 181; *State v. James*, 63 Mo. 570. As to liability for co-conspirators, see *infra*, § 1406. That a principal, who leaves the performance of his official duties to a subaltern, is indictable for the subaltern's failure to perform an official duty, see *U. S. v. Buchanan*, 4 Hughes, 487; 9 Fed. Rep. 689; *U. S. v. Beaty*, Hemp. 487.

⁵ *Supra*, § 91; *R. v. Medley*, 6 C. & P. 292; *infra*, §§ 1422, 1423, 1425.

(c) *When the Principal resides out of the Jurisdiction.*

Non-resident principal intraterritorially liable.

§ 248. When the principal resided out of the jurisdiction in which the offence was consummated, he is chargeable in such place of consummation, notwithstanding his non-residence.¹

VI. MISPRISION.

Misprision of felony is concealment of felony.

§ 249. At common law a party is guilty of misprision of felony who stands by the commission of the felony without endeavoring to prevent it, and who, knowing of its commission, neglects to prosecute the offender.² Misprision, as a substantive offence, however, is practically obsolete. The same end, so far as is consistent with the general policy of society, is reached by the rule noticed in another work, which makes it incumbent on all persons present when an unlawful act is attempted to take part with the officers of the law in the prevention of such act.³

¹ See *infra*, §§ 279, 280, 287; R. v. Garrett, 22 Law & Eq. 607; 6 Cox C. C. R. 260; U. S. v. Davis, 2 Sumn. 482; Com. v. Pettes, 114 Mass. 307; People v. Adams, 3 Denio, 190; Adams v. People, 1 Comstock, 173; Com. v. Gillespie, 7 S. & R. 469.

² Hawk. P. C. b. 1, c. 59, s. 2; 1 Hale P. C. 431-448.

According to Sir J. F. Stephen, Dig. C. L. art. 156, "Every one who knows that any other person has committed high treason, and does not within a reasonable time give information thereof to a justice of assize or a justice of the peace, is guilty of misprision of treason, and must, upon conviction thereof, be sentenced to imprisonment for life, and to forfeit to the queen all his goods and the profits of his lands during his life.

"Every one who knows that any other person has committed felony and conceals or procures the concealment thereof, is guilty of misprision of felony, and, upon conviction thereof, the offender, if a sheriff, coroner, or their bailiff, 'shall have one year's imprisonment and after make a grievous fine,' at the discretion of the court, 'and if they have not whereof they shall have imprisonment of three years.' In other cases the offender is guilty of a misdemeanor."

³ See Whart. Cr. Pl. & Pr. §§ 10 *et seq.* As to misprision of treason, see U. S. v. Burr, 4 Cranch, 470; *infra*, §§ 1782 *et seq.* By Rev. Stat. U. S. §§ 5333, 5390, misprision of treason and misprision of felony are made specifically indictable.